No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

Clarence Wayne Dixon, Petitioner,

vs.

David Shinn, et al., Respondents.

*****CAPITAL CASE*****

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

# APPLICATION FOR STAY OF EXECUTION

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

The State of Arizona has scheduled the execution of Clarence Wayne Dixon for **May 11, 2022, at 10:00 a.m., Pacific time**. Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Dixon respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari filed along with this application for stay.

## PROCEDURAL BACKGROUND

On April 5, 2022, the Arizona Supreme Court issued a warrant of execution scheduling Dixon's execution for May 11, 2022. Warrant of Execution, State of Arizona v. Clarence Wayne Dixon, No. CR-08-0025-AP (Ariz. Apr. 5, 2022); *see also* Ariz. R. Crim. P. 31.23(c). On April 8, 2022, undersigned counsel filed in the Pinal County Superior Court a motion to determine Dixon's mental competency to be executed pursuant to A.R.S. § 13-4021 *et seq*. (Pinal ROA 44.) That same day, the Pinal County Superior Court found the motion timely and that Dixon made "the minimum required showing" that reasonable grounds exist for a hearing pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pinal ROA 43.) The court scheduled a hearing on Dixon's *Ford* claim under A.R.S. § 13-4022(C) and ordered that he be evaluated by two experts, one nominated by the State and the other by Dixon.

The hearing on Dixon's *Ford* claim was held on May 3, 2022, concluding that afternoon at approximately 3:30 p.m. Close to midnight on May 4, 2022, the

superior court issued its ruling. (Pinal ROA 8.) It found—contrary to the testimony of the State's only expert—that Dixon "has a mental disorder or mental illness of schizophrenia." (Pinal ROA 8 at 2.) It also noted evidence of "arguably delusional thinking concerning the Defendant's rational understanding" of the reason for his execution. (Pinal ROA 8 at 3.) It concluded that Dixon had failed to rebut the presumption of competence by either clear and convincing evidence or by a preponderance, but also that whether Dixon had shown incompetence by a preponderance of the evidence "is a much closer question." (Pinal ROA 8 at 5.)

Dixon received the complete transcript of the hearing on May 5, 2022. On May 7, 2022, Dixon filed in the Arizona Supreme Court a petition for special action review of the superior court's denial of his *Ford* claim pursuant to A.R.S. § 13-4022(I). Petition for Special Action, *Clarence Wayne Dixon v. Hon. Robert Carter Olson*, No. CV-22-0117 (Ariz. May 7, 2022). On May 9, 2022, the Arizona Supreme Court declined to accept jurisdiction over Dixon's petition. Order, *Dixon v. Hon. Robert Carter Olson*, No. CV-22-0117 (Ariz. May 9, 2022).

Also on May 9, 2022, Dixon filed in the United States District Court for the District of Arizona a Petition for Writ of Habeas Corpus challenging his competency to be executed under *Ford* and a Motion for Stay of Execution. (Dist. Ct. ECF No. 86.) The district court denied relief on May 10, 2022. (Dist. Ct. ECF No. 96.) It did so consequent to its significantly expedited review of his habeas petition (which occurred in less than 24 hours) and after denying Dixon the right to reply in support

of the Eighth Amendment claim raised therein. *Compare* Rule 1, Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") ("These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by: (1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States[.]"), *and* Habeas Rule 5(e) (providing that "[t]he petitioner may file a reply to the respondent's answer or other pleading[]"), *with* Dist. Ct. ECF No. 88 (finding that "[b]ecause Dixon's execution is scheduled to take place in less than 48 hours, . . . [d]ue to the expedited nature of the request, the Court will not permit a reply[]"). In short-circuiting Dixon's right to full and fair habeas review of his concededly timely and newly-ripe *Ford* claim, the district court abused its discretion.

On the morning of May 10, 2022, Dixon filed an appeal to the Ninth Circuit Court of Appeals and moved the court for a stay of execution. (9th Cir. ECF No. 7.) That afternoon, the Ninth Circuit held oral argument and subsequently affirmed the denial of Dixon's habeas petition and motion to stay his execution. (9th Cir. ECF No. 15-1.) Dixon filed a petition for panel and/or en banc rehearing (9th Cir. ECF No. 17), which was denied on May 10, 2022 (9th Cir. ECF No. 18).

**REASONS FOR GRANTING THE APPLICATION**

In deciding whether to grant a stay of execution pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing

that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar). As set forth below, these factors weigh in favor of staying Dixon's execution.

**A. Dixon is likely to succeed on the merits**

First, Dixon has made a strong showing that he is likely to succeed on the merits of his claim that he is incompetent to be executed under *Ford*. As demonstrated in his petition for a writ of certiorari, Dixon suffers from a severe mental illness, schizophrenia with paranoid ideations the hallmark of which is delusional and contaminated thought content. As a result of this psychotic illness, Dixon has experienced long-standing hallucinations and persecutory delusions, and consequently does not have a rational understanding of why the State is attempting to execute him. *See Panetti v. Quarterman*, 551 U.S. 930, 958 (2007); *see also Ford*, 477 U.S. at 409. In its order denying Dixon's *Ford* claim, the state court contravened and unreasonably applied the *Panetti* standard. (Dist. Ct. ECF No. 86, Section IV.)

The state court also based its denial on unreasonable factual determinations, including by inexplicably ignoring the report and testimony of Dixon's psychiatric

expert, Lauro Amezcua-Patino, M.D., and instead relying on cherrypicked observations from the State's expert, Carlos Vega, Psy.D., who conducted his evaluation of Dixon in 70 minutes over video; admitted never asking Dixon why he believed he was being executed (the critical question under *Panetti*); testified that he disagreed with and capriciously refused to apply the DSM-5 diagnostic criteria for schizophrenia, delusions, and persecutory delusions; and failed to apply the DSM-5 diagnostic criteria to his own diagnosis of antisocial personality disorder. (Dist. Ct. ECF No. 86, Sections III–IV.) Dr. Vega then topped his testimony off with an admission that he had done "very little" research to determine what is required to perform an evaluation to determine whether a prisoner is competent to be executed, and he misstated the standard for competency as "just a question of you know connecting this murder to the execution." (Tr. 05/03/2022 p.m. at 101.) But *Panetti* makes it clear that a prisoner's <u>*awareness*</u> of the crime and punishment is insufficient to establish competency; rather, the prisoner must rationally understand the meaning and purpose of his execution. 551 U.S. 959–60. Dr. Vega also testified that Dixon has a rational understanding of the State's reasons for his execution based, in part, on Dixon's pro se writings, despite admitting that he "didn't read" and "just barely [] looked at" them. (Tr. 05/03/2022 p.m. at 93.)

The record of the *Ford* proceedings leaves no room for doubt that the state court's denial of Dixon's *Ford* claim contravened and unreasonably applied *Panetti*, and was based on unreasonable factual determinations, disentitling that

adjudication to deference under § 2254(d)(1) and (2). And because the State failed to rebut the overwhelming evidence demonstrating that Dixon does not rationally understand the State's reasons for his execution as a function of the delusional thought content to which his schizophrenic illness gives rise, Dixon is likely to succeed on the merits of his *Ford* claim on de novo review. (Dist. Ct. ECF No. 86, Sections III–IV.)

As detailed in Dixon's concurrently filed petition for a writ of certiorari, Dixon's paranoid schizophrenia—a psychotic illness diagnosed by clinical and forensic psychiatrist Dr. Amezcua-Patino, and which the superior court found proved by clear and convincing evidence—causes Dixon to experience hallucinations and persecutory delusions, including that the state and federal judiciaries are conspiring to execute him in order to save state agencies from political embarrassment related to his meritless claim against the Northern Arizona University ("NAU") police department. Both experts at the hearing, including the State's expert, Dr. Vega, admitted that Dixon fixates on a "deluded notion that the government has refused to agree with his legal argument, not because his argument is not sound but rather the government is afraid of the consequences of admitting they are wrong." (Hearing Ex. 31 at 6.) Both experts also agreed that Dixon has no memory of the crime for which he was sentenced to death. (Hearing Ex. at 6; Tr. 05/03/2022 p.m. at 10–12.)

At the hearing, Dr. Vega testified that he never asked Dixon why he believes

he is being executed, explaining, "I really didn't have to ask him what he believed" because "I just did not think it was necessary." (Tr. 05/03/2022 p.m. at 100–01.) Dr. Vega also testified that Dixon's delusions meet the DSM-5 criteria for delusions, but that he believed the DSM-5 definition of a "delusion" was incorrect and therefore Dixon is not delusional. (Tr. 05/03/2022 p.m. at 70–77.) Dr. Vega testified that the DSM-5 definition of "persecutory delusions" is likewise incorrect because it "watered down the definition of delusions[.]" (Tr. 05/03/2022 p.m. at 77.) Dr. Vega stated that Dixon shows no signs of schizophrenia, despite acknowledging that Dixon was consistently diagnosed with schizophrenia by various psychiatrists and psychologists over the span of four decades, and despite admitting that Dixon satisfied the DSM-5 criteria for the illness. (Tr. 05/03/2022 p.m. at 77–85.) Instead, Dr. Vega diagnosed Dixon with antisocial personality disorder (ASPD), even though he admitted that Dixon did not satisfy the DSM-5 criteria for that diagnosis. (Tr. 05/03/2022 p.m. at 87–91.) And while Dr. Vega pointed to Dixon's writings as evidence of his rational understanding and thus mental competency, he also admitted that he "just barely" read them. (Tr. 05/03/2022 p.m. at 93.)

When asked by counsel for the State, "[D]oes what Dixon's specific diagnosis is, ultimately affect your opinion about whether he has a rational understanding of the state' reason for his execution?" Dr. Vega responded, "Yeah, of course it does." (Tr. 05/03/2022 p.m. at 43.) Dr. Vega then went on to testify that Dixon's primary

diagnosis is antisocial personality disorder ("ASPD").[1] (Tr. 05/03/2022 p.m. at 43.)

Rejecting Dr. Vega's ASPD diagnosis and non-diagnosis of schizophrenia, the superior court found that Dixon proved by clear and convincing evidence that he "has a mental disorder or mental illness of schizophrenia[.]" (Pinal ROA 8 at 2.) Nevertheless, the court inexplicably found testimony presented from Dr. Vega "persuasive" and relied on that testimony to find that Dixon could not meet his burden to demonstrate that he is not competent to be executed. (Pinal ROA 8 at 4.) The superior court's reliance on Dr. Vega's observation that Dixon has a rational understanding of the State's reasons for his execution is also objectively unreasonable because Dr. Vega testified that Dixon's "specific diagnosis [] ultimately affect[s his] opinion about whether he has a rational understanding of the State's reason for his execution[]" (Tr. 05/03/2022 p.m. at 43), and the superior court found Dr. Vega's non-diagnosis of schizophrenia erroneous (Pinal ROA 8 at 2).

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[1] Dr. Vega also testified that he disagreed with the diagnosis of schizophrenia, but if that diagnosis were correct, it would be "comorbid to the principle [sic] diagnosis of a personality disorder[.]" (Tr. 05/03/2022 p.m. at 77.) When confronted with the DSM-5 diagnostic criteria for antisocial personality disorder, which demonstrates that schizophrenia cannot be comorbid to antisocial personality disorder, Dr. Vega had no coherent response. (Tr. 05/03/2022 p.m. at 91–92.) *See also e.g.*, *Rogers v. Dzurenda*, 25 F.4th 1171, 1188 (9th Cir. 2022) (". . .[I]t was accepted at the time of Rogers's trial that a diagnosis of schizophrenia preempts, or precludes, a diagnosis of ASPD. This information was readily available in the ASPD section of the DSM-III. . . . As Dr. Molde later testified at the evidentiary hearing before the district court, ASPD by definition requires a normal mental status examination. The preemption line of questioning was important because Dr. Gutride diagnosed Rogers with ASPD, but his reports described symptoms consistent with schizophrenia, and therefore symptoms that were inconsistent with the normal mental status examination that ASPD requires.").

By Dr. Vega's own admission, if his non-diagnosis of schizophrenia was erroneous, then his related opinion about whether Dixon rationally understands the State's reasons for his execution cannot be relied upon. (Tr. 05/03/2022 p.m. at 43.)

While acknowledging *Panetti*'s standard, the superior court failed to correctly apply it. (Pinal ROA 8 at 2–4.) In finding Dixon's mental competency claim unproved, the court relied on statements from Dixon that reflected his awareness that the State says it "want[s] to kill me for murder[.]" (Pinal ROA 8 at 2–4.) But that is precisely the "too restrictive" inquiry that this Court rejected in *Panetti*. 551 U.S. at 956–58. Dixon's awareness of the State's rationale does not show he has a rational understanding of it. *Id.* at 958–59 ("The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called into question, . . . if a prisoner's mental state is so distorted by mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.").

The superior court also characterized Dixon's reaction to the judiciary's denial of his legal claims as suggesting only his perception of judicial "bias." (Pinal ROA 8 at 2–4.) But that Dixon believes there is judicial bias is irrelevant to the critical question of whether Dixon's perception of bias is grounded in reality. The evidence shows it is not: the judges in Arizona are not, as Dixon believes, orchestrating his execution as part of a coverup for the NAU police's illegal investigative, arrest, and DNA collection activities back in 1985 all in order to

protect the NAU police and government entities from the embarrassment of that exposé. (Hearing Ex. 2 at 3–4; Tr. 05/03/2022 a.m. at 89; Tr. 05/03/2022 p.m. at 44–45.) Both experts agreed that Dixon has a delusional notion that the judicial system and actors in it are conspiring to deny his claim against the NAU police despite knowing it is meritorious in order to protect the government from embarrassment. (Tr. 05/03/2022 a.m. at 69; 05/02/2022 p.m. at 24; Hearing Ex. 31, Vega Report at 6.)

As discussed elsewhere, the superior court found that Dixon proved by clear and convincing evidence that he has paranoid schizophrenia. (Pinal ROA 8 at 2.) However, it dismissed the unrefuted medical evidence of Dixon's psychotic delusional thought process resulting therefrom as only "arguably delusional" and merely reflective of Dixon's "favored legal theory." (Pinal ROA 8 at 2–3.) Again, Dixon does have a favored legal theory, but that alone begs the relevant question: whether that theory is grounded in a serious mental illness which impairs Dixon's rational understanding of the reasons for his execution. *Panetti* required the superior court to focus on that question.

The superior court should have assessed Dixon's mental competency within the framework of his schizophrenic illness and the psychotic delusions to which it characteristically gives rise. *Id.* at 960 ("The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder."). Applying *Panetti*'s framework here, the superior court failed to assess how Dixon's favored legal theory is inextricably linked to his

delusional psychotic driven belief that, "[t]hey say they want to kill me because I killed someone. But I know that they want to kill me because they don't want to be embarrassed"—that is, embarrassed by the exposé that the NAU police in 1985 acted without statutory jurisdiction by arresting him in an unrelated criminal case, investigating, and collecting his DNA. (Tr. 05/03/2022 a.m. at 62–66; *see also* Hearing Ex. 31 at 6.) Under *Panetti*, "the legal inquiry concerns whether these delusions can be said to render Dixon incompetent." *Id.* at 956. The evidence before the superior court shows that it does.

In sum, the superior court contravened and unreasonably applied *Panetti*, ignored evidence in the record before it demonstrating that Dixon experiences delusions as a result of his paranoid schizophrenic illness that prevent him from rationally understanding why he is being executed, and made findings—including as to the "persuasive[ness]" of observations offered by Dr. Vega—that are flatly contradicted by the record and the court's finding that Dr. Vega's opinion that Dixon does not have schizophrenia was not credible. (*See* Pinal ROA 8 at 2.) In doing so, the state court relied on an expert who misunderstood the competency standard under *Panetti*; who disregarded the DSM-5 definitions for schizophrenia, delusions, persecutory delusions, and antisocial personality disorder in favor of his own more restrictive and made up definitions; and who also admitted to not reading the very documentary evidence on which he based his ultimate opinion. Consequently, the state court's rejection of Dixon's *Ford* claim contravened and unreasonably applied

clearly established federal law, and was based on unreasonable factual determinations. 28 U.S.C. § 2254(d)(1), (2).

For those reasons, which are elaborated on in Dixon's petition for a writ of certiorari, he has made a strong showing that he is likely to succeed on the merits of his *Ford* claim and obtain habeas relief from his unconstitutional warrant of execution.

**B. The balance of harm weighs in Dixon's favor**

The second and third factors—whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—weigh in Dixon's favor. Undeniably, Dixon will suffer irreparable harm if the execution is not stayed until his petition for a writ of certiorari is considered. If this Court does not stay issue a stay, Dixon will be executed without the opportunity to fully litigate his meritorious constitutional claim: that he is insane within the meaning of *Ford* and cannot be constitutionally executed. That is an "irremediable" harm because an "execution is the most irremediable and unfathomable of penalties." *Ford*, 477 U.S. at 411; *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (recognizing that irreparable harm "is necessarily present in capital cases").

Allowing the State of Arizona to execute Dixon while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984). Because "'the

normal course of appellate review might otherwise cause the case to become moot,' . . . issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)).

Turning to the third factor, a stay will not substantially injure the opposing party. Dixon acknowledges that the State has a "strong interest in proceeding with its judgment." *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir. 2005). However, he could not have brought his *Ford* claim until his execution became imminent. *See* I, 551 U.S. at 947 ("[W]e have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings."); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (competency claim necessarily unripe until state issued warrant of execution). It is beyond dispute that Dixon has diligently and expeditiously litigated his *Ford* claim. A brief stay of execution to accurately determine whether Dixon's mental competency to be executed was constitutionally considered by the state court, in accordance with this Court's precedent, prevents the State from committing an illegality. The State cannot claim harm for having to follow the law. This Court has held "that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford*, 477 U.S. at 409–10. In so holding the Court reasoned that it "is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417.

### C. A stay of execution will serve the public interest

Finally, a stay here would further the public interest, which is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes regarding constitutional rights. *See Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.") This Court has recognized that "the objective of community vindication" in imposing a death sentence is called into question where an individual's mental state is so distorted "that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 959. The execution of a mentally incompetent person "serves no retributive purpose." *Id.* at 933. It "simply offends humanity." *Id.* at 958 (quoting *Ford*, 477 U.S. at 407–08). A stay of execution, therefore, will serve the strong public interest—an interest the State shares—in administering capital punishment in a manner consistent with the Constitution.

## CONCLUSION

The State of Arizona is set to execute a 66-year-old legally blind man of Native American ancestry who has indisputably suffered from a psychotic disorder for more than 40 years and who has presented overwhelming evidence to the state court that he is mentally incompetent to be executed under *Ford*. For the reasons stated above, Dixon respectfully requests that the Court stay his execution so that

his petition for certiorari can be fully and fairly considered.

Respectfully submitted: May 10, 2022.

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