No. 20A-9

IN THE
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

WESLEY IRA PURKEY,

(CAPITAL CASE)

Response in Opposition to Application for a Stay or Vacatur of the Injunction Issued by the United States District Court for the District of Columbia

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The Government asks this Court to vacate the preliminary injunction entered by the District Court of the District of Columbia. The injunction was entered after the District Court's considered review of the facts underlying Petitioner's dementia and mental illness, which render him incompetent to be executed.

Petitioner and his counsel have been pursuing his claim of incompetence since November of last year. As the Government repeatedly emphasizes, it was only this morning, that the District Court addressed the merits of his request and preliminarily enjoined his execution, having determined that he had made a substantial threshold showing of incompetence. The Government would have this Court vacate this injunction because, in its view (1) it was addressed to the wrong tribunal and reliance on the wrong cause of action and (2) Petitioner has failed to make the required threshold showing. Intervening on the Government's behalf would cut short the process contemplated by federal statute and the Constitution.

There is no merit to these arguments, as the district court correctly found, and certainly no showing of merit that is sufficiently high to meet the government's burden. Indeed, the district court's injunction relies on settled, relevant precedent from this Court that the government effectively ignores in its application to vacate. The government claims this is a "core habeas" case that challenges Mr. Purkey's death sentence. But the controlling decision in *Ford v. Wainwright,* 477 U.S. 399, 425 (1986) says otherwise: "the only question raised is not *whether,* but *when,* his execution may take place." *Ford,* 477 U.S. at 425 (emphasis in original) (Powell, J., concurring); *see also Panetti v. Quarterman,* 551 U.S. 930, 945 (2007) (finding that

Justice Powell's concurring opinion controls procedure for *Ford* claims). The government also says that Mr. Purkey's extensive showing of incompetency does not meet the requisite threshold, but it ignores the many similarities in the record here to the record in *Panetti v. Quarterman,* 551 U.S. 930, 949 (2007), which easily met the threshold. In short, there can be no meaningful dispute there that Mr. Purkey's showing of incompetency exceeded the threshold needed to compel a full and fair process for resolving his claims.

To be sure, the government has some leeway on what that process can look like at the outset; it could have, for example, set up a process for resolving *Ford* claims in a manner or proceeding, and Mr. Purkey would have been bound to honor those procedures to the extent they were adequate to meet the standard set forth in *Panetti*. But it cannot set up no procedures at all, and then complain about how Mr. Purkey chose to litigate his claims, so long as he acts diligently in doing so. And that is indisputably what occurred here. Mr. Purkey is the first federal prisoner to raise a *Ford* claim, and, in the 35 years since *Ford*, the Defendants have neglected to create any process at all.

As part of his effort to diligently pursue protection from unlawful execution, Petitioner has long sought his own medical records as well as access to medical professionals. Despite requesting those records from Respondent for the past nine months, Respondent has yet to disclose them, instead providing them to the lawyers for the Government. They, in turn, have declined to provide them to counsel, claiming only that the Eighth Amendment does not require as much.

Petitioner has also sought access to brain imaging that would corroborate his mental decline related to Alzheimer's disease. The Government only this week provided the imaging that he had been requesting for months. And Mr. Purkey's counsel has just learned, for the first time, that the government appears to have had scientific confirmation in their possession of significant structural abnormalities in the brain that are consistent with cognitive impairment such as vascular dementia or other conditions. Access to this testing had been requested by Plaintiff for months, and arbitrarily denied by Defendants. Defendants reversed course last week, and permitted the testing at the expense of the defense team. Even though the testing was paid for and requested by Plaintiff's counsel and their experts the results were initially delivered only to the Government, last week. The government provided reports based on this data late last week, but did not deliver the underlying scans to Mr. Purkey's defense expert until yesterday. Although Mr. Purkey's expert has not been able to verify the extent of the atrophy and damage to Plaintiff's brain through the actual scans, the reports themselves make clear that significant abnormalities exist.

It is against this backdrop, that Defendants seek to vacate the injunction, and avoid the judicial review and process owed to Mr. Purkey under *Ford*. The issue before the Court at this time is not whether the district court's ruling was correct—though we firmly believe that it is because it simply follows settled Supreme Court precedent. Rather, the question is whether, despite Defendants' obstructionist behavior in the district court and attempt to rush this serious competency claim through to execution

without meaningful review, the balance of the equities cuts so strongly in its favor that this Court should allow the Government to short-circuit a significant and indisputably timely Constitutional claim altogether by vacating the preliminary injunction. The answer is clearly no. As a matter of settled law, Plaintiff is entitled to such process review and, without it, his execution would violate the United States Constitution. Defendants-Appellants have not come close to carrying the "heavy burden" necessary to justify a stay.

Background

On November 26, 2019, Mr. Purkey initiated the present action in the D.C. District Court, including extensive factual allegations and evidentiary support, challenging the constitutionality of his execution during his period of incompetency pursuant to *Ford*. *See* Complaint, ECF No. 1. Mr. Purkey's *Ford* civil complaint did not challenge his conviction or sentence but, rather, his current competency to be executed and the failure of Appellants to effectuate *any* process under *Ford*. In addition, Mr. Purkey's complaint challenged the complete lack of process in federal *Ford* determinations. *See id.* ¶¶ 118–21; Pl.'s Opp'n to MTD at 7–10, ECF No. 20; Pl.'s Reply in Supp. of Pl.'s Renewed Mot. for a Prelim. Inj. at 2, 16–17, ECF No. 29 (comparing the complete lack of any federal *Ford* procedure with the many state procedures in those states that recognize the death penalty). Mr. Purkey first brought his *Ford* complaint after the issuance of a warrant scheduling his execution because a competency to be executed claim is not ripe until the execution is imminent. *See*

Panetti v. Quarterman, 551 U.S. 937, 947 (2007) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998)).

Mr. Purkey is also a plaintiff in a related case in the D.C. District Court that challenged the constitutionality of the Government's proposed lethal injection protocol. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145-TSC (D.D.C. Aug. 20. 2019) (the "Protocol case"). On November 20, 2019, the D.C. District Court entered a preliminary injunction in the Protocol case, preventing Mr. Purkey's December 13, 2019 execution date. However, on December 4, 2019, Mr. Purkey filed a parallel protective Motion for a Preliminary Injunction (ECF No. 7) in his *Ford* case out of an abundance of caution to ensure he would not be executed while incompetent if the Protocol Case injunction was lifted. On December 17, 2020, after the initial execution warrant had expired, and after Appellants had filed an opposition to Mr. Purkey's Preliminary Injunction Motion (ECF No.10), Mr. Purkey filed a Motion to Withdraw the protective Motion for Preliminary Injunction, agreeing with the Government that since his execution was no longer imminent, the preliminary injunction motion was no longer ripe. *See* Mot. to Withdraw, ECF No. 11. On December 31, 2019, the D.C. District Court granted the motion to withdraw and *sua sponte* ordered Mr. Purkey to respond to jurisdictional arguments raised in the Government's Opposition to Mr. Purkey's preliminary injunction motion, including argument relating to the court's jurisdiction over a civil rights *Ford* claim brought outside habeas. The parties completed briefing on January 28, 2020. ECF Nos. 14–17. Defendants-Appellants then filed a Motion to Dismiss or, in the alternative, to

Transfer to the Southern District of Indiana, where Mr. Purkey is incarcerated. Defendants-Appellants' motion to dismiss or transfer was fully briefed. ECF Nos. 18–21. Throughout this period and before, Plaintiffs diligently sought Mr. Purkey's medical and other records from the Appellants to assist his expert in preparing reports about Mr. Purkey's competency. App. A, ECF No. 30-1. The Government refused throughout this period to provide any information, largely ignoring Mr. Purkey's requests.

On April 7, 2020, the preliminary injunction issued in the Protocol Case was vacated by the D.C. Circuit. *See* Judgment*, FBOP Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Apr. 7, 2020). On June 15, 2020, the next business day after the issuance of the mandate in connection with that D.C. Circuit litigation, Attorney General Barr issued another warrant for Mr. Purkey's execution with only 30 days' notice, setting his execution date for July 15, 2020. This was done despite Mr. Purkey's unresolved and substantiated *Ford* claim, a lack of promulgated federal *Ford* procedures in any form (draft or otherwise), a global pandemic that caused USP Terre Haute, where Mr. Purkey is located, to prohibit visitations, and documented COVID-19 cases in the prison, including at least one COVID-19-related death. At the time the new warrant was issued, neither the Attorney General nor the BOP had promulgated any procedures to ensure critical visitors could consult with Mr. Purkey safely without unnecessary risk of exposure to the deadly virus known to be present inside the prison. R. Woodman Decl. ¶¶ 37–38, ECF No. 23-6.

Due to the imminence of the newly issued execution warrant and Appellants' continued delay and refusal to provide Mr. Purkey relevant materials related to his *Ford* claim, as described further herein, on June 22, 2020, Mr. Purkey moved the D.C. District Court for a renewed preliminary injunction of the scheduled execution in order to ensure he receives (a) a fair hearing on the issue of his competency to be executed; (b) a determination of his competency *vel non* to be executed; and (c) the completion of expedited discovery in advance of a *Ford* hearing, to which he is entitled based on his substantial threshold showing of incompetency. Pl.'s Renewed Mot. for a Prelim. Inj. Barring Execution of Wesley Purkey Pending Final Disposition on the Merits 1–2, ECF No. 23. On June 23, 2020, Mr. Purkey also filed a motion for expedited discovery in that matter, seeking information relevant to his *Ford* claim that is in the sole possession and control of Appellants and which he has long been denied. Pl.'s Mot. for Expedited Disc., ECF No. 24.

On July 14, 2020, in an abundance of caution Mr. Purkey filed a Motion to Preserve Jurisdiction and Stay Execution ("Motion to Preserve") in an action in the Southern District of Indiana. *Wesley Ira Purkey v. William P. Barr, et al.,* No. 2:19-cv-00517-JMS-DLP (S.D. Ind.) ("*Bivens* Action"). That court was currently considering a motion to hold those proceedings in abeyance pending resolution of claims related to Mr. Purkey's competency, and Mr. Purkey sought to have that court enter an order to preserve its jurisdiction to consider the underlying competency issue, should this matter be transferred to Indiana at the last minute. The government seeks to characterize that as some form of "forum shopping" but it was

really another action of diligence and prudence. Although Mr. Purkey was confident that the district court had jurisdiction in D.C. over his civil rights action (as the district court ultimately determined that it did), Mr. Purkey noted in his motion to preserve his intent to file a protective petition for habeas corpus relief under 28 U.S.C. § 2241. The need for this sort of protective filing became apparent when, in connection with the execution of Mr. Lee on July 13, 2020, the proceedings culminated with the Applicants' issuance of a new warrant for Mr. Lee's execution bearing the same date, despite the serious due process issues raised by the implementation of an execution warrant with no notice whatsoever. Given that lack of any process and protocols for addressing these issues, and specifically execution of the mentally incompetent, and the demonstrated rush to execution without full and fair consideration of his claims, Mr. Purkey became concerned that the government might take advantage of a last minute transfer to carry out his execution before he could move for a stay. Because his claims are meritorious and deserving of judicial review and adjudication on the merits, and only just became ripe, that motion was filed solely to protect his interest to have some court hear his *Ford* claim on the merits before Mr. Purkey was put to death. While the Indiana court denied the motion almost immediately, it expressed sympathy with Plaintiff's counsel's "desire to avoid the frantic pace of recent related litigation." ECF No. 83. Nonetheless, that court concluded that if "if [Plaintiff] is directed to bring a *Ford* claim in a § 2241 petition in [the Indiana district court]," then he must file such a claim in a § 2241 petition in that court, not as part of the *Bivens* Action. *Id.*

This morning, at 5:09 a.m., the D.C. District Court issued its ruling, enjoining Mr. Purkey's execution, scheduled for today. The district court correctly held that Plaintiffs are likely to prevail on their claims. The court found that, because Mr. Purkey's claim is of constitutional dimension and falls outside the core of habeas, jurisdiction is appropriate under 28 U.S.C. § 1331. Order at 9, ECF No. 36. Even if the claims were core habeas, the court found that it would still have jurisdiction because "the question of personal jurisdiction or venue" was not raised by the Government in their motion to dismiss and was therefore waived. *Id.* The court also correctly found that "Plaintiff has made the substantial threshold showing required by *Ford*, and in doing so, has demonstrated a likelihood of success on his claim for a competency hearing." *Id.* at 11.

THE RECORD IN FRONT OF THE DISTRICT COURT

The district court issued its ruling based on extensive evidence proffered by Mr. Purkey detailing his incompetence, his diligence, and the government dilatory tactics.

I. MR. PURKEY'S INCOMPETENCY

Mr. Wesley Purkey is a 68-year-old man suffering from progressive dementia, schizophrenia, complex-Post Traumatic Stress Disorder ("PTSD"), and severe mental illness including significant delusions and paranoia, rendering him unable to comprehend the reason for his execution and thus entitled to process on the issue of his competency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Although no such process has yet been afforded, and despite Appellants' repeated roadblocks to gaining additional relevant information in pursuit of Mr. Purkey's *Ford*

claim, the evidence of his incompetency is already extensive. Mr. Purkey's cognitive deterioration, memory loss, paranoia, confusion, and delusion are well established in the record through declarations and reports from counsel, defense team members, and medical experts, as well as through medical testing and relevant documents.

First, Mr. Purkey's defense lawyers, investigators, and medical experts who have evaluated him over decades have described his paranoia and delusions in detail. *See, e.g.*, Complaint, Exhibit 1 at 10, ECF No. 1-1 (explaining Mr. Purkey's longstanding belief that the prison and guards are poisoning him in retaliation for his legal work); Complaint, Exhibit 13 at 561, ECF No. 1-8 (May 15, 1981, psychiatric evaluation reporting auditory hallucinations as Mr. Purkey held two conversations at the same time, "whisper[ing] in an entirely different conversation from what he was talking aloud."); *Id.* at 345, ECF No. 1-6 (May 1998 emergency room record noting Mr. Purkey was admitted because he "started to act paranoid," stating that "they" were watching him at all times and sprayed him with "poisonous mist several times" while he was sleeping"); Complaint, Exhibit 5 at 40, ECF No. 1-1 at 40 ("Early in my involvement [as Wes's mitigation specialist], Wes began exhibiting delusional thinking"); Complaint, Exhibit 7 at 74, ECF No. 1-1 ("Wes was constantly paranoid that various prison officials were trying to harm him in retaliation for his 'jailhouse lawyering,'" and his "paranoia also increased over time."); E. Vartkessian Decl., ECF No. 23-5; R. Woodman Decl., ECF No. 23-6.

Second, testing has confirmed Mr. Purkey's cognitive decline. In 2003, neuropsychological testing of Mr. Purkey revealed moderate microsomia on the Smell

Identification Test (SIT)—an early marker of dementia, including Alzheimer's Disease. Complaint, Exhibit 3 at 12, ECF No. 1-1. Additionally, a brain scan from 2003 "indicated abnormalities in the area of the brain involved in memory and typically implicated in Alzheimer's disease." *Id.* at 20. Thirteen years later, in 2016, neuropsychological testing revealed that Mr. Purkey was suffering from frontal lobe deficits and progressive dementia consistent with Alzheimer's disease. Complaint, Exhibit 9 at 88, ECF No. 1-1. The testing revealed that Mr. Purkey had experienced significant declines in both memory and executive functioning since the previous testing in 2003. *Id.* A follow-up report in 2018 revealed that Mr. Purkey's condition had continued to deteriorate since 2016, and the report recommended a further neurology work-up, including brain imaging, and a reassessment of his neurological status. Complaint, Exhibit 15 at 120, ECF No. 1-18.

Additional testing administered in August 2019 by Dr. DeRight, a neuropsychologist, led him to diagnose Mr. Purkey with Alzheimer's disease, a progressive neurodegenerative disease that impacts memory, intellectual function, and behavior. Complaint, Exhibit 3 at 28CF No. 1-1; Complaint, Exhibit 6 at 89, ECF No. 1-1 (testing, medical and family history "strongly suggest" in 2016 that "Mr. omplaint, Exhibit 12 at 120, ECF No. 1-2 (describing the reports of cognitive, physical and psychiatric decline and finding that this "reported pattern of change is very much consistent with progression of a cortical dementia"); Encyclopedia of Psychology at 71 (4th ed., vol. 1 2010) (describing Alzheimer's Disease). Dr. DeRight worsening cognitive symptoms, including paraphasic word efforts, word loss, impaired recall of

information he knew before, and incontinence, was also highly consistent with the progression of Alzheimer's disease. *See* Complaint, Exhibit 3 at 27, ECF No. 1-1; Encyclopedia of Psychology at 71 (4th ed., vol. 1 2010) (describing Alzheimer's Disease). Dr. DeRight opined that collateral information about Mr. Purkey's worsening cognitive symptoms, including paraphasic word efforts, word loss, impaired recall of information he knew before, and incontinence, was also highly consistent with the progression of Alzheimer's disease. *See* Complaint, Exhibit 3 at 27.

Third, expert review of relevant records supports the conclusion that Mr. Purkey is suffering from cognitive impairment due to a dementing disorder. Dr. Thomas Hyde, a neurologist, similarly concluded that there is "substantive evidence of Mr. Purkey's neurological deterioration over time affecting memory and cognitive function that is compatible with the diagnosis of a dementing disorder," based on a close review of Mr. Purkey's available records, including medical records, family birth and death records, and expert reports. Dr. Hyde Decl. ¶ 13, ECF No. 23-4. While unable to make a definitive diagnosis without the benefit of an in-person visit—rendered impossible due to the COVID-19 pandemic—or a review of recent medical records or current diagnostic testing—rendered impossible by Appellants' failure to provide requested materials—Dr. Hyde nevertheless concluded that Mr. Purkey's "intellectual deficits, paranoia, and delusional beliefs, and the course of his progressive deterioration are consistent with the diagnosis of dementia." *Id.* at 81.

Fourth, Mr. Purkey's confusion and memory loss has been witnessed over time by those most familiar with him. Mr. Purkey's mitigation specialist, Dr. Elizabeth Vartkessian, PhD, who has had close contact with Mr. Purkey for the last five years, has witnessed Mr. Purkey's recent, continual, and rapidly declining cognitive abilities both in-person before the USP Terre Haute lockdown and even by telephone since the lockdown began, despite the severe limitations of telephonic consultations. *See generally* Vartkessian Decl., ECF No. 23-5. In Dr. Vartkessian's most recent visits with Mr. Purkey, the last of which was early March 2020, he struggled to remember words for simple items and could not recall names of individuals he knew well. *Id.* at 2-4.

Fifth, the evidence indicates that Mr. Purkey's cognitive decline and paranoia render him incapable of understanding the reason for his execution. Dr. Bhushan Agharkar, a neuropsychiatrist, observed that while Mr. Purkey could recite the Government's position that his execution is for the murder of Jennifer Long, this was merely "parroting," meaning he can repeat what others say but cannot rationally understand what it means. Mr. Purkey holds "a fixed belief that he is going to be executed in retaliation for his legal work, to prevent him from being a hassle for the government." *Id*. This is not a standalone belief but rather serves as a foundation for an entire delusional system involving conspiracies of retaliation. Mr. Purkey holds an honest and deeply entrenched belief that the federal Government plans to execute him not as punishment for the murder of Jennifer Long, but because of his "protracted jailhouse lawyering." Complaint, Exhibit 15 at 994 (D.D.C. Nov. 26, 2019), ECF No.

1-18. In Mr. Purkey's mind, the voluminous grievances and lawsuits he has filed throughout his incarceration "have had a monumental impact in preventing correctional officers from depriving prisoners of their constitutional rights." Complaint, Exhibit 5 at 41 (D.D.C. Nov. 26, 2019), ECF No. 1-1. Mr. Purkey's ongoing paranoia and inability to connect cause and effect is demonstrated through his strong belief that Attorney General Barr and the BOP are plotting to kill him in retaliation for his litigation and to prevent him from future filings. *See, e.g.*, Complaint, Exhibit 1 at 12, ECF No. 1-1 (finding that Mr. Purkey insists the Government is "eager[] to be rid of him and his successful litigation"). Moreover, Mr. Purkey perceives his own counsel "as part of the conspiracy against him and his efforts to litigate against the prison"—a belief that prevents him from cooperating with them on matters related to his execution. Complaint, Exhibit 5 at 54, ECF No. 1-1. Dr. Agharkar concluded to a reasonable degree of medical certainty that Mr. Purkey "lacked a rational understanding of the basis for his execution." Complaint, Exhibit 1 at 12, 13, ECF No. 1-1 ("The lack of rationality from Mr. Purkey's delusional thoughts and paranoia are compounded by the deterioration of his brain from his dementia.").

II. THE GOVERNMENT'S CONTINUED REFUSAL TO PROVIDE MR. PURKEY INFORMATION RELEVANT TO HIS COMPETENCY

Notably, the extensive evidence of Mr. Purkey's incompetency presented to date does not yet include current records and other evidence that is directly relevant to his *Ford* claim, for the simple reason that Appellants have refused to provide any of this evidence in the nine months since the filing of his complaint, despite numerous requests. *See* R. Woodman Decl. at 3, ECF No. 23-6. Records in

Appellants' sole possession include Mr. Purkey's updated BOP medical and mental health records, disciplinary records, and administrative records. *Id.* Access to Mr. Purkey himself is necessary for medical experts to conduct in-person assessments of his declining mental competency as well as the ability to conduct neurological testing. Complaint, Exhibit 1, ECF No. 1-1 (Dr. Agharkar Report); Dr. DeRight June 14, 2020 Letter, ECF No. 23-2; Dr. Hyde Decl., ECF No. 23-4. Appellants have repeatedly refused to provide any of this information. R. Woodman Decl. at 3, ECF No. 23-6; App. A, ECF No. 30-1.

Since August 2019, counsel for Mr. Purkey has made repeated efforts to obtain this information to further evaluate Mr. Purkey's competency. *See* R. Woodman Decl., ECF No. 23-6; *see also* App. A, ECF No. 30-1; R. Woodman Suppl. Decl. ¶ 28. Appellants have ignored or stonewalled these efforts, refusing to provide the requested information, moving the goalposts on access to expert testing, and withholding highly probative contemporaneous information about Mr. Purkey's mental and physical health. As of today, the day of Mr. Purkey's execution, counsel had still not received requested information as narrowly-tailored and straightforward as his most recent medical records. *See* R. Woodman Suppl. Decl. ¶¶ 5–7.

Mr. Purkey's updated BOP medical, administrative, and mental health records, the surveillance video from Mr. Purkey's cell, and the BOP death watch protocol are all relevant to Mr. Purkey's current mental state and functioning. *See* App. A, ECF No. 30-1. The BOP first told Mr. Purkey's counsel that the information

could only be obtained indirectly, such as through the Freedom of Information Act ("FOIA") process (even though the request was for Mr. Purkey's own records and made by Mr. Purkey's attorney of record). , ECF No. 23-6. On October 9, 2019, Mr. Purkey's counsel submitted expedited FOIA requests for the information to the BOP when his execution was scheduled for December 13, 2019. R. Woodman Decl., ECF No. 23-6; Complaint, Exhibit 17. Counsel had also unsuccessfully requested the cell video footage on September 17, 2019. R. Woodman Decl., ECF No. 23-6. Expedited FOIA processing was granted but the BOP indicated that processing may nonetheless take up to six months. Complaint, Exhibit 16 at 1454–55pending execution date only two months away. R. Woodman Decl., ECF No. 23-6. BOP Legal Counsel responded on October 16, 2019 that she would follow up to see about a more expedited time frame. *Id.* ¶ 13. Purkey's pending execution date only two months away. R. Woodman Decl., ECF No. 23-6. BOP Legal Counsel responded on October 16, 2019 that she would follow up to see about a more expedited time frame. *Id.* at 155 ¶ 13. . BOP Legal Counsel responded on October 16, 2019 that she would follow up to see about a more expedited time frame. *Id.* at 155 ¶ 13. *Id.* at 155 ¶ 13.

The records went unproduced, and counsel for Mr. Purkey again asked for them on November 11, 2019. *Id.* at 155, 206–07 (R. Woodman Decl.). This time, counsel asked that BOP provide the records within ten days, given Mr. Purkey's then-pending execution date. *Id.* BOP Legal Counsel acknowledged that "everyone involved is cognizant that time is of the essence," and agreed to forward the communication to FOIA personnel. *Id.* Again, no records were produced. *Id.*

Even after Mr. Purkey's initial execution warrant expired, Mr. Purkey's counsel continued to pursue these critical records and the BOP continued to refuse to provide them. On February 3, 2020, Mr. Purkey's counsel submitted updated and renewed FOIA requests seeking: (1) BOP policies and procedures pertaining to BOP surveillance of Mr. Purkey as well as copies of video surveillance tapes of his cell, and (2) Mr. Purkey's medical, mental health, and administrative BOP file (including disciplinary records). *See id.* at 161, 301–12 (R. Woodman Decl.). A supervisory attorney at the BOP acknowledged receipt of the requests and confirmed they would be forwarded to the FOIA processor who would reach out if they needed any more information to fulfill them. *See id.* at 161, 323–25 (R. Woodman Decl.). Mr. Purkey's counsel received no requests for further information to facilitate the FOIA request, and, again no records were produced. R. Woodman Suppl. Decl. ¶ 7.

Remarkably, Appellants thereafter disputed that Mr. Purkey renewed his FOIA requests at all, and then represented that the BOP did not have any record of the updated or renewed FOIA request. *See* R. Woodman Decl., ECF No. 23-6 Mr. Purkey's counsel again pressed the complete failure to provide Mr. Purkey's records or grant access for testing in filings in the *Ford* matter. Purkey's Opp'n to MTD (D.D.C. Mar. 16, 2020), ECF No. 20.[1] On June 15, 2020, shortly before receiving

[1] Counsel specifically argued that Defendants should grant access to the necessary materials (even while an injunction was in place in the Protocols case) because waiting for a short warrant period would impose an "'unrealistic time-frame' to allow counsel to obtain the information it needs to prepare for a competency hearing, this court to conduct it, and an appellate court to review it." Memorandum in Support of Plaintiff's Opposition to Defendants Motion to Dismiss, ECF No. 20.

notice of the new execution warrant, and on June 25, 2020, Mr. Purkey's counsel *again* followed up with BOP Legal Counsel about the 2020 FOIA requests. *See* R. Woodman Decl. ¶ 32, ECF No. 23-6; R. Woodman Suppl. Decl., ECF No. 30-2. On June 26, 2020, BOP Legal Counsel claimed that she was "unaware of any outstanding requests for medical and psychological records" and that "the two quickest ways" to obtain "medical and psych" files were to ask Mr. Purkey to request them or "through the discovery process." R. Woodman Suppl. Decl., ECF No. 30-2.

On June 23, 2020, Mr. Purkey filed a motion for expedited discovery of the materials he had long sought in relation to his *Ford* claim. In response, on June 29, 2020, Appellants in the *Ford* matter continued to refuse to provide the relevant records and failed to address why, after eight months, Mr. Purkey had not received the materials through the "expedited" FOIA process. *See* Defendants' Opp. to Plaintiff's Mot. for Expedited Discovery, ECF No. 27; *see also* Defendants' Opposition to Plaintiff's Motion for Renewed Preliminary Inj., ECF No. 26.

On July 4, 2020, a federal holiday, BOP Legal Counsel inexplicably purported to change position, stating that "I have provided Mr. Purkey's entire medical and psychological files to the AUSAs [Assistant United States Attorneys] involved in his case (copied here). They have agreed to produce the same to you under the rules for discovery." R. Woodman Suppl. Decl. ¶¶ 5,7. But the referenced records do not include all requested information, such as video records and administrative file and disciplinary records. R. Woodman Suppl. Decl. ¶ 7. And, on the day of Mr. Purkey's

scheduled execution, these records, allegedly sitting in the hands of defense counsel in the *Ford* matter, *still* had not been produced. *See id.*

The reports from Drs. DeRight and Agharkar and declaration from Dr. Hyde illustrate that important questions of fact regarding Mr. Purkey's competency cannot be fully assessed without the withheld medical and BOP records. For example, Mr. Purkey's legal team reports that Mr. Purkey appears to be incontinent. Complaint, Exhibit 3 at 25, ECF No. 1-1. This is an important marker of Alzheimer's Disease. *Id.* at 28. The medical records may shed light on when Mr. Purkey's incontinence began and the extent of his loss of this biological function. Dr. Agharkar noted that Mr. Purkey has less movement on the right side of his face, as if he had suffered a stroke. Complaint, Exhibit 1 at 11, ECF No. 1-1. Without the medical records, counsel lacks information about whether Mr. Purkey has had a stroke that could indicate further cause for his cognitive decline. These questions are merely illustrative, not exhaustive, of the information withheld. The need for the withheld medical records is especially pressing because neither Mr. Purkey's counsel nor his expert witnesses have been able to visit Mr. Purkey in-person since March 2020. Continuous observation is imperative to identify the declining functions and cognitive awareness that are hallmarks of persons with dementia. This is one reason the surveillance footage from Mr. Purkey's cell is so critical in addition to his medical and administrative records. Range video surveillance, which shows Mr. Purkey in his typical prison setting, will provide for observation of Mr.

Purkey's condition in a way that the somewhat artificial setting of a visitation cannot.

Appellants have also prevented Mr. Purkey's access to highly probative testing ordered by his experts. On September 26, 2019, Dr. Agharkar ordered brain image testing based on Mr. Purkey's history of cognitive deficits and the need to rule out an intracranial process. *See* ECF No. 23-6. On June 15, 2020, Mr. Purkey's counsel requested that Dr. DeRight be allowed to visit and evaluate Mr. Purkey in person. Dr. DeRight had last conducted an in-person examination of Mr. Purkey in August of 2019. *See* ECF No. 23-2. Standard best medical practices require repeated neuropsychological examinations, including up-to-date neuroimaging and blood laboratory tests, to assess Mr. Purkey's current abilities and the progression of his dementia. *Id.* Dr. Hyde also made clear that additional examination and testing is necessary but has been unable to safely examine Mr. Purkey in person due to the prison closure and the pandemic. *See id.* at 74 ¶ 8 (stating that "a complete neurological assessment includes a face-to-face interview and physical neurological examination of Mr. Purkey, and follow-up with relevant diagnostic testing," to include an MRI, EEG, a variety of blood tests, spinal tap, and PET scans). For months, the BOP refused to permit such testing, claiming a lack of ability or authority to allow it, and stating, among other things, that the testing required a court order

Petitioner has also sought access to brain imaging that would corroborate his mental decline related to Alzheimer's disease. The Government only this week

provided the imaging that he had been requesting for months. And Mr. Purkey's counsel has just learned, for the first time, that the government appears to have had scientific confirmation in their possession of significant structural abnormalities in the brain that are consistent with cognitive impairment such as vascular dementia or other conditions. Access to this testing had been requested by Plaintiff for months, and arbitrarily denied by Appellants. Appellants reversed course last week, and permitted the testing at the expense of the defense team. Even though the testing was paid for and requested by Plaintiff's counsel and their experts the results were initially delivered only to the Government, last week. The government provided reports based on this data late last week, but did not deliver the underlying scans to Mr. Purkey's defense expert until yesterday. Although Petioner's expert has not been able to verify the extent of the atrophy and damage to Plaintiff's brain through the actual scans, the reports themselves make clear that significant abnormalities exists.

Appellants' months-long failure to provide relevant information has been exacerbated by the COVID-19 pandemic. Cases continue to rise in states across the country, including in the Midwest. *Id.* at 53 ¶ 8 (J. Goldenson Decl.). Prisons and other detention facilities pose heightened risks for COVID-19 exposure and transmission. *Id.* at 56 ¶ 17. The lack of adequate ventilation, inability of all prisoners and staff to practice social distancing, inadequate hand washing, and insufficient cleaning practices all contribute to the increased risk for the rapid spread of COVD-19 in prisons. *Id.* at 56–59. In recognition of the threat of COVID-19, the

BOP suspended all social and legal visits across the country.[2] All visitation at USP Terre Haute has been suspended since March 13, 2020. At the time of this filing, the BOP website still states that no visitors are allowed at USP Terre Haute and that all social and legal visits for all BOP facilities remain suspended. *Id.* at 61 ¶ 39. USP Terre Haute has reported cases of COVID-19 among its prisoner population, and, notably, it has recently been reported that a BOP staff member coordinating the upcoming executions tested positive for COVID-19. R. Woodman Suppl. Decl. ¶ 8. With scant testing, it is impossible to know the full scale of the infection. *Id.* ¶ 37.

Mr. Purkey's counsel immediately contacted BOP Legal Counsel to discuss USP Terre Haute's visitation policy after receiving notice of Mr. Purkey's new execution warrant. *Id.* at 166, 363–64 (R. Woodman Decl.). BOP Legal Counsel expressed willingness for legal visits to resume for prisoners with scheduled executions but could not provide any official protocols regarding visitation or safety precautions. *See id.* at. 166, 365–66. Although BOP Legal Counsel stated that she would provide Mr. Purkey's counsel with a written policy on June 17, 2020, Mr. Purkey's counsel has yet to receive any such official documentation regarding legal or expert visits. *Id.* at 166, 367–69. The BOP has not explained how visitation would be safe for the four inmates with execution warrants and their visitors when it remains suspended for the over 1200 other prisoners at USP Terre Haute and their visitors. The BOP's cursory and unplanned approach to resuming legal visits is

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[2] *BOP Implementing Modified Operations*, Fed. Bureau of Prisons, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited July 12, 2020).

entirely insufficient, particularly given the close quarters and limited ventilation and air flow within death row visitation rooms. J. Goldenson Decl. ECF No. 23-3.

Nor does the BOP's approach provide adequate access to Mr. Purkey to make meaningful assessments. Mr. Purkey's counsel and medical experts have been unable to visit Mr. Purkey for months. *See* (E. Vartkessian Suppl. Decl., ECF No. 23-5; R. Woodman Decl., ECF No. 23-6; R. Woodman Suppl. Decl., ECF No. 30-2. These in-person visits by individuals who have long known Mr. Purkey and have witnessed his mental decline over the years are critical to understanding the trajectory of his progressive dementia and his present mental state. *See* Letter from Jonathan DeRight, PhD, ABPP-CN, Woodbridge Psychological Associate, PC, to Rebecca E. Woodman, Esq., Attorney at Law, L.C. (June 14, 2020), ECF No. 23-2; Dr. Hyde Decl. ¶¶ 11–12, 14, ECF No. 23-4; E. Vartkessian Decl. ¶¶ 4, 11, 22–25, ECF No. 23-5. All three of Mr. Purkey's expert witnesses have made clear how vital it is for Mr. Purkey's legal team to have in-person visits, testing, imaging, and examinations to obtain an accurate assessment of the progression of his dementia. *See* Complaint, Exhibit 1, ECF No. 1-1 (Dr. Agharkar Report); Dr. Hyde Decl. ¶¶ 8–9, 11–12, 15–17, ECF No. 23-4; DeRight June 14, 2020 Letter, ECF No. 23-2.

More fundamentally, the decision to fast-track Mr. Purkey's execution during the pandemic and the BOP's lack of adequate preparation or procedures to facilitate safe visitations, let alone executions, given the USP Terre Haute COVID-19 outbreak, creates an impossible situation for all involved in the days leading up to Mr. Purkey's execution. In order to advocate for their client's constitutional rights

and uphold the core values of the U.S. Constitution, Mr. Purkey's counsel and experts must risk their own lives and the lives of their family members or medically vulnerable persons to whom they provide care. Mr. Purkey must face the prospect of dying without his legal and spiritual advisors, and without familial support by his side—either because they will not be permitted to visit him, or because they must risk their lives to do so. Even the family members of the *victim* of Mr. Purkey's crime must make this difficult decision, as it is their right to attend the execution.

Appellants' decision to schedule Mr. Purkey's execution with only one month's notice, after the months-long refusal to provide relevant materials and access to Mr. Purkey, and in the midst of a global pandemic that creates new difficulties and dangers associated with in-person visits, deprives him of his constitutional rights under the Fifth and Eighth Amendments.

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court's discretion. *See Kemp* v. *Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). "Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision." *Dugger* v. *Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting); *see also Doe* v. *Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals "[a]lthough there is a question as to the likelihood of ... success on the merits" because "the applicants have not shown cause so extraordinary

as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding" (internal quotation marks omitted)).

A stay pending appeal is available "only under extraordinary circumstances," and the "district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). The Government has not carried its "heavy burden" to justify such relief here, *id.*, as (1) it has not "made a strong showing that [it] is likely to succeed" in challenging the injunction on appeal; (2) it will not "be irreparably injured absent a stay"; (3) a stay would substantially and irreparably injure Plaintiffs; and (4) a stay is not in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Where, as here, the court below issued a stay based on its careful review of the extensive evidence offered by Mr. Purkey and the Appellants have engaged in dilatory tactics and obstruction, this Court should not vacate the decision below.

I. APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

The district court correctly held that Mr. Purkey is likely to prevail on his claims. The court found that, because Mr. Purkey's claim is of constitutional dimension and falls outside the core of habeas, jurisdiction is appropriate under 28 U.S.C. § 1331. Order at 9, ECF No. 36. Even if the claims were core habeas, the court found that it would still have jurisdiction because "the question of personal jurisdiction or venue" was not raised by the Government in their motion to dismiss

and was therefore waived. *Id*. The court also correctly found that "Plaintiff has made the substantial threshold showing required by *Ford*, and in doing so, has demonstrated a likelihood of success on his claim for a competency hearing." *Id.* at 11.

A. The District Court Properly Found That It Has Jurisdiction to Hear Mr. Purkey's Claims

The district court correctly found that claims pursuant to *Ford* are not traditional "core habeas" claims required to be brought under 28 U.S.C. § 2241. Order at 7, ECF No. 36. In a capital case, the test for whether a claim is within the bounds of "core habeas" is whether it would permanently prevent his execution. Clearly established Supreme Court precedent shows that this case is outside that core because "[u]nder *Ford*, when a plaintiff claims incompetence, 'the only question raised is not whether, but when, his execution may take place.' This temporal question is distinct from 'the antecedent question whether petitioner should be executed at all.'" *Id.* (citing *Ford*, 477 U.S. at 425 (internal citations omitted)); *see also Stanley v. Davis*, No. 07-cv-4727, 2015 WL 435077, at *4 n.4, *5 (N.D. Cal. Feb. 2, 2015) (it is "difficult to discern a meaningful difference between a *Ford* challenge and a methods challenge. . . .[which] may be brought under section 1983."); *Ward v. Hutchinson*, 558 S.W.3d 856 (Ark. 2018) (a state prisoner sought declaratory and injunctive relief in a civil rights action under 42 U.S.C. § 1983 challenging, in part, his competency to be executed); *Hubbard v. Campbell*, 379 F.3d 1245, 1247–48 (11th Cir. 2004) (Barkett, J., dissenting) (a civil rights action is an appropriate vehicle to raise a *Ford* claim because it does not challenge the fact or validity of the sentence,

only the constitutionality of the execution at a specific temporal point of incompetency, an issue not reached by the majority).

A "core habeas" is one in which "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477 (1994). In such cases, a civil rights action is not an available remedy. "But if . . . the plaintiff's action, even if successful, will not demonstrate the invalidity of [his conviction or sentence], the [§ 1983] action should be allowed to proceed . . . ." *Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011) (quoting *Heck v. Humphrey*, 512 U.S. at 487); *see also Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. Nov. 29, 2006) (action to obtain DNA appropriate pursuant to § 1983 because "such access would not imply the invalidity of his conviction" even if it may eventually lead to such a claim)).

It is clear that where a prisoner seeks injunctive relief that "would not necessarily bar the inmate's execution," the challenge is not limited to habeas because the challenge does not seek to establish "unlawfulness [that] would render a conviction or sentence invalid." *Hill v. McDonough*, 547 U.S. 573, 574 (2006) (citations omitted); *Nelson v. Campbell*, 541 U.S. 637, 643–44 (2004) (citations omitted) (allowing a challenge to the method of execution outside of habeas because it did "not directly call into question the 'fact' or 'validity' of the sentence itself"). This is true even if the challenge would "frustrate an execution as a practical matter." *Hill*, 547 U.S. at 574 (explicitly rejecting an amici argument that any "challenge that would frustrate an execution as a practical matter must proceed in habeas.").

As Mr. Purkey emphasized in his renewed motion for preliminary injunction (ECF No. 23) and the district court correctly observed in granting it, *Ford* "noted that incompetence may be temporary, and that a person may be returned to competency in order to carry out his sentence." *Ford*, 477 U.S. at 425 n.5 (Powell, J., concurring). It is a well-settled principle that competency is not inherently static and may be restored—a concept that Appellants continue to ignore and refuse to disclaim even though the Government is a vocal advocate of that principle. *See Indiana v. Edwards*, 554 U.S. 164, 175 (2008) ("[Competency] varies in degree. [Competency] can vary over time. [Competency] interferes with an individual's functioning at different times in different ways."); *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017) ("competency can be lost or regained over time" in the context of *Ford*); *United States v. Dahl*, 807 F.3d 900, 904 (8th Cir. 2015) ("[C]ompetency is not static and may change over even a short period of time[.]") (internal quotation marks omitted); *United States v. Grape*, 549 F.3d 591, 597–98 (3d Cir. 2008) (the Government could restore competency by medicating currently incompetent defendant who became mentally ill in prison); *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (upholding the state's forced medication of a prisoner to restore him to competency); *Commonwealth v. Sam*, 952 A.2d 565, 582 (Pa. 2008) (allowing involuntary medical intervention to restore an inmate to competency); Pl.'s Reply to Defs.' Resp. to Mr. Purkey's Br. Filed Pursuant to this Court's Order of Dec. 31, 2019 at 3 n.1, ECF No. 17 ("Nearly all death penalty jurisdictions that have implemented procedures that govern *Ford* claims include provisions for restoring competency.").

Notably, as the district court found, Appellants do not contest the court's jurisdiction as to Mr. Purkey's process challenge. *See* Order at 8, ECF No. 36. "Plaintiff's second claim challenges the manner of his execution by arguing that due process entitles him to a competency hearing before he can be executed. Compl. ¶ 119, ECF No. 1. Success on this claim would not challenge his death sentence but would only provide him a competency hearing. Again, Appellants appear to concede that there is an acceptable alternative—his execution can occur after he is found competent. Pl.'s Opp'n to MTD at 15–16, ECF No. 20.

Finally, the district court determined that, even if it could be said that Mr. Purkey's claims were "core habeas", the court would still have jurisdiction because the requirement that habeas petitioners file in the district of confinement "'is a question of personal jurisdiction or venue not a question of subject matter jurisdiction.'" Order at 9, ECF No. 36 (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 447, 451 (Kennedy, J., concurring)). Because Appellants conceded that personal jurisdiction and venue were appropriate in the D.C. District Court and only moved to dismiss for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6), the Government waived that requirement. *Id*.

When the Court reaches the merits after full briefing, it is much more likely that it will affirm the district court in its correct application of clearly established precedent. The Government cannot satisfy its "heavy burden" to justify a stay of execution.

B. The District Court Properly Found That Mr. Purkey Met *Panetti*'s Threshold Showing of Incompetence

The district court correctly found that Mr. Purkey "made a substantial showing of incompetence" and was thus "entitled to an opportunity to be heard, including a fair hearing." Order at 10–11, ECF No. 36 (citing *Ford*, 477 U.S. at 425–26 (Powell, J., concurring)). In making this determination, the district court credited the extensive evidence submitted by Mr. Purkey in support of his incompetence and concluded 1) that Mr. Purkey "does not understand that his execution is punishment for his capital crime"; 2) that "he has a documented history of mental illness, including delusional and paranoid thinking, starting in childhood and continuing to the present"; 3) that "his dementia has caused a decline in his mental health"; and 4) that "his long-term inability to communicate with counsel evinces his incompetence." Order at 10, ECF No. 36. The Court also credited the report by Dr. Bhushan Agharkar concluding that Mr. Purkey lacks a rational understanding of the basis for his execution. *Id*. (citing Agharkar Report, at 11–12, Complaint, Ex. 1, ECF No. 1-1.) Further, the Court observed that, while Appellants disputed Mr. Purkey's claim of incompetence, they provided no independent evidence of competence. Order at 10, ECF No. 36. Having met the substantial threshold showing, the district court correctly found that Mr. Purkey "has demonstrated a likelihood of success on his claim for a competency hearing." *Id.* at 11.

Appellants advance the same arguments here that were unavailing in the court below, and these arguments must again fail. *See* Mot. to Dismiss at 21–25, 29, ECF No. 18. As the district court recognized, Mr. Purkey has

submitted substantial and reliable evidence of his progressive dementia, schizophrenia, delusions, and paranoia, including through numerous declarations and reports from counsel, defense team members, and multiple medical experts, as well as through medical testing results, medical records, and other relevant documents. Compl., ECF Nos. 1 to 1-52; Pl.'s Renewed Mot. for Prelim. Inj. & Supporting Documents, ECF Nos. 23 to 23-7. Appellants attack Dr. Agharkar's expert conclusions based solely on their layperson, uninformed understanding of mental health. Appellants argue that Mr. Purkey's lack of rational understanding for his execution is really a lack of understanding of the reason for scheduling his execution, but as the district court observed, this is not "independent evidence of competence." Order at 10, ECF No. 36. Further, any factual disputes raised by Appellants, even if they were valid—which they are not—support the district court's finding that a hearing is warranted.

Ford and *Panetti* make clear that once a prisoner has made a "substantial threshold showing of insanity" he is entitled to "the protection afforded by procedural due process," including a hearing at which to present evidence on the ultimate issue of competency. *See Panetti*, 551 U.S. at 949. *Panetti* explains the substance of these procedures, emanating from Justice Powell's controlling opinion in *Ford* setting out the *minimum* procedures for competency determinations:

> [I]f the Constitution renders the fact or timing of [the condemned prisoner's] execution contingent upon establishment of a further fact,

> then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.

Panetti, 551 U.S. at 948–49 (quoting *Ford*, 477 U.S. at 411–12). A "fair hearing" is necessary under *Panetti* and *Ford* because there are facts that must be established at the time of, or shortly before, an execution date to determine if sanity is an issue. *Panetti*, 551 U.S. at 948–49 (quoting *Ford*, 477 U.S. at 426). The fact of the condemned person's sanity is the necessary predicate for the retributive justification of death as a punishment. *Id.* Without this, the punishment becomes indefensible. This critical constitutional inquiry must be subject to the adversarial process and judicial scrutiny.

Notably, Mr. Purkey made this substantial threshold showing despite Appellants' significant interference with his attempts to gather critical evidence. The Government's refusal to honor Mr. Purkey's repeated requests over the past nine months for medical and mental health records, surveillance video from his cell, and access to medical testing, as well as the interference with access to visitations because of the COVID-19 pandemic, has deprived him of expert and legal assistance and the opportunity to review and submit additional relevant evidence of his incompetency.

With no authority, Appellants argue that a failure to meet the threshold showing entitles a prisoner to "no process –including information sharing." ECF No. 39 at 16. Neither *Panetti* nor *Ford* stands for the proposition that the government may obstruct a prisoner's access to his own counsel and medical records and then complain that the prisoner has failed to demonstrate current incompetency. *Panetti*

and *Ford* are premised on the opposite assumption: that counsel will have access to their client in making a substantial threshold showing. In *Ford*, counsel relied on, *inter alia*, the inmate's medical records that showed a pattern of deterioration into a paranoid psychosis. Ford, 477 at 402. In *Panetti*, counsel and a psychiatrist were able to meet with Panetti on the eve of his execution to corroborate the apparent illness as described by prison staff. *Panetti*, 551 U.S. at 940-42. In neither case did the state seek a litigation advantage by depriving counsel of information about their client.

That is what Appellants attempted to do here. Mr. Purkey's counsel requested his medical records for months, complying with every procedural mechanism and rule Appellants put forth. To date, Appellants have failed to produce any of Mr. Purkey's updated records despite repeated requests, nor have his experts been able to conduct necessary in-person examinations. The brain scans that Mr. Purkey requested for months took place only last week, and Appellants' representation that they sent "counsel the reports and original imaging from Purkey's most recent medical scans" is misleading at best. ECF No. 39 at 5. In fact, despite being informed by BOP that the requested scans and imaging were conducted on or after July 8, 2020 and that one of Mr. Purkey's experts would receive those scans and imaging from BOP by July 11, 2020, the expert did not receive them until July 14, 2020, *i.e.*, the day before the Mr. Purkey's scheduled execution. He has yet to receive the EEG results.

Critically, five minutes before this filing, Mr. Purkey's counsel learned that the Government appears to have had scientific confirmation in their possession of significant structural abnormalities in Mr. Purkey's brain that are consistent with

cognitive impairment such as vascular dementia or other conditions. Access to this testing had been requested by Plaintiff for months, and arbitrarily denied by Appellants. Appellants reversed course last week, and permitted the testing at the expense of the Mr. Purkey's team. Even though the testing was paid for and requested by Plaintiff's counsel and their experts, the results were initially delivered only to the Government, last week. The Government provided reports based on this data late last week, but did not deliver the underlying scans to Mr. Purkey's expert until yesterday. Although Plaintiff's expert has not been able to verify the extent of the atrophy and damage to Plaintiff's brain through the actual scans, the reports themselves make clear that significant abnormalities **exists.**

II. APPELLANTS WILL NOT BE IRREPARABLY HARMED BY THE PRELIMINARY INJUNCTION

Appellants have not shown that they would be harmed—much less irreparably so—absent a stay. Appellants complain that their "significant advanced planning and coordination" will be frustrated. Defs.' Mot. to Stay Prelim. Inj. Pending Appeal at 6, ECF No. 39. But Appellants created this situation when they filed a truncated execution warrant while Mr. Purkey diligently sought to litigate his claim. Any scheduling inconveniences for Appellants are of their own making and fail to rise to the level of irreparable harm.[3]

[3] Counsel object to Appellants' proposition that they can execute him "later today or possibly tomorrow." According to the regulation, Mr. Purkey's warrant has been issued for a specific "date"—i.e., today. Appellants' suggestion appears to contravene the regulation. ECF No. 39 at 19.

III. PLAINTIFF WILL BE IRREPARABLY HARMED BY A STAY OF THE INJUNCTION

Plaintiff, by contrast, would suffer irreparable harm of the highest order if the preliminary injunction is stayed. As the district court observed, "[i]n Ford, Justice Marshall acknowledged that 'execution is the most irremediable and unfathomable of penalties.' 477 U.S. at 411 (*citing Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)." Order at 11, ECF No. 36. As the district court correctly found, "absent a preliminary injunction, Plaintiff would be executed without being given the opportunity to be heard regarding his competence to suffer such a sentence" having "made a substantial threshold showing of innocence." *Id.* at 11–12. Importantly, the district court noted that Appellants "do not dispute that irreparable harm is likely." *Id.* at 12.

IV. A STAY IS NOT IN THE PUBLIC INTEREST

The balance of the equities and public interest also favor a stay. Where the Government opposes a stay, these two factors merge. *See Nken*, 556 U.S. at 434–35. This Court has an interest in granting a stay in order "to protect the Court's jurisdiction over the case, for if the inmate was executed while the competency question was pending, the case would become moot even if it later appeared that the inmate clearly was incompetent." *Smith ex rel. Smith v. Armontrout*, 626 F. Supp. 936, 939 n.1 (W.D. Mo. 1986). A cognizable *Ford* claim presents important constitutional questions courts must approach with "deliberate and thoughtful" consideration, for "a ripe *Ford* claim is due the same consideration as other issues raised in a first habeas petition." *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014, 1030–

31 (D. Ariz. 2001) (granting stay of execution pending resolution of *Ford* claim). A stay in this matter to ensure an incompetent person is not executed in violation of the U.S. Constitution:

> will not substantially harm the government, which has waited at least seven years to move forward on Purkey's case. . . . the public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case. Just because the death penalty is involved is no reason to take short-cuts—indeed, it is a reason not to do so.

Notice of Recent Decision, Ex. A at 26–27, ECF No. 31-1.

Other courts have found "little potential for injury" as a result of a delayed execution date. *See*, *e.g.*, *Harris v. Johnson*, 323 F. Supp. 2d 797, 809 (S.D. Tex. 2004). Any potential harm to the Government caused by a delayed execution is outweighed by the obvious harm to Mr. Purkey and the public's interest in a constitutional application executions. Not delaying the execution undermines the rule of law as pronounced by *Ford* and *Panetti*—that we as a society do not execute the incompetent.

Further, the only delays in this matter have been caused by Appellants. Since August 2019, despite repeated requests and efforts by Mr. Purkey's counsel, Appellants have continuously refused to provide his medical, mental health, and administrative records or, to furnish (or possibly even preserve) video evidence depicting Mr. Purkey's dementia, all of which is integral to Mr. Purkey's claim. *See generally e.g.*, R. Woodman Decl., ECF No. 23-6; Pl.'s Mot. For Expedited Disc., ECF No. 24; Reply in Supp. of Pl.'s Mot. For Expedited Disc. & App. A, ECF Nos. 30, 30-1. Additionally, due to the COVID-19 pandemic, BOP has precluded all visitors into USP Terre Haute beginning March 13, 2020, and now is only allowing visitors for

prisoners with execution dates. *See* E. Vartkessian Suppl. Decl. at 2, ECF No. 23-5. USP Terre Haute has documented cases of COVID-19 and at least one COVID-related death. Any alleged concern about the victims rings hollow given Appellants' choice to recklessly execute Mr. Purkey during a global pandemic with minimal safety procedures in place, putting the victim's family in a position to choose between attending the execution (as is their right) and risking their health and safety (and possibly their lives). BOP still has released only cursory guidance on keeping visitors safe and have refused to provide meaningful information related testing, ventilation, and other necessary procedures to keep visitors safe. R. Woodman Decl. ¶¶ 33–38, ECF No. 23-6.

By contrast, Mr. Purkey has acted diligently and expediently to protect his constitutional rights. This case falls into a category of cases where filing is not ripe until execution is imminent. *See Panetti*, 551 U.S. at 947 (citing *Stewart v. Martinez-Villareal,* 523 U.S. 637, 644–45 (1998) (a competency to be executed claim is not ripe until it is time to execute the sentence)). Mr. Purkey's status has declined over the years, including in the months and weeks leading up to his initial execution date, and has declined even more since. E. Vartkessian Suppl. Decl. ¶¶ 5–21, ECF No. 23-5; R. Woodman Decl. ¶¶ 14–23, ECF No. 23-6. It is due to this decline, Mr. Purkey's current mental incompetency, and the imposition of the sentence, that the case is properly before the district court.

Even where Appellants have a "strong interest in enforcing its criminal judgments," that interest is outweighed by the public's interest in a "humane and

constitutional" application of the federal execution protocol. *Nooner v. Norris*, No. 5:06CV00110 SWW, 2006 WL 8445125, at *4 (E.D. Ark. June 26, 2006). Mr. Purkey does not contest his conviction or the sentence of death. He contests only the unconstitutional way in which the Government proposes to execute him in his current condition of incompetency. In any event, "the fact that the government has not—until now—sought to" schedule Mr. Purkey's execution "undermines any urgency surrounding" its need to carry out Mr. Purkey's sentence. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018). The preliminary injunction will therefore "not substantially injure other interested parties," the public, or the Government. *Chaplaincy*, 454 F.3d at 297.

And, the COVID-19 pandemic inescapably impacts what can be considered a humane and constitutional execution. Based on Mr. Purkey's deteriorating condition, it is very likely that Mr. Purkey's competency has only continued to decline. But Mr. Purkey's counsel has been unable to assess this without access to in-person visits with her client. R. Woodman Decl. ¶¶ 33–38, ECF No. 23-6; E. Vartkessian Suppl. Decl. ¶¶ 22–25, ECF No. 23-5. Further, the lack of access to one of the only forms of contact with the outside world has itself likely exacerbated his serious mental illness and deteriorating mental capacity. E. Vartkessian Suppl. Decl. ¶ 25, ECF No. 23-5. Even if BOP begins to permit visits, Mr. Purkey's legal counsel, expert witnesses, and others will need to risk their lives to save Mr.

Purkey's. It is not in the public interest to subject citizens to undue and unnecessary health hazards.[4]

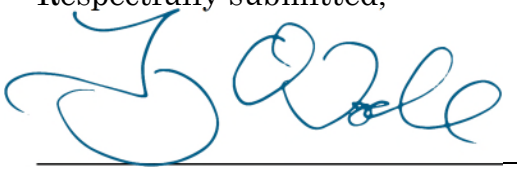
Finally, it is clearly not in the public interest to execute an incompetent person. The public interest is not served by executing an individual presenting a *prima facie* case of incompetency before he has the opportunity to avail himself of the legitimate procedures to challenge his competence, as required by clearly existing United States Supreme Court authority. Accordingly, the public interest is only served by preliminarily enjoining Mr. Purkey's execution because it will allow for the equal application of the law in judicial processes.

The public interest lies in ensuring that Appellants comply with the Constitution and the laws Congress enacted.

[4] Appellate state courts have stayed several executions in light of the COVID-19 pandemic. *See* ECF No. 23 at 36 n.6.

July 2020

Respectfully submitted,



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