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

Thomas D. Hird, Oklahoma Bar #13580*
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APPENDIX

TABLE OF APPENDICES

Page(s)

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BENJAMIN COLE,	)	**NOT FOR PUBLICATION**
	)	
Petitioner,	)	
vs.	)	**No. MA-2022-898**
	)	
JIM FARRIS, Warden,	)	
Oklahoma State Penitentiary,	)	
	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 17 2022

JOHN D. HADDEN
CLERK

ORDER DENYING EXTRAORDINARY RELIEF

On October 10, 2022, Petitioner, Benjamin Cole, by and through counsel, Thomas D. Hird and Katrina Conrad-Legler, filed pleadings in this Court seeking extraordinary relief. Petitioner requests that this Court issue a writ requiring Respondent, Jim Farris, Warden, Oklahoma State Penitentiary, to notify the District Attorney of Pittsburg County that there is good reason to believe that Petitioner, under judgment of death, has become insane as provided in 22 O.S.2021, § 1005. Petitioner has also moved for a stay of his execution, scheduled for October 20, 2022.[1]

PROCEDURAL HISTORY

[1] Respondent filed a combined response to Petitioner's Petition for Writ of Mandamus and Application for Stay of Execution.

Petitioner was tried by jury in the District Court of Rogers County and convicted of First Degree Child Abuse Murder (21 O.S.2001, § 701.7(C)), for the December 20, 2002 murder of his nine-month-old daughter, Brianna Cole. The jury found the existence of two aggravating circumstances: (1) that Petitioner had been previously convicted of a felony involving the use or threat of violence to the person; and (2) that the murder was especially heinous, atrocious, or cruel. *Cole v. State*, 2007 OK CR 27, ¶¶ 1-2, 164 P.3d 1089, 1092. The trial court sentenced Petitioner to death in accordance with the jury's verdict. Petitioner appealed his conviction and sentence to this Court, but we denied relief. *Id.*, 2007 OK CR 27, ¶ 66, 164 P.3d at 1102. He sought *certiorari* review in the United States Supreme Court, but the Court denied his petition. *Cole v. Oklahoma*, 553 U.S. 1055 (2008). We denied Petitioner's application for post-conviction relief. *Cole v. State*, PCD-2005-23, (Okl. Cr. Jan. 24, 2008) (unpublished).

Petitioner sought federal habeas corpus relief. On September 1, 2011, the United States District Court for the Northern District of Oklahoma denied his Petition for Writ of Habeas Corpus. *Cole v. Workman*, 2011 WL 3862143 (N.D. Okla. Sept. 1, 2011). On February 18, 2014, the Tenth Circuit Court of Appeals affirmed the denial of

federal habeas corpus relief. *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014). On October 6, 2014, the United States Supreme Court denied Cole's petition for *certiorari* review. *Cole v. Trammell*, 571 U.S. 891 (2014).

On October 10, 2014, the State filed an application with this Court seeking entry of an order scheduling Petitioner's execution. On October 24, 2014, this Court set March 5, 2015, as the date for Petitioner's execution. Petitioner, along with four other Oklahoma prisoners under a sentence of death, filed an action in federal district court under 42 U.S.C. § 1983 contending that Oklahoma's method of execution violated the Eighth Amendment. Petitioner and the other prisoners moved for a preliminary injunction against Oklahoma's lethal injection protocol. The federal district court denied the motion and the Tenth Circuit Court of Appeals affirmed. *Glossip v. Gross*, 776 F.3d 721, 723-27, 736 (10th Cir. 2015). The United States Supreme Court granted *certiorari* and on January 28, 2015, stayed Petitioner's execution pending final disposition of his request for a preliminary injunction. *Glossip v. Gross*, 574 U.S. 1143 (2015). On June 29, 2015, the Supreme Court affirmed the judgment of the Court of Appeals for the Tenth Circuit, dissolved the stay, and held that Oklahoma's

method of execution was constitutional. *Glossip v. Gross*, 576 U.S. 1143 (2015).

On that same date, the State filed a second application seeking to schedule Petitioner's execution date. On July 2, 2015, Petitioner filed his objection to the setting of an execution date. In the absence of any proof that sanity proceedings had been properly instituted pursuant to 22 O.S.2011, § 1005 and *Allen v. State*, 2011 OK CR 31, 265 P.3d 754, we overruled Petitioner's objection and on July 8, 2015, this Court set October 7, 2015, as the date for Petitioner's execution.

On July 22, 2015, Petitioner, by and through counsel, filed a Petition for Writs of Mandamus and/or Prohibition in the District Court of Pittsburg County, Case Number No. CV-2015-58, which requested the District Court require Respondent institute proceedings to determine Petitioner's competence to be executed pursuant to 22 O.S.2011, § 1005, and requested an evidentiary hearing on the issue. Petitioner further sought to prohibit Respondent from putting him to death other than by administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent. On August 17, 2015, the case came on for conference and the

District Court directed Respondent to cause Petitioner to speak to his attorneys as well as the mental health professional they had retained.

On August 25, 2015, the Honorable James Bland, District Judge, denied Petitioner's request for a writ of prohibition. The District Court granted Petitioner an evidentiary hearing to enable Petitioner to present evidence that he met the high burden of "a substantial threshold showing" of insanity this Court recognized in *Allen*, 2011 OK CR 31, ¶ 9, 265 P.3d at 756-57, but refused counsel for Petitioner's request to order Petitioner sedated and medically examined against his will.

On August 28, 2015, the District Court conducted the evidentiary hearing to determine whether Petitioner met the substantial threshold showing. Counsel for Petitioner introduced some of Petitioner's writings and certain records from the Department of Corrections concerning Petitioner's medical and mental health status. Counsel also introduced the testimony of four witnesses, including a psychiatrist, which the federal public defender's office had retained.[2] Reciting the "substantial threshold showing" from *Allen*, the District

[2] The State stipulated to the admissibility of the mental health records.

Court determined that Petitioner had not met the burden of proof and had not shown that Respondent had refused to carry out a clear legal duty. Petitioner sought writs of mandamus and prohibition in this Court and we denied relief on October 2, 2015, finding no abuse of discretion since "there is not a reasonable probability that Petitioner lacks the competency to be executed. As such, we conclude that Respondent did not have a clear legal duty to act under § 1005." *Cole v. Trammell*, 2015 OK CR 13, ¶¶ 35-36, 358 P.3d 932, 941.

Petitioner sought post-conviction relief in this Court a third time, and we denied his request for relief on October 7, 2021. *Cole v. State*, 2021 OK CR 28, 499 P.3d 760. On February 22, 2022, the United States Supreme Court denied Cole's petition for *certiorari* review. *Cole v. Oklahoma*, __ U.S. __, 142 S. Ct. 1139 (2022). Petitioner then sought to reopen his 2015 federal habeas case in the Northern District of Oklahoma which the Court allowed. On June 13, 2022, the Northern District issued an Order for Mental Health Evaluation which occurred at the Oklahoma Forensic Center. Scott Orth, Psy.D., conducted the evaluation and submitted his report to the Northern District on July 14, 2022. Orth determined Petitioner had a rational understanding of the reason for his execution and that his execution was imminent.

Counsel sent a letter to the warden with numerous medical reports including Orth's, requesting that he notify the Pittsburgh County District Attorney that there was a reasonable probability that Petitioner had become insane so that a hearing on his insanity could be scheduled.

On July 1, 2022, this Court scheduled Petitioner's execution for October 20, 2022, pursuant to the State's request. On August 2, 2022, Respondent sent a letter to Petitioner's counsel advising that based upon all the information and materials provided by Petitioner's attorneys and the evaluation by Dr. Orth, he had no good reason to believe Petitioner had become insane since his delivery to the Oklahoma State Penitentiary for execution.

Petitioner initiated mandamus proceedings in the District Court of Pittsburgh County on August 15, 2022. He sought an order compelling Respondent to notify the Pittsburgh County District Attorney that there were reasonable grounds to believe Petitioner was insane. The District Court, Judge Michael Hogan, held an evidentiary hearing on the matter on September 30, 2022. After receiving all the medical evidence and hearing testimony of Respondent, Judge Hogan found Petitioner failed to "meet the required 'substantial threshold'

showing of insanity" and denied Petitioner's request for a Writ of Mandamus on October 4, 2022.

FACTS

Petitioner killed his nine-month-old daughter, Brianna Cole, on the evening of December 20, 2002. He snapped her spine in half, completely tearing through her aorta. The State Medical Examiner ruled the death a homicide and described the official cause of death as fracture of the spine with aortic laceration. Petitioner confessed to causing the fatal injuries. He explained that he'd been trying, unsuccessfully, to get the child, who was lying on her stomach, to stop crying. Petitioner grabbed his daughter by the ankles and pushed her legs toward her head until she flipped over. This action broke the child's back and resulted in the fatal injuries. Afterwards, Petitioner played video games, denied anything was wrong with the child when confronted by his wife, and said nothing to rescue or medical personnel about what had happened. *Cole*, 2007 OK CR 27, ¶¶ 1-4, 164 P.3d at 1092-93.

Petitioner's competence has been litigated throughout this case. Most of his competence claims concern his lack of communication with counsel or those associated with counsel, his disagreements with

counsel, his refusal to assist counsel and his dedication to his religious beliefs. All state and federal courts have rejected Petitioner's claims.

In these proceedings, as he did in the District Court and as he did in 2015, Petitioner argues that he is incompetent to be executed, primarily relying upon reports from three experts, none of whom were able to converse with Petitioner regarding his incompetence. Raphael Morris, M.D., who prepared his initial report prior to the 2015 hearing, diagnosed Petitioner with schizophrenia, despite his minimal interaction with him. Morris admitted, however, that "Petitioner was aware of the nature of the proceedings against him what he was tried for, the purpose of his punishment, and his impending fate." *Cole*, 2015 OK CR 13, ¶ 29, 358 P.3d at 939. Morris's report for this hearing basically avers that he has learned nothing which changes the opinion he gave in his initial report.

George Hough, Ph.D., never received cooperation from Petitioner despite numerous attempts to evaluate him, dating from 2016. However, Hough gave his opinion, based upon other records and observations of Petitioner, that Petitioner is mentally ill and not competent to be executed. Hough's most recent attempt to evaluate Petitioner occurred in April of 2022. Petitioner refused to leave his cell

or to speak with Hough or counsel, so the two men observed Petitioner through an opening in his cell door. Hough reiterated his earlier opinion about Petitioner's competence, despite having no interaction with him.

Another expert, radiologist Travis Snyder, D.O., never met with Petitioner, but reviewed an MRI scan of Petitioner's brain taken on March 30, 2022. He observed some physical changes in Petitioner's brain which he believes may have worsened Petitioner's alleged schizophrenia. Despite never having met Petitioner or examined him, Snyder opined that the imaging supports other opinions that Petitioner is incompetent.

Pursuant to an order from the Northern District, Scott Orth, Psy.D., evaluated Petitioner at the Oklahoma Forensic Center on July 5, 2022. Orth spent two and one half hours with Petitioner. Orth also reviewed Petitioner's medical records, his Oklahoma Department of Corrections records, school records and court records. In his report, Orth states that Petitioner spontaneously told him, "they want to make sure I'm competent, and that I realize first that I killed my daughter and I went through a trial for taking my daughter's life and a jury found me guilty; they found me guilty of murder and I was given the death

penalty for that, and I accept responsibility for that." Petitioner also told Orth he was "third on the list [to be executed]" and he believed his execution date was October 20, 2022. Orth determined Petitioner did not suffer from any delusions and exhibited no "evidence of any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his ability to rationally understand that he is to be executed and that his execution is imminent." While Petitioner spoke about his religious beliefs during this evaluation, Orth stated those beliefs did not affect Petitioner's understanding of his crime, criminal punishment or his impending execution.

Respondent testified at the hearing. He indicated he had never observed Petitioner to be dirty and that Petitioner was very specific in ordering food items from the canteen. On September 15, 2022, Respondent had Petitioner moved to an execution cell as is DOC's policy. At that time, Tina Fuller of the prison mental health team, explained the execution procedures to Petitioner and Fuller was confident in Petitioner's understanding of those and of his competence. Respondent read the death warrant to Petitioner, stopping every so often and asking Petitioner if he understood. Petitioner nodded his

understanding. Petitioner's main concern during this time with Respondent was that he would have extra items in his cell so that he would be warm and that he would receive his canteen orders. Petitioner made some phone calls. Respondent gave his opinion that Petitioner consciously decides if he will speak to people or not. The warden confirmed that he did not believe that Petitioner had become incompetent to be executed. Judge Hogan found Petitioner failed to "meet the required 'substantial threshold' showing of insanity" and denied Petitioner's request for a Writ of Mandamus.

STANDARD OF REVIEW

The requirements for the issuance of an extraordinary writ are set forth in Rule 10.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022). For a writ of mandamus, "[p]etitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief." Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022).

Petitioner argues the District Court's decision was "plainly erroneous." "In cases of this nature, this Court will review pursuant to

the clearly erroneous standard, *i.e.*, for an abuse of discretion." *Cole*, 2015 OK CR 13, ¶ 18, 358 P.3d at 937. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (internal citation and quotation marks omitted).

DISCUSSION

Petitioner argues both the warden and the District Court abused their discretion in this matter and that Oklahoma's procedure for seeking a competency determination in these cases violates the Constitution.

In *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (plurality), the Court held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." S*ee also Allen v. State*, 2011 OK CR 31, ¶ 8, 265 P.3d 754, 756. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court explained the plurality holding in *Ford*. "Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection

afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 424, 426); *Allen*, 2011 OK CR 31, ¶ 89 265 P.3d at 756-57.

Such a hearing "may be far less formal than a trial" but must afford a prisoner an "opportunity to be heard" consistent with the "basic requirements required by due process." *Panetti*, 551 U.S. at 949-50 (citations and quotations omitted). "These basic requirements include an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.'" *Id.* (quoting *Ford*, 477 U.S. at 427).

Under our statute, 22 O.S.2021, § 1005, proceedings to determine the competence of a defendant who is to be executed must be commenced when "there is good reason to believe that a defendant under a sentence of death has become insane." That procedure entails the warden bringing the matter to the attention of the district attorney in Pittsburgh County who should immediately file in the county district court a petition "stating the judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be

inquired into." *Id.* Thereafter, the court must impanel a jury to hear the inquiry. *Id.*

Although Section 1005 provides for the warden to institute such proceedings when "there is good reason to believe that a defendant under a sentence of death has become insane," judicial oversight of the warden's performance of that role is available through mandamus proceedings. *See Woolen v. Coffman*, 1984 OK CR 53, ¶ 6, 676 P.2d 1375, 1376-77 ("Mandamus is a command from a court of law of competent jurisdiction . . . to some inferior court, tribunal, or board, or corporation or person, requiring the performance of a duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from the operation of law."). Should the district court deny mandamus relief, this Court will entertain a petition for such relief. Rule 10.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022).

This Court recognizes the propriety of the procedure under Section 1005 and the adequacy of mandamus review on the issue of competence to be executed. In *Allen*, 2011 OK CR 31, ¶ 9, 265 P.3d at 756-57, we expressly determined that "Oklahoma's procedure on its face complies with the federal constitution." The Tenth Circuit Court

of Appeals has also recognized the adequacy of Oklahoma's procedure in this regard, albeit in unpublished opinions. *See Ochoa v. Trammell,* 504 Fed.Appx. 705, 708 (10th Cir. Dec. 3, 2012) (unpublished) (citing *Allen v. Workman* and finding it persuasive in denying Ochoa's identical challenge); *Allen v. Workman*, 500 Fed.Appx. 708, 710-12 (10th Cir. Oct. 8, 2012) (unpublished) (the warden's role as "gatekeeper" does not violate due process). As Petitioner has not presented any authority that our decision in *Allen* was wrongly decided we see no reason to depart from our prior holding. Petitioner's challenge to the procedure for handling competency to be executed claims is denied.

Turning now to Petitioner's claim that the District Court abused its discretion in denying his petition for Writ of Mandamus, we deny his claim. We find that the trial court did not abuse its discretion when it found that Petitioner "does not meet the required 'substantial threshold' showing of insanity." A prisoner under a sentence of death must meet this requirement before he is entitled to an adjudication to determine his condition. *Panetti*, 551 U.S. at 950; *Ford*, 477 U.S. at 426 ("substantial threshold showing of insanity [required] merely to trigger the hearing process."); *Murphy v. State*, 2012 OK CR 8, ¶ 35, 281 P.3d 1283, 1293. Because the threshold was not met, the warden

did not abuse his discretion in refusing to make the notification pursuant to Section 1005.

In *Ford*, the Court recognized "that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity" focused on "providing redress for those with substantial claims." *Ford*, 477 U.S. at 417. There is a presumption that the prisoner is competent. *Id.*, 477 U.S. at 426. A prisoner must overcome this presumption and show that there is a reasonable probability that he is insane. *Id.*, 477 U.S. at 426; *Leland v. Oregon*, 343 U.S. 790, 799 (1952).

In *Bingham v. State*, 1946 OK CR 54, 169 P.2d 311, this Court set forth the standard for sanity to be executed:

> The test of the question as to whether one about to be executed is sane or insane is whether or not such person, at the time of the examination, from the defects of his faculties, has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court. If he has, then he is sane; otherwise he is insane, and should not be executed.

Id., 82 Okla. Crim. 305, 311, 169 P.2d at 314-15 (quotations and citation omitted).

Although the United States Supreme Court did not set forth a precise standard of competency in *Ford*, the Supreme Court in *Panetti* recognized 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 957, 959. To have a rational understanding, the prisoner's mental state must not be so distorted by delusions or 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. *Id.*, 551 U.S. at 959-60. However, the Supreme Court clarified that:

> The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality.

Id.

Reviewing the evidence adduced at the hearing, it is clear that Petitioner, while exhibiting some peculiar behaviors, completely and

rationally understood the nature of the proceedings against him, what he was tried for, and that his execution was imminent. Orth, a neutral evaluator selected by the Oklahoma Forensic Center to evaluate Petitioner pursuant to the Northern District's order, interviewed Petitioner at length in July 2022. He opined that Petitioner did not suffer from any delusions and exhibited no "evidence of substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his ability to rationally understand that he is to be executed and that his execution is imminent." Moreover, Orth quoted Petitioner in his report as spontaneously stating the following: "they want to make sure I'm competent, and that I realize first that I killed my daughter and I went through a trial for taking my daughter's life and a jury found me guilty; they found me guilty of murder and I was given the death penalty for that, and I accept responsibility for that." Petitioner also told Orth he was "third on the list [to be executed]" and he believed his execution date was October 20, 2022. Orth had no difficulties in communicating with Petitioner. While Petitioner spoke about his religious beliefs during this evaluation, Orth stated those beliefs did not affect

Petitioner's understanding of his crime, punishment or his impending execution.

Respondent testified at the hearing and indicated he had never observed Petitioner to be dirty and that Petitioner was very specific in ordering food items from the canteen and voicing complaints if the order was incorrect. On September 15, 2022, Respondent had Petitioner moved to an execution cell as is DOC's policy. At that time, Tina Fuller of the prison mental health team explained the procedures that would occur to Petitioner and Fuller was confident in Petitioner's understanding of those and of his competence. Respondent read the death warrant to Petitioner, stopping every so often and asking Petitioner if he understood. Petitioner nodded his understanding. Petitioner's main concern during this time with Respondent was that he would have extra items in his cell so that he would be warm and that he would receive his canteen orders. Petitioner made some phone calls. Respondent gave his opinion that Petitioner consciously decides if he will speak to people or not. Respondent confirmed that he did not believe that Petitioner had become incompetent to be executed.

Petitioner admitted several expert reports at the hearing. The most striking aspect of these reports is that none of them were based

upon the experts' personal interactions with Petitioner. A recurring theme in these materials is that Petitioner holds strong religious beliefs and generally refuses to communicate with counsel, or anyone associated with counsel. The first expert, Raphael Morris, M.D., who prepared his initial report prior to the 2015 hearing, diagnosed Petitioner with schizophrenia, despite his minimal interaction with him. Morris admitted, however, that "Petitioner was aware of the nature of the proceedings against him what he was tried for, the purpose of his punishment, and his impending fate." *Cole*, 2015 OK CR 13, ¶ 29, 358 P.3d at 939. In his updated report admitted at this hearing, again absent any personal contact with Petitioner, Morris's opinion is that he has learned nothing about Petitioner which causes him to change his initial opinion.

George Hough, Ph.D., never received cooperation from Petitioner despite numerous attempts to evaluate him beginning in 2016. However, Hough gave his opinion, based upon other records and observations of Petitioner, that Petitioner is mentally ill and not competent to be executed. Hough's most recent attempt to evaluate Petitioner occurred in April of 2022. Petitioner refused to leave his cell or to speak with Hough or counsel, so the men observed him through

an opening in his cell door. Based upon this, Hough reiterated his same opinion about Petitioner's competence, referencing Petitioner's refusal to interact with him as evidence of his incompetence. In Petitioner's prior mandamus proceeding, this Court found Petitioner's refusal to cooperate with these medical professionals and his counsel "appeared to be a choice on his part." *Cole*, 2015 OK CR 13, ¶ 13, 358 P.3d at 936.

Yet another expert, radiologist Travis Snyder, D.O., never met with Petitioner, but reviewed an MRI scan of Petitioner's brain taken on March 30, 2022. He observed some physical changes in Petitioner's brain which he believes may have worsened Petitioner's alleged schizophrenia. Despite never having met Petitioner or examined him, Snyder opined that the MRI scan supports other opinions that Petitioner is incompetent.

Petitioner attempted to discredit Orth's evaluation by submitting Hough's critique of it. However, the main thrusts of his critique are that Orth's report is based upon a single interview with Petitioner, rather than a series, and his skepticism that Petitioner would communicate so freely with Orth. Given the fact that Hough's opinions about Petitioner's competence are based upon not even one interview

with him, such a critique is incredible. Moreover, in *Cole*, 2015 OK CR 13, ¶ 12, 358 P.3d at 936, this Court determined that Petitioner was initially willing to speak with his defense team; but after reading a report prepared by Morris during federal habeas proceedings, disparaging Petitioner's beliefs as a "primitive coping mechanism," he refused to interact with them.. It seems clear that Petitioner viewed Orth, not a member of Petitioner's defense team, but a neutral evaluator, as someone who held no pre-conceived notions about him.

Petitioner has provided no new evidence regarding his competence, other than Orth's report which finds him to be competent to be executed. Based upon the entire record, we find there is not a reasonable probability that Petitioner lacks the competence to be executed. Accordingly, we conclude neither Respondent nor the District Court abused their discretion in finding Petitioner failed to meet the required "substantial threshold" showing of insanity. Petitioner's Petition for Writ of Mandamus is **DENIED**. Petitioner's Motion for Stay of Execution is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17 day of October, 2022.

SCOTT ROWLAND, Presiding Judge

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

WILLIAM J. MUSSEMAN, Judge

ATTEST:

Clerk

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

IN RE: BENJAMIN R. COLE	Case No. CV-2022-140
	Execution set for October 20, 2022

ORDER ADDRESSING BENJAMIN R. COLE'S
REQUEST FOR A WRIT OF MANDAMUS

The Movant, Benjamin Cole, appeared in person and with counsel of record. The respondent, Warden Jim Farris, appeared in person and with counsel of record.

The purpose of this Order is to adjudicate whether Benjamin Cole has become incompetent to be executed. The relevant statute on this issue is 22 O.S. § 1005 which 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 summoned and impaneled form the regular jury list a jury of twelve persons to hear such inquiry.

DISCUSSION

For a discussion of the relevant history of Mr. Coles case see *Cole v Trammell*, 2015 OK. CR. 13. The Court notes the Movant and the Respondent have filed proposed Findings of Fact and Conclusions of Law. The Respondents filing is literally one hundred and twenty-six (126) pages in length. The Movants is eighteen (18) pages. To the extent those findings and conclusions are not inconsistent with this Order the same are adopted by the Court.

The Court has reviewed the relevant caselaw and all of the other records and briefing presented in the case.

The Court first notes the expert reports are conflicting. This may be due to the inability of experts on behalf of the Movant being unable to communicate with Mr. Cole. Attempts have been made by the defense team and their experts to communicate with Mr. Cole as recently as April 25th and 26th, 2022. These attempts proved fruitless. Mr. Cole did not testify in the hearing conducted on September 30, 2022. He was transported for an MRI at Oklahoma State University Medical Center, Tulsa. The results were interpreted by Dr. Travis Snyder and are a part of the record. Also submitted are the reports and affidavits of David Hough, PH.D., ABPP together with the previous reports of the many experts who have evaluated Mr. Cole.

Also presented by the Movant was the testimony of Warden Farris. The Respondent did not present any witnesses but rested on the report of Dr. Orth which is included within the documents submitted by the Movant.

ANALYSIS AND DECISION

It is clear the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States constitution forbids execution of "the insane" person. See *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 2610, 91 L. Ed. 2d 335 (1986). However, the law "presume[s] that [a] petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." *Id.* at 426,

The Court is of the opinion the Movant does not meet the required "substantial threshold" showing of insanity. This conclusion is based on the Court's reading of the voluminous record presented; observations of those who have interacted with Mr. Cole; expert reports (especially those more recent to the relevant time period); the testimony of Warden Farris; the admitted medical records; and psychiatric records.

The Court is cognizant of Mr. Cole's refusal to cooperate with his defense team, nevertheless, he was evaluated at the Oklahoma Forensic Center by Dr. Orth. During this time, he did cooperate in the evaluation which lasted approximated one hundred and fifty (150) minutes. This was an examination the parties agreed to be performed at the Oklahoma Forensic Center, although they did not necessarily agree to Dr. Orth. Dr. Orth's report is extensive in scope and in the materials reviewed. The report is very persuasive on the issue of the Defendant's current capacity.

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 on October 20, 2022. Therefore, the request for a Writ of Mandamus directing Warden Farris to conduct his duty under Section 1005 in notifying the District Attorney of Pittsburg County there is good reason to believe Benjamin Cole has become insane is Denied.

It is so ordered this 4th day of October, 2022.

JUDGE OF THE DISCTRICT COURT

CERTIFICATE OF MAILING

I hereby certify on the 4th day of October, 2022, I mailed a true and correct copy of the foregoing document to the following:

Thomas Hird
Katrina Conrad
Western District of Oklahoma
215 Deana A. McGee, Ste 707
Oklahoma City, OK 73107

Ashley Willis
Tessa Henry
313 N.E. 21st Str.
Oklahoma City, OK 73105

Pittsburg Count District Attorney's Office

Signed:

Bailiff
Pittsburg County Judge's Chambers

IN THE DISTRICT COURT IN AND FOR PITTSBURG COUNTY,

18th JUDICIAL DISTRICT, STATE OF OKLAHOMA

IN RE: BENJAMIN R. COLE,)
)
) Case No. CV-2022-140
)
Inmate No: 489814)

****

TRANSCRIPT OF PETITION FOR
WRIT OF MANDAMUS HEARING
HAD ON SEPTEMBER 30, 2022
MCALESTER, OKLAHOMA
BEFORE THE HON. MICHAEL HOGAN

****

A P P E A R A N C E S

TRIAL JUDGE:
Hon. Michael Hogan
District Judge
McAlester, Oklahoma

FOR THE PETITIONER:
Ms. Bonnie Blumert,
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I N D E X

30th, SEPTEMBER, 2022
TESTIMONY of WARDEN JIM FARRIS

PETITIONER'S EXHIBITS

NUMBER	DESCRIPTION	MARKED
25	Memorandum	18
19-23	E-mails	33
26	Narrative	42
27	Levels of Mental Health	51
1	Supporting Documents	56
2	Outline Document	57
3	Snyder Declaration	58
5	Affidavit of Hough	59
4	Hough's Addendum	63
6	Hough's Eval	64
7	Comp to be Ex. Ev. Dr. Hough	66
8	Hough Resume	59
9	E-mail	67
10	E-mail	68
11	Declaration of Dr. Snyder	69
12	Comp Hearing Request	70
13	Hough's Credentials	71
15	Dr. Orth's Report	73
14	Court Order	74
17	Warden Farris' Letter	79
16	Consultation	82

RESPONDENT'S EXHIBITS

NUMBER	DESCRIPTION	MARKED
	(NONE)	

(Exhibits retained by the Court.)

P R O C E E D I N G S

THE COURT: We're on the record in CV-22-140 *In Re: Benjamin Cole*.

Would the attorneys announce their appearances for the record.

MS. BLUMERT: For Mr. Cole, Bonnie Blumert, Katrina Conrad-Legler and Tom Hird.

MS. WILLIS: Ashley Willis, Tessa Henry, and Christina Burns for Warden Farris.

THE COURT: Are both parties announcing ready?

MS. BLUMERT: Yes, Judge.

MS. WILLIS: Yes, Your Honor.

THE COURT: We had a discussion in chambers without a court reporter regarding what the parties' position is on the burden of proof in this case. And I want to put that on the record before we begin because it affects how I listen to the evidence.

Do you want to go -- since you're the movant, would you prefer to go first?

MS. BLUMERT: Yes, Judge. Would you like me to argue from the table or the podium?

THE COURT: Podium.

MS. BLUMERT: Judge, the standard for this is not clear in the case law, and I think that's why we're here talking about it and needing to come up with a decision.

What we can extrapolate, though, are a few principles that lead us to ultimately understand that the standard is lower than preponderance of the evidence, which would make it potentially akin to reasonable suspicion or some articulable facts that support the proposition.

I get that from a few places. One of those is *Cooper v. Oklahoma* which is 517 US 348, a 1996 case. And, in that case, they say that the standard of the insanity for execution trial is preponderance of the evidence. The standard has to be lower than that to get to the trial itself. It can't be the same as that standard or higher than that.

In re: Gary Thomas Allen gives us a good example of that. Which is -- give the Court the case number -- it's a Pittsburg County case number C-05-510, a 2008 case, that was -- the proceeding I'm referencing is explicitly the insanity for execution trial. So the trial that we are contemplating here today.

In that case, the government made the argument for the trial that it was preponderance of the evidence. They cite *Ford*, *Bingham versus State* -- the cases that we've talked about -- that say that the clear and convincing standard was unconstitutional. So they agreed that the standard was preponderance of the evidence for that proceeding.

And then from that argument, the Court crafted a jury instruction that we have that tells us that the standard

at that trial was -- that the burden of proof is on Gary Thomas Allen or his representative to establish by a preponderance of the evidence that he was presently insane, as the term is defined in the instructions.

So that's the standard from those cases for the trial. This has to be lower than that. What I think that that evidence really means is that there is some -- what that standard means is that there are some legitimate evidence as opposed to -- well, that that legitimate evidence is satisfied by expert reports and evaluations as opposed to an inmate's mother calling the warden and saying, my son's crazy, don't kill him or a cell mate saying or just murmuring through people. That would not be enough.

What this statute contemplates is expert reports and understands that that is the evidence that it contemplates when it wants to evaluate whether there is good reason to believe.

The *Cole versus Trammell* case that we have talked about that was litigated on for this -- for this client is Cole V. Trammell 358 Pacific 3rd 932. And I'm pin citing to Paragraph 21. In this case, there are fleshing out -- talking about standards in *Panetti* and *Ford,* and they're talking about the hearing, and it says: Such a hearing must afford a person an opportunity to be heard, consistent with the basic requirements of due process. These basic requirements include

an opportunity to submit evidence and argument from the prisoner's counsel -- argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.

So the Court of Criminal Appeals contemplates that that is what that evidence is that they're looking at. It's expert opinions. And it doesn't need to be uncontroverted.

I think the State is tending to argue that we have to make a showing that it's uncontroverted because they'll point to Dr. Orth's report and say: Well, there's another report that says something different, that says he is competent, so they haven't made the showing to surpass that. But the statute contemplates that there will be -- excuse me -- the Court of Criminal Appeals contemplates that there could be conflicting expert reports.

So the expert reports, the fact that those exist, I think is the evidence that that standard contemplates, and that's what it's looking for when it says: What is that threshold? What is that high showing? It's not simply statements or suspicions that somebody is incompetent. It's expert reports. It's specific findings. It's a lengthy history of medicine treatment with regard to mental health.

So the standard, Judge, is lower than a preponderance of the evidence and akin to reasonable

suspicious.

THE COURT: You may proceed.

MS. WILLIS: Thank you, Your Honor.

Your Honor, I'd first note that *Cooper v. Oklahoma* is a competency to stand trial case and I do not believe it is relevant here for what we're here for today. And what she cited from the *Cole v. Trammell* case, which is 2015 OKCR 13, Paragraph 20, where they're discussing *Ford* and *Panetti*, specifically says that once you make a substantial threshold showing of insanity, that procedural due process allows him to move on to a hearing. And the hearing that she was referring to in Paragraph 21 is where they have the opportunity to be heard, consistent with the basic requirements of due process, where they can present evidence.

Your Honor, the Petitioner is presumed competent in this case, and they must overcome that -- that presumption by making a substantial threshold showing. And while the -- the case law is unclear as to what a substantial threshold showing is, it is not a low burden. *Ford* says, as we said earlier, it is a high burden, and -- let's see, I had that -- that is *Ford v. Wainwright* 477 US and the pincite is 417.

And, Your Honor, we argue that the Petitioner must meet that substantial threshold showing. The case law is not clear, but that is the Supreme Court law, that they have to make that substantial threshold showing before they are

entitled to a hearing. And then to overcome that, it is high -- it is a preponderance of the evidence. It is 51 percent or higher more likely than not.

Just look over my notes really quick.

THE COURT: You gave me a cite a second ago, 215 Oklahoma CIV CR --

MS. WILLIS: OK CR 13, and I'm citing to Paragraph 20. And that's the *Cole v. Trammell* case.

Thank you.

THE COURT: Are you ready with your first witness?

MS. BLUMERT: Yes, Judge.

THE COURT: Call your first witness.

MS. BLUMERT: Petitioner calls the warden, Jim Farris.

THE COURT: Warden Farris, if you will step right up here, I'll swear you in. I notice you got some documents with you. Just be advised you're not allowed to look at those unless you're asking to refresh your memory. You can put them up there, just -- you're not allowed to just start reading through them during your testimony. That's kind of a whale, you have to pull that chair back.

Raise your right hand, please.

WARDEN JIM FARRIS,

being first duly sworn, was examined and testified as follows,

to wit:

THE COURT: All right. If you please have a seat.

You may inquire.

DIRECT EXAMINATION

BY MS. BLUMERT:

Q. Can you please state your name for the record.

A. Jim Farris.

Q. What is your job, Warden Farris?

A. My position is warden of the Oklahoma State Penitentiary and also the Jackie Brannon Corrections Center.

Q. Do I call you Warden or Mister? What title do you prefer?

A. Warden would be fine, but you can call me anything you need to.

Q. Warden, what sort of education do you have to do that job?

A. I have a Bachelor's degree in criminal justice, psychology and sociology.

Q. Do you have any training in psychiatry?

A. In psychiatry, no. Just the basic psychology.

Q. Some of the things that are part of the criminal justice degree?

A. Yes.

Q. You're not a mental health professional?

A. No, ma'am, I'm not.

Q. Tell us about your duties as a warden of those facilities.

A. Well, if I told you all the duties, we'd probably be here a few weeks.

Q. Sure. And you can give us the highlights. Just broadly, what are your duties?

A. The main duties are, basically, the care of the inmates that are assigned to me at the correction center. Make sure that they have the proper care until they're, you know, officially discharged or whatever process the Court sets forth in those.

Duties is extremely large in a roundabout way. It's -- it's -- with the staffing, the budget, many different things that we do as far as properly educating the inmates and getting them ready to leave, if they're going leave, and follow the -- basically, the main thing is what we are -- what's court appointed for us to do with that inmate. If it's mainly focused on the education or a GED, we always look at those things to try to do to get those inmates processed out.

But as far as overall duties, it's extreme. Just like sitting here today is one of my duties. I think the most important thing that I go in in a facility each day is to ensure my staff and the inmates stay safe every day.

Q. (By Ms. Blumert) Would you say that, broadly, your

role is more administrative and less, in terms of direct, inmate interaction?

MS. BURNS: Objection; leading.

THE COURT: Overruled.

Go ahead. You may answer.

THE WITNESS: Basically, I would say I think, if you looked at a description for a warden with the Department of Corrections, your basic line is going to be different with every warden in corrections. I'm a little bit different than some wardens. Of course, it's administrative; that's just part of it. But I always take my role a little bit deeper than that. With the inmates, I've been around corrections for 33 years, inside it. So many of the inmates, the long-term inmates, I know well, so various times I'm on the yard, you know, and I'm visiting inmates. And a lot of it is inmates that, you know, I've known a long time, maybe see what information that they got and how our facility's going and what processes we need to fix.

So, yes, it's administrative, but I take pride in being out there with the inmates also.

Q. (By Ms. Blumert) Are you aware of a man who lives in your facility named Benjamin Cole?

A. Yes, ma'am.

Q. What unit does he stay on?

A. H unit.

Q. And tell the Court what H unit is.

A. H unit is our -- basically, our high max unit. We -- we have some death row, and we also have inmates that have been classified that can't be dealt with. In a simplified way, or explaining this, is is inmates that can't be deal with at the medium security level or the minimum security level.

Q. Would it be fair to say that a bulk of the death row inmates stay on H unit?

MS. BURNS: Objection; leading.

THE COURT: Overruled.

THE WITNESS: Would you say that again, ma'am? I couldn't hear.

Q. (By Ms. Blumert) Would it be fair to say that a bulk of the death row inmates get assigned to H unit?

A. At one time, yes, that was considered the spot where death row -- we also have two other units that we have tried -- with the way the nation's going with death row inmates -- to get them different types of things that may be -- for instance, the exercise piece of it, to maybe see more daylight, to actually be out on a yard where you can see other inmates.

So normally in a past process, yes, H unit would be the death row. Now, we have another unit that we're actually putting death row inmates on to try to get them a little bit more communication with -- with everybody. A little bit more life, I'd guess you'd say.

Q. Would that be A unit?
A. Yes, ma'am.
Q. And you said there was another unit that some folks are going to; which one is that?
A. A unit.
Q. Okay. Is there a second one?
MS. BURNS: Objection, Your Honor, relevance.
THE COURT: I don't know what -- if it is relevant.
MS. BLUMERT: May I respond, Judge?
THE COURT: Yes.
MS. BLUMERT: Judge, the whole issue here is what the treatment is of inmates, what the warden knows about his facility, what he knows about the folks who are staying at his facility, particularly, those that are on death row that are on H unit or A unit, how much interaction he has with them and what he knows. This whole hearing is about what the warden knows. So I think it's important to talk about --
THE COURT: You can inquire on that issue, but not where he's housing -- I want to know where Mr. Cole is.
So the objection is sustained as to relevance on that particular question.
Q. (By Ms. Blumert) Would you describe A unit. It's a bit looser, right, in terms of restrictions?
A. Somewhat. Somewhat looser. And when you say

"restrictions," there's different things. Like with the exercise piece of it, that is a part of it, and that's -- I wouldn't say it's a step down as far as H unit, but it gives us a little bit more of the inmate feeling he's getting a little bit to see or do.

So you could call it a step down. We do not call it a step down, but that's kind of the process.

Q. Right now, what unit is Mr. Cole on?

A. H unit.

Q. To your knowledge, has he ever been on A unit?

A. To my knowledge, has he ever been on A unit?

Q. Correct.

A. Yes.

THE COURT: Did you say, "yes"?

THE WITNESS: Yes, sir.

THE COURT: He has been on A unit? Is that a "yes"?

THE WINTESS: Yes.

THE COURT: Okay. Thank you.

Q. (By Ms. Blumert) When I say, "been on A unit," was he housed in A unit?

A. I do not -- you're going to have to -- I don't know what you're trying to say.

Q. Do you understand whether Mr. Cole has ever been housed on A unit?

A. I know what -- where Mr. Cole has been my two years at Oklahoma State Penitentiary.

Q. And is that H unit?

A. Yes, ma'am.

Q. In 2019, there was an effort by your facility to move some folks to A unit out of the highly restriction H unit; is that fair?

MS. BURNS: Judge, I'm going to object again as to the relevance of this line of questioning.

THE COURT: At this point, the objection's overruled. I'm not sure what the relevance is. I need to -- you can develop that.

Q. (By Ms. Blumert) The time you talked about where there was a tendency or a push to move folks to less restrictive units, was that around 2019?

A. I believe it was. Now, I was not at the facility at that time, but I know that that was kind of a push to do.

Q. And was there a policy that would determine which inmates moved to A unit versus stayed on H unit?

A. Most of the decision making in that was looked at -- maybe -- there was many things that were brought in to that protocol, and a lot of it was based on if the -- if there had been something set with the inmates with the execution time or different things like that. A lot of it was the behavior, what level the inmate's on and what we felt security -- or what they

felt at that time was the security protocol they needed to be -- piece of that.

Q. Were some of the things you considered for that were an inmate's mental health, their risk of victimization, whether they were high profile, things like that?

A. At that time -- again, I was not at Oklahoma State Penitentiary when they first did the movement. So I'm sure that that was what they did look at, but I -- again, I cannot speak for the previous warden at that time when that was done.

Q. As warden, you have access to the records of the facility and the records of previous wardens, correct?

A. There's some records that for previous wardens may be -- may be difficult to look at or get, but it's a fine line between records that I would be trying to get, you know, as far as mental health and different things like that; although, I do have access to those type records. What I do rely on as a warden of a facility, I rely on my staff and the professionals in those areas to give me the correct information. And I feel like I -- my staff have done that very well at the Oklahoma State Penitentiary.

Q. The policy that a warden may implement would persist unless those -- unless there was another policy that changed that, correct?

MS. BURNS: Judge, I'm going to object again. I'm just not seeing where this is going as relevant to this

hearing.

MS. BLUMERT: May I respond, Your Honor?

THE COURT: Yes.

MS. BLUMERT: Judge -- and without just, essentially, testifying -- but what I'm ultimately trying to do is show that there are criteria that the facility uses to put people in H unit versus A unit and the fact that Mr. Cole is still on A unit is significant, and there's a record that indicates his specific retention on H unit.

THE COURT: He's on H unit; you said A.

MS. BLUMERT: Excuse -- I did. His retention on H unit is significant because there's reasons for that, and we have a document that's redacted, and I would like to ask the warden about that and let him talk about that.

THE COURT: Well, he can answer if he knows, but he's been there two years.

MS. BLUMERT: I understand that, Judge.

THE COURT: Just answer the questions you know about, not what you've heard from someone else.

THE WITNESS: Yes, sir.

THE COURT: You may restate the question.

Q. (By Ms. Blumert) You understand that when you came in that there were policies that had been in place prior to your tenure, right?

A. Yes, ma'am.

Q. And unless you decided to change those, those would persist?

MS. BURNS: Objection; lack of foundation.

THE COURT: Overruled. Guys, we're in -- I know you're trying to make a good record here, but this is a non-jury trial. I need to get this testimony on at some point, so just keep that in mind when you make your objections. I'm the trier of fact and the decider of what the law is, as far as this hearing's concerned, and I'm -- I know how to do that.

So let's proceed.

MS. BLUMERT: May I approach the witness?

THE COURT: Yes.

MS. BLUMERT: For the record, I have previously marked Petitioner's Exhibit 25. I provided, prior to the start of this hearing, binders with all the documents that I intend to admit to the judge and to counsel.

Q. (By Ms. Blumert) Warden Farris, I'm handing you what's been previously marked as Petitioner Exhibit 25. Please review it for a moment.

Do you recognize this document?

A. I do not recognize this document. And the reason -- I'm not saying that this document is not there. This document did not come from me. It was from the previous warden up through -- looks like through the director -- the then director, Scott Crow. But I've not seen this particular

document.

Q. What is it?

A. It's basically a -- basically a --

MS. BURNS: Your Honor, I'm going to object at this time. His --

(Crosstalk.)

THE COURT: Hang on. Hang on.

MS. BURNS: He doesn't --

THE COURT: There's another objection, so let me -- don't keep talking. It's very difficult for the reporter to get that testimony down.

Go ahead.

MS. BURNS: He doesn't recognize this document, and so I'm objecting to lack of foundation. He does not recognize it. He doesn't -- didn't compile it. And now she's asking him questions about a document that he has no personal knowledge of.

THE COURT: Okay. I don't think we're to that objection yet. If you do not recognize the document --

THE WITNESS: I do not.

MS. BLUMERT: May I respond, Judge?

THE COURT: I don't need a response. I need to get this evidence on. So you may inquire.

Q. (By Ms. Blumert) When was this document created?

A. It looks like -- says October 23rd, 2019.

Q. Okay. And what does it show? What do you understand it to show?

A. It's -- it looks like it's different phases for the pods. The Department at times -- and this is -- like I said, this is not my document, but guessing on what this is, the Department usually goes with phases on a lot of different things, you know, to either phase down from a particular level or phase up. So without looking at exactly what the phases are saying, that's what I'm guessing this is talking about.

THE COURT: Warden, I'd ask that you not guess. If you don't know, don't guess.

Q. (By Ms. Blumert) You review documents like this in in your tenure as the warden, correct?

A. Yes.

Q. And you would have had access to previous wardens' documents, right?

A. Some. Yes.

MS. BLUMERT: Okay. Move for admission of Exhibit 25.

THE COURT: Any objection?

MS. BURNS: Yes, Your Honor. Based on lack of foundation and the fact that, you know, he has not personally reviewed this document. He was guessing as to what it's contents could possibly be.

THE COURT: What's the legal basis for your

objection?

MS. BURNS: Lack of foundation and lack of personal knowledge.

THE COURT: The objection will be overruled. It will be admitted for what weight it might possibly have.

Q. (By Ms. Blumert) Warden, I'd like to turn your attention to that document, and that document specifically is entitled that it's the relocation of death row inmates, correct?

A. Excuse me, could you repeat that?

Q. Entitled that it's the relocation of death row inmates.

A. Yes, ma'am.

Q. And specifically talks on the second page about the criteria for which inmates are going to be moved to A unit, correct? Do you see that part there on the second to last paragraph on the bottom?

A. Yes, where they were asked, is that what you're saying, that paragraph there?

Q. Well, it says the criteria for determining that is mental health, risk of victimization, high profile, et cetera.

A. Okay. I'm not seeing that part.

MS. BLUMERT: May I approach the witness, Judge?

THE COURT: Yes.

Q. (By Ms. Blumert) This paragraph here. And in the

paragraph below that, it discusses interviewing the inmates in preparation for making the determination which unit they will be on, correct?

A. Yes.

Q. And in the two pages after that, there's specific inmate names, right?

A. Yes.

Q. List of inmates that were on death row at that time, regardless of unit?

A. Yes.

Q. And on the second page of that listing, it mentions Benjamin Cole, Inmate Number 489814, correct?

A. I'm trying to see where his name's at.

Q. It's the third name down from the top on the second list of names -- excuse me, the second page of names.

A. Second page of names? Yes.

Q. And it says: Staff believes that inmate has, blank, blank, and his age makes him susceptible to victimization.

Do you see that part?

A. I do.

Q. Do you know what is redacted from that section?

A. No, I do not. This is not my document.

Q. Do you know why a redaction like that would be made?

MS. BURNS: Objection. Judge, I'm sorry, there is zero foundation for this.

THE COURT: Sustained.

Q. (By Ms. Blumert) Do you know why, specifically, Mr. Cole is remaining on H unit this summer and this year and to the present day?

A. In my two years, I have seen where -- one thing I would say in just my interpretation of it -- again, I can't go on what previous wardens looked at. I'm looking at the way I look at it.

Now, with H unit, H unit is all high max security. A unit and C unit are also maximum security areas. So the removal from him to me at that time, he is set, you know, for the execution process. So in my mind, I'm not looking at -- particularly within my two years of trying keep up with 800 -- or possibly 800 inmates and 800 at the Jackie Brannon -- exactly why there's not a particular inmate moved.

MS. BLUMERT: Objection; nonresponsive.

THE COURT: Are you -- are you finished?

THE WITNESS: Yes, sir.

THE COURT: Okay.

Q. (By Ms. Blumert) Do you know why Benjamin Cole remains on H unit?

A. Benjamin Cole remains on H unit at this time because he is set for execution. He is currently in the protocol for an execution. We have the cells outlined in our execution process that they are assigned to.

Q. Part of the execution protocol is the 35-day mark, correct?
A. Yes.
Q. Has significance?
A. Yes.
Q. At that point, an inmate is moved to a different cell, right?
A. He's -- it's a different cell, yes. Now, if --
Q. And so --
If I may, actually, Judge, I'd move to treat this witness as hostile under 12 OS 611. I think we'll be here for long periods of time if I'm not allowed to ask pointed, legal questions.
THE COURT: That's the position I took from the start of this, so you can -- you can proceed with questions.
Q. (By Ms. Blumert) So, Warden Farris, he was moved to that 35-day cell, would've been, earlier this month, correct?
A. I believe -- I believe the dates was September 15th, I believe.
Q. So this summer, let's say from May to about July, Mr. Cole was not in the 35-day cell, correct?
A. No, ma'am.
Q. He was on H unit that he's been on for some time?
(Court reporter requests verbal response.)
THE COURT: There needs to be -- did you answer?

THE WITNESS: I'm -- I'm just listening to her. Was there a question?

What are you asking me?

Q. (By Ms. Blumert) He was on H unit for some time prior to that window, correct?

A. Yes.

Q. How long has been Mr. Cole been at OSP?

A. I couldn't tell you the exact day. I know it's been many years that he's been there.

Q. Far prior to your tenure, correct?

A. Oh, yes.

Q. Your facility would have fairly lengthy records about him, right?

A. I wouldn't say lengthy, but there would be records that do go back. I'm not sure how far they would go back, but, yes, we do have records of -- we keep records for a while.

Q. Oklahoma State Penitentiary keeps records about all kinds of things, correct?

A. Correct.

Q. Down to staff interactions, canteen orders, medical visits, things like that, right?

A. There can be, depending on the circumstances. If you say canteen, it -- a lot of that depends on if there was an issue with it, whether there was an actual report done on it. But there is certain records that we do not have, so I can't

say we have everything.

Q. I'm not asking if you have everything, Warden, I'm asking if you do keep records about those types of things.

A. If there -- yes, if we see it as a reason to keep it.

Q. There are certain things that happen in that facility that, every time it happens, a staff member makes a record, whether that's a mental health visit or canteen visit, there's some type of things that require a record every time, correct?

A. Should be, yes.

Q. Sometimes those records are requested by outside groups or you might send them to a legal department, things like that --

A. Yes.

Q. -- that's what those records are for?

Have you personally interacted with Mr. Cole?

A. I have attempted to.

Q. Tell us what that means. What do you mean by "attempt"?

A. Basically, to have a conversation with Mr. Cole, to go to the cell and, like I would do with all inmates, you know to check. The interaction -- basically, interaction as far as communication-type interaction was basically during the 35-day protocol when we started it. He -- he interacted with me. Mr. Cole, with staffing and everything, is pretty consistent. It's just kind of depends on him. There's some staff members at

times he'll communicate with and there's sometimes they won't.

Usually -- if it is something, usually, it's possibly a canteen issue. He knows exactly if something's done wrong with his canteen, so he will express that, you know, to the canteen officer or the officer himself.

We have a unit manager that he's opened up to a little bit, you know, within the last few months also. So it just depends on -- on Mr. Cole.

Q. You don't sit down and have lengthy conversations with him out on the yard or anything, right?

A. No.

Q. Mr. Cole has been in -- is in a wheelchair, correct?

A. Yes, he is.

Q. He's fairly lean?

A. Yes.

Q. Has messy, unkempt hair and beard?

A. I would not say that. It depends. And I think you could look at that as every inmate at the correctional facility. You may be at a cell one time and their hair's going all different ways or -- I think with Mr. Cole, some of the things that you see, sometimes it may be up, sometimes there's a headband around his head, sometimes it's scattered. The main things that I've seen, especially during the 35-day protocol, was he was very clean. He always has been. He -- we refer to it -- he doesn't like want to come out, you know, and do

showers and stuff like that, but we always refer to it in corrections, as I've stated many times, as bird baths, where he cleans himself like that. Some inmates do that because they do not want to come out.

Q. Would you say like using the sink and their hands?

A. To -- yeah, to wash, and, basically, do those things.

Q. His cell often has food and other assorted items in it, correct?

A. Yes. And explaining that, Mr. Cole is a very -- he's a little bit more -- it's difficult to say that. We have some inmates that their cells are emaculate. We have some inmates that are just not, you know, very clean, sanitary. So with Mr. Cole, it's -- it's very odd. A lot of his is with -- with the eating. He has the religious beliefs, the fasting process. So those always worry me because I want, you know, to ensure our inmates are eating and doing that. And with fasting, fasting always kind of worries me a little bit, you know, because some inmates do fast, and they fast for quite a while. Mr. Cole, when he is fasting, you know, when we deliver the meals, we try to give him every opportunity, you know, to eat those meals and so forth. He gets most of it off canteen, so...

Q. Warden, I'm going to stop you there. There's times where Mr. Cole will hoard many, many meals in his cell, correct?

A. At times, there has been where he has done that, and I think that the process in that is just sometimes Mr. Cole likes to sleep for the most part --

Q. And that's not my question, Warden.

A. -- during the day.

Q. Warden, there are food boxes that stack up in his cell, correct?

A. I wouldn't say just just enormous, but there is times where it is left in the hope that, you know, even if he may be fasting, he may want to eat.

MS. BLUMERT: Objection, speculation, Judge, and nonresponsive.

THE COURT: Well, overruled. These are open-ended questions so he's giving an open-ended answer.

Q. (By Ms. Blumert) Would you consider 147 food boxes in his cell to be a normal amount?

A. 147 food boxes?

Q. Yes.

MS. BURNS: Judge, objection to the form of the question. I don't know if this is a hypothetical or if this actually -- I'm not sure if this is even an actual question based on actual facts.

THE COURT: What's the legal basis for your objection?

MS. BURNS: Form of the question.

THE COURT: Overruled.

THE WITNESS: When you say 147 boxes, I'm not sure exactly how you're interpreting that. If you say, is there 147 food trays from food service in there, yes. But there's times when inmates will order their canteen, sometimes it'll go over the allowed amount, sometimes, you know, it's in that amount. So when we say 147, there probably is some things like that with the canteen items. Sometimes he will order canteen and it may not be touched for several, several days on that. So --

Q. (By Ms. Blumert) Warden, are you aware of whether at any point Mr. Cole had 147 meals in his room? Not canteen. Meals.

A. Meals, I am not aware of that.

Q. Your knowledge of Mr. Cole comes from things your staff have told you and from records, right?

A. The majority of it, yes.

Q. Inmates in OSP can have visitors, right?

A. Excuse me?

Q. Inmates -- and I say OSP, Oklahoma State Penitentiary, the facility you're over -- inmates at OSP can have visitors, correct?

A. Yes, ma'am. Unless there is some security reason for that or a visitor has been suspended. But, yes, they can.

Q. And to your knowledge, Mr. Cole would decline visits

often, correct?

A. Yes.

Q. Visits from his lawyers?

A. Yes.

Q. Visits from doctoral staff?

A. Yes.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: Yes.

Q. (By Ms. Blumert) Warden, we talked a little bit about the records that you have in the facility and the records that you rely on. You have access to -- you have access to records in your facility that you did not personally make, correct?

A. Yes.

Q. Records that your staff makes?

A. Yes.

Q. And you would rely on those things -- well, excuse me -- the staff rely on those records amongst themselves to do their job, correct?

A. Yes, to an extent. Yes.

Q. And you rely on some of those records to do your job, as well?

A. Of course.

Q. You would have reviewed files about Mr. Cole as part of this process that we're here about today, correct?

A. I have reviewed numerous files on Mr. Cole or the processes. I will explain that, if I can. Is that my main process was -- looking at Mr. Cole, is what I have determined in the last few years, both -- both groups or both -- all attorneys and myself agreed with the -- with the evaluation of Mr. Cole by Dr. Orth. We all agreed to that. We all done that. I relied extremely on Dr. Orth's report that we all agreed to do. And I rely on my staff; I rely on my mental health; I rely on my doctor that talked to me about different things. And it's been consistent with Dr. Orth's report and consistent with my staff of the -- how I make my judgment.

Q. Some of those records might include letters or e-mails in there as staff are discussing Mr. Cole, things like that, correct?

A. E-mails, no, I don't -- I'm not looking at e-mails. I don't know -- incident reports, different things like that. E-mails, I don't look at staff's e-mails.

Q. If there's an e-mail that's extrapolated and put into Mr. Cole's file, would you see something like that?

A. If -- if it's extracted, yes. A lot of times.

Q. And I'm not -- I'm not asking whether you go into staff's e-mails and look for certain things. If there as an e-mail that has been put into a file of Mr. Cole's, you would see that in there, correct?

A. Not necessarily. Unless -- if I'm looking at

particular something on that, I may see that. If it's particular things that I'm needing from medical or something I -- it would be a particular file or particular information that I'm needing. So I can't say I would actually see that.

Q. You have the ability to look at that, correct?

A. The ability to look at it?

Q. Yes.

A. If it's there, yes.

Q. I'm not asking if it's there. If something's in a file, you have the ability go look at that item, correct?

A. Yes.

Q. Sometimes some of the things that you have might be correspondence from attorneys, correct?

A. Some of the things that I have -- that I can look at, is that what you're saying? Of course. It's sent to me.

Q. Right. But you will get, sometimes, correspondence from attorneys about inmates in your facility, correct?

A. Occasionally, yes.

MS. BLUMERT: May I approach, Judge?

THE COURT: Yes.

MS. BLUMERT: For the record, I am handing the witness Petitioner's Exhibits 19 through 23 inclusive.

Q. (By Ms. Blumert) If you could peruse those for a moment.

A. Can I comment on this?

Q. Not yet, Warden.

Do you recognize what these documents are?

A. I recognize it's -- it's a document that was sent in 2016 to an interim warden at that time.

MS. BLUMERT: And just for clarification -- I apologize for the record -- I did not hand the witness Number 23, which I'm doing right now.

Q. (By Ms. Blumert) Do you recognize what these documents are? These documents are e-mails from Counsel to a warden, correct?

A. Yes.

MS. BURNS: Objection; foundation, leading --

THE WITNESS: A previous warden.

THE COURT: I'm sorry. What's the objection?

MS. BURNS: Leading. And she's trying to lay the foundation for him.

THE COURT: Well, the objection as to leading is overruled.

Q. (By Ms. Blumert) These are e-mails from Counsel to the warden of OSP, correct?

MS. BURNS: Same objection, Your Honor; lack of foundation. He has to provide that foundation.

THE COURT: You can -- the objection's sustained. You can lay a foundation if he's able to provide one.

Q. (By Ms. Blumert) Do you recognize what these documents are?

A. It looks like it's e-mails to the -- not even the previous warden, but the warden before that.

Q. What are the dates on those documents?

A. One's December 15th, 2017. One's December 20th, 2017. Previous warden was Terry Royal.

Q. Those are various dates between 2016 and 2017, right?

A. It's what, ma'am?

Q. Various dates between 2016 and 2017, right?

A. The ones I see, if there's another one here. But it looks like you've got two -- December 20th, 2017 --

Q. Number 19 is --

A. And excuse me, December 20th. Well, it looks like both of these are on December 20th, 2017.

Q. Petitioner's Exhibit 19 is dated June 9th, 2016, correct?

A. I'm not seeing a 2016.

Q. Do you have 19, 20, 21, 22 and 23?

A. I've got -- 19, 23 and 22 here, but 23 is only two pages. That's the e-mails.

Q. Okay. Where are the others that I handed you?

A. These are all the rest of them.

Q. Okay. You have in front of you Petitioner's 19, 20, 21, 22 and 23, correct?

A. I do.
Q. And the date on Number 19 is what?
A. It's June 9th, 2016, to Kevin Duckworth, Interim Warden.
Q. And the date on 20 is May 18th, 2016?
A. May 18, 2016, yes.
Q. 21 is January 11th, 2016?
A. Yes, ma'am.
(Court reporter requests clarification.)
THE WITNESS: 2016 was from Warden Chrisman.
Q. (By Ms. Blumert) And I'll get to that, Warden. I'm just asking you what the dates are right now.
Number 22 is December 15th, 2017, correct?
A. Yes.
Q. And Number 23 are dates in December of 2017, correct?
A. Yes.
Q. You were not warden during these letters, correct?
A. No, ma'am.
Q. But your facility, your office, would maintain correspondence that the warden receives as the position, correct?
A. Yes. These particular things, we should have a record of. I have not seen these particular documents, but...
Q. You don't have -- there's no policy in the warden's office of destroying correspondence that you would receive,

right?

A. No.

Q. You don't have policies of ignoring them?

A. A policy of ignoring?

Q. Ignoring correspondence that comes in.

A. A policy of ignoring them?

Q. You don't have one of those, right?

A. No.

Q. Okay. You don't have any reason to believe that these are not in your files, right?

A. No. There's no reason that they're not somewhere in the files. No, I don't.

MS. BLUMERT: Move for admission of 19 through 23, inclusive.

THE COURT: Objection?

MS. BURNS: Your Honor, I'm going to object as to the lack of personal knowledge, lack of foundation as to trying to introduce these through this witness and also hearsay.

THE COURT: Tell me how that's an exception to the hearsay rule since it's not a document generated by his facility.

MS. BLUMERT: Judge, they're documents that he keeps in the course of his business as a government agency under 2308 Subsection, I believe, 7. 12 OS 2308 Subsection 7,

government records exception. I'm not indicating that the warden created these, but, essentially, that he maintains them as part of his business, that he has them. He testified that he -- the office keeps them, that they review those things, and that, essentially -- really, though, these are not hearsay. They're not offered to prove the truth of what's in them.

But the point is that the warden is aware of them and he is -- has -- would be on notice about these documents and have access to them. That's the whole purpose of this hearing.

THE COURT: I disagree with your citation to 2803 Subpart 7. That refers back to Subpart 6. That's not an exception to the hearsay rule. These are not documents he generated. He wasn't even a warden then.

MS. BLUMERT: No, he wasn't, Judge.

THE COURT: I -- you've made your point that they're in his record. They're in his record.

Is that what you're trying to prove?

MS. BLUMERT: Yes. Just that he has -- these are the records he has access to because the whole hearing is about what he knows.

THE COURT: Well, they're -- I think that point's been made. But we're in 2022, these are from 2016, so if that's your point, I'm -- I've got that written in my notes.

MS. BLUMERT: So for clarification, Judge, are

they --

THE COURT: They are not admitted.

MS. BLUMERT: Okay.

THE COURT: Warden, do you have Exhibits 19 through 22 -- 23?

THE WITNESS: I do. 21, I don't. Oh, there it is. My bad. I do have them.

THE COURT: Yes, sir.

Q. (By Ms. Blumert) Warden, some of the records that your facility keeps are mental health records, right?

A. I -- I do not keep the mental health records. Mental health would keep those records of that. I do not keep the mental health records in our areas.

Q. And, Warden, I'm not asking if you keep them. Your facility keeps those, correct?

A. Yes.

Q. You keep those --

A. They should.

Q. -- keep those to run your facility and provide medical treatment to inmates, right?

A. Yes.

Q. Right?

A. Yes.

Q. The folks who work in those units are the ones that make those records?

A. Yes.
Q. They keep notes about things like visits with inmates?
A. Yes.
Q. And to your knowledge, in March of this year, Mr. Cole was taken to the OSU Medical Center to have his brain scanned?
A. Yes. I'm not correct on those -- exactly sure on date.
Q. If I estimated March, would that jive with your understanding?
A. Probably pretty close to that.
Q. If I told you March 30th, would you have any reason to disagree with that?
A. Well, I wouldn't have a reason to disagree with you, but I couldn't tell you if you were correct or not on the date.
Q. Mr. Cole is regularly seen by physical medical doctors and mental health doctors, correct?
A. Yes.
Q. Do you know how often?
A. Their protocol, the majority of time, is when they see -- when they see inmates is, basically, if there is an issue or something that they have to do -- check per their protocol. If there's an inmate that's having an issue -- and I'll just use -- throw this out there to get an understanding

of it -- but, naturally, if there's an inmate that has cancer, that they have to do certain treatments on that. There's a different protocol for every inmate.

I don't know how many times they have actually went to check on Mr. Cole. I do know what my doctor has told me, the physical doctor, about Mr. Cole and his evaluation of Mr. Cole. And that's not me reading the documents; I went with his observations of him through the years and actually here recently.

Q. What doctor's that?

A. Dr. Payne.

Q. So you -- just to make sure I understand your testimony correctly, you're saying that you reviewed records of Dr. Payne's evaluations of Mr. Cole or you spoke with Dr. Payne?

A. I spoke with Dr. Payne.

Q. Okay. And as you spoke with him, were you guys sort of looking through records together?

A. No, Dr. Payne does that. Like I said, I can't tell you if he does it for eight hours a day or what it is. But I had a conversation with Dr. Payne -- actually a few conversations -- but the main --

Q. Let me stop you, Warden, and kind of back to the question is: Do you know how often a doctor like Dr. Payne sees Mr. Cole?

A. No, I don't know the exact times, no.
Q. Do you know how long the visits are?
A. Well, with -- with Mr. Cole, it's usually -- kind of depends on what he's checking for.
Q. So the question is: Do you know how long the visits are?
A. No, I couldn't tell you how long they are, no.
Q. Do you know which providers see him?
A. With Mr. Cole, the providers that do see him is mental health, and, basically, the doctors. Mr. Cole's not on any mental health medication and has always refused that. So there's -- even with the mental health piece of it, I think our processes are, basically, we -- we do above the standard for what it would normally be.
Q. And let me stop you, Warden. The question is: Do you know who sees him?
A. Are you talking about the people or the positions?
Q. Both. Do you know either of those things?
A. Yes. I actually -- the mental health person that does most of the visits name's Tina Fuller. I've also had many -- or discussions with her, you know, about she sees with Mr. Cole. I've actually got --
Q. And she's not the only doctor, correct?
A. No, there's -- there's other doctors. We had a -- we've just had one that retired that --

Q. And there's other staff that sees him, as well?
A. Staff, yes. But we have all staff that do checks with corrections officers to canteen officer to unit managers to case managers.
MS. BLUMERT: May I approach, Judge?
THE COURT: Yes.
MS. BLUMERT: I'm handing the witness Petitioner's Exhibit 26.
Q. (By Ms. Blumert) Do you recognize these documents, Warden?
A. It's a mental health narrative from Dr. Smash, who has retired. But do I need to read it?
Q. Do you recognize those and the pages behind it, as well? It's a, I believe, five-page document.
A. As far as recognizing the documents, yes.
Q. Now, what are these documents?
A. These are clinical notes from Dr. Smash. And a lot of that is what they see when they actually do their checks, different things like that. So it's -- one thing with these, you're liable to see --
Q. Who creates these documents, that you can tell?
A. Well, this right here is the mental health professional, or one of them.
Q. And who is that?
A. Dr. Smash.

Q. Who creates the other ones?

A. Tina Fuller. We've got -- trying to think of her last name -- Angela, I can't remember her last name, but could actually create the mental health piece note like this.

Q. Can you look on that and tell who wrote that note for each one?

A. I got Dr. James Smash. It's got -- I think it says -- my eyes are not real good -- Dennis Deakins, I believe, and I've got, on this one -- I'm trying to read what it says here. Oh, Patty Stem. I was looking for where she put her name.

Q. Do you recognize those names as folks that work in your facility?

A. Recognize the names? Yes.

MS. BLUMERT: Move for admission of Exhibit 26.

THE COURT: How many total pages is Exhibit 26?

MS. BLUMERT: I believe it's five, Judge. Five pages.

THE COURT: The reason I ask, on my Exhibit 26, there's a tab that also has 27. Is that separate?

MS. BLUMERT: Yes. We added that late. I apologize, Judge. It's the five pages of 26.

MS. BURNS: I have no objection, Your Honor.

THE COURT: No objections? Okay. Exhibit -- so is it Exhibit 26 through 27 or is it --

MS. BLUMERT: Just Exhibit 26. I apologize for the confusion, Your Honor. 26 is five pages long. 27 is separate.

THE COURT: Is 27 the mental health service levels classification?

MS. BLUMERT: Yes.

THE COURT: Okay. This tab is on the wrong exhibit.

MS. BURNS: I'm sorry, Your Honor. I don't -- I don't -- I'm not sure I have an objection. I thought we were discussing the mental health progress notes from 3/29 of '22, it's marked as 26. Is that -- but it's only one page.

THE COURT: Yeah. Take your -- that tab that's on your document --

MS. BURNS: Okay.

THE COURT: -- take it off and move it to mental health service classification. So the record she's submitting it five pages in -- five total pages.

MS. BURNS: I'm good with that, Your Honor.

THE COURT: Those are admitted without objection.

Q. (By Ms. Blumert) Okay. The first page there, the one that has the sticker on it --

A. Yes.

Q. -- is a mental health progress note for Ben Cole,

correct?

A. Correct.

Q. Created by James Smash, Ph.D., the clinical coordinator?

A. Correct.

Q. This is on March 29th, right?

A. Yes, it is.

Q. Is it the day before he's taken for his brain scan at OSU Medical Center, right?

A. Like I said, it is around that time. I couldn't tell you the exact date on the scan.

Q. That's fair. What does that paragraph say? The part that's yellow.

A. Do you want me to read it?

Q. Yes.

A. Inmate was seen in his cell. He was being moved to medical for a shower. Inmate cell was -- was moderately filthy. The door floor had area condiments, bottles filled with liquids at the base of the floor. There were trays of food that he had not turned in for pickup. He had more trays, food unopened and food opened in the corner by the bunk that he has -- that he doesn't sleep in.

Inmate was unable to fully position himself in the wheelchair without help from security officers. Inmate's clothing looked dingy and perhaps dirty. However, his

fingernails were clean and so was his hair. His beard was free of debris and looked combed as well as brush -- brushed, excuse me.

His sweats and top were dingy looking. There were no unpleasant odors, surprisingly.

Q. The next note -- I think you may have, kind of, mixed your pages up.

The note I'm referring to, for everyone, is from March 27th, 2019, which is the date just below that long line. This one is a wellness center weight check for Mr. Cole, correct.

A. You -- the 3/27?

Q. Yes. Right next --

A. Do I need to read it?

Q. No. Just right next to the date, it marks it as a wellness center weight check, correct? It's the very --

A. I think I'm looking at the wrong one. I don't -- I've got a 3/27, but I think there was another one here, 3/27. Not sure I'm looking at the right one that you're talking about.

Q. Yes, you are. And just right next to that date at the very top --

A. Yeah. Yes. Wellness check, yes, wellness and weight check.

Q. Done by Dr. Deakins?

A. Yes, ma'am.

Q. Where he makes a note, third line: I reviewed his mental health and medical entries to 2014, essentially, unchanged.

Correct, it says that?

A. Yes.

Q. The third page --

MS. BLUMERT: And for everyone, it is from April 3rd, 2017, entitled: Mental health progress note soap.

THE WITNESS: Soap, yes.

Q. (By Ms. Blumert) What does soap mean, Warden? Do you know? Is it an acronym for something, soap?

A. What does "soap" mean, is what you're asking?

Q. Yes. Do you know?

A. Soap is a -- an item to clean your body with.

Q. So that -- it just means the word "soap," it's not an acronym for anything?

A. Not -- I don't know.

Q. You're not positive?

A. No.

Q. Okay.

A. I know what I use soap for. I know what most people use soap for.

Q. This particular note was signed by Patty Stem, the 2 coordinator, correct?

A. Correct.
Q. And cosigned by a variety of other providers, which we note at the bottom?
A. Yes. Cosigned electronically, yes.
Q. And in this one, Ms. Stem notes, when she's cleaning him, the things that he's talking about, correct, in that second line here? He's saying, "wash and comb," "wash and comb?"
A. Yes.
Q. And he repeats that and also says, "sink and toilet;" those are the things that he's talking about?
A. Yes, ma'am.
Q. Ms. Stem asked him about the hoarded food in his cell and he didn't respond, correct?
A. Correct.
Q. The objective data, the little --
A. At the canteen part, yeah.
Q. And the objective data below, it notes that he appears disheveled and has an anxious mood, correct?
A. Yes.
Q. A blunted affect and mumbled speech and poverty of speech, correct?
A. Yes.
Q. The 4th page of this exhibit.
MS. BLUMERT: Turn everyone's attention to the

narrative from April 3rd, 2017, also.

Q. (By Ms. Blumert) It's the second one. It's very short. That's a mental health progress narrative, correct? Do you see that one, Warden?

A. Yes.

Q. And that one indicates that the inmate had 147 kosher meals in his cell and canteen foods, correct?

A. Yes. But I'd also like to add to that, this is in 2017, so I would have not known -- or I didn't have any knowledge --

Q. Warden, that's what the record says, right? Correct?

A. Yes.

Q. And the final page of this exhibit is a record from March 11th, 2014.

A. Are you -- is that the one that's got "soap" too?

Q. Yes.

A. Yes. Okay.

Q. This is one's signed by Dr. Kirby and cosigned by the chief medical officer, correct?

A. Yes, one -- one was retired.

Q. That's who writes it, correct, Warden?

A. Yes. 3/11/2014, correct?

Q. Yes. And down towards the bottom of that yellow portion, there's an italics heading called: Comments on subjective findings.

And this notes indicates that the mental health level of zero appears to be incorrect. He has a mental health level of B at Age 39. So his mental health level at Age 48 should not be zero.

Do you see the part where I'm reading?

A. Yes, I do.

Q. And so Ms. Stem indicates at January 14th he had a diagnosis suggesting -- of a psychotic disorder, correct?

A. I do see that.

Q. He was not fully psychotic that day, but did refuse to speak and had oppositional behavior consistent with the possibility of paranoid thinking, right?

A. I see that, yes.

Q. His conduct could also indicate his social isolation that is typical of schizophrenia?

A. Yes, typically.

Q. And that they would continue to monitor his medical status -- or his mental health status, excuse me, right?

A. Correct.

Q. That note talks about something that's the mental health levels; are you familiar with those, Warden?

A. With mental health levels?

Q. Yes.

A. Somewhat.

Q. That they exist in the facility for classifying the

amount of treatment an inmate gets, right?

A. Yeah. And the majority of it is exactly for -- not exactly -- but is for the treatment and how they are treated and what kind of medication that they do get.

Q. To help the staff know which ones are higher need or slower need or what types of needs, right?

A. Correct.

MS. BLUMERT: May I approach the witness, Judge?

THE COURT: Yes.

MS. BLUMERT: I'm now handing the witness Exhibit 27, which is the last two pages of your binder.

Q. (By Ms. Blumert) Do you recognize that document, Warden?

A. Yes, I do.

Q. That is -- tell the Court what that is.

A. This is -- basically, what I'm looking at is the levels of mental health. It all has a description on how each level might come to from a professional -- mental health professional on what type of treatment that they may need.

Q. And that's a record that you use in the course of your work at OSP, correct?

A. Well, it is used for certain things for behavioral type issues. The thing that would come into play for myself, or my staff, with the security piece of it, is depending on the mental health level that may be extreme to where there may be

different precautions that we need to use with this inmate that --

Q. Sure. And let me kind of refine the question, Warden. This categorization is something your facility uses in its day-to-day business, correct?

A. Well, mental health does it, and they make us aware of something that would be something that would -- we need to know security-wise.

MS. BLUMERT: Move for admission of Exhibit 27.

MS. BURNS: I have no objection, Your Honor.

THE COURT: Exhibit 27 will be admitted without objection.

Q. (By Ms. Blumert) Warden, Level B in there --

(Court reporter requests clarification.)

MS. BLUMERT: B as in Baker. Which actually says MH-B (Baker).

Q. (By Ms. Blumert) Do you see that part?

A. Yes.

Q. Okay. Indicates that that is a level where someone requires psychotropic medications?

A. Yes.

Q. Has current major diagnoses, things like that?

A. Yes, ma'am.

Q. Requires prescribed scheduled treatment or therapy, maybe suicide attempts or ideations?

A. Yes.
Q. And that those folks in that category can be seen on an outpatient basis, correct?
A. Yes.
Q. At some point, it's your understanding from those records that Mr. Cole was on Level B, correct?
A. Yes.
Q. And at some point that he was moved down to Level A?
A. Yeah.
Q. And Level A still requires a mental health diagnosis or treatment at some point, correct?
A. Yes.
Q. Okay. And symptoms may be acute or episodic; do you see that?
A. Yes. And not chronic, yes.
Q. MH-O or O at the top indicates inmates who do not fit the following criteria, correct?
A. Yes, ma'am.
Q. So inmates that just don't fit anything that's on this list, right?
A. Correct.
Q. And that that last record in 26 indicated that it looked like his level was zero, but the -- Ms. Stem and the other doctors indicated that that wasn't correct, right?
A. Yes.

Q. Warden, in May of this year, you received a letter from Mr. Cole's attorney, correct?

A. Mr. Hird?

Q. I'm sorry. Say that again.

A. Mr. Hird? Mr. Cole's attorney, Mr. Hird? Yes.

Q. Yes. And that letter came by e-mail and by physical mail, correct?

A. Yes.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: We've been going about an hour-and-a-half. The Court's going to be in recess. The time now is 10:30. We'll be back on the record at 10:40. We're off the record.

(Whereupon, proceedings recessed.)

THE COURT: Okay. The Court's back in session. Where is our witness?

MS. BURNS: He ran to the restroom, Judge. He should be right back.

THE COURT: Warden Farris, I would remind you you're still under oath. You may inquire.

Did we lose a lawyer or -- just be advised the Court tries to run this on schedule. And, actually, I'm two minutes late. So when we take a break and I say 10:40, I intend to be back on the record at 10:40.

MS. BLUMERT: May I proceed, Judge?

THE COURT: Yeah, we're waiting on you.

MS. BLUMERT: My apologies.

THE COURT: Yeah, if we go off the record and I say 10:40, I intend to be back on the record at 10:40.

MS. BLUMERT: I apologize, Judge. I thought it was 10:45. Excuse me.

Q. (By Ms. Blumert) Okay, Warden, I believe we were talking about the letter you received from Mr. Hird, correct?

A. Yes, ma'am. I believe you mentioned that.

Q. And then it came by e-mail and then by physical mail, correct?

A. Yes, ma'am.

MS. BLUMERT: What I did, Judge, is I just gave the witness the binder so I can just refer to those numbers. Is that acceptable?

THE COURT: Yes.

Q. (By Ms. Blumert) Turn to Tab 1, Warden. Do you recognize that document?

A. Am I looking at the tab wrong? It's just got your list.

Q. The document that's behind the tab.

A. Okay.

Q. But it has, in the bottom right-hand corner, the yellow Petitioner's Exhibit sticker.

A. Okay. Oh, okay. Yes. Are you talking about the

e-mail?

Q. Yes.

A. Yes.

Q. Okay. What is that? What is the document that is Exhibit 1?

A. It's -- it's an e-mail with supporting documents that Mister -- that basically come from Mr. Hird.

Q. And it was an e-mail that you received?

A. Yes.

Q. When was it sent to you?

A. May 20th.

Q. Who sent it to you?

A. Tom Hird.

MS. BLUMERT: Move for admission of Exhibit 1.

THE COURT: Any objection?

MS. BURNS: No, Your Honor.

THE COURT: Exhibit 1 is admitted without objection.

Q. (By Ms. Blumert) Behind Tab 2, Warden, do you recognize that document, Petitioner's Exhibit Number 2?

A. Yes.

Q. Do you recognize that document?

A. Yes.

Q. What is that?

A. This is a document, basically, from the Public

Defender's Office that was sent to me via e-mail, regular US Mail and basically outlining the attachments, some of the affidavits from doctor -- Dr. Hough and some of the neurologist's report that was kind of tied in together that -- and this was -- basically, I would call it a face sheet for that.

MS. BLUMERT: Move for admission of Petitioner's Exhibit 2.

THE COURT: Any objection?

MS. BURNS: No objection.

THE COURT: Exhibit 2 is admitted without objection.

Q. (By Ms. Blumert) Do you recall, Warden, those six documents that are listed there, whether this letter actually came with those documents?

A. If I recall correctly, I believe the documents were with everything. I don't think -- I don't believe they come separate. I believe they all came together.

Q. And you don't have any memory of any one of those missing, right?

A. No. No.

Q. Petitioner's Exhibit 3, flip to that next tab, if you would, Warden.

A. Yes.

Q. Do you recognize that document?

A. I do.
Q. Okay. What is that document? What's it called?
A. This is basically a declaration by Dr. Snyder, who was -- did the -- the MRI, and basically explaining, basically, his qualifications. And then went into, actually, the structure of -- without getting into detail, the structure of the brain or lesion that he was talking about in the MRI.
Q. And you reviewed that when you received it, correct?
A. Yes, ma'am.
MS. BLUMERT: Move for admission of Petitioner's Exhibit 3.
THE COURT: Any objection?
MS. BURNS: No.
THE COURT: Are you offering 3 through 6?
MS. BLUMERT: I believe it's 3 through 8, Judge. They were all those attachments, and I don't mind admitting them as a group, if Your Honor would like.
THE COURT: Just for time purposes, yes, I would prefer you did, in that manner.
MS. BLUMERT: Okay.
Q. (By Ms. Blumert) Warden, look at the documents behind Tab Number 4, please.
MS. BURNS: We have no objection to these, Your Honor.
THE COURT: To Exhibits 3 through 8, is there an

objection?

MS. BURNS: No objection, Judge.

THE COURT: Exhibits 3 through 8 are admitted without objection.

Q. (By Ms. Blumert) These documents, Warden, are the ones that --

A. Ma'am, did you say 4? Is that what you said, 4? Document 4 or --

Q. I did. But I backed up to 3 through 8 as a whole.

A. Oh, okay.

Q. Those are the documents that came with the letter that you received in May, correct?

A. Yeah. I hadn't looked at the 5, 6, but from that list, yes.

Q. And you reviewed those when you received the letter?

A. Yes.

Q. You read the reports that are detailed in here, correct?

A. Yes, ma'am.

Q. I'm sure it probably took a little bit, right?

A. Yes, ma'am.

Q. And were you able to note in those -- the other reports that they mentioned or other materials that they talked about, correct?

A. Yes.

Q. And in many of those reports, they talk about the other documents that they relied on in making certain opinions or findings, right?

A. Yes. And that would kind of take a little explanation, and I don't know if y'all want me to do that.

Q. Well, so some of them -- for example, Number 7, if you'll flip to that.

A. 7. Okay. I'm on it.

Q. That's the competency to be executed evaluation of Dr. Hough from 2016, correct?

A. Yes, ma'am.

Q. And in that report, Dr. Hough makes an ultimate opinion about whether Mr. Cole is competent to be executed, right?

A. Yes, he did.

Q. And his opinion is that he is not?

A. Correct.

Q. Dr. Hough talks about a whole slew of things, but talks about a bunch of biographical information about Mr. Cole, right?

A. Yes, ma'am.

Q. Previous evaluations from other doctors that he reviewed, correct?

A. Yes.

Q. And those have mixed results. Some of those say

competent, some say not competent, right?

A. Correct.

Q. You don't have all of those reports he referenced, but you were able to read that he did look at them?

A. Yes, ma'am.

Q. And he kind of talks through in there what the gist of that report was, correct?

A. Yes.

Q. He also notes in there -- he notes some of the reports that he received from lawyers that reported difficulties with communicating with Mr. Cole, correct?

A. Yes. And -- well, I'm sorry. I was adding stuff. Go ahead.

Q. And he also makes notes that he reviewed staff observations of Mr. Cole, and that's on, I think, Page 7 of that report?

A. Yes. I'm not sure what page.

Q. The report's pretty long, but there's page numbers and that is on Page Number 7, that he notes he reviewed records that staff --

A. With the prison staff, yes.

Q. Yes. Staff of the prison -- excuse me, notes that the staff at the prison had made. He also notes on Page 9 notes from some cellmates, statements that they made about him staying to himself or being kind of nutty or moody?

A. Correct. Third paragraph, yes.
Q. Dr. Hough also noted the -- the tumor in Mr. Cole's brain, correct, or excuse me, the lesion?
A. The legion lesion, yes.
Q. And that is something that you also saw in Dr. Snyder's report?
A. Yes.
Q. And that's the bulk of Dr. Snyder's report, is discussion of that brain lesion?
A. Correct.
Q. And both Dr. Snyder and then Dr. Hough notes that it's kind of how that lesion affects a person's behavior or their brain, right?
A. Yes. They did have that interpretation of some of the things that -- that they thought could do that. Nothing that I don't think's ever been proven, but in their thought process.
Q. Right. As to -- to the best of their knowledge, this is their understanding of what it can do to a brain, right?
A. Correct.
Q. Dr. Hough also noted that there was a lack of schizophrenia treatment for Mr. Cole, right?
A. Yes, ma'am. There -- he did state that, but just to open up on that, he was never classified or never diagnosed with schizophrenia. We can't --

Q. Well, now, there are -- there are folks in here that did diagnose him with schizophrenia, correct?

A. I've -- all's I've -- I've seen possibly schizophrenic, schizophrenic tendencies, but the full assessment of being an actual schizophrenia, if I missed it, I did, but I have not seen a full fledged diagnosis of schizophrenia.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: Yes.

Q. (By Ms. Blumert) If you will flip to Exhibit 4, and flip to Page 4, which they're kind of cut off, but it's the last page of that exhibit, in Subparagraph 14.

A. Now, I'm looking at Exhibit 4, correct?

Q. Yes. And it's Dr. Hough's addendum.

A. Correct. I seen which one -- what number I'm looking at.

Q. So this is the same doctor whose report we were just talking about, right?

A. Right. I was just seeing what number you were referring to on it.

Q. And there's -- the report's broken out by paragraphs, and there's Paragraph 14; do you see that?

A. That's what I was needing. Okay.

Q. And Dr. Hough indicates that his current observations were consistent with his previous observations, right?

A. Current were consistent -- yes.

Q. And what you understand from reading these reports is that Dr. Hough had been able to meet with Mr. Cole on a few occasions; other occasions he was unsuccessful, right?

A. I would -- I wouldn't call any of them successful, meetings with doc -- I know the attempt was there, but I don't know that he was successful in what you'd call a meeting with him. I'm still not seeing -- oh, okay. Okay.

And I'm reading "consistent." There's things that relay that I've not seen anything where there is a diagnosis of that. He's --

Q. Page 6 -- excuse me -- Exhibit 6, Page 4, which is Dr. Hough's evaluation. On page 4 of Exhibit 6, this is his addendum to his eval that was in Exhibit 7. And under his updated opinions on Page 4, Number 1, he says: "Mr. Cole is diagnosed with chronic and persistent schizophrenia that is extreme in severity."

Do you see that there?

A. Possible. Possible trial of treatment.

Q. Say that again.

A. Well, he's got possible treatment to express a schizophrenic condition.

Q. Okay. Well, on Page 4, it says: "Mr. Cole is diagnosed with chronic and persistent schizophrenia that is extreme in severity," correct? It says that? I'm not asking

you to make an opinion about it. That's what it says.

A. I know, I'm not seeing it. I guess I'm looking wrong.

Q. Tab 6, Page 4.

THE COURT: Counsel, is Dr. Hough going to testify?

MS. BLUMERT: No, he's not, Judge. The Court indicated that it did not want to hear from experts it has reports from.

THE COURT: Right. But do you -- who are your other witnesses?

MS. BLUMERT: We have no more witnesses. Just the warden.

THE COURT: Okay.

Q. (By Ms. Blumert) Do you see that Exhibit 6, Page 4, right?

A. Exhibit 6, Page 4. I'm on that, yes.

Q. Okay. Point Number 1 at the top says: "He's diagnosed with chronic and consistent schizophrenia," correct?

A. Yes, that's what Mr. Hough said, yes.

Q. And then Number 3, he talks about the documented brain lesion, correct?

A. Correct.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: Yes.

Q. (By Ms. Blumert) Warden, in Exhibit 7 -- I know I'm kind of jumping around. Bear with me.

Exhibit 7 is the competency to be executed evaluation by Dr. Hough that we talked about a little bit already, correct?

A. Correct.

Q. And on Page 4 of that, Dr. Hough indicates in the third paragraph, the large section of text, that he's --

A. Page 4, you said?

Q. Page 4.

A. Okay.

Q. Exhibit 7. Dr. Hough indicates that he relied on or reviewed an evaluation by Dr. Morris.

A. 2015?

Q. Yes.

A. Yes.

Q. And Dr. Morris in there had met with Mr. Cole and had written a report about those meetings and his diagnoses, correct?

A. Yes.

Q. And Dr. Morris indicated he'd given him a schizophrenia diagnosis also, correct?

A. I don't understand the wording on that, but, in 2009, he opened the diagnosis of schizophrenia.

Q. And Dr. Hough was reviewing that and incorporates

that into his report, right, the statements from Dr. Morris?

A. Yes.

Q. You received all these reports in this letter on May 20th, correct?

A. I believe that was the day.

Q. And May 25th you received another e-mail from Mr. Hird, correct?

A. Not sure on exact date, but yes.

Q. Sometime after that?

A. Yes.

Q. I'm going to turn your attention to Exhibit 9. If you'll flip to that one. Does that look like the e-mail that you said you received?

A. It looks like the e-mail. I can't -- I can't say I remember this exact e-mail, but it looks like, yes.

Q. You don't notice anything about it that's changed or different from your memory, correct?

A. Well, he states that basically, on this, there are supporting documents on it and stuff, so -- "Please find a letter with additional supporting documents per our request."

Q. Sure. You just -- you received this e-mail that just says this as that text, right?

A. Yes. Yes.

MS. BLUMERT: Move for admission of Exhibit 9.

THE COURT: Any objection?

MS. BURNS: No, Your Honor.

MS. BLUMERT: And the tab right after that, Petitioner's Exhibit --

THE COURT: Hang on. Let me complete my record. Exhibit 9's admitted without objection.

MS. BLUMERT: I apologize, Judge.

Q. (By Ms. Blumert) Warden, if you'll flip to Tab 10. Do you see that document there? It's one page.

A. Yes.

Q. What is that document?

A. It's -- it is an e-mail that's basically referring to the MRI by Dr. Snyder.

Q. It -- was it a letter in the mail or an e-mail?

A. I think -- if I remember right, I think I got both.

Q. The one we just looked at --

A. I know I got a FedEx on it too, but I think I believe it was e-mail too.

Q. You've seen this letter that we're talking about?

A. Yes. Yes.

MS. BLUMERT: Move for admission of Exhibit 10.

THE COURT: Any objection?

MS. BURNS: No, Your Honor.

THE COURT: Exhibit 10 is admitted without objection.

Q. (By Ms. Blumert) And when you received that letter,

it indicated to you that there was attachments with it, correct, some supplemental documents?

A. Yes.

Q. If you'll flip to Tab 11, does that look like the documents that you received with it?

A. Yes. And I remember this document.

MS. BLUMERT: For the record, I'm drawing the warden's attention to Petitioner's Exhibit 11.

Q. (By Ms. Blumert) What is that document, Warden?

A. It's the declaration of Travis Snyder to basically --

Q. It's a second one, a second declaration?

A. Yes. But it's explaining basically what -- his professionalism, what he's done basically in his past, and he gives -- he gives also an update kind of on the lesion and different things and trying to explain a little bit about the the numbering system and different things with the -- with the lesion. So...

Q. And there's some diagrams that were attached at the back of it, correct?

A. When you say "diagrams," it was basically pictures of the brain, basically, with different color system on it.

Q. Do you see the last three pages of that Exhibit 11, are those the ones that you received?

A. Let me look here. Yes.

MS. BLUMERT: Move for admission of Exhibit 11.

THE COURT: Any objection?

MS. BURNS: I have no objection, Your Honor.

THE COURT: It's admitted without objection.

Q. (By Ms. Blumert) Warden, I'll draw your attention to Petitioner's Exhibit 12, which is behind Tab 12.

What is that document?

A. This is mail that came -- believe it came from e-mail and regular mail, but, basically, the requesting on, basically, the information from Dr. Hough that we -- that I proceed with the competency hearing to put forth.

Q. Well, that letter in Exhibit 12 you received on August 1st -- well, it's dated August 1st, correct?

A. Yeah, but I can't say -- I do not know the exact date.

Q. You mean the date that you received it?

A. I don't know the exact date that I seen it. I just can't -- I don't remember that because sometimes something may come and I may not see it until possibly a day later or --

Q. Sure. That's fair. You can't say the date you actually looked at it, that's what you're saying?

A. Right.

Q. Okay. It's dated August 1st, so you would not have read it before that, to your understanding, right?

A. I don't know how I would have. But -- unless it was sent with a wrong date put on it.

Q. You don't disagree with that date, right? Excuse me. You don't have any reason to disagree with that date?

A. No.

MS. BLUMERT: Move for admission of Exhibit 12.

THE COURT: Any objection?

MS. BURNS: No objection.

THE COURT: Be admitted without objection.

Q. (By Ms. Blumert) And that exhibit talks about receiving another report from Dr. Hough, correct, a supplement?

A. Yes. But the supplement was responses -- or responses to Dr. Orth. Is that what you're talking about?

Q. Yes. Did you receive that?

A. Yes.

Q. Okay. Flip to Number 13, Petitioner's Exhibit 13. What do you see on that document? What is that?

A. It's basically almost like a resume, I guess you'd say, but it was from Dr. Hough and explaining his credentials.

Q. Well, what else is in that?

A. Basically, some of the stuff, the evaluations that he has done in the past, not just what -- what his qualifications were, but some of the things he has done in the past and some of the things that he -- a few of the things with OSP Corrections Center. So...

Q. He also talks in there about his evaluation of

Dr. Orth's report, correct?

A. Correct.

MS. BLUMERT: Move for admission of Exhibit 13.

THE COURT: Any objection?

MS. BURNS: No objection.

THE COURT: Exhibit 13 is admitted without objection.

Q. (By Ms. Blumert) And you were able to review Exhibit -- or review the contents of that exhibit when it arrived to you, correct?

A. Yes. Again, I can't say the exact day, but yes.

Q. And in that report, Dr. Hough goes through Dr. Orth's report, right?

A. Correct.

Q. And he talks about his critic of the report? Yes?

A. Correct, yes. Yes, I had that in both reports from Dr. Orth and Dr. Hough.

Q. That he ultimately says that Dr. Orth should be relied upon with a high degree of caution, if at all, right?

A. Correct.

Q. And he also -- in this supplemental, he attaches some DOC from your facility?

A. Correct.

Q. Excuse me. DOC records from your facility?

A. Correct.

MS. BLUMERT: I'd move for admission of Exhibit 13.

THE COURT: It's been admitted.

Q. (By Ms. Blumert) Warden, I want to draw your attention to Tab 15, Petitioner Exhibit 15. Do you recognize this document?

A. Yes. This is -- can't remember the exact date I got it on. It was in July. But, yes, it's from Dr. -- the report that was sent to Judge Frizzell from Dr. Orth.

Q. But you got -- and you reviewed this document, correct?

A. Yes, I did.

Q. And be fair to say that this is Dr. Orth's report of his evaluation?

A. Is this -- that I'm looking at now?

Q. Yes.

A. Yes. I assume.

MS. BLUMER: Move for admission of Exhibit 15.

THE COURT: Any objection?

MS. BURNS: No, Your Honor.

THE COURT: Be admitted without objection.

Q. (By Ms. Blumert) This is the report that, as you understood it, was made by court order of Judge Frizzell in the Northern District, right?

A. Correct.

Q. By joint agreement of the parties that asked for it?
A. Yes, it was agreement on everyone for this --
Q. Agreed not for Dr. Orth specifically, but for an evaluation, right?
A. Correct.
Q. And you know that because you've reviewed the court order, as well?
A. Yes.
Q. I'm going to draw your attention to Tab 14, Petitioner's Exhibit 14. And, Warden, Exhibit 14 looks like the court order for that report, correct?
A. Correct.
Q. Warden, what did you do in response to seeing that letter and the supplements you received from Mr. Hird?
A. When I received the information from Mr. Hird? Are you talking about everything or just one particular item from Mr. Hird?
Q. As you received all those documents, what did you do in response to that?
A. Reviewed them. There's -- there's times within our day that we can -- I can possibly say I'm going to be looking at these documents and possibly spend four or five hours reviewing documents. There's days that I may be able to just get to it 30 minutes and maybe have to review from home. But with documents on these, I reviewed them as quickly as I

possibly could.

Q. But you ultimately -- you read through those?

A. Yes, ma'am. Yes, ma'am.

Q. You also reviewed records from the Department of Corrections, specifically the penitentiary that you're over, correct?

A. I reviewed -- with Mr. Cole, I reviewed -- I didn't go back and look, pull mental health records back from 2003, 2004. I based most of -- majority of my stuff on my evaluations from my staff, from -- I looked focusedly on the court-appointed -- or excuse me, not court-appointed, but the court process where they named a person to look at -- evaluate, which was Dr. Orth, so --

Q. How come? Why that one?

A. Because that's who everyone agreed to do. That's who y'all agreed to do, as we did.

Q. Was there someone that told you to pay more attention to that one?

A. No. I paid attention to all of them. But when you look at it and you're trying to balance some things out as basically I have to do as an administrator, I look at, hey, if there's an agreement with both parties and here's where we are, naturally, that's going to be the one that's probably the head of it, because it is agreed by both parties. Y'all -- yours -- you'd agree with it, we'd agree with it.

So, naturally, I looked at the other reports. I'm not saying that. But what I found in both -- both reports, it's one doctor criticizing another doctor and how they did things. I also looked very heavily in which doctor actually had a personal -- or he had -- was able to communicate to get the things he needed to make a proper diagnosis. So it -- to me, it's not whether -- I've got to do the right thing, try to make the right decision on everything. I'm not going to come up here and say everybody goes to the death sentence or anything like that. That's not -- that's not what I do. So I have to balance those things.

And we -- that's what we had. We had Dr. Orth criticizing Dr. Hough. We had Dr. Hough criticizing Dr. Orth.

Q. So you were looking at those and trying to kind of make a value judgment of which one seemed more correct; is that fair?

MS. BURNS: Judge, I'm going to object to the form of that question. I think that that goes to the ultimate issue in this case. I would ask for her to rephrase.

THE COURT: Objection's overruled.

You can -- you can answer, if you have an answer.

Q. (By Ms. Blumert) Do you need me to re-ask it?

A. Please.

Q. As you looked through those reports, you were kind of

trying to decide which one seemed more valuable or more correct to you; is that fair?

A. It's fair to an extent. But when you look at the certain things -- and, again, as everyone has stated, I'm not a mental health professional. And I know that. But what I have to do is what steps one may have taken that may have given them a better look at what's going on with that individual. It's obvious when you look at it, that, in my opinion, Dr. Orth had that better piece of it.

Now, Dr. Hough would not say those things. But when you look at it and you're wondering, how do you come up with a diagnosis when they -- he doesn't even talk to you, you know, you're basing it -- you're guessing at it, as I feel like that was part of this on all of that.

But I do, I have to weigh in all of that, because there is more than one report, and everything, you know, contradicts things.

Q. So you were weighing in to figure out which one of these doctors maybe did it right?

A. I can't say -- you know, I cannot say who is -- is the perfect person in this. And also what -- my -- and my decision has to be looked at is what state statutes references. And --

Q. Warden, you're not a mental health professional, like you said, right?

A. I am, but I'm just explaining, you know, what -- what I have to look at is is does this inmate know that he has an execution coming. Does he know and understand why he's being executed.

And I think people get -- they go off key with what is actually state statute on this. And sure, I'm trying to weigh in on everything in the world with mountains of this stuff. But when I look at state statute, when I look at the law in those things right there, it's pretty clear to me with this.

And, like I said, I do have to look at what both parties agreed to. I'll do the right thing no matter what. And if I felt he was incompetent, I have no problem with moving that forward. Not a problem at all. But in this case here, I did not see that.

Q. So you were looking and you're trying to decide if you think, based on these, Mr. Cole is competent or not to be executed, correct?

A. Well, yes. Yes.

Q. And so then, ultimately, after you made that -- made that conclusion, you, under the statute, decided not to refer Mr. Cole's case to the Pittsburg County DA, right?

A. I -- correct.

Q. Because it's your understanding that Mr. Cole had not become insane, as the statute uses those words, right?

A. Well, correct. And, basically, like the -- with the state statute and how its wording, yes, I believe he is -- from what I've seen in reviewing all the reports and listening and relying on my staff to what they tell me on a daily basis, from my officers, from my case managers, unit managers, from the mental health, from the doctors, that he is -- he is competent to move forward.

Q. And then after you made that decision, you drafted a letter with that opinion, right?

A. Correct.

Q. And you sent that out to Mr. Cole's attorneys, right?

A. Correct.

Q. I'm going to draw your attention to Petitioner's Exhibit 17, behind Tab 17. Do you recognize that document?

A. Yep, I do.

Q. That's your letter, correct?

A. It's -- it is my letter, yes.

Q. And in that letter, you indicate that you were not going to refer this to the Pittsburg County DA, correct?

A. Correct.

MS. BLUMERT: Move for admission of Exhibit 17.

MS. BURNS: No objection.

THE COURT: Exhibit 17 is admitted without objection.

Q. (By Ms. Blumert) And in the very last paragraph on

Page 2, Warden, you state, about four lines from the bottom, that it's your determination that Mr. Cole has not become insane, correct?

A. Correct.

Q. And so you decline the request to initiate competency proceedings, right?

A. Correct.

Q. Is that still your opinion today?

A. It is.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: Yes.

MS. BLUMER: Judge, just for clarification and housekeeping, did I admit or were 14 and 16 introduced?

THE COURT: 14 was discussed, but not offered. 16 was not discussed nor offered.

Q. (By Ms. Blumert) Warden, if you'll flip to Tab 14. I believe we talked about that already.

MS. BLUMERT: And I move for admission of 14.

THE COURT: Any objection?

MS. BURNS: No, Your Honor.

THE COURT: 14 is admitted without objection.

Q. (By Ms. Blumert) And Number 16, behind that tab, Warden.

A. 16 or 14?

Q. 16.

A. 16. Okay.
Q. Do you see that report?
A. I do.
Q. Do you recognize that?
A. Not right offhand, I don't.
Q. Do you know whether you've reviewed that report? Well, let me ask you this: What is that report, for the record?
A. Well, basically, it's a, excuse me, consultation, but it's dated January 21st, 2015.
Q. Done by Dr. Raphael Morris?
A. Yes. At the top, yes.
Q. And that's the report that we talked about Dr. Hough relying on?
A. That he referred to, correct --
Q. Yes.
A. -- he referred to in his reports?
Q. Yes.
A. Yes.
Q. Were you able to review that -- the consultation, Exhibit 16?
A. Yes, I do believe I have this one. And, again, in this one here, Dr. Hough referred to Dr. Morris as opened -- it's really hard to determine language -- that he opened -- basically opened the determination -- opened it up for a

determination of schizophrenia, if I remember correctly.

MS. BLUMERT: Move for admission of Exhibit 16.

THE COURT: Any objection?

MS. BURNS: Judge, I don't know if -- I don't believe that there is testimony directly to the point of whether Warden Farris reviewed this particular document, if whether it was a factor in him making his determination or giving his opinion today. So...

THE COURT: What's the legal basis for your objection?

MS. BURNS: Relevance.

THE COURT: Objection's overruled. Dr. Hough has indicated he reviewed it and it's part of his evaluation. It will be admitted over objection.

Q. (By Ms. Blumert) Warden, on Page 10 --

A. Of which one?

Q. Of Exhibit 16. I apologize. On page 10 of that, the heading is "Conclusions," can you read the first three lines of that for us.

A. I continued to open that Mr., or maybe that's pronounced different, I'm not sure. Is it Opine?

Q. Opine.

A. Okay. I'm not a good dictionary person. "I continue to opine that Mr. Cole suffers from Schizophrenia, Paranoid Type."

Q. Keep going.

A. Keep going? "Although I was confident that he suffered from the diagnosis over six years ago, there is even more evidence available at this time. Schizophrenia is a neurolo-" -- excuse me -- "a neurochemical disorder" --

Q. That's good. Thank you, Warden.

MS. BLUMERT: Nothing further. Pass the witness.

THE COURT: How do you guys want to -- I don't know how long you'll be on your exam. So the time now is 11:30. We can start that or we can -- we can take a break. It's just -- it doesn't matter to me.

Does anyone need a break?

MS. BLUMERT: I'm okay to keep going, whatever -- I'll defer to the Court.

THE COURT: Are you good, Warden?

How about the reporter?

Okay. You may inquire.

CROSS-EXAMINATION

BY MS. BURNS:

Q. How are you, Warden?

A. Been better.

Q. Hanging in there? Okay. I want to back up and ask you a few questions on your observations or any communications that you've had with Mr. Cole recently. Okay. And this is

kind of a foundation.

How often do -- what's the protocol as far as you checking on him to see what his physical and mental state is?

A. Well, when we start our -- basically, what we call -- our 35-day protocol, it's daily. If -- if there's some reason that I have to be gone out of state or whatever, then I assign somebody that will give me the information; usually it's a deputy warden to make that check, review different things.

MS. BLUMERT: I object, Judge, to discussion of the 35-day protocol. I think that's outside the scope of this hearing.

THE COURT: Is your objection relevance?

MS. BLUMERT: Yes.

THE COURT: Do you have a response?

MS. BURNS: I do, Your Honor. The 35 -- he testified that the 35-day protocol for this particular execution date was initiated on September 15th, and she discussed that. She discussed the 35-day notification or the protocol in her directive of the warden --

THE COURT: There's been testimony about the warden speaking with Mr. Cole within the 35 days, which I understand to be the time frame for the protocol we're here on, so the objection's overruled.

Go ahead.

Q. (By Ms. Burns) You were talking about -- if you can just explain to the Court, so when the 35-day protocol is initiated, how -- you said that he is monitored on a daily basis?

A. Yes, ma'am.

Q. And what kinds of monitoring does that consistent of?

A. Basically, with the cell that he is placed in, we have an officer that sits there and monitors everything, movement, it's 24/7, monitors everything. That is a determination. If, you know, the meal times they get there, certain responses that do -- the canteen person may come or the case manager may come to do their visits, Chaplin, and so forth. It's a pretty detail of things of what goes on all day, but it's 24/7 surveillance.

Q. Okay. And how often are you provided -- when that process is initiated, are you provided with daily updates, or how often are you consulted or do you directly observe Mr. Cole?

A. I do my direct observation when I go to there and usually visit with the officer. Mr. Cole's one that -- you know, unless -- unless it may be a canteen issue -- is probably not going to, you know, talk to you unless you actually go in the cell and sit down with him and do those type of things. But with -- with the -- as reviewing the law book, if there's something that comes up that is of concern -- and, for

instance, it may be something going on with them medically -- then they will notify me immediately to figure out what we need to do with this process and where we need to move forward with it. And it may be anything: I need to get medical up there immediately or maybe having to remove him, take him somewhere. But, basically, to ensure that he is taken care of to the extreme max.

Q. Okay. And so Mr. Cole's 35-day notification, this procedure was started on September 15th of this year?

A. Yes, I believe that was the day, yes.

Q. Okay. And as part of that, was he -- I'm guessing -- well, let me ask you: Was he examined by a medical doctor?

A. Yes.

Q. And who was that doctor?

A. The medical doctor was Dr. Payne.

Q. Dr. Payne?

A. Yes.

Q. Did Dr. Payne consult with you about any observations that he had made of Mr. Cole?

A. Yes.

Q. And were those helpful in you making your determination as to the issue today?

A. Yes, it was.

Q. And what -- specifically, what was helpful for you?

A. It was helpful to get -- trying get an overall

understanding of the thought processes that are going on. And some of the things that we -- we have to do as corrections professionals, if we're -- if there's, in a ways, games being played or something that we're trying to be manipulated on a certain extent. When visiting with Dr. Payne, he informed me -- and, again, I'm not a doctor, but he tried to describe the test that you do with reflexes, with certain types of punctures on your legs --

MS. BLUMERT: I object to this, Judge.

THE WITNESS: -- that he could fully walk.

THE COURT: Hang on a second. If there's an objection, you need to discontinue your testimony.

THE WITNESS: Okay.

THE COURT: What's your objection?

MS. BURNS: As to relevance, Judge. He's opining about things that occurred even after his letter was submitted. And that, essentially, anything after that letter is not relevant to the question --

THE COURT: Well, I've seen a report from Dr. Payne, a progress note in the records that you've submitted.

MS. BLUMERT: I'm sorry. Say that again.

THE COURT: I believe one of your progress notes were from Dr. Payne, are they not?

MS. BLUMERT: I don't think anything after

August 2nd, that I'm aware.

THE COURT: Was that prior to the protocol, the 35-day protocol, the one from Dr. Payne?

MS. BLUMERT: Yes. The 35-day protocol started September 15th. August 2nd is when the warden wrote his letter that he'd made his decision.

THE COURT: Okay. Objection's sustained.

Q. (By Ms. Burns) When you have check on Mr. Cole, personally, has he ever interacted with you in any sort of way?

A. Most of the interactions with Mr. Cole may be -- may be moving his hand to a certain way, may be moving his head to an extent. And never within the cell, and that's pretty typical of all the staff. Like I said, there's some depending on what -- what they're going there for. Mr. Cole will not relay to me about anything. He's not going to talk to me about how he feels and different things like that. He's just not, not going to do that.

Again, Mr. Cole, when we started the 35-day protocol where I sit down and he's brought out of the cell and we meet with everybody -- with the mental health professionals and so forth -- Mr. Cole did communicate and did talk where there are certain things that, you know, we go over in a 35-day protocol, and he did -- and --

MS. BLUMERT: Same objection, Judge, as to relevance for this time period.

THE COURT: Sustained. I want you to stay within the 35-day time period.

MS. BURNS: Okay. Yes, Your Honor.

Q. (By Ms. Burns) So absent -- we're going to -- I'm going to ask you questions about anything outside of that 35-day protocol, okay? And -- but you had kind of other communications and observations of Mr. Cole outside of that; is that right?

A. Yes. Yes.

Q. Okay. And were those similar to what you had observed, what you just testified about, did he ever acknowledge you, speak with you, anything like that?

A. No, not speak --

Q. Okay.

A. -- no. It -- you would get something from him, whether, like I said, a hand raise or something that would show, you know, he knows you're there, but he's not talking to you. That's the way I always took it in the times I went up there to try to communicate with him.

Q. Okay. And did it appear that -- those actions that you've described, did they appear to be in response to something that you had said or something that your staff had said?

A. No. I think -- I think his response was basically I know you're there, it's time for you to go --

Q. Okay.

A. -- that's kind of how I looked at it.

Q. Okay. And how often does Mr. Cole -- how often is he checked on by anyone other than you? And I'm talking about not within the 35-day protocol.

A. Security does checks. And outside of security, security does checks every 30 minutes.

Q. Okay. And would it be fair to say that if security had noticed something -- such as him having mental health issues or seeming to be disoriented or possibly seeing or hearing things -- that they would have notified you?

A. Yes. If there is something that is on a dangerous level, then -- then I'm -- I will be notified on that because there will be certain protocol that we will need to do if it becomes self-harm, if it becomes an assault on someone else or another inmate or so forth. With Mr. Cole, there was many things seen at different times. During 30-minute checks, you're going to be see many different things.

Typically, if we walked up there today, you would see Mr. Cole laying there, may have the TV on, maybe with his headband on, looking at the wall. But as many times as security goes there, there's times where he's up moving around in his cell, there's times when he's up doing his washing, there's times when he's up doing his eating. So -- and those are things they see. So, like I said, I relay -- or I look a

lot on what my staff sees and what they relay to me.

Q. Okay. Outside of the 35-day notification protocol, has Dr. Snyder -- was he -- is he the doctor that you consult with at your facility?

A. Dr. Snyder?

Q. Dr. Payne, I'm sorry.

A. I was like --

Q. I'm sorry. Dr. Payne.

A. Yes. As far as the regular doctor, the physical piece of it, yes.

Q. And has he spoken with you about Mr. Cole's physical health at all?

A. No. The only thing that has come up with Mr. Cole is when we started -- nothing in the past. There was -- when we did start the 35-day protocol -- I know I'm not supposed to get into that -- but nothing in the past physically or alarming about Mr. Cole.

Q. Okay. And so -- and that -- you know, you would obviously been notified if there had been something alarming that he observed?

A. Oh, yes.

Q. And would the same be true with your mental health professionals or mental health workers that are employed at OSP?

A. Yes. Mental health is almost like another entity of

corrections, basically. I don't -- they have their own chain of command. Naturally, it's all under my umbrella, but they have a different chain in command in how they do their reporting, how they do things that, you know, might fall under possibly a HIPAA violation or any of those things like that.

But if there's something that -- now, I wouldn't be notified, for instance, if an inmate started a light depression medication, you know, something like that. What I would get notified, hey, we've got a -- and I'm just using -- I've got a Class C inmate, he's very violent, we think that, you know, there needs to be some more precautions on it. Those are the type things that I would get from my staff.

Q. Okay. And so they kind of -- would it be fair to say that they only really involve you if there is a very serious issue that they feel like you need to know about?

A. Correct. Correct.

Q. Okay. And do you know how involved the mental health professionals that you've testified about, how involved are they in monitoring inmates, raising concerns, you know, putting them on any sort of medication, if they deem it necessary, how involved are they in that process?

A. I have always said this in my 32 years, '3 years of corrections in every role that I've played, I've always felt mental health was to the extreme within corrections, and I've felt like a lot of times it was just maybe over-calculations

and just excessive, you know, in certain areas. And so when I look at mental health in corrections, I think that I have no doubt in my mind that it's -- it's very, very thorough and overly thorough.

Q. Okay. And does that factor into your decision as to whether Mr. Cole understands if he -- that he is being executed and what he is being executed for?

A. With my mental health?

Q. Uh-huh.

A. Not mine personally, but --

Q. Yes.

A. Yes. Like I said, there's -- there's lots of things, and it's not just -- when I'm trying to put a puzzle together, it's not just the mental health. I relied on them, especially in a case like this, very, very -- but I rely on all my staff, every one of them.

Q. And would you agree with me if I said -- if your mental health professionals believed that Mr. Cole either had schizophrenia or some sort of mental health diagnosis, that they would have -- they would have diagnosed him and they would have told you about it?

A. Absolutely.

Q. And to your knowledge, since the time that you've been warden at OSP, has Mr. Cole ever been on any sort of mental health medication for depression, anxiety,

antipsychotics, anything like that?

A. Not to my knowledge.

Q. Okay. And would it also be fair to say that if your staff felt like he needed to be on those medications, he would be on them?

A. Oh, absolutely.

Q. Do you recall if any of your staff -- do you have -- do you work with a psychologist, psychiatrist? Is there a consultant that you work with at the prison?

A. Well, when you say "work with" --

Q. Uh-huh.

A. -- there is people that I get my information from. The majority that what I did get from -- and like I mentioned earlier, that he's retired -- was Dr. Smash. I know there's several references in there with him. So, you know, now there -- it may be two or three or a couple that -- really, there's a couple that, you know, I really rely on that I -- you know, that -- that are going to give me just detailed information. And what I want to know, I want to know it factual, you know, tell me exactly what's going on. If you deeply -- if you feel that there's a problem. So -- and I'm comfortable -- 100 percent comfortable with them -- probably more than -- and I've been over seven prisons in corrections -- more comfortable here than anywhere.

Q. Okay. And I'm glad that you brought up Dr. Smash.

So he has -- the Exhibit 26 of the Petitioner, it appears that these are, at least in some part, medical progress notes, and one of them is by Dr. Smash.

MS. BURNS: May I approach, Your Honor?

THE COURT: Yes.

Q. (By Ms. Burns) Okay. You got this, but I'm just going to show this to you. It's Petitioner's 26. And did you read on there prior -- in your prior testimony that there was some sort of mental health progress, some sort of evaluation that Dr. Smith -- or that Dr. Smash did on this particular date?

A. Are you talking about an evaluation?

Q. Or just an observation.

A. It was more -- more observation --

Q. Okay.

A. -- to me. And when -- and when -- and I understand that's all a piece of it. But his observation is something that you see at different times. Now, he talks about, you know, the cell, you know, being -- and, at times, with Mr. Cole, there's -- there's lots of legal things he keeps in his cell. There's lots of stuff like that. He wears -- when you think that -- and you look and you might see -- and that's with all inmates. Sometimes they might be dingy. A lot of times they're older garments. They like to hold on. Not that they're not clean, but they've got an older look to it. But

with Mr. Cole, in all the observations I've had, he looks very clean. So I agree with all that. I'm not saying -- I believe his --

Q. And the reason --

A. -- I believe his information is correct for the most part here.

Q. And the reason why -- yeah, I do want to bring that up because in 26 -- Petitioner's 26, says Dr. Smash notes that despite the state of his cell and possibly his clothing, did Dr. Smash note that he did not smell bad? Did Dr. Smash note that --

(Court reporter requests clarification.)

THE COURT: You need to answer out loud, please.

THE WITNESS: Oh, am I waiting or answering?

Q. (By Ms. Burns) I'll re-ask the question.

A. Okay. I'm sorry.

Q. That's okay. Did Dr. Smash note in this particular progress note that Mr. Cole did not have an odor about him?

A. Yes, he noted that here.

Q. And did he note that his body and his hair appeared to be clean?

A. Yes.

Q. And that is -- is that consistent, those observations -- are those observations consistent with the times that you have directly observed Mr. Cole, yourself?

A. Yes.

Q. Have you ever observed Mr. Cole -- at any point in your time at OSP, have you ever observed him to smell, be dirty, unkept hair, anything like that?

A. No. And relaying back to that, and I always have to rely back on my staff to inform me of things like that, that would happen to be -- naturally we don't say, hey, we're going to go up there and we're going to do a use of force to make sure that that inmate -- because -- because if he doesn't come out to do the showers, doesn't not necessarily mean he's not clean. I think that's a misconception by a lot. Well, he's not coming out taking a shower. But, with Mr. Cole, he was washing in his cell with the sink and all that.

Q. Okay.

A. So I have never observed him to be, I guess the proper word would be, nasty, or anything like that.

Q. And the fact that you had never observed him to have an unkempt appearance, is that consistent with observation -- well, did any of your staff observe him washing in his cell?

A. Yes. Yes.

Q. Okay. So his -- his physical, clean physical appearance is consistent with the fact that he actively washes himself?

A. Yes. Yes.

Q. Okay.

A. We -- my staff, typically -- we all do -- in corrections, we call it a birdbath, is what we call it. So...

Q. Okay. I think that you noted on direct that Mr. Cole primarily eats things from the canteen?

A. Primarily, yes.

Q. Okay.

A. Yes.

Q. Do you know if there's any particular reason for that?

A. He quotes it or has stated it to other -- other individuals it's because of his religious beliefs.

Q. And are you aware of Mr. Cole's religious beliefs?

A. I know that he has religious beliefs, and he can -- his quotes of them, I've never heard him personally quote to me any. I know he quotes, you know, a lot to different people that may talk to him, so -- when he does open up. But, yes, I'm aware of his beliefs.

And he actually does a lot of -- now he's comparing to his religious beliefs -- fasting. So in my -- in my times, I always get nervous about when inmates -- and several do -- go on a fasting deal because of their religious beliefs. Because, you know, it's my job to keep them safe dearly. So I get a little bit edgy, you know, when that's come to me about that.

Q. Would you say that it's pretty often for an inmate to

go on a fast pursuant to religious beliefs?

A. Would I say what now?

Q. Does it happen often?

A. It depends on your description of often, but it does happen. And what's -- you -- what happens is, the fasting is all different for whatever they may say. It may be a day; it may be a week; it may be until midnight. So they say all kinds of different things.

Q. And I think that it was brought up, the topic of Mr. Cole hoarding his food?

A. Uh-huh.

Q. Have you ever directly observed that?

A. I have not actually seen a hoarding of food. Now, there has been times, if you look in there, you might see some canteen items there. I think when we -- when people say that, with the hoarding of food, it's more precautionary on my staff's part and going a little bit overboard.

Naturally, when a -- like a morning meal is fed, when a noon meal comes, we take that stuff or it's given back or the tray may be given back. Well, he does so much fasting, it's kind of like, well, should we leave it there a little bit longer, you know, to make sure that he'll eat.

Q. Okay. To your knowledge, has Mr. Cole always made sure that he drank plenty of fluids, stayed hydrated?

A. Yes, yes.

Q. So that's never been a problem?
A. Not to my -- not to my knowledge.
Q. And kind of going back to the canteen, does he -- so whenever he has items that he's either bought or ordered from the canteen, what's the process as far as what does the staff do to give those items to him? What do they do?
A. What happens on the canteen, there's the forms that are delivered to the inmates. They will actually put on the forms what they're ordering. Those will be picked up by the canteen specialist. They'll take -- they'll fill -- not just there, but the whole facility, they'll take those, fill those orders, make sure they got -- you know, with canteen, make sure there's money there on their books, and then it's delivered.
Q. Okay.
A. But they fill out the forms for what they want.
Q. So in order for Mr. Cole to be able to receive items from the canteen, he would've had to fill out a form?
A. Yes.
Q. And do you know if he has done that?
A. Yes.
Q. And does he have to sign anything, like an acknowledgment, when he receives those items?
A. Yes, he does.
Q. And has Mr. Cole always done that?
A. Yes. His writing is very, very large.

Q. Okay.

A. And it's -- he -- he'll -- if it's "no" or this, he writes very large in his writing and stuff. But yes, he does.

Q. And those -- those guards or people that are employed to work there, when they bring him his canteen, has -- has any one -- any one of them ever indicated that Mr. Cole couldn't accept the items, didn't understand what he was asking for or basically just did not understand why he was receiving them?

A. No. It's almost the opposite.

Q. Okay. Tell me what you mean by that.

A. What I mean by the opposite of that, from the canteen specialists, from the unit managers and down, that's one way he will talk to you, if there is a canteen issue. And he knows -- sometimes with canteen, when that ordering is made, there may be something that we don't have in the canteen, so there may be a substitution --

Q. Uh-huh.

A. -- that's actually added on that. He knows every time and he does not want substitutions, you know, on his canteen. So he makes it really aware to whoever is delivering at that time. So it's almost he over --

Q. Okay. So he just wants to make sure that he got what he paid for, essentially?

A. Yes. Absolutely.

Q. Okay. Now, I think that there was some testimony

about the fact that he had a wheelchair in his cell?

A. Uh-huh.

Q. Was that -- was he granted permission by DOC to have that?

A. That -- the wheelchair in his -- in his cell was approved by me and me only.

Q. Okay.

A. I approved the chair to go into his cell because I knew -- even on the information that I had received, I wanted to make sure with our movement -- and, again, I'm referring back to the 35-day, to which I don't know if I'm supposed to.

Q. Not if it's within that period.

A. Not just that 35-day. Okay. I was talking about the wheelchair in the 35-day.

Q. Okay. Okay. I will ask another question. Were there any times that you were responsible for discussing his execution date or reading his death warrant to him?

A. Yes.

Q. Do you recall if that happened -- or when that happened?

A. That was on the 35-day.

Q. Okay. Did Mr. Cole -- whenever you were directly observing him, interacting with them, did he ever appear to be afraid of you or of any of your staff?

A. No.

Q. To your knowledge, has anyone of your staff indicated that he appeared to be afraid of them?

A. I've never been approached or anything on being afraid of Mr. Cole.

Q. Have your staff ever given you any details about the quality or the types of communications that he's had with them?

A. Yes.

Q. Has he -- what has his demeanor been like? Has he been rude, polite?

A. You know, with Mr. Cole, I would say you couldn't even classify it as either one.

Q. Okay.

A. I just think it's just real direct. Just for instance, like canteen, it's pretty direct and all that. Not anything that I think is rude or anything like that or disrespectful.

THE COURT: Counsel, I'm going to have to stop you at this point. There's a courtroom deputy that's -- his last day is today. I've told him I would buy his meal, so I'm going to have to take a break.

The time now is 11:58. Just out of an abundance of caution, if we get held up, let's get back to the record at 1:30.

Court's in recess. We're off the record.

(Whereupon, proceedings recessed for a lunch

break.)

THE COURT: We are back on the record. It's 1:30.

And, Warden Farris, if you would, I would remind you you are still under oath. If you can retake the witness stand.

THE WITNESS: Yes, sir.

MS. BURNS: And, Your Honor, before I continue with my cross-examination of the warden, I just wanted to make a quick record over an issue that came up this morning. I know that this court's ruling was that, as far as for purposes of this hearing, we were not the allowed to get into the 35 -- anything that occurred after, I believe, August 2nd. I would ask for this Court to consider the communications that Mr. Cole had with Warden Farris during -- on September 15th, which was the first day of his 35-day notification.

And the reason for that is because I think that the information that Warden Farris would be able to provide is directly relevant to this issue, and that's also supported by the fact that, you know, Mr. Cole's competency is fluid. And so he has -- the warden has a continuing duty to monitor and observe Mr. Cole and make sure that the opinion that he testified to is the same opinion that he has as far as competency up until the day of execution.

And so I think that confining this particular

hearing to only the dates that Defense requested will deprive this court of that relevant information. I think it's necessary. And I understand that if this court does not want to get into that, I would like to make an offer of proof for the record, at least.

THE COURT: You don't need to make an offer of proof. That was a very limited ruling with respect to the 35-day protocol. That -- there's an abundance of documents. I have 27 exhibits up here that goes into matters way outside of the 35 days, that I think you misunderstood the court's ruling. With respect to the exact subject he was testifying to, it was outside of that and was not contained within that 35-day protocol, which is what you were discussing with him. That's a very limited ruling. I've got a 2015 report in here from a doctor.

MS. BURNS: Okay.

THE COURT: There's multiple records in here that are outside of 35 days. I'm not saying that you can't ask him about anything that didn't occur within this little narrow window, because his competency is fluid. I've got records from back to 2003, there was a jury trial on competency of Mr. Cole.

MS. BURNS: Okay.

THE COURT: So don't -- don't think that that's the court's ruling.

MS. BURNS: Okay. I guess I misunderstood then.

THE COURT: You don't need to make an offer of proof on that. That was very limited to the exact subject that was being questioned about at that time.

MS. BURNS: Okay. Yes, Your Honor.

MS. BLUMERT: If I may, Judge. I think there may be some confusion. My objection is that I do not believe anything the warden testifies to during the 35-day period is relevant, because he rendered his opinion prior that. And so I think the analysis is about his decision prior to that, and it's my understanding -- correct me if I'm wrong -- but the AG wants to talk about what happened during the 35-day period, which I would object to, but I think --

THE COURT: I wan to hear about what happened in the 35-day period because if he becomes incompetent in the 35-day period, this is a whole different animal. I mean, it's highly relevant. If he -- if he's not able -- he's got people monitoring Mr. Cole 24 hours a day, that's his testimony. If his condition changed or something occurred, I want to know about it.

MS. BLUMERT: Well, so I think she was asking to flesh some of those things out, which we were objecting to, but I think it's -- that's my understanding is that you want to talk about what happened in that period?

MS. BURNS: I do. So based on --

THE COURT: Well, the objection's overruled.
MS. BURNS: Okay.
THE COURT: Can we proceed?
MS. BURNS: Yes, sir.
THE COURT: Okay. Ask your next question.
MS. BURNS: I am ready to proceed, Your Honor.
MS. BLUMERT: Judge, may I just have a standing, ongoing object to content for the 35-day period?
THE COURT: Yes.
MS. BLUMERT: Thank you, Your Honor.
MS. BURNS: May I inquire, Your Honor?
THE COURT: Yes.

CONTINUED CROSS-EXAMINATION

BY MS. BURNS:

Q. Okay. Warden Farris, we're going to go back to the 35-day notification period, which I believe you testified this morning that it started on September 15th of this year?

A. Yes, ma'am.

Q. Okay. And can you just explain for the Court what exactly is involved, what happened on September 15th as far as Mr. Cole and this particular protocol?

A. With the 35-day protocol, it's basically meeting with the inmates, making sure that the understanding is there of what is happening and what we're going to be moving forward with. That entails reading different things. Some of our

protocol with say, for instance, the canteen, the property, burial arrangements, all of those things come into the 35-day protocol, the last meal, you know, those type of requests too. But that -- that meeting with him, along with other professionals -- and when I say that, you know, you've got mental health there also that has that meeting with him and let him know, you know, how they will be checking on him and those type of things. That's the main thing with the 35-day protocol.

The inmates, according to our protocol, we move to a certain area of the facility. He is moved from another cell, which is the execution cells. We have four of those, which is aligned with our chamber. So that, making sure he understands going through his property and making sure everything is in compliance with those things, and for me to see is there anything he needs outside of that.

Q. Okay. And is this incorporated -- this particular protocol, I'm guessing, it's in DOC policy?

A. Yes, ma'am.

Q. And is the underlying purpose of this protocol to provide you with continuing information to ensure that the inmate remains competent and understands what is going to happen and why?

A. Absolutely.

Q. Okay. Okay. Now, on September 15th, you initiated

that with Mr. Cole, correct?

A. Correct.

Q. And so Mr. Cole was taken from the -- I guess the normal cell that he is in and he was taken to one of the execution cells?

A. Correct.

Q. Okay. And I think that you testified this morning that he has an individual who is monitoring him 24 hours a day?

A. Yes, ma'am.

Q. And do they keep any records of any behavior that they observe of Mr. Cole during that period?

A. Yes. The records will basically be, you know, when people visit with him, if there's anything unusual, then that is placed in there too, did the inmate, you know, eat at a certain time, is it delayed, who actually came up there, whether it be mental health, all those things. There's no limit to what they can put in that log.

Q. Okay.

A. So some -- as we're logging, we keep the mandatory stuff that we need to know, you know, if there's something that I got to find out quickly, if there's a medical emergency or something there that I've got to make a decision on really quick, I need to know right then. But just the typical deal until I do my observation, I don't need to have all that at that moment.

Q. Okay. And is it correct that -- or would you say that this is correct, that the individual who is monitoring Mr. Cole during this period, are they required to make notations or give an update like every 15 minutes?

A. Yes.

Q. Okay.

A. Yes. There will be continuous updates. And it may be status the same or different things on that. So...

Q. Okay. And so on September 15th, I believe you testified previously that Dr. Payne did a medical evaluation of Mr. Cole; is that correct?

A. Yes, ma'am.

Q. And do you know exactly what Dr. Payne noted pursuant to that evaluation? What did he tell you?

A. Dr. Payne -- and this -- when I say this with the 35-day protocol, it's not that there hasn't been checks before that. I have to get -- as we start it, again, I have to get refreshed on those things. Mr. Payne advised me that with the test that he has done on Mr. Cole, that he is able to function, he's able to walk and he's able to move, and he -- he --

MS. BLUMERT: Objection, Judge. We don't have -- this is information and statements he's testifying to, we do not have any documents, notice, anything about this. We requested it in discovery and we have not received any of those. This is the first time I'm hearing any of it.

THE COURT: What's the legal basis for your objection?

MS. BLUMERT: So it should be excluded because it wasn't provided to us under discovery code, proper notice and that's the remedies exclusion.

THE COURT: Were these records provided to the defense team?

MS. BURNS: I'm going to allow my co-counsel to answer.

MS. WILLIS: Your Honor, if I may respond. Discovery is still ongoing. I don't even have these records. Our discovery deadline is October 19th. And I also believe that these records must be requested via a court order. They cannot be turned over without a court order, so we would need a specific court order for those records.

THE COURT: There has to be a waiver of the privilege. I don't have any documents to indicate that that was waived, and I'm going to exclude this evidence based upon several reasons.

But it's not been exchanged between the parties. Number two, it's rank hearsay, unless it fits under an exception, which I don't believe it does at this point.

Q. (By Ms. Burns) And so after --

THE COURT: Hang on a second. It -- I didn't mean to interrupt you.

Isn't there one of your records, the progress note from -- I can't find it, but I could have sworn I saw something from Dr. Payne.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: It's a real short progress note. But in my records, I don't find it.

Warden, I know -- I believe you testified to it this morning.

THE WITNESS: With Dr. Payne, sir?

THE COURT: Yes, sir.

THE WITNESS: Yes. Yes.

THE COURT: While they're looking, go to your next question, please.

Q. (By Ms. Burns) Warden, so he was -- so on September 15th, in addition to being evaluated by Dr. Payne, was he also observed or evaluated by anyone for mental health?

A. Yes, Ms. Tina Fuller.

Q. Okay. And do you recall about how long Ms. Fuller observed him or performed an evaluation? I don't know which.

A. Well, with that particular time on that, when we were starting the 35-day protocol, what she does is explain the processes to him that's going to happen, that he's going to be checked. She didn't actually do the check right then in the 35-day protocol.

Q. Okay.

A. Now, I -- I have talked Ms. Fuller, you know, at times and have gotten the same information from her that is consistent with all the staff members that I've got on the evaluation of it, and she's 100 percent he's -- he's competent.

Q. And so the -- when you say that the information you got from Ms. Fuller was consistent with everything else you've been -- I guess you've received from your staff, would it also be consistent with your determination that Mr. Cole is competent for execution?

A. Yes.

Q. As part of this 35-day protocol -- I kind of touched upon this this morning -- but is part of that you essentially read to him his either judgment and sentence or death warrant?

A. Correct.

Q. And did you do that with Mr. Cole?

A. Yes.

Q. And can you tell the Court what happened when you did that and if he ever responded to you?

A. In -- in the process that was going, Mr. Cole basically, in how he was sitting basically at the table, didn't ever make eye contact, but in reading it, when I read that, I'm always -- when I'm reading stuff like that, I watch behavior also. Mr. Cole -- after I would read a little bit of it, then I would also always ask, "Are you understanding?" And I'd always get like a head nod for a yes, is what I took it, he's

understanding what I'm saying and what I'm talking about.

Q. Okay. And as far as the specific questions that are most relevant today, did -- did you ever ask Mr. Cole during this conversation if he understood that he had an execution date set and when that was?

A. Yes, he did know what the process was. Of course he's been through the process before, so he knew. The biggest concern with Mr. Cole was to basically get that done, the way it seemed, to get it done, to get out of there. And he wanted to make sure he had certain things before his execution, and those certain things would be to make sure he's warm, which I did approve him to have two coats extra than what he had. So those were the main things, make sure that he could get his canteen, and the other things that, you know, he did not want, you know, which, last meal, and those type of things.

Q. Okay. And then kind of I want break down those answers. So did he specifically talk to you about his concerns about being warm when you had this conversation?

A. Yes.

Q. And he was also concerned about the food that he would get from canteen?

A. Yeah. He wanted to make sure -- well, not what he would get from canteen. I'd explained -- but in our protocol, our policy, we can't actually give them canteen until after ten days.

Q. Okay.
A. So he was concerned about that.
Q. That he may not be getting canteen?
A. That he may not be getting canteen. But that's not unusual for the protocol on -- for every inmate to not get their canteen for ten days, so it's not something -- that's something you see from every inmate on the canteen part.
Q. And he actively expressed concern over making sure that he stayed warm in the execution cell?
A. In the cell he was being placed in.
Q. Okay. Got ya.
A. Because he basically stays cold a lot, so that was probably the biggest concern that he had. He said -- or he nodded that he understood all that process. I felt, you know, it was almost boring to him, you know, to hear this again, you know. But, like I said, I felt that he understood completely what I was saying.
Q. Did he ever -- did you ever ask him if understood why he was being executed?
A. Why, that was not a question that I personally ask him then. I know it was asked on -- when the stuff with doctor -- Dr. Orth had made sure that those questions were asked and completely understand that. But I did not personally ask that question, "Do you know why?"
Q. Was there any other question, other than what we've

discussed, that you did ask him during this period?

A. Not particularly a question. What I do in those situations too is -- it's a very uncomfortable situation for everybody. It's nothing that anyone likes to do and all that. So what -- what I try to do is -- and Mr. Cole's a little bit different than that, but what I try to do is basically talk, let them know that we're here for them, you know, I'll be there every day. And that's what I reference to him, I'll be up here, you know, to make checks on you every day. Please -- please let me know, or my staff know, if there's anything, you know, that we can help you with during this process.

Q. And did he appear to understand what you were telling him?

A. Yes.

Q. Did he ever vocally respond?

A. He -- with him, the actual vocalization was all about those type of things -- when I asked him, "Do you understand?", it was a head nod.

Q. Okay.

A. But the conversations would start up with the canteen, to make sure he's being warm, making sure he had everything with his -- all of his materials, which is one cubic foot that we can allow, you know, in the cell, to make sure he had all that stuff too.

Q. And, Warden, the more that you spoke with him during

this period, during the 9/15 conversation that you had to him -- had with him, did it seem to you the more that you engaged him in conversation, the more responsive he ultimately became?

A. Yes. I think if you -- if you're there with Mr. Cole and you engage in something, he's going to -- he will respond in some way. And sometimes it may not be -- he may -- if he decides he's not going to talk to you, you know, he'll give you a hand, you know, or a nod, you know, and so forth. It just depends on him.

Q. Okay. And I know that, you know, you've previously testified that you're aware that Mr. Cole has very strong religious beliefs?

A. Yes.

Q. And as part of this 9/15/22 conversation, did you go over, or are you supposed to go over, any paperwork regarding burial, cremation, what happens with his things after the execution?

A. Yes. Yes.

Q. And did you do that with Mr. Cole?

A. Yes. And there is -- there is forms that -- sometimes when we start that protocol, it's not just, you know -- they don't know exactly at that time. So what we do is we leave them the forms and they'll return them to us when they decide. And sometimes it takes a little while for that. And

like Mr. Cole, he basically said right off he did not want no last meal. But I make sure he still has a form in case he changes his mind on that.

Q. To your knowledge, did Mr. Cole express any preference or intent as to where he wanted to be buried and if he could have anyone assist with that?

A. He -- he was unsure at the time.

Q. Was there any point after that time that any of that information came to your attention?

A. As far as the burial?

Q. Uh-huh.

A. Not to my attention. I know that there was some attempts from him, you know, to call, I believe it was another Chaplin that was recommended. I know there was attempts, several yesterday, to make that call, but there was no answer on that part of it.

Q. Okay. And just a little bit more details on that. Did your facility -- did y'all provide him with a particular phone number to call the -- the individual --

A. Yeah. The numbers will be -- it depends on who is approved for that piece of it too. If it's a particular Chaplin and all that, you know, our Chaplin, you know, kind of organizes that. But the phone process was taken to him on the 28th. And, actually, he -- the unit manager actually made sure he knew how to operate that phone. And the main calls, I

believe -- I'm not for sure if another went out today or several went out today, but I know some has went out or attempted to go out.

Q. And you said that he was given a -- I guess taught how to use the phone on the 28th of September?

A. Yes, ma'am.

Q. So this month. Okay. And to your recollection, the most recent phone calls he's made happened on the 29th; is that what you said?

A. Today's the 30th, correct?

Q. Yes. Yes, it is.

A. I believe it was the 28th that the calls -- the majority of the calls were attempted.

Q. But your -- your facility has documentation that he has made phone calls?

A. Yes. Yes. The attempts to make those, yes.

Q. Do you know who he was attempting to call specifically?

A. Not specifically. I -- what I -- what I was relayed to that that might have been the Chaplin or try to get an attempt to the Chaplin that was recommended to him. So that's -- that's what I was thinking the attempt was made, because he hadn't actually put anybody forth yet.

Q. And just for clarification, the Chaplin at your facility was the one who kind of initiated or gave the

information of this other one?

A. Well, the actual -- with the phone piece of it, was actually the unit manager --

Q. Okay. Okay.

A. -- the unit manager, you know, which there are daily visits to. Now -- and he has opened up quite a bit, you know, to the unit manager there too. So...

Q. Was that recently?

A. Which -- which part, ma'am?

Q. He's opened up to the unit manager.

A. Yes, it's actually -- it's -- that unit manager -- that particular unit manager, that's only been in that spot for the unit management I think approximately two months now. And she's been real thorough about, you know, trying to visit, you know, all the -- and make sure that -- and for some reason, you know, he's -- according to her, he's -- he's opened up to her.

MS. BLUMERT: Objection. Objection, Judge. The same objection as discovery. This is all hearsay as well. I have never heard any of this. I've never seen any of these reports. This is the first time I'm hearing all of this.

THE COURT: Sustained.

MS. BURNS: Your Honor, if I could make a record on that. If the Court would just entertain the fact that, you know, this is being offered to show that he did make phone calls, not necessarily it's offered -- it's not necessarily

offered for the truth of what those conversations -- or how they happened or what the content of them were, it's simply to show this Court that he has been engaging with staff of the facility.

THE COURT: Okay.

MS. BURNS: Thank you.

Q. (By Ms. Burns) Okay. I want to talk a little bit about DOC's or OSP's efforts to try and facilitate communication between Mr. Cole and his defense team. Okay.

To your knowledge, has this facility, has it ever prevented his defense attorneys or any person on the defense team from being able to meet with him?

MS. BLUMERT: Object, Judge. Object to relevance. There are a lot of records about this. And this is certainly an enormous issue. But it's not relevant for the purpose of this hearing.

MS. BURNS: It is relevant.

MS. BLUMERT: This hearing --

THE COURT: The Court will decide whether it's relevant. So let's make that clear, who's the gatekeeper on that.

What's the basis for your objection? Relevancy?

MS. BLUMERT: That it's not relevant, Judge, because the issue was what the warden knew and what he knew about this facility. Not necessarily what Mr. Cole is saying

to us because our communications are not at issue for this purpose. They become relevant at a competency trial, they might become relevant in that circumstance, but this one where we are looking at the warden's decision to make a referral to Pittsburg County, I don't think the other parts of that's relevant.

THE COURT: Well, there's documents that I've seen that -- where that issue's been raised. It's been raised in Dr. Hough's -- did I say it -- how do you say his name?

THE WITNESS: Hough.

THE COURT: Hough. Dr. Hough's report. It's been raised by multiple parties involved with the defense team. So if there's any efforts by OSP to thwart your ability to have contact with your client, I want to know about it.

So you may proceed. Counsel, we're covering a lot of the same ground that I heard this morning. This -- a lot of this I've heard. And I promise you, I'm going to read your records. So just keep that in mind with respect to your questions.

Ask your next question, please.

MS. BURNS: Thank you.

Q. (By Ms. Burns) And so, Warden, I believe you said that DOC has never tried to prevent anyone from his defense team from meeting with or communicating with Mr. Cole?

A. Never.

Q. And the reason I'm asking this is because I know that you reviewed Dr. Hough's reports.

A. Yes.

Q. And do you recall how many times Dr. Hough came to OSP to attempt to meet with him?

A. Not -- do not know the number of times. I know there was never any communication with that. And to -- if I can add to that also, we -- if an inmate refuses to see something as a legal -- unless it's -- unless it's court ordered for me to do something to bring the inmate here or anywhere else, we -- we cannot go in there and remove an inmate and force them to talk to an attorney. We cannot do that. Only -- only if I'm court ordered he's got to be somewhere at a certain time, then we go in there and we make sure that that happens. But we've never done anything to say that they couldn't talk to him.

Q. And so did the fact that -- when you reviewed the information, the reports from Dr. Hough, the information that Defense Counsel has discussed with you this morning, did the fact that Dr. Hough never had a substantial or lengthy conversation with Mr. Cole, did that affect your determination of -- or give any more weight to Dr. Orth's report?

A. The way Dr. Hough -- in reviewing that and how it was -- how I observed it, it was very concerning. And what I mean by that is if any of us was to walk up and see that at just one hour during the day or just walk up, you would see,

most of the time, the same thing from Mr. Cole. And you could say, hey, he's not responding, he's not doing, anything like that.

Now, the majority of that is because he sleeps during the day. So it was very concerning to me how this broad evaluation could come out when you're not -- you're not getting no -- you're not hearing nothing from the inmate. He could go to every cell at OSP, maximum security piece, and make that same evaluation right now.

Q. And would you agree with me that Dr. Orth's examination is the most recent examination of Mr. Cole?

A. Yes, ma'am.

Q. And would you also agree with me that, according to his report, it lasted approximately 150 minutes?

A. Yes, ma'am.

Q. And so Dr. Orth met with Mr. Cole and evaluated him for 150 minutes?

A. Yes, ma'am.

Q. Do you recall that he put in his -- or reported that he was able to engage Mr. Cole in conversation?

A. Yes.

Q. Do you remember how Mr. Cole responded to him?

A. It was -- the response was -- basically, when you look at the responses, the questions that were asked, it was a normal response, basically like we're sitting down and we're

having that conversation --

Q. Uh-huh.

A. -- you know, where we're talking one-on-one. The questions that were asked, I felt, were very relevant, relevant to state statute, relevant to how we proceed on this, and the main things of, you know, do you understand why you're being executed, you know, and those things, do you understand or know the date you're being executed, and those whole processes in that.

Q. Do you recall reading in Mr. -- or in Dr. Orth's report that, from the outset of the evaluation, Mr. Cole indicated that he understood that the purpose of it was to -- and I'm going to quote -- "To see if I'm mentally fit for court and competent here to see if I can go ahead and, I guess, be executed."

Do you remember reading that?

A. Yes.

Q. And do you recall reading that he also indicated -- and I'm quoting again -- "The State of Oklahoma is executing me for the killing of my daughter"?

A. Yes.

Q. Do you recall reading in this report also that when Dr. Orth talked about or tried to get his understanding of, you know, what he thinks will happen when he is executed, do you recall him saying that his, you know -- he will cease to exist

on this corporeal plane and hopefully he will go home to be with his father?

A. You talking about in the reports?

Q. Uh-huh.

A. Yes.

Q. Do you also recall that Dr. Orth noted no delusions that he was some sort of Messiah or divine spirit or anything like that?

A. Yes. It did -- that was noted. One thing that was noted too that was -- that really jumped to my attention is that he did understand why he was there and he did make the comment, you know, that Dr. Orth I know is here to make sure that I'm not seeing -- I believe it was little green men.

So he knew exactly why he was there. He understood the whole process and so forth.

Q. Do you also recall reading that -- you know, discussing what he desires when -- to -- what he desires be done with his body when he is -- when he has passed, he talked about, if it were up to me, I would be buried in a small, modest wooden box in a Jewish cemetery somewhere in Tulsa?

A. Yes.

Q. Do you recall that Dr. Orth made -- or observed no evidence of any sort of mental impairment?

A. Yes.

Q. That he diagnosed him with no sort of mental illness?

A. Correct.

Q. And that was based on this conversation that was a 150-minute conversation?

A. Correct.

Q. And just a couple more questions, Warden.

Did it also factor into your decision to essentially give greater weight to Dr. Orth's evaluation, did the fact that he did reference Dr. Hough's prior evaluation and he referenced quite a few other documents prior to meeting with Mr. Cole?

A. Are you saying did it have any weight?

Q. Did -- did that make an impact on you? Did that make you believe that Mr. Orth was more thorough and probably had more reliable information?

A. Oh, in no doubt. And like I said, when I am trying to put the puzzles -- or the pieces of this puzzle together -- and, again, when you've got two conflicting doctors, it's almost like you try to see which one was more thorough, which one actually got -- was able to retrieve the most information to make a proper diagnosis.

Q. Uh-huh. Did you -- do you recall reading in Dr. Orth's report that Mr. Cole spontaneously indicated to him, as far as execution dates are concerned -- and I'm quoting -- "As I understand it, the first execution is on August 25th. Then the next one is September 23rd. So I'm third on the list.

So sometime later in October, I believe, possibly the 20th. And that they want to make sure that I'm competent."

Do you recall reading that?

A. Correct.

Q. And do you recall reading that those were Mr. Cole's words?

A. Yes.

Q. Is the -- are the observations and the conclusions that Dr. Orth reached in his report, are they consistent with the observations of yourself and your staff of Mr. Cole?

A. Very consistent.

Q. And how so? Can you just kind of explain that.

A. Well, what the -- the evaluation of Dr. Orth, when you read it, is something that with long-term viewing of Mr. Cole, his -- and, again, not just the mental health professionals, but everyone involved in that that see certain things, that see certain things that you wouldn't normally see when you -- if you walked up there right now. So I had to weigh all those things and put them all together and do that. But Dr. Orth's related to what every staff member is -- has said in the past, is saying now.

Q. Would you agree with me that Mr. Cole consciously decides who he chooses to talk to and who he doesn't?

A. In my opinion?

Q. Yes. In your opinion.

A. In my opinion, yes. And in my opinion, it depends on the circumstances or -- now, one thing that was done -- excuse me -- with Dr. Orth, it was done outside of the facility. So that -- I think that, you know, helped out. I think with Mr. Cole, it's prison staff, prison food, is something that he's not going to really open up to unless it's something that's concerning, a canteen problem, something like that, so then he will open up on that extent.

Q. So would you -- would it be your opinion that he opens up and speaks to people based on what his needs are?

A. Correct.

Q. Okay.

MS. BURNS: Your Honor, I'm going to pass the witness.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. BLUMERT:

Q. Warden, you know the clinical standards for rendering opinions on mental health diagnosis -- mental health professionals?

A. Could you repeat that?

Q. Do you know the clinical standards for rendering opinions about individual's mental health?

A. Do I know the standards of it?

Q. Yes.

A. No, I could not repeat them to you, the standards.
Q. Do you know the clinical standards for diagnosing people with mental illnesses?
A. I'm not really understanding what you're asking here.
Q. You don't know the medical standards or the clinical standards for diagnosing people with --
A. I'm not a --
Q. Let me finish, Your Honor -- excuse me -- Warden, let me finish. You do not know the standard for a diagnosis for mental health by professionals, right?
A. I do not -- how they -- I do not --
Q. You do not? It's yes or no. You don't know?
A. -- their solutions, no.
Q. Dr. Orth did no testing of Mr. Cole, correct?
A. If he --
Q. He didn't do any tests, right?
A. Any --
Q. Testing.
A. He -- well, as far as the communication, the observation --
Q. He didn't -- do you know what an MMPI is?
A. Yes, I do.
Q. Did he do that?
A. No.
Q. Did he do any of these other tests, psychological

tests?

A. Not that I know of.

Q. Okay. And Dr. Hough didn't either?

A. Nope, he did not.

Q. Do you know the only doctor who did?

A. No.

Q. Dr. Morris did. Did you read his report, right?

A. That did the MMPI?

Q. Dr. Morris did testing, correct?

A. He did. He did.

Q. And he's the only doctor -- excuse me -- let me back up.

Dr. Morris did those tests. He found him incompetent and diagnosed him with schizophrenia, correct?

A. According to the document, yes.

Q. In 2015 is when that was?

A. Correct.

Q. The mental health folks that come around in the facility often visit Mr. Cole through the bean hole in his door, correct?

A. Majority of the time.

Q. No doctor from the mental health unit at OSP has done a mental health evaluation on Mr. Cole ever, correct?

A. Are you talking about the MMPI?

Q. No one's ever done a mental health evaluation on

Mr. Cole, correct, at OSP?

A. The expanded level of a mental health evaluation, I can't say what exactly they done on everything. I -- when they do their thing with Mr. Cole -- again, I'm not a mental health professional. So their testing techniques and what they do and all that, I -- I am not aware of all the things that it comes up with to determine that. So --

Q. So you're not aware of any mental health professional at OSP doing a specific evaluation on Mr. Cole?

A. A specific evaluation? No.

Q. Okay. You're not aware of anyone at OSP that's diagnosed Mr. Cole with malingering, correct?

A. With what?

Q. Malingering.

A. That he's been diagnosed with it?

Q. Right.

A. No.

Q. The 35-day protocol is for all inmates, correct, all inmates that are at the point --

A. Yes.

Q. -- of 35 days out from an execution?

A. Correct.

Q. That's not unique to Mr. Cole?

A. No.

Q. A lot of that protocol is set up to prevent folks

from taking their own lives, correct?

A. I think there's -- there's a lot of reasoning for a 35-day protocol.

Q. But that's part of the reason?

A. Correct.

Q. To keep a full observation on them, lights on, all of that, right?

A. Yes. But that's not determined with the 35-day protocol because something that says, "This person has a mental health thing," that's something that is mandatory for all of us to do --

Q. And that's not my question, Warden. The question is: Part of that protocol is to prevent any inmate from taking their own life regardless of their mental health status?

A. Every process we do is for that, every process at the facility.

Q. When Mr. Cole is actually transported to the 35-day cell, he was taken up there on a gurney, correct?

A. When he was taken to his cell?

Q. Up to the 35-day cell.

A. Yes, ma'am.

Q. And there were six guards that took him up there on that gurney?

A. There were six guards that took him up there. And the reason why --

Q. There -- there were six guards that took him on the gurney, correct?

A. They have to pick up the gurney.

Q. Right. How long do you think you spent with Mr. Cole doing your packet interview?

A. The 35-day piece?

Q. Yes.

A. Maybe an hour-and-a-half, maybe. I'm not sure.

Q. Most of his answers were nods or single words, correct?

A. Not single words.

Q. Most of his answers were a nod or a single word?

A. Depending on what the things were, depending on what -- what was being asked of him.

Q. He wasn't saying long sentences or paragraphs or narratives or anything, right?

A. No, not -- not -- like when we talked about the cell conditions and stuff like that and how he wanted to stay warm, it was a type of conversation with that. But that was something he really wanted to be engaged in to make sure that he had.

Q. That was not my question, Warden. The question is: He did not give long, narrative answers in the bulk of that interview, correct?

A. Not to some questions. Or not to some parts of it.

Q. So you're telling me that this man that's sitting right here slumped over in this chair was talking at length to you?

A. Yeah, I sure am.

Q. Long sentences?

A. Long -- well, I don't know what you mean by "long sentence," but we had discussions on the cell conditions and the stuff as far as what was going to be allowed in his cell. He actually talked and expressed that stuff.

Q. What did he say?

A. The exact words?

Q. Yeah.

A. I'm not going to repeat the exact words on a conversation, but he was concerned about the burial, he was concerned about the property that he could have in his cell, he was concerned -- main concerns were to make sure because he explained how he gets cold, he's always been cold. The cells that we got, there's sometimes they get to a certain --

Q. And, Warden --

A. Well, you said -- you asked what he said. So I was telling you.

Q. You're not telling me what he said. I'm asking you for the words. What did he say?

MS. BURNS: Your Honor, I think he is indicating what Mr. Cole said. Now, if she's asking for him to a direct

quote, I don't think that's a fair question.

THE COURT: What's the legal basis for your objection?

MS. BURNS: Lack of -- I mean --

THE COURT: There's not one, because you just don't like the answer. He can answer -- if you don't know verbatim, just answer with what you believe, generally, he said. If you know that.

THE WITNESS: I just did. I can't repeat the exact words. If I had a recorder, I could let you listen to it, but I can't repeat the exact words. I know what the conversations were about.

Q. (By Ms. Blumert) Did you make a report about this or write these things down as he was talking?

A. Did I make a report on what he was saying?

Q. On your discussion with him.

A. No.

Q. His concern with warmth was for the cell that he was in right then, correct?

A. No. It was for the overall -- what he considered was a standard for, basically, all the cells at OSP.

Q. But he's concerned with being warm in the cell right now, right, as opposed to being concerned with being warm while he's being executed, right?

A. The deal with him was to stay warm, continuously. In

the past when he's in the 35-day protocol, he wanted to ensure because, from what he stated, is that he's always had the experience of being cold. He didn't know what that was. But he felt always cold. And sometimes the vents he felt like were clicked on too high and different things like that. So he wanted to make sure that no matter what the process we were in is to make sure he stayed warm. And I agreed with that.

Q. So he wasn't uniquely talking about the day of his execution, right?

A. I can't say it was the day. Not saying the day I get executed, you know, I want to make sure I'm warm.

MS. BLUMERT: May I have a moment, Judge?

THE COURT: Yes.

MS. BLUMERT: Nothing further, Judge.

THE COURT: Anything further?

MS. BURNS: I just have one question, Your Honor.

RECROSS EXAMINATION

BY MS. BURNS:

Q. Warden, Defense Counsel brought up the fact that Mr. Cole was transported via gurney?

A. Correct.

Q. Now, was there a specific reason why that decision was madeand why it took six individuals to do that?

A. When -- with Mr. Cole, who's -- basically stays in

the wheelchair, it is by a doctor that says Mr. Cole is fine, he can do that movement, it has been seen in his cell. What I did -- the six officers and the gurney was 100 percent my call on that. And that's -- that's what I ordered. And what happens is, in the area that he's going to, there is stairs, and then we got our execution cells, and then the execution room. So the stairs involved -- in my way of thinking, I was going to make sure we do this absolutely correct. And I also got medical down there. And I knew Mr. Cole was not going to get up to go up the stairs. So I got them to assess, is there a certain technique we use to actually pick him up? And they decided that the gurney was the best way.

I wanted to make sure that the gurney is not slipped by a certain person or -- so there were six officers there to ensure that we didn't hit a bump or anything like that when we got him up there. So that was 100 percent my call on that.

Q. And it was for Mr. Cole's safety?

A. It was for Mr. Cole's safety.

MS. BURNS: Nothing further.

THE COURT: Anything further?

MS. BLUMERT: No, Judge.

THE COURT: You may stand down. Call your next witness.

MS. BLUMERT: Petitioner calls no further

witnesses and Petitioner rests.

THE COURT: What says the Attorney General's Office?

MS. WILLIS: Your Honor, we have no witnesses to call. We rest.

THE COURT: Okay. And you're not offering any exhibits since Dr. Orth's report has already -- already been offered?

MS. WILLIS: That is correct.

THE COURT: You've got an exhibit -- just as a housekeeping matter, Exhibit 19 is not offered.

MS. BLUMERT: You said Exhibit 19 is not offered?

THE COURT: Has not been offered.

MS. BURNS: I believe I offered it and it was not admitted is my understanding.

Is that correct.

(Court reporter clarifies the record.)

THE COURT: I've got the wrong exhibit number then.

MS. BLUMERT: I apologize, Judge. My understanding is incorrect.

THE COURT: Exhibit 18. I wrote down 19. Exhibit 18 has not been offered.

MS. BLUMERT: I did not offer 18, yes, Judge.

THE COURT: Okay. That needs to be withdrawn from the record. I'm going to provide that back to Counsel.

And are you offering this notebook as your exhibits, the one that I have in my possession.

MS. BLUMERT: Yes, Judge. As far as the official record for exhibits.

THE COURT: I'd remove Exhibit 19. Exhibit 19 is being removed from the record.

MS. BLUMERT: 18 and actually 24, Judge, I did not admit either.

THE COURT: It's 18. I said it again. As well as 24?

MS. BLUMERT: 24 was not offered, yes, Judge.

MS. WILLIS: And, Judge, our -- I just want to make sure we're on the same page. We have Exhibits 19-23 as not being admitted. Is that --

THE COURT: 18.

MS. WILLIS: 18. Okay.

THE COURT: And 24, a memorandum, one-page memorandum, actually, it's two pages, those will be removed from the Court's records. And there's some -- actually some new records that I have not seen yet. If the Court wants to review --

MS. BLUMERT: May I approach to collect those, Judge?

THE COURT: Yes. If you'll retrieve those. They're not in the file. And because of that, I don't believe -- I don't want to make a decision here without reviewing these records that I haven't seen before today. There's a few that I haven't seen. And I asked -- inquired earlier about Dr. Payne's report. Did anyone find that?

MS. BLUMERT: We scoured our records, Judge, and did not find any report from --

THE COURT: I recall the warden testifying on Dr. Payne, a record from him, this morning. Is that not correct?

MS. BLUMERT: My understanding is that he just recently got some information from Dr. Payne. I don't know if he's talked to him previously, but we don't have any documents.

THE COURT: Okay. You have no --

MS. BLUMERT: Correct.

THE COURT: -- records from Dr. Payne? And your argument's already been advanced at the first of this hearing regarding the burden of proof.

So with that said, is there anything further on the record.

MS. BLUMERT: Yes, sir. I would like to make a closing argument.

THE COURT: Is your -- you'd like to make a what?

MS. BLUMERT: A closing argument, or a statement.

THE COURT: Is it not something that I've already heard?

MS. BLUMERT: It is not, Judge.

THE COURT: Okay. If I haven't heard it, you may proceed.

MS. BLUMERT: Do you want me to talk from the podium, Judge?

THE COURT: Yes.

MS. BLUMERT: Judge, what I provided, and I believe everybody has a copy of, is what is essentially a PowerPoint presentation. But it's in paper format. Does everyone have their copy of that? I'm going to be talking from that so that you all can follow along.

THE COURT: You may proceed.

MS. BLUMERT: May I begin?

Judge, what we were ultimately asking this Court to do is enter a Writ of Mandamus filing. And that is what the original filing was for and that is what triggered this proceeding here before Your Honor.

We are specifically asking for an order requiring the warden to refer Mr. Cole's case to the Pittsburg County DA for competency proceedings, ultimately, for a jury trial. Court of Criminal Appeals says a Writ of Mandamus is

what is appropriate here under Rule 10.6(b). The legal standard here is abuse of discretion. And under the *Cole v. Trammell* case from 2015, that Court defines that as: Any unreasonable or arbitrary action taken without proper consideration of the facts and laws pertaining to the issue.

That case is particularly relevant because it was analyzing this exact proceeding that occurred seven years ago. And, ultimately, the Court of Criminal Appeals ruled there that based on what the warden had, she did not abuse her discretion. And the whole test there was, "What did the warden know?"

There was at length of testimony and evidence presented, but ultimately the Court said so much of that wasn't relevant because it wasn't before the warden when she made her decision. And that that is what is at issue here, is what was before the warden.

Ultimately, Judge, the Warden abused his discretion. There was good reason to believe that Mr. Cole was not competent to be executed. Mr. Cole showed that there was a reasonable probability that he is insane. The warden incorrectly made that finding on his own about Mr. Cole's competency rather than making a determination that there was a question as to competency.

Essentially, using the legal standard for abuse of discretion. The warden made his decision to decline

referral to the DA without proper consideration of the facts and the law pertaining to the issue.

And I'm not saying that he did that maliciously or deliberately. I think he has the question wrong. He misunderstands his task. He is consistently opining about the competency of Mr. Cole and that's not his task. The question before him is whether there is an issue that he needs to refer to Pittsburg County to go flush out. That's the question. His job is to function as a gatekeeper to prevent fraudulent claims of insanity from filling the courts, not to make his own determination about competency.

I think of this akin to like police that are out in the field. The police are out in the field deciding whether to arrest someone and present charges to the DA. The police are not deciding that someone is guilty and rendering some sort of judgment. They're saying, Is there a suspicion here, is there something going on and we think, hey, there's some evidence this person committed a crime, we need to go look into it.

That's what the Court's for. That's what the task is here. And that is what the task was for the warden. It really was a simple question for him: Is there an issue?

He doesn't have to decide if he's competent. He misunderstood what he was supposed to decide. He did not properly consider the law and facts pertaining to the issue.

So on the next page of the slide is the question before this Court. So the Court, in deciding whether to issue this writ, is ultimately going to ask whether the warden had good reason to believe that Mr. Cole was incompetent to be executed. The legal standard for that is whether he abused his discretion by not initiating those proceedings. Did he make the decision to decline referral without proper consideration of the facts and the law. And I want be really clear here because I understand the urge is to talk so much about Mr. Cole's competency, and, certainly, that is the bulk of -- it's the ultimate issue. But we're not there yet. We are below that. This is not a competency trial. We are not deciding whether Mr. Cole is competent. We are not deciding whether the warden should have believed Mr. Cole was incompetent. This is not a form for a battle of the experts.

The weighing that the warden was doing is what the jury does at trial. We do not need to make an analysis of that, and we do not need to weigh that out.

So what law applies here? Under the Eighth and Fourteenth Amendments of the Constitution in *Ford versus Wainwright*, we cannot execute an incompetent person because, if we do, that violates our standards of decency. We don't -- we don't want to look back on this in a decade and hang our heads in shame over a barbaric decision we make.

So to safeguard this idea, Oklahoma has a rule

and it is 22 OS 1005 and that is the statute that we have all been talking about at length. It's the statute that we cite in briefs, and it's the statute that the warden looked at. And I imagine his legal counsel gave him advice about what he is supposed to do.

There are three times in there that I think are worth flushing out the definition for. The first one is "Good reason to believe what that means," the other is "Becoming insane," and the question of his insanity being inquired into.

So the first one: "Incompetent to be executed or insane." And I don't want to get too bogged down in here because the Court doesn't need to answer this question, but I think just defining the term is appropriate. Federal law requires a rational understanding for the reason of the execution. That's all they -- the question isn't: "Does he know what's happening"? The question is: "A rational understanding." And that's different than just a general awareness.

Questions or other standards such as just does he have intelligence to understand this or convey information, and some of that kind of comes from the *Bingham* case, but those are not what governs. Federal law is what governs, because it provides increased protections beyond Oklahoma's. And that has to be incorporated into the competency inquiry when it's made. And we're not there yet. But that's just the definition for

it.

The next definition of the term to flesh out we sort of talked about this morning, but that is: What does, "Good reason to believe," mean? At the very top of that slide is some language from *Cole v. Trammell* and from *Ford*. "A petitioner under sentence of death must make the necessary showing -- substantial threshold showing and standing before he's entitled to adjudication." The talk about this threshold being the trigger process before we have the trial. And what *Ford's* language says is: "A prisoner must overcome the presumption that he is competent and show there is a reasonable probability he is insane."

And that's the standard at the competency trial. So this cannot be that high. And I won't rehash it, but the language from -- the concept from *Cooper versus Oklahoma,* which was a -- and I misspoke earlier -- not an execution competency trial, but just a standard competency trial. And then *In Re: Garry Allen*, which was an execution competency trial. But the standard there that we can extrapolate, the standard here is lower than preponderance.

The evidence that the Court can understand is sufficient is that there are in expert reports and opinions that meet the threshold. That's what's needed as opposed to just someone saying that, "Hey, maybe this person's not well." It's wanting substantial evidence of that, which is a

reasonable request. And that's why the statutes and the language and case law goes on and on about it. It has to be some significant evidence. It can't just be a thought or a hunch. And that's what expert testimony is.

What is this not? What does this standard not mean? The statute and the case law make no mention of the warden himself personally weighing in on this. The question is not whether the warden himself believes the person is incompetent. The statute doesn't contemplate that. The case law indicates that the warden's role here is to prevent frivolous claims of incompetency from being made. That's all. He doesn't have to have a personal belief of competency. He doesn't have to figure out whether somebody is. He just has to think and consider whether there is good reason.

The statute and the Supreme Court contemplate the battling and the weighing of the experts will occur at the competency trial where that standard is preponderance. So we know that ours is lower.

The final question here is just a note about the language, the question of his sanity, that comes at the end of that 1005 statute. And it's talking about when that trial occurs, and the trial will be asking the question that his sanity -- excuse me -- asking that the question of sanity be inquired into. And this phrases -- phrase tells us something else. That the warden doesn't have to have an opinion either

way about competency. The question is going to be looked into. He just needs to know is there a question to look into. It doesn't have to -- the evidence before the warden doesn't have to rise to some clear and convincing standard. Just that there is a question. That there is an issue. Conflicting expert opinions do not negate this. In fact, they support that concept; there is an issue.

The next page in that handout is a case timeline. I'm not going to flush that out. I just thought that would be helpful, as the Court looks at this, to kind of understand it in a more clear way.

There is one particular fact at the bottom they did not include, is that on September, I believe, 2nd or 5th -- 5th -- 15th. The 35-day protocol starts. That happened in early September. So the bulk of this argument, Judge, is: What did the warden know? What was the good reason that the warden had to believe that Mr. Cole, himself, was incompetent?

And earlier I was just discussing what the laws are. But now we get into the meat of what the warden understood. It's important to know that his value judgment on these is irrelevant. The fact that they exist is enough.

He can opine about which expert report means more and which one is good and real and which one is legitimate. But that is absolutely irrelevant to this analysis. That is something that experts will talk about at a

trial. He does not need to make that determination.

I know we kind of went on for a while, especially on direct, with the warden. And I know that that was tedious going through that, but I think it's important to know all that because we need to know what the warden knew and what he analyzed.

We all have those records. We've been looking at those for months. This Court has. The parties have. The issue, though, is what the warden had and what he understood. And that is what this analysis is. What -- what did he know; did he abuse his discretion in light of what he knew the law and the facts to be.

There's two main kind of sections of things that he had. One is all his expert reports. And the second thing is his statements from his staff members over the years and the things that they have noticed in their facility.

Now, some of that, of course, is considered by the experts, but the warden looked at that also as he testified on direct about the records he reviewed or didn't review. And the ones that he knew about, both from the reports and just his own look into what his staff is doing. He receives all these records that the Court will certainly -- I'm sure has gone through some already and indicates it will continue to go through -- but he has Dr. Travis Snyder's report, Hough's report, Orth's report, Dr. Morris' report. So many of these.

And the results are conflicting. But I think it's important to note that there are varying diagnoses, there are varying depths of reports. Some of them certainly involve testing. Some of them are just, Here's what I can do with what I have. I'm looking at records, I'm doing all these things.

And so the fact that these records exist is what is noteworthy and that the warden reviewed them and that he reviewed reports from legitimate medical professionals that find Mr. Cole incompetent. He reviewed reports from legitimate medical professionals that find him incompetent and competent. And it's conflicting. And it's not up for the warden to decide. But he had that before him. He can take those reports for what them purport to be. He doesn't need to dig into -- I don't need to doubt the credentials of this doctor or this doctor.

That's what the professionals do when they testify at trials, is they try to undermine each other's reports and their methods. That's not necessarily something the warden needs to do. He doesn't have the training to do that. Nobody expects him to do that. That is an unreasonable burden on a warden, whether it's Warden Farris or any other warden that's going to be over OSP.

The second thing he looks at is all the information from his own staff and facilities. And I think it's fair to say that some of it is -- the warden is not aware

of all of it. He should be aware of a lot of it. That's the question here is he's supposed to look at what -- is there an issue? And he needs go to his staff and go find out that they have had trouble talking to Mr. Cole for years. That they don't have a specific diagnosis for him from their facility, because they haven't done a full mental health evaluation. They don't know. They know something's wrong with him, but they can't say what it is. They don't say he's malingering. They certainly suspect it, but no one ever diagnoses him with that. They don't have that information.

And I know that the State will point to some of that as proof that he's just kind of faking or making his own choices, but those are analyses that experts get to make. We do not have the skill to make those. Warden doesn't, the parties don't. That's what doctors do.

The medical records that he looked at would have shown him that Mr. Cole is often catatonic. He is forced to shower at times. He's -- does not keep his cell clean. He was hoarding up to 147 meals at one point. That -- this isn't just inmates hoarding food and items. Inmates do that. And he -- you know, the warden understands that and knows that. This is something so unique that the medical and mental health staff were like we need to make a note of this in our report. 147 meals is almost 50 days' worth of food, three meals a day for weeks at a time he's keeping in his cell.

This is all good reason for the warden to believe that Mr. Cole is incompetent. Just looking at these things, we just have reason to believe it. He doesn't need to think that that's, in fact, true, just that he suspects it.

So we're asking this Court to issue that Writ of Mandamus that the warden abused his discretion in failing to refer Mr. Cole's case to the DA of Pittsburg County, so that the question of his sanity can be inquired into. There was good reason to believe that there was a doubt as to Mr. Cole's competency. The warden ignored it or discounted it. He decided which ones -- which opinions he liked better, that he thought were better. But that's not what he's supposed to be doing here. He just looks and says, "Is there a reason to believe this? Yes."

I think -- and I think it's important to note, there was that, kind of, exchange where the warden was saying that he believed that Dr. Hough had never diagnosed Mr. Cole with schizophrenia because he was using the word "opine," which means that's what he is theorizing, that's what he is believing. And I think it's just indicative of the way the warden interprets these records. He's guessing as to the meaning. As to the -- he's construing a meaning that he wants, not necessarily what those terms actually mean for medical professionals.

He believed -- the warden believed there was not

a schizophrenia diagnosis. But as we learned that there was. Doctors have given him that. Not every single one of them, of course. And Dr. Orth doesn't. But doctors do give him that.

Death as a punishment is fundamentally different than any other punishment that we implement as a state, and we need to be careful. And I include in this the language from various Supreme Court opinions about how careful we need to be. I understand -- I don't need to -- I understand we all know this is heavy, and this is serious.

Finally, I think that it's important to note that Mr. Cole has a right to due process, and this hearing is part of that. But the next hearing is part of that too. The Court of Criminal Appeals said that: Such a hearing must afford a prisoner an opportunity to be heard, consistent with the basic requirements of due process. That these basic requirements include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may different from the State's own psychiatric examination.

And that's what's supposed to happen at the trial. That language is opining about what that trial looks like. So I don't want to conflict that with what we have here.

We are asking you, Judge, to issue the Writ of Mandamus, finding that the warden did have reason to institute proceedings with the Pittsburg County District Attorney's

Office.

THE COURT: Counsel.

MS. WILLIS: Very briefly, if I may, Your Honor?

THE COURT: Yes.

MS. WILLIS: Your Honor, because Counsel discussed the burden of proof, again, I would like to make a few things a little more clear. And I know Your Honor is probably tired of hearing the same words come out of my mouth. But the -- Mr. Cole is presumed competent. And what has to be determined before Mr. Cole is entitled to, or given a jury trial on his competence, is that he must overcome the substantial threshold showing that he is insane. And to overcome that substantial threshold showing, Mr. Cole has to show that he does not have a rational understanding of the reasons for the execution or that he is being executed.

And, therefore, to show -- and even the Court of Criminal Appeals said -- and I have it in my notes -- that the Court of Criminal Appeals said that to overcome the substantial threshold showing, Mr. Cole is not entitled to a jury trial, and to do so he must show that -- if he has not met a substantial threshold showing; therefore, he has not shown that he does not have a rational understanding of his execution or the reasons therefore, then this Court must deny the writ.

Your Honor, they have not met that burden today. We have -- we have information that Mr. Cole has told Tina

Fuller recently that he understands why he's being executed. He told Dr. Orth. And I understand Mr. Cole today does not look like he would have a conversation, but Mr. Cole had conversations, spontaneous conversations with Dr. Orth. He was very clear in why he was being executed. "For the murder of my daughter."

He was very clear in what would happen after his execution. He knew the date of that execution. And the fact that Mr. Cole is not -- has chosen not to speak with some people at times, or speak to Dr. Hough, that's Mr. Cole's decision. And Mr. -- Dr. Hough has opined that Mr. Cole is not competent to be executed; however, when Dr. Hough asked those questions of Mr. Cole, Mr. Cole did not respond to him when those questions were asked. The individual who asked those questions for him, mister -- Dr. Hough -- or Dr. Orth did not, specifically, ask those questions; Mr. Cole, himself, spontaneously stated that the Court ordered an evaluation of him to determine if he was competent to be executed, and if he understood why he was being executed. And I know Dr. Orth -- Mr. Cole's own statements were quoted for this Court during the warden's cross-examination. And so before a Petitioner can even be entitled to a jury trial, this Court has to find that Mr. Cole has overcome the substantial threshold showing of insanity and found that he does not have a rational understanding of his execution.

And, therefore -- because everything before the warden did not give the warden good reason to find that Mr. Cole has become insane. And that's the language. The warden has to find that there is good reason that he has become insane. And that "has become insane," has to do with, does he have a rational understanding of the execution, and the reasons for the execution.

And, Your Honor, the warden did not abuse his discretion as all of the information before the warden, from the expert Mr. Cole actually spoke to, and that -- was that Mr. Cole does have a rational understanding of the execution, the reasons for the execution, and that it is imminent. And, therefore, we'd ask this Court to deny the Writ of Mandamus. Thank you.

THE COURT: Okay. Counsel, the Court will review the additional documents I've referred to, as well as the case law that has been discussed, with respect to the burden of proof. And I will start on an opinion probably today depending on how long it takes me to get through that. But it won't be ready today. It won't be out, you know -- I'll go through that multiple times before. But hopefully by Monday or Tuesday this next week.

We had jury trial scheduled and mine got continued so I've got plenty of time. So I'll be working on that the rest of today, tomorrow -- Monday, as well. Anything

further on the record?

MS. BLUMERT: Nothing from us, Your Honor.

THE COURT: Okay. Let the record reflect -- from the AGs?

MS. WILLIS: No, Your Honor.

THE COURT: Let the record reflect the Court's in possession of the Petitioner's exhibits, with the exception of those that have been withdrawn. I'm going to need to keep these since they're -- this is what I need to review. Once I'm done with that, it'll go to the court reporter, and it'll be in her possession, pending the outcome of this matter. Okay. If there's nothing further, we're off the record. Parties are excused.

(Whereupon, proceedings concluded.)

* * * *

REPORTER'S CERTIFICATE

STATE OF OKLAHOMA)
) SS.
COUNTY OF PITTSBURG)

I, Shannon Duncan, Certified Shorthand Reporter No. 1984 within and for the State of Oklahoma, do hereby certify:

That I was present and reported in machine shorthand the oral proceedings had in the foregoing matter on September 30, 2022, before the Hon. Michael Hogan, District Judge for the 18th Judicial Court of Oklahoma, sitting in District Court in the City of McAlester, County of Pittsburg, State of Oklahoma; that I have since that time transcribed all of my notes taken as aforesaid; and that the foregoing is a full, true, and accurate transcript of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand on the October 7, 2022.

Shannon Duncan, CSR No. 1984
within and for the State of Oklahoma

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

IN RE: BENJAMIN R. COLE)
)
Inmate No.: 489814)
)

Case No. CV-22-140

Execution set for October 20, 2022

PETITION FOR WRIT OF MANDAMUS, BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, PETITIONER'S MOTION FOR EVIDENTIARY HEARING, -and- PETITIONER'S MOTION FOR ORDER FACILITATING PROPER EVALUATION OF PETITIONER BY EXPERTS AND BRIEF IN SUPPORT

APPENDIX OF EXHIBITS

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COUNSEL FOR BENJAMIN COLE

APPENDIX D

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

IN RE: BENJAMIN R. COLE)
)
Inmate No.: 489814)
)

Case No. _____

Execution set for October 20, 2022

PETITION FOR WRIT OF MANDAMUS,
BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS,
PETITIONER'S MOTION FOR EVIDENTIARY HEARING,
-and-
PETITIONER'S MOTION FOR ORDER FACILITATING PROPER EVALUATION OF PETITIONER BY EXPERTS AND BRIEF IN SUPPORT

APPENDIX OF EXHIBITS
INDEX

Exh. No.	Title of Exhibit
1	05/20/2022 Letter to Warden Farris
2	05/25/2022 Letter to Warden Farris
3	08/01/2022 Letter to Warden Farris
4	08/02/2022 Letter from Warden Farris
5	07/14/2022 Report of Scott Orth, Psy.D.
6	10/13/2016 Competency to Be Executed Evaluation by George Hough, Ph.D.
7	01/14/2018 Competency to Be Executed Evaluation Addendum by George Hough, Ph.D.
8	05/04/2022 Affidavit of George Hough, Ph.D. regarding 04/25/2022 attempted visit and observations of Cole
9	05/04/2022 Affidavit of George Hough, Ph.D. regarding 04/25/2022 attempted visit and interactions with prison staff
10	07/29/2022 Declaration of David Hough, Ph.D. regarding Orth report with sample of 2014 DOC records attached

11	01/16/2015 Affidavit of Anne Hayman, MD
12	05/11/2022 Declaration of Travis Snyder, DO
13	05/25/2022 2nd Declaration of Travis Snyder, DO
14	04/04/2009 Independent Psychiatric Consultation by Raphael Morris, MD
15	01/21/2015 Updated Independent Psychiatric Consultation by Raphael Morris, MD
16	Curriculum Vitae of David Hough, Ph.D.

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF OKLAHOMA

SUSAN M. OTTO
FEDERAL PUBLIC DEFENDER

DEATH PENALTY FEDERAL
HABEAS CORPUS DIVISION:
REPLY TO: __X__
215 DEAN A. MCGEE
SUITE 707 OLD POST OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
(405) 609-5975
FAX: (405) 609-5976

MAIN OFFICE:
REPLY TO: _____
215 DEAN A. MCGEE
SUITE 109 OLD POST OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
(405) 609-5930
FAX: (405) 609-5932

BRANCH OFFICE:
REPLY TO: _____
FEDERAL TRANSFER CENTER
P.O. BOX 898802-8802
OKLAHOMA CITY, OKLAHOMA 73159-8802
(405) 680-4047
FAX: (405) 680-4082

May 20, 2022

VIA EMAIL AND REGULAR U.S. MAIL

Mr. Jim Farris, Warden
Oklahoma State Penitentiary
P.O. Box 97
McAlester, Oklahoma 74502-0097

Re: Benjamin Cole, DOC #489814

Dear Warden Farris:

We believe our client, Benjamin Cole, DOC #489814, is incompetent to be executed. *See* Order, *Benjamin Cole v. Jim Farris*, 15-CV-0049-GKF-CDL (N.D. Okla. Feb. 17, 2022) (finding Mr. Cole's execution date no longer indefinite and reopening action asserting Cole is incompetent to be executed pursuant to *Ford v. Wainwright,* 477 U.S. 399 (1986)). In addition to what's been presented previously in litigation, we provide the following support for our position:

1. Declaration and attached CV of neuroradiologist Travis Snyder, D.O., dated May 11, 2022;
2. Affidavit of David George Hough, Ph.D., ABPP, dated May 4, 2022;
3. Second affidavit of David George Hough, Ph.D., ABPP, dated May 4, 2022;
4. Competency to Be Executed Evaluation: Addendum of David George Hough, dated January 16, 2018;
5. Competency to Be Executed Evaluation of David George Hough, dated October 13, 2016; and
6. CV of David George Hough, PhD., ABPP.

Oklahoma Statutes, Title 22 O.S. § 1005 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.

Oklahoma law also provides a definition of "insane" for these purposes which, as you will see, might be more precisely termed "incompetent to be executed."' The definition asks whether the inmate has:

> . . . sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court. If he has, then he is sane; otherwise he is insane, and should not be executed.

Bingham v. State, 169 P.2d 311, 312 (Okla. Crim. App. 1946). We submit Mr. Cole is incompetent to be executed in all respects under this definition. It is perhaps worth making a special note that the attached materials, particularly Dr. Hough's affidavits and reports, make clear Mr. Cole does not have "sufficient understanding" and "intelligence" to convey *any* information to his attorneys or the court.

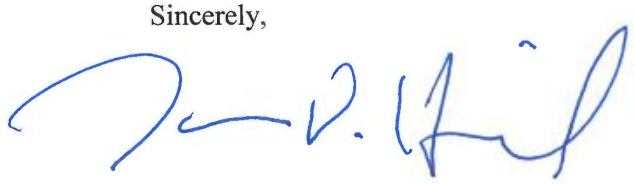
Of special import, *Panetti v. Quarterman*, 551 U.S. 930, 956-59 (2007) provides that the individual must have a *rational* understanding of his impending fate. Moreover, "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Id.* at 959. In a more recent case, the Supreme Court broadened the concept of insanity and held that dementia, too, "can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the state wants to execute him" *Madison v. Alabama*, 139 S. Ct. 718, 729 (2019). Copies of the cases cited in this letter (*Ford, Panetti, Bingham,* and *Madison*) are attached for your convenience.

As detailed in Dr. Hough's and Dr. Snyder's materials, Mr. Cole does not have a rational understanding of his impending fate due to his significant mental illness and brain lesion. Mr. Cole's mental illness is a longstanding one, with severe symptoms that have been documented by multiple sources, including the prison's own medical providers over the years. Should you desire copies of previous reports documenting Mr. Cole's mental illness and corresponding incompetence, we will gladly provide the same.

We respectfully submit Dr. Hough's and Dr. Snyder's opinions standing alone provide "good reason" under 22 O.S. § 1005 to refer this matter for competency proceedings in the district court and ask that you notify the District Attorney of Pittsburg county of the same.

We respectfully request that you respond as soon as practicable to this letter outlining your plans going forward. Thank you for your attention to this matter.

Sincerely,



Thomas D. Hird

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF OKLAHOMA

SUSAN M. OTTO
FEDERAL PUBLIC DEFENDER

DEATH PENALTY FEDERAL
HABEAS CORPUS DIVISION:
REPLY TO: ___X_____
215 DEAN A. MCGEE
SUITE 707 OLD POST OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
(405) 609-5975
FAX: (405) 609-5976

MAIN OFFICE:
REPLY TO: _____
215 DEAN A. MCGEE
SUITE 109 OLD POST OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
(405) 609-5930
FAX: (405) 609-5932

BRANCH OFFICE:
REPLY TO: _____
FEDERAL TRANSFER CENTER
P.O. BOX 898802-8802
OKLAHOMA CITY, OKLAHOMA 73159-8802
(405) 680-4047
FAX: (405) 680-4082

May 25, 2022

VIA EMAIL AND FEDEX

Mr. Jim Farris, Warden
Oklahoma State Penitentiary
P.O. Box 97
McAlester, Oklahoma 74502-0097

Re: Benjamin Cole, DOC #489814

Dear Warden Farris:

On Friday, I wrote to ask you to initiate competency proceedings on behalf of Benjamin Cole because he is incompetent to be executed. Among the attachments was a recent declaration/report from Dr. Travis Snyder, wherein he found Mr. Cole's recent brain MRI "markedly abnormal" and demonstrative of multiple pathologies. He further noted that more sensitive volumetric analysis and diffusion tensor imaging had not yet been capable of analysis, and reserved the right to supplement his report when they became available.

Yesterday he informed us he was able to get the volumetric analysis and diffusion tensor imaging uploaded. Attached is a second declaration/report by Dr. Snyder detailing new findings from the volumetric analysis and diffusion tensor imaging. The markedly abnormal results "are concordant with other MRI sequences and upgrade the damage identified." *See* attached declaration/report at ¶6. I believe this declaration/report, along with the other information you have been made aware of, may assist you in your decision to initiate competency proceedings for Mr. Cole.

Thank you for your attention in this matter.

Sincerely,

Thomas D. Hird

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF OKLAHOMA

SUSAN M. OTTO
FEDERAL PUBLIC DEFENDER

DEATH PENALTY FEDERAL
HABEAS CORPUS DIVISION:
REPLY TO: X
215 DEAN A. MCGEE
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OKLAHOMA CITY, OKLAHOMA 73102
(405) 609-5930
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FEDERAL TRANSFER CENTER
P.O. BOX 898802-8802
OKLAHOMA CITY, OKLAHOMA 73159-8802
(405) 680-4047
FAX: (405) 680-4082

August 1, 2022

VIA EMAIL AND OVERNIGHT POSTAL MAIL

Mr. Jim Farris, Warden
Oklahoma State Penitentiary
P.O. Box 97
McAlester, Oklahoma 74502-0097

Re: Benjamin Cole, DOC #489814

Dear Warden Farris:

On May 20, 2022, I wrote to ask you to initiate competency proceedings on behalf of Benjamin Cole, because he is incompetent to be executed, and on May 25, 2022, I wrote you to supplement that submission. I write again to supplement our submission with a new declaration from David George Hough, Ph.D., ABPP. The declaration was written in response to the report of Scott Orth, Psy.D., dated July 14, 2022. Once again, thank you for your attention to this matter.

Sincerely,

Thomas D. Hird

J. Kevin Stitt
Governor

OKLAHOMA Corrections

Scott Crow
Director

August 2, 2022

Thomas D. Hird
Assistant Federal Public Defender
Capital Habeas Unit
Federal Public Defender-Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

Re: 22 O.S. § 1005 Notification - Benjamin Cole (489814)

Dear Mr. Hird,

Inmate Benjamin Cole is currently incarcerated with the Oklahoma Department of Corrections and housed at the Oklahoma State Penitentiary upon a sentence of death. Mr. Cole is set to be executed on October 20, 2022. During my tenure as Warden of this facility, I have carefully considered all information and material submitted by Mr. Cole's attorneys regarding his mental health and conditions of confinement. Additionally, pursuant to an "Order for Mental Health Evaluation" entered upon agreement of the parties in the case of *Benjamin Cole v. Jim Farris*, Case No. CIV-15-0049-GKF-CDL (United States District Court for the Northern District of Oklahoma), Mr. Cole was transported to the Oklahoma Forensic Center in Vinita, Oklahoma on July 5, 2022 and evaluated for the purpose of determining whether Mr. Cole has a rational understanding: (1) of the reasons he is being executed, and (2) that he is to be executed imminently. The evaluation was filed under seal in the referenced action at Doc. 59 and includes the following finding:

> ...Mr. Cole does not currently evidence any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his competency related abilities regarding his pending execution...Mr. Cole appears to evidence that he can

sufficiently and rationally discuss his understanding of the reason he is being executed, and that he is to be executed and that said execution is imminent.

As the Warden of the Oklahoma State Penitentiary, and in accordance with 22 O.S. § 1005, it is my duty to inform the Pittsburg County District Attorney if I have good reason to believe that Mr. Cole has become insane after his delivery to this prison for execution. Upon careful consideration of the material submitted by legal counsel for Mr. Cole and the above-referenced evaluation, which was obtained by agreement of all parties, it is my determination that Mr. Cole has not become insane since his delivery to the Oklahoma State Penitentiary for execution. As such, I am declining your request to initiate competency proceedings on behalf of Mr. Cole.

Sincerely,

Jim Farris
Warden, Oklahoma State Penitentiary

cc: Ashley Willis
Tessa Henry
Jennifer Crabb

OKLAHOMA DEPARTMENT OF MENTAL HEALTH
AND SUBSTANCE ABUSE SERVICES
OKLAHOMA FORENSIC CENTER

July 14, 2022

The Honorable Judge Gregory Frizzell
Judge of the United States District Court
Northern District of Oklahoma
333 West Fourth St., Rm. 411
Tulsa, Oklahoma 74103

RE: COLE, BEJAMIN ROBERT, SR. (DOB: 04/08/1965)
15-CV-0049-GFK-CDL

Dear Judge Frizzell:

In response to your Order dated 06/13/2022, I evaluated Mr. Cole on an outpatient basis at the Oklahoma Forensic Center for a mental health evaluation pertaining to his pending execution and have reached the following conclusions.

PROCEDURES OF EVALUATION:

1. Clinical interview and competency evaluation of Mr. Cole, conducted by Scott Orth, Psy.D. at the Oklahoma Forensic Center (OFC) on 07/05/2022, totaling approximately 150 minutes.
2. Review of the Order for Mental Health Evaluation for 15-CF-0049-GFK-CDL from the United States District Court for the Northern District of Oklahoma, dated 06/13/2022.
3. Review of the Petitioner's Motion for Order Facilitating Mental Health Evaluation and Brief In Support for 15-CV-049-GFK-CDL from the United States District Court for the Northern District of Oklahoma, filed 05/23/2022.
4. Review of the Court of Criminal Appeals of Oklahoma opinion for 2015 OK CR 13, dated 10/02/2015.
5. Review of the Transcript(s) of Proceedings for CV-2015-58 from the District Court of Pittsburg County, dated 08/25/2015 and 08/28/2015.
6. Review of the Transcript of Jury Trial on Competency Proceedings for CF-2002-597 from the District Court of Rogers County, held on 09/13/2004 through 09/14/2004.
7. Review of the Affidavit(s) by Ashley Barrett and Randy Lumley, regarding Mr. Cole, both sworn on 06/15/2022.
8. Review of Oklahoma Department of Corrections (ODOC) records for Mr. Cole, including medical records (dated 12/27/2004 through 03/29/2022); "Mental Health" records (Mental Health or Mental Status Review; Mental Health Assessment; Periodic Physical Examination (Non-Chronic Clinic); Wellness Check) (dated 04/15/2010 through 06/17/2022); Text Order(s) 03/10/2014 through 03/29/2022); All Problems Report (01/26/2015); All Procedures Report (07/17/2015); All Vital Signs Report (12/27/2004 through 03/29/2022); Scheduled Events (04/16/2014 through "09/03/2028"); and Medication (07/03/2017).
9. Review of records from Travis Snyder, DO, specifically Declaration (05/11/2022); 2nd Declaration (05/25/2022), and Dr. Synder's Curriculum Vitae (10/08/2021).
10. Review of records from George Hough, Ph.D., ABPP, specifically Affidavit(s) (05/04/2022); Competency to be Executed Evaluation (10/13/2016) and Addendum (01/16/2018); and Dr. Hough's Curriculum Vitae (undated).
11. Review of records from Raphael Morris, MD, specifically Independent Psychiatric Consultation (04/04/2009) and Updated Independent Psychiatric Consultation (01/21/2015).

24800 S. 4420 Rd., P.O. Box 69, Vinita, Oklahoma 74301-0069 • (918) 256-7841 Voice • (918) 256-4491 FAX

12. Review of letters to Judge Steidley by Samina R. Christopher, Ph.D., dated 07/24/2003 and 08/18/2004, regarding prior evaluations of Mr. Cole's adjudicative competence for CF-2002-597 (Rogers County).
13. Review of a letter to John Dalton, Oklahoma Indigent Defense System, by Michael R. Basso, Ph.D., regarding Mr. Cole, dated 06/15/2004.
14. Review of a Social History – Risk Assessment of Mr. Cole by Jeanne Russell, Ed.D., dated 05/27/2004.
15. Review of Round Valley Unified School District school records for Mr. Cole.
16. Review of Department of the Air Force records for Mr. Cole.
17. Collateral phone contact by OFC administrative staff with Oklahoma State Penitentiary staff on 07/13/2022, regarding Mr. Cole.
18. Records check with the medical records departments at the Oklahoma Forensic Center, Tulsa Center for Behavioral Health, Oklahoma County Crisis Intervention Center, Griffin Memorial Hospital, Central Oklahoma Community Mental Health Center, Oklahoma Crisis Recovery Unit, Jim Taliaferro Community Mental Health Center, Northwest Center for Behavioral Health, Rose Rock Recovery Center, Children's Recovery Center, and Carl Albert Community Mental Health Center for Mr. Cole.
19. Review of www.oscn.net and doc.ok.gov records for Mr. Cole, retrieved electronically on 07/05/2022.

CRIMINAL INFORMATION AND REASON FOR REFERRAL:

According to available legal documents for CF-2002-597, on 12/20/2002 Mr. Cole "grabbed [B.V.C.'s, D.O.B. 3/27/2002] feet while she was lying on her stomach and did pull her feet towards her head quickly and hard, causing her body to bend backward fracturing the spine which ruptured the aorta, causing her to bleed to death," was charged with Murder – First Degree (Child Abuse), convicted and found Guilty by a jury in Rogers County, Oklahoma on 10/21/2004, and sentenced to death on 12/09/2004.

Prior to Mr. Cole's jury trial for CF-2002-597, he was evaluated for his adjudicative competence by various experts, and was subsequently found competent to proceed following a competency jury trial in Rogers County that took placed between 09/13/2004 and 09/14/2004. The interested reader is referred to evaluations by Dr. Christopher (07/24/2003 & 08/18/2004), Dr. Russell (05/27/2004), and Dr. Basso (06/15/2004).

Following Mr. Cole's conviction for CF-2002-597, he has been subsequently evaluated by a number of additional experts, including Dr. Randall Price, Dr. Morris, and most recently by Dr. Hough. (The interested reader is referred to Dr. Hough's Competency to be Executed Evaluation, dated 10/13/2016 for a thorough review of Mr. Cole's evaluation history from 2003 through 2016). Proceedings for CV-2015-58 from the District Court of Pittsburg County, were held on 08/25/2015 and 08/28/2015 regarding Mr. Cole's competency to be executed, but the District Court subsequently found that "Petitioner had not met the burden of proof and had not shown Respondent had refused to carry out a clear legal duty" (2015 OK CR 13, 10/02/2015). Since the issuance of the Court of Criminal Appeals of Oklahoma's decision for 2015 OK CR 13, and according to the Petitioner's Motion for Order Facilitating Mental Health Evaluation and Brief In Support for 15-CV-049-GFK-CDL from the United States District Court for the Northern District of Oklahoma,

filed 05/23/2022, Mr. Cole, by his counsel, requested the Court for "an order facilitating a mental-health evaluation." Mr. Cole's counsel, Thomas D. Hird and Katrina Conrad-Legler, noted numerous concerns regarding Mr. Cole, citing Affidavits of attempted evaluations of him by Dr. Morris back in 2014, as well as more recent evaluations and/or Affidavits by Drs'. Hough and Snyder. According to the Order for Mental Health Evaluation for 15-CF-0049-GFK-CDL from the United States District Court for the Northern District of Oklahoma, dated 06/13/2022, Judge Frizzell ordered the current Mental Health Evaluation of Mr. Cole, to "determine whether Petitioner has a 'rational understanding': 1) 'of the reason [Petitioner] is being executed'; and 2) [t]hat [Petitioner] is to be executed and that execution is imminent."

NOTIFICATION OF LIMITS OF CONFIDENTIALITY:

Mr. Cole was informed (in simple language) during the interview of the nature and purpose of the evaluation and the limitations of confidentiality. After first querying his spontaneous understanding of the nature and purpose of the evaluation, I informed him the was a court-ordered evaluation for his rational understanding about the reason the State of Oklahoma is seeking to execute him, and about his rational understanding about the imminence of his pending execution. I also informed him that the usual doctor-patient relationship did not exist, and that a report would be prepared and submitted to the referring court and both his (Petitioner) and Respondent attorneys, and could be used in legal proceedings. At the outset of sitting down and querying Mr. Cole's understanding of the reason for the current evaluation, he spontaneously states "well, I guess to see if I'm competent and mentally fit to be executed," adding "they [the court] wanted to take me to get a competency evaluation and see if I'm mentally fit for court and competent here to see if I can go ahead and I guess be executed." He then spontaneously notes "as I understand it, the first new execution is August 25th, then the next one is September 23rd, and I'm third on the list, so sometime in later October, I believe, possibly the 20th" and that "they want to make sure I'm competent, and that I realize first that I killed my daughter and I went through a trial for taking my daughter's life and a jury found me guilty; they found me guilty of murder and I was given the death penalty for that, and I accept responsibility for that." In my opinion, Mr. Cole is able to indicate an appropriate understanding of the limits of confidentiality and his responses indicate he understands the information conveyed to him regarding the evaluation.

COLLATERAL INFORMATION:

As noted above, Mr. Cole's history of psychological, psychiatric, neurological, and neuropsychological evaluations has been thoroughly documented in previous letters to the court; therefore, it will not be reiterated in this letter. The interested reader is referred to the above noted evaluations (again, particularly Dr. Hough's evaluation, dated 10/13/2016) for Mr. Cole's documented history through 2016.

Oklahoma State Penitentiary records: Mr. Cole's OSP records through 2014 have been previously documented and/or litigated through various evaluations and/or hearings regarding his competency for execution, and will not be reiterated in this letter. The interested reader is referred primarily to the transcript for the Proceedings for CV-2015-58 from the District Court of Pittsburg County, dated 08/25/2015 and 08/28/2015, as well as Dr. Hough's evaluation (10/13/2016).

Since 2015, almost all of Mr. Cole's ODOC mental health records ("Mental Health" records (Mental Health or Mental Status Review; Mental Health Assessment; Periodic Physical Examination (Non-Chronic Clinic); Wellness Check), dated 04/15/2010 through 06/17/2022) note him to evidence no apparent and/or overt signs of mental illness. Notably, the majority of these records indicate he routinely does not engage with staff, with staff framing these interactions (or lack thereof) as "refusals."

Records indicate that during his interaction with detention staff shortly following his hearing on 08/28/2015, he was noted to be "sp[eaking] clearly and openly about himself and his feelings about his future death....he was alert and oriented with no evidence of thought disorder or neurological impairment...showed no delusions [firm false beliefs despite clear evidence to the contrary] in his thought process" (Mental Health Progress Note – SOAP, 09/01/2015). During an interaction with staff on 01/19/2016, Mr. Cole was noted to have "showed mild signs of Depression, from his appearance and behavior, but was able to make decisions for himself and ask for assistance from others when he has needs. He answered questions quickly and firmly when it was a subject that mattered to him" (Mental Health Progress Note – SOAP, 01/19/2016). Records did note that on 05/16/2016 Mr. Cole was "brought to medical for an evaluation. i/m [inmate] was uncooperative and required to be pepper sprayed. i/m was able to ambulate to his cell, but has been uncooperative when asked to stand on scales to be weighed. i/m [*sic*] voiced n complaints of pain except for the burning sensation of the pepper spray," (Progress Note, 05/16/2016). Mental health staff noted that on 05/16/2016, Mr. Cole "was removed from his cell for evaluation, he refused to place his arms out to be cuff [*sic*] and OC [oleoresin capsicum] spray was used. He was cuff [*sic*] and taken to Medical room on H Unit. He was uncooperative, but did ask to his Case Manage" (Mental Health Progress Note – Evaluation/uncooperative, 05/16/2016).

On 10/05/2016, Mr. Cole was noted to be "disheveled, tense, with a flat affect [absence or near absence of emotional expression]," although his thought process was noted to be "organized" (Mental Health Progress Note – SOAP, 10/05/2016). On 10/14/2016, Mr. Cole was noted to "mumble...gibberish" but was also described as being "ambulatory during mealtime and when alone in his cell, but when medical personnel...are visible he states he is unable to walk due to weakness and too confused to answer questions" (Wellness Check, 10/14/2016). On 04/05/2017, Mr. Cole was noted to have a "20 minute conversation this clinician. He recalled meeting with this clinician during and following his last 35 day notification of execution, and noted that although the execution was temporarily stayed that he didn't 'have much time left, time is growing short.'...He noted some of the other inmates in the infirmary, and that he was praying for their health. He also mentioned the death of his case manager, and his sadness upon learning of the news...Inmate spoke for such a length of time that this clinician had to break away from the conversation. Inmate thanked this clinician for checking on him, and reconfirmed with primary QMHP [qualified mental health professional] that he would see her on rounds" (Mental Health Progress Note – SOAP, 04/05/2017). During an interaction with staff, on 09/27/2017 Mr. Cole was described as evidencing "selective-mutism," and that he "chose to talk about having property removed because he had too much, but refused to exchange on queries by the staff" (Mental Health Progress Note – SOAP, 09/27/2017). On a note dated 08/16/2018, Mr. Cole was noted to have "denied any mental health concerns and did not exhibit any symptoms. When asked if he needed anything from mental health, inmate responded 'I just need Jesus.' No concerns noted by staff at this time" (Mental Health or

Mental Status Review, 08/15/2018). Staff note that on 01/17/2019, Mr. Cole "declined need for mental health services. He appeared to struggle when talking. He sat in a wheelchair holding up his legs with his hands. His clothes were in poor condition, his hair is long and unkempt but he did not smell" (Mental Health Progress Note – SOAP, 01/17/2019). His provider noted that on 04/26/2019 he was "very dirty…Inmate made short statements like 'no help' when asked if he need anything from mental health. Inmates presentation [*sic*] was bizarre as he hunched over holding his legs up in the wheel chair with his arms even though this action was unnecessary…Inmate continues to refuse to engage when meeting with medical and mental health. Although inmate has been seen by multiple staff members standing, walking and speaking on his own without much effort" (Mental Health Progress Note – SOAP, 04/19/2019).

Records indicate that on 09/10/2019, Mr. Cole was noted to "answer…questions of how he was and how he was doing. Inmate just answered with one word answers, 'yes.'…No concerns noted by staff at this time" (Mental Health or Mental Status Review, 09/10/2019). On 10/23/2019, staff noted he stated "I'm resting and I have no issues.' He denied having any mental health concerns to discuss at this time. No concerns noted by staff" (Mental Health or Mental Status Review, 10/23/2019). His provider noted that on 03/19/2020 Mr. Cole "was mumbling that he was fine. Inmate was difficult to understand and he had to repeat himself several times" (Mental Health or Mental Status Review, 03/19/2020). On 11/12/2020, Mr. Cole was noted that he "did not report or exhibit symptoms of mental illness or behavioral issues. He was friendly and cooperative. He denied having any concerns at this time" (Mental Health or Mental Status Review, 11/12/2020). Nursing staff noted that on 12/31/2020 Mr. Cole was "very talkative today. Answers all questions appropriately. Reports that he will not be able to weigh because he can't balance on the scale. I/M reports that he has been eating well and taking in an adequate amount of fluids. I'M shows no s/s [signs and/or symptoms] of dehydration…Denies needs or requests at this time" (Wellness Check, 12/31/2020). On 01/21/2021, Mr. Cole apparently had a "failure to obey" offense, although no specific information is listed in the available record regarding this incident (Mental Health Recommendations Regarding Offender Discipline, 01/25/2021). Most recently, staff note that Mr. Cole "continues to ignore QMHP when QMHP is at his door. He will cover his head or look the other way like he doesn't see QMHP" (Mental Health or Mental Status Review, 06/09/2022) and that he "would not acknowledge QMHP" (Mental Health or Mental Status Review, 06/17/2022). A number of the records reference Mr. Cole refusing various providers and tasks such as "wellness checks," but no further description is noted in the records, other than to say "[i]nmate refused to be seen" ("Mental Health" records (Mental Health or Mental Status Review; Mental Health Assessment; Periodic Physical Examination (Non-Chronic Clinic); Wellness Check), dated 04/15/2010 through 06/17/2022). Lastly, in addition to ODOC records indicating Mr. Cole does not appear to have ever been prescribed psychotropic medication since his incarceration, he has also only ever carried the "DSM IV [Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition]" diagnostic code "799.9" – Diagnosis Deferred.

Reports by Travis Snyder, D.O.: According to two Declarations from Dr. Snyder, dated 05/11/2022 and 05/25/2022, he noted he reviewed MRI (magnetic resonance images) scans of Mr. Cole's brain, and provided various interpretations of said MRIs. Dr. Snyder noted that the "clinical record is highly concordant with the imaging findings described," and that "[m]ultiple providers have stated that Benjamin Cole is not competent to understand legal proceedings and have recommended a

follow-up MRI to the 2004 MRI. Given the high concordance of the imaging with the clinical record, the imaging reviewed is supportive of their opinions" (05/11/2022). There is no indication in Dr. Snyder's Declarations, however, that he himself has ever physically observed and/or interacted in any manner with Mr. Cole.

Evaluations/Affidavits by George Hough, Ph.D., ABPP: Dr. Hough first completed a Competency to Be Executed Evaluation of Mr. Cole on 10/13/2016. At that time. Dr. Hough noted he conducted "Mental Status Interviews and Clinical Observations," and reviewed numerous reports and records pertinent to Mr. Cole and his case. Dr. Hough noted that during his interviews with Mr. Cole, he "appeared very psychologically regressed and vegetative," and that he "rarely made a verbal statement and when he did his speech was barely audible" or otherwise refused to meet with him. Dr. Hough noted that "[d]espite the breadth of these materials reviewed, it is acknowledged that this report also contains limited direct interview data from Mr. Cole himself." Dr. Hough notes, however, that "Mr. Cole's past and current attorneys have repeatedly noted that before, and especially after his capital sentence, that Mr. Cole has not been able to confer with them in a rational and coherent [understandable] manner that has been of assistance with the case. Essentially, legal defense teams have had to work on his defense without his input. Each defense team after the death sentence have encountered the same set of issues: namely, his persistent religious delusions and preoccupation with the end of the world, all of which has made it impossible to hold rational conversations with him about his case." There is no indication in his evaluation that Dr. Hough himself had elicited any type of delusional statements from Mr. Cole during his interactions with him, and that he made "clinical inferences" about him "from a review of [cited within his Evaluation] these voluminous materials." Dr. Hough indicated that based upon the totality of his evaluation of Mr. Cole, he diagnosed him with "295.90 Schizophrenia, Paranoid Type, Continuous, with chronically religiously themed delusions, (along with severe level negative symptoms); 293.89 Catatonic Features Associated with Schizophrenia: stupor, mutism and negativism; [and] 799.59 Unspecified Neurocognitive Disorder (with etiology not yet determined-11 mm brain lesion in the deep white matter of the frontal-parietal region of left hemisphere). Dr. Hough opined that Mr. Cole "is not competent to be executed. There was no affirmative evidence from this evaluation that Mr. Cole does understand and appreciate that he may again be scheduled for execution or the reasons why the execution would take place." He also recommended that Mr. Cole would "require... treatments be initiated" in order to be restored to execution competence, and that "[w]ithout attempting these treatments Mr. Cole's competency for execution will not be restored."

Dr. Hough subsequently generated a Competency to Be Executed Evaluation: Addendum, dated 01/16/2018. Dr. Hough noted that "[g]iven the extended length of time since the last report was provided it was considered necessary to provide an updated opinion upon Mr. Cole's mental status." Dr. Hough noted this was based upon him "review[ing] available documentation provided by Mr. Cole's legal defense team" but that "[u]pdated records from the professional staff employed at the McAlester Prison have not yet been forthcoming for review." Dr. Hough noted that upon his review of the information provided to him, the "amalgamation of the data from these records fully support that he is continuing to experience schizophrenic illness and that the course of his illness is chronic, unremitting, and continuing to deepen. In sum, there is no evidence from the records that Mr. Cole's mental status has improved; it has not." He acknowledges that "these records do not constitute a formal psychiatric evaluation of [his competency to be executed] issue nor was their intended

purpose to answering that question for the court. To fully assess that particular issue a comprehensive psychiatric evaluation would be required." Dr. Hough maintains his prior diagnoses for Mr. Cole, and continued to opine that Mr. Cole "is not competent to be executed."

Most recently, Dr. Hough indicated he attempted to meet again with Mr. Cole, along with his legal team, at OSP on 04/25/2022 and 04/26/2022 (Affidavit(s), 05/04/2022). Dr. Hough noted that Mr. Cole did not engage in meeting with him or his legal team during these attempted visits. He noted that his "current observations are consistent with my previous observations and with reports reflected in the medical records. Mr. Cole's overall behavior remains very regressed, and primitive, and refractory to efforts to communicate with him by others. I did not observe any behavior by Mr. Cole that I would consider rational or coherent, and his cognitive capacity is currently assessed as extremely impaired," adding that he "discern[s] no clinical improvement whatsoever since my last face-to-face encounter; it has most likely worsened" (Affidavit(s), 05/04/2022).

Affidavit(s) by Ashley Barrett and Randy Lumley: According to Affidavits by Randy Lumley and Ashley Barrett, both of whom indicate they work at OSP, they provided numerous observations about Mr. Cole's behavior, alleging that "Inmate Cole is not at all what he seems" and that he is "very troublesome and intentionally creates issues for staff." Other than being on an observational basis, it is unclear from these Affidavits how these staff members determined the "intentional" nature of Mr. Cole's behavior.

Oklahoma State Penitentiary: In a documented phone conversation by OFC administrative staff with Oklahoma State Penitentiary staff (07/13/2022), consistent with available records, staff report that Mr. Cole is not currently prescribed any psychotropic medication. Saff further indicated that Mr. Cole has not engaged in any behavioral incidents for at least approximately the last 30 days, and that he is currently housed in a "single cell" on "death row."

Records check for Mr. Cole: According to the medical records departments at the Oklahoma Forensic Center, aside from his evaluations for adjudicative competence for CF-2002-597 back in 2003 and 2004, Mr. Cole does not have any documented history of having previously received services at this facility. Additionally, according to the medical records departments at the Tulsa Center for Behavioral Health, Oklahoma County Crisis Intervention Center, Griffin Memorial Hospital, Oklahoma Crisis Recovery Unit, Central Oklahoma Community Mental Health Center, Northwest Center for Behavioral Health, Carl Albert Community Mental Health Center, Jim Taliaferro Community Mental Health Center, Children's Recovery Center, and Rose Rock Recovery Center, Mr. Cole does not have any documented history of having previously received mental health services at those facilities.

CURRENT MENTAL STATUS:
Mr. Cole is a 57-year-old White male who appears somewhat older his stated age, but is groomed within community standards. Notably, his clothing appears clear, his hair appears washed and pulled back in a ponytail, his nails appear trimmed and clean, and there is no discernable body odor from him. He presents in a wheelchair, and while he is initially is handcuffed, transport staff agree to remove them at my request and he remains uncuffed throughout the remainder of the interview. During the evaluation he displays neither increased nor decreased psychomotor activity. At times he

gestures with his hands and arms when speaking to make a point, but his gestures are all consistent with his statements. His eye contact at first is limited, in that for much of the initial part of the evaluation, he appears to be squinting; however, throughout the interview he makes comments about my behavior, and requests I resume writing when I stop at times to listen to his statements. As the evaluation progresses, he opens his eyes further, to the point that he and I are able to have more routine eye contact, all of which at that point is within cultural norms. Mr. Cole actively participates in the interview, spontaneously engaging with me, is cordial and polite, and is cooperative with me throughout the interview. Mr. Cole, does, however, routinely interject statements reflective of his own agenda, particularly regarding his views about religion. He inquires about my religious beliefs, and often requests that I write down specific responses of his, particularly when he cites scripture from the Bible. Mr. Cole routinely states that he "prefers to talk in parables," and references that he feels when he speaks he is "giving testimony," but when I specifically ask him to provide a response absent religious interjection, he is does so without difficulty. In fact, when I attempt to redirect Mr. Cole, at times he bargains for "just give me 20 more seconds to finish, and then I will answer your question," at which time he then does. I find him to be easily interruptible, and additionally at no point does he become irritated or frustrated with my attempts to redirect him. He appears to relish discussing his religious beliefs and worldview, but again when I redirect him back to the evaluation, he easily changes the topic to my question and provides a goal-directed response to it. Additionally, his subsequent responses are always relevant.

Mr. Cole describes his current emotional state as "its good, like Jesus in the Bible." Regarding his sleep, he states "I sleep all the time, but I pray a lot, too." He indicates his energy level is "about zero," but attributes this to "I'm getting old and I feel like I'm falling apart some, and I don't really remember things as well as I used to." He describes his appetite as "it's good." When I ask him, Mr. Cole does not report or endorse any current suicidal and/or homicidal ideation, intent, or plans. He also reports he has never previously attempted suicide. In fact, when I ask Mr. Cole about being suicidal, he states "I would never do something like that; for me, that would be like jumping in the Lake of Fire." His mood (sustained emotion) is euthymic (normal), and his affect (immediately expressed or observed emotion) is appropriate to his expressed thoughts and neither significantly increases or decreases in range or intensity. His attention, concentration, and focus are sufficient for the purposes of this evaluation, and appear in my opinion sufficient for execution competency. His memory also appears sufficient for execution competency, based upon his ability to spontaneously recall case specific information consistent with available records without assistance from me. Consistent with prior psychological testing of his intellectual functioning ("overall intelligence was average (FSIQ [Full Scale Intelligence Quotient] =99);" see Dr. Basso's report, 06/15/2004), Mr. Cole's intellectual functioning currently is grossly clinically estimated to be within the average range, as assessed by his general fund of information, syntax, vocabulary, and reasoning ability.

Currently, Mr. Cole's expressed thoughts are coherent (understandable), logical, and goal-directed. He does not evidence any loose associations (little or no connection between ideas in a sequence, i.e., expressed thoughts shift from one topic to another in an unrelated manner), thought blocking (train of expressed thought that suddenly stops, often in mid-sentence), or flight of ideas (expressed thoughts rapidly jump from one topic to another while remaining obviously connected). When I query him about experiencing either auditory and/or visual hallucinations (sensory perception in the absence of external stimuli), Mr. Cole states "it's just when the Lord speaks to me," noting he hears

"spiritual communications," and notes he is not having such experiences while meeting with me. He does not otherwise endorse currently experiencing or ever having had a history of experiencing, any other sort of auditory hallucination-type experience. When I ask specifically about visual hallucinations, Mr. Cole states "are you asking if I see little green men running around on the floor that beam up in a spaceship to Venus and look for the purple monsters? [laughs briefly] no, I do not see things, I never have." Further, during my meeting with Mr. Cole, he does not ever evidence any substantial overt signs of perceptual disturbances (i.e., hallucinations), substantial overt signs of mental illness, intellectual impairment, neurocognitive impairment, or memory impairment that would impair his competency related abilities.

Lastly, in my opinion, at no point does Mr. Cole spontaneously espouse any delusions (firm false beliefs despite clear evidence to the contrary). He does not ever attribute to himself, either spontaneously or when I directly query him, as having any sort of supernatural, otherworldly, mystical, and/or divine abilities and/or purpose. He does not ever reference, either spontaneously or when I directly query him, about his instant case or subsequent punishment as fulfilling any sort of prophecy, or that (presuming, for the purposes of this evaluation) when his execution is carried out, that any sort of supernatural, otherworldly, mystical, and/or divine, or prophetic event will transpire. Instead, following his execution he indicates his corporeal form will cease to exist on the plane of existence he agrees everyone considers being "alive," noting "my bones will return to dust," but that his "spirit" will "hopefully" (as he expresses it) return "to my Father in Heaven." Mr. Cole does spontaneously express the "hope" that following (again, presuming, for the purposes of this evaluation) his execution, that "ideally Governor Stitt might have a change of heart about seeking capital punishment and focusing on death for inmates, and instead focus more on life and rehabilitation," although again, at no point does he express that said event would be divine or supernatural in nature and instead states "it's just something I hope he considers and take to heart. I'll pray for him and the people of Oklahoma that it happens." Mr. Cole does reference his belief that there is "little time left in the world," and repeatedly asserts his belief that due a perception of the limited time left for humanity, that "therefore, people need to get right with Jesus." He maintains he does not have any specific directive or special and/or specific knowledge, either mystically or divinely obtained, or from any sort of otherworldly, or celestial, or divine being as having any bearing or weight on his beliefs or statements. In fact, when I press him on his beliefs, he laughs and then states, "Dr. Orth, I'm just a super-duper hyperbolic Jesus freak." He does not ever indicate, either spontaneously or when I directly query him, that his beliefs cause him any sort of distress, or that if he does not discuss them that some sort of negative and/or catastrophic event will occur. Finally, Mr. Cole's responses are not indicative of any delusions when asked about specific beliefs such as being able to read others' minds, being followed, etc.

RELEVANT HISTORY FROM DEFENDANT:

Mr. Cole self-reports he has never previously received mental health services and that he has never been prescribed psychotropic medication. Educationally, he reports he graduated high school, describing his grades while in school as "well, I'm a bit slow, but once I learn something, I get it. I had to really make myself work hard to get like a C, but I'm a determined person." He indicates he "flunked Kindergarten," but states "I don't know" when I ask the reason for it. He indicates he was never placed in any special education classes or identified as having any learning and/or intellectual disabilities. He reports a prior formal work history, including enlistment in the United States Air

Force, and notes he had never previously received Social Security benefits prior to his conviction for CF-2002-597. With regard to his physical health, Mr. Cole states "I feel like I have some impairments; basically, like I'm just falling apart," which attributes to "I can't really live the sort of holistic lifestyle I would like to while in prison." When I ask about what he considers a "holistic lifestyle," he states "like getting to eat organic food and a diet that's consistent with what's in the Bible." When I specifically ask him, he does not report having any current chronic health and/or medical conditions. With regard to history of head injuries and/or periods of losing consciousness, Mr. Cole initially states "that's all been explained in prior reports of mine," but then spontaneously adds "there was a guy with a hammer that struck me in the head back in 1985 or 1986. I went to the hospital with a concussion and had five stitches. I've also had one concussion from playing a football game back when I was 17 [years of age]." I do not know of any medical health history that would interfere with Mr. Cole's competency related abilities. Lastly, while Mr. Cole currently self-reports he had never been placed in special education classes, various reports reference he in fact had been placed in such classes, particularly due to him "functioning below his grade level at the time" (Dr. Russell's Social History – Risk Assessment, 05/27/2004). I do not otherwise have access to any additional records, other than those cited above in the Procedures of Evaluation, to either substantiate or refute any other aspects of Mr. Cole's self-reported psychosocial history.

RESPONSES TO COURT ORDERED ITEMS:
In line with the Court's order, the following are offered:

1. Whether the Petitioner has a rational understanding of the reason (Petitioner) is being executed?

YES. Mr. Cole does not currently evidence any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his ability to rationally understand the reason he is being executed. Throughout my evaluation with Mr. Cole, from the outset and throughout the entirety of it, he expresses both a factual ("see if I'm mentally fit for court and competent here to see if I can go ahead and I guess be executed") and rational ("the State of Oklahoma is executing me for killing my daughter") understanding of the reason he is being executed. As noted earlier, at no point does Mr. Cole ever attribute to himself, either spontaneously or when I directly query him, as having any sort of supernatural, otherworldly, mystical, and/or divine abilities and/or purpose. He does not ever reference, either spontaneously or when I directly query him, about his instant case or subsequent punishment as fulfilling any sort of prophecy, or that (presuming, for the purposes of this evaluation) when his execution is carried out, that any sort of supernatural, otherworldly, mystical, and/or divine, or prophetic event will transpire. He rationally expresses an understanding that following (presuming, for the purposes of this evaluation) his execution, that his corporeal form will cease to exist on the plane of existence he agrees everyone considers being "alive," but notes that his "spirit" will "hopefully (as he expresses)" return "to my Father in Heaven." He rationally discusses his desires for what he hopes happens with his remains, specifically noting that "if it were up to me, I would be buried in a small, modest wooden box in a Jewish cemetery somewhere in Tulsa," adding "I just would prefer they [ODOC officials] not cremate my remains." Mr. Cole does not ever assert, either spontaneously or when I directly query him, that his (presuming, for the purposes of this evaluation) pending execution by the State of Oklahoma is for any other reason other than his instant offense for CF-2002-597. Again, as noted earlier, Mr. Cole spontaneously states to me, at the very outset of our

meeting, that "they want to make sure I'm competent, and that I realize first that I killed my daughter and I went through a trial for taking my daughter's life and a jury found me guilty; they found me guilty of murder and I was given the death penalty for that, and I accept responsibility for that." Given the totality of the available data to me, it is my opinion that Mr. Cole has a rational understanding of the reason he is being executed by the State of Oklahoma.

2. Whether the Petitioner has rational understanding that (Petitioner) is to be executed and that his execution is imminent?

YES. Mr. Cole does not currently evidence any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his ability to rationally understand that he is to be executed and that his execution is imminent. As noted earlier, at the outset of my meeting with Mr. Cole, he spontaneously states to me that, "as I understand it, the first new execution is August 25th, then the next one is September 23rd, and I'm third on the list, so sometime in later October, I believe, possibly the 20th." At no point throughout my meeting with him does Mr. Cole express any sort of irrational, delusional, or in general psychotic or distorted belief about the (presumed, for the purposes of this evaluation) imminence of his execution. While Mr. Cole does not spontaneously discuss his understanding of the procedures of the execution process, he spontaneously and rationally acknowledges the State of Oklahoma will execute him via a lethal injection. He expresses rational awareness that this will take place in the "execution chamber" at OSP. He acknowledges that he will have a "last meal," and that he will have to make plans about what to do with his property following his execution. Again, he rationally expresses an understanding that following (presuming, for the purposes of this evaluation) his execution, that his corporeal form will cease to exist on the plane of existence he agrees everyone considers being "alive," but notes that his "spirit" will "hopefully (as he expresses)" return "to my Father in Heaven." He rationally discusses his desires for what he hopes happens with his remains, specifically noting that "if it were up to me, I would be buried in a small, modest wooden box in a Jewish cemetery somewhere in Tulsa," adding "I just would prefer they [ODOC officials] not cremate my remains." Given the totality of the available data to me, it is my opinion that Mr. Cole has a rational understanding that he is to be executed by the State of Oklahoma, and that his execution is currently imminent.

REPORT SUMMARY

Mr. Cole is a 57-year-old White male who was evaluated on an outpatient basis at the Oklahoma Forensic Center for a Mental Health Evaluation to "determine whether Petitioner has a 'rational understanding': 1) 'of the reason [Petitioner] is being executed'; and 2) [t]hat [Petitioner] is to be executed and that execution is imminent." Mr. Cole is able to communicate in a coherent, logical, and goal-directed manner regarding his pending execution. He is able to sufficiently and rationally discuss his understanding of the reason he is being executed, and that he is to be executed and that said execution is imminent. In my opinion, Mr. Cole does not currently evidence any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that would preclude his competency related abilities regarding his pending execution. In fact, in my opinion, Mr. Cole's presentation with me during this evaluation appears largely (if not entirely) consistent with his presentation during prior evaluations of his adjudicative competence for CF-2002-597, dating back almost 20 years. Consistent with those prior opinions of his adjudicative competence, I

believe that Mr. Cole's presentation, particularly his discussion of religion and religious-themed topics, is solely the discussion of an overvalued belief system, and one that is frankly largely consistent with a religious belief system of millions of individuals who share said beliefs, and is not the product of a statutory-defined mental illness.

Again, at no point during his interview with me does Mr. Cole in his discussions about his religious belief system, ever attribute to himself any sort of supernatural, divine, mystical, or prophetic standing, meaning, or significance, and he routinely refers to himself as an earthly being whom simply enjoys (frankly relishes) discussing his religious belief system. He himself references that he likes and/or wants to discuss his religion and beliefs, and doing so is enjoyable for him. He does not express that his beliefs have any sort of obsessive quality to them (i.e., that he finds these beliefs distressing, and that if he does not discuss them that some sort of negative and/or catastrophic event will occur). Throughout the interview, despite his expressed desire to discuss his religious beliefs, I am always able to redirect him, with little difficulty, and he is able to manage said redirection without becoming distressed, frustrated, and/or irritable or agitated. At no point during my interview with Mr. Cole does he appear to ever lack any sort of capacity to engage in a discussion about his understanding of his pending execution. Overall, in my opinion, Mr. Cole appears to evidence that he can sufficiently and rationally discuss his understanding of the reason he is being executed, and that he is to be executed and that said execution is imminent.

Respectfully submitted,

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Competency to Be Executed Evaluation

Client:	Benjamin Cole
Dates of Evaluation:	February 16-17, 2016; May 10, 2016
Location of Evaluations:	Oklahoma State Penitentiary, McAlester, Oklahoma
Referral Source:	Michael Lieberman, JD. Oklahoma City, OK.
Date of Report:	October 13, 2016

REASON FOR REFERRAL:

Mr. Cole was referred for a psychological evaluation to document his current emotional and cognitive status, and to render a professional opinion as to whether he is currently competent to be executed by the State of Oklahoma.

PROCEDURES ADMINISTERED:

Mental Status Interviews and Clinical Observations; Review of Mr. Cole's collection of personal documents (16 standard boxes); Review of Accompanying Background Clinical Records & Evidence (see Appendix A)

I: Summary of Background Records:

Background

In brief, Mr. Cole was born into a family system where both parents were heavy users of drugs and alcohol before he was born, and his mother continued to drink heavily while pregnant with him. In this family Mr. Cole began using substances early, and was drinking alcohol by age 6. From there he went on to become a polysubstance user, which included huffing gasoline fumes and other toxic chemical

products. Mr. Cole's step-brother, Leonard O'Neil, reported that as a child Mr. Cole huffed gasoline for 1-2 years at a frequency of daily or sometimes once a week (Vol. I, #3, p. 314, Transcribed Interview).Throughout Mr. Cole's childhood he was severely abused physically and emotionally. Incest ran rampant in the family, as elaborated upon by Mr. Cole's step-sister Cherry Peirce (Vol. I, Affidavit, p. 374). Academically Mr. Cole was required to repeat kindergarten and he was placed in a Special Education curriculum for problems with his low reading and auditory comprehension skills. He was held back once again in 5th grade. In 6th grade his intelligence level was measured as showing a wide split between his verbal and nonverbal intelligence (Verbal IQ= 86; Performance IQ=113; Mean = 100 and Standard Deviation = 15). Discrepancies in measured IQ scores this large are not uncommon among individuals with organic brain problems. Such discrepancies indicate, as well, lateralization of brain functioning such that in Mr. Cole's case his language skills (predominantly left hemisphere) are far weaker than his rather high levels of skills related to visual-spatial-motor skills (predominantly right hemisphere). By the 8th grade he was also assessed as registering below average compared to his same-aged peers on standardized achievement measures.

By age 18 Mr. Cole drank heavily and was becoming increasingly isolated and withdrawn. After high school he experienced long periods of unemployment and worked menial jobs. At age 20 he sustained a serious closed head injury (hit in head with hammer while drinking with friends). He joined the U.S. Air Force but continued to demonstrate alcohol and impulse control problems, and he was afraid of being promoted from the rank of Airman E-2 to Airman E-3 (despite the fact that military promotion would provide extra pay and privileges, more opportunity for advancement and a greater degree of respect). His biological mother, as well as his brother, Robert, both described that Ben "snapped" while in the Air Force (Vol. I., #8, p. 11). During phone calls with him in 1993/94, for example, his communications were sounding increasingly bizarre as he told them the rock band "Slayer" was sending him subliminal messages to do things he did not want to do. He was ultimately discharged from the military after he received a two-year prison sentence in California for abusing his first son, Ben Cole, Jr.

After release from prison, Mr. Cole continued to show evidence of continued and progressive mental decline. By age 33 he was essentially homeless and adrift, and was living under bridges or in a tent by a river. He then lived in a common-law relationship with Ms. Susan Young. During that relationship they lost custody of her young son from a previous relationship, and they were both cited by child protection services for neglect. Mr. Cole's condition continued to deteriorate to the point he could not hold steady employment and he still drank heavily. In the brief union with Ms. Young the couple had a child, Brianna Victoria Cole (DOB: 3/27/2002). As reflected in the case files, Mr. Cole was subsequently convicted for first degree murder of Brianna Cole as an infant in the District Court of Rogers County, Oklahoma. Though originally offered a sentence of life without parole to avoid the death penalty, Mr. Cole rejected this plea offer and went to jury trial. Mr. Cole was found guilty at trial and was sentenced to death. He is currently on the H Unit at Oklahoma State Penitentiary ("OSP") in McAlester, Oklahoma. At the time of this evaluation, Mr. Cole is currently under a Stay of Execution in the State of Oklahoma pending the outcome of present investigations into the status of the death penalty in Oklahoma.

Prior Psychiatric Evaluations

There have been multiple psychiatric evaluations conducted of Mr. Cole over the past 13 years, beginning with early evaluations to assess his competency for trial. In parallel to these competency evaluations there have been several neuropsychological evaluations. These have provided the data required to request more sophisticated neuroimaging studies that confirmed the presence of organic brain lesions of the left hemisphere of Mr. Cole's brain.

Mr. Cole was initially evaluated at the Rogers County Jail by Dr. Kathy LaFortune, who worked for the Oklahoma Indigent Defense System ("OIDS"), on 2/13/03, to determine whether his attorney should hire

an expert witness to address his psychological disturbance at trial (Vol. I., #2, p. 198). At that time Mr. Cole was considered by Dr. LaFortune to be competent to proceed to trial though his attorneys, Silas Lyman and John Dalton (who also worked for OIDS) reported that he was unable to assist them in his defense.

Dr. Bill Sharp conducted a psychological evaluation at the behest of Mr. Cole's attorneys on 10/25/03 at the Rogers County Jail (Vol. I., #2, p. 208). During the evaluation Mr. Cole was reported to be paranoid and neuropsychological testing was recommended based upon the results obtained from neuropsychological screening measures.

Dr. Jeanne Russell was asked by Mr. Cole's attorneys to provide an in-depth assessment of Mr. Cole's social history and risk assessment (Vol. I., #2, p. 217). In her report of 5/27/04, she noted that 80% of the time he focused on religious topics and that he gets depressed on certain days of the month that remind him of his daughter's death and burial. At that point his religious discourse, though pervasive, was not yet considered of delusional proportions; rather, it was considered consistent with the fundamentalist church he had previously attended.

Based upon Dr. Sharp's recommendations, a comprehensive neuropsychological evaluation was conducted by Dr. Michael Basso on 6/15/04 (Vol. I., #9 p. 125). Dr. Basso further noted in his report Mr. Cole's prior history of head injury on the right forehead with a hammer. Dr. Basso concluded that he found a pattern of mild to moderate abnormalities in Mr. Cole's brain functioning, which included the following areas of impairment: impaired abstract visual reasoning, impaired simultaneous conceptual sequencing, impaired figural fluency, impaired verbal concept formation and impaired right tactile sensation. Overall, Dr. Basso concluded the presence of impaired brain functioning, which was maximally present in the left temporal-parietal region of the brain. He recommended further evaluation with a neurologist, as well as a magnetic resonance imagining study (MRI) and an electroencephalography (EEG).

Along with the above noted neuropsychological findings from both Dr. Sharp's screening assessment, and further quantified by Dr. Basso's full neuropsychological assessment, Mr. Cole's attorneys continued to struggle with whether he was competent to assist them in a meaningful and productive manner. They sought yet another competency evaluation. In a letter written to Judge Dwayne Steidley 8/18/04 (Vol. I., #2, p. 241), Dr. Samina Christopher reported upon her findings that Mr. Cole met the statutory requirements to stand trial and to assist counsel if he chose to do so. As with other competency reports in these earlier years, neuropsychological issues were not addressed.

The question of competency to assist counsel was again raised by Mr. Cole's attorneys, when Dr. Paula Monroe evaluated Mr. Cole on 8/30/04. On referral from attorney James Bowen, Dr. Monroe was asked to assess Mr. Cole's ability to understand the charges against him and to rationally assist counsel in his defense (Vol. I., #2, p.236). Mr. Bowen had been concerned about Mr. Cole's religious preoccupations as interfering with his ability to assist counsel. In this evaluation, Dr. Monroe found Mr. Cole competent to proceed to court.

Approximately three years later, Dr. Randall Price conducted a Competency to Stand Trial evaluation on 11/19/07 (Vol. I., p. 171, & p. 252), which included direct observations of the client –attorney interactions. Throughout the evaluation Mr. Cole spoke of little else but scripture, and told Dr. Price that he could not be interviewed about his past history since any discussion about it would be "like putting Jesus on the cross again and again, which is like doubting my own forgiveness." Throughout the evaluation he was likewise rambling in speech, grandiose and delusional. Noting the significant impairments in reality testing, as well as with communication and delusional thinking, Dr. Price opined

that while Mr. Cole did understand the factual basis of his case, he was unable to competently assist his attorney due to his perseverative focus on religiously themed delusions.

Dr. Raphael Morris provided a comprehensive psychiatric evaluation (dated 4/4/09) and found Mr. Cole to be incompetent to assist counsel. Mr. Cole was diagnosed as suffering from schizophrenia, paranoid type, with grandiose delusions manifested as hyper-religiosity (Vol. I., #2, p. 261). In this report Dr. Morris had to rely heavily upon collateral sources since Mr. Cole was too delusional to make rational sense.

Six years later, on 1/21/15, Dr. Morris evaluated Mr. Cole again and updated his previous evaluation of 4/4/009. In the update he noted that he first met Mr. Cole in 2008, and that in 2009 he opined the diagnosis of schizophrenia, paranoid type. He elaborated that Mr. Cole had demonstrated mental illness even before 2003, which had persisted to the present. He opined that Mr. Cole lacked the capacity to participate in habeas proceedings and recommended further mental health evaluations. In this affidavit Dr. Morris further noted that because Mr. Cole had not received any treatment for the schizophrenia over the six years since he had evaluated him, that he has deteriorated even further, as demonstrated by his prolonged periods of refusing to come out of his cell, refusal to meet with evaluators or his legal team, and that he has stopped bathing resulting in extremely poor hygiene. Dr. Morris also attempted to conduct an evaluation to determine Mr. Cole's competence to be executed and noted that he was not allowed to meet with the defendant in his cell to observe him there. Dr. Morris concluded that there was even more objective evidence of paranoid schizophrenia than he had observed in the 2009 evaluation. Dr. Morris also concluded, as well, that there was more evidence that Mr. Cole suffers from a neurochemical illness, a conclusion that has been supported by prior neuro-imaging studies. Dr. Morris also recommended that follow-up PET Scan and MRI studies be obtained. Finally, as Mr. Cole's execution date loomed near, Dr. Morris indicated that given all of these clinical considerations, that Mr. Cole's competency to be executed must be questioned.

Prior Neuroimaging Studies

Indicated below are the results from a series of neuroimaging studies that were conducted following on prior recommendations for advanced neuroimaging studies to clarify the pathognomonic findings obtained from the neuropsychological testing.

Dr. John Hastings, M.D. of Neurologic Medicine reviewed the results from Mr. Cole's MRI taken on 9/22/04. Dr. Hastings reported finding an 11 mm lesion of the left hemisphere, located deep in the white matter near the internal capsule (Vol. I., #2, p. 249). The lesion was non-specific but had a configuration that might be seen in a multiple sclerosis tumor or small abscess. No atrophy or shrinkage was observed as might be seen with chronic alcohol or a degenerative disease process. Further studies were recommended to determine if the lesion is static or progressive (2/13/07).

This same MRI of 9/22/04 was reviewed by Dr. Matthew Powers, M.D. of Powers Radiology, P.C. on 2/3/07. Dr. Powers provided an essential recapitulation of the report provided by Dr. Hastings (Vol. I., #2, p.251). Dr. Powers confirmed the radiological finding of an 11 mm lesion within the deep white matter of the brain. This was considered a large lesion. Findings further noted that disruption of these white matter fiber tracts in the brain tissue can result in significant behavioral dysfunction due to the interruption of electrochemical signal transmission across brain regions, resulting in impairments in information processing and a break down in the regulation of complex behavioral functioning. The cause of these defects in the frontal-temporal region were considered unknown. In this report follow up recommendations were offered: (1) a second MRI was recommended because the 11 mm lesion could be a tumor and a new MRI would help determine if the lesion is static or is continuing to grow; (2) An EEG was also recommended since the obtained results were also considered consistent with a potential seizure

disorder; (3) a PET (Positron Emission Tomography) Scan, which is the most accurate and useful form of brain scanning; (4) and finally, a fludeoxyglucose study (FDG) of local glucose metabolism.

In her affidavit of 1/16/15, Dr. Anne Hayman, a Board Certified Radiology Specialist, observed of the findings obtained with Mr. Cole's MRI images: "His brain renders him unable to respond in a normal way to his environment. The lesion and symptoms are worsening." She elaborated that the lesion could be "progressive structural and biochemical abnormalities that severely impair his ability to interact appropriately with his surroundings" (Vol. I., #2, p.300). She also noted that the lesions was detected over 10 years ago and has progressed, and that Mr. Cole's symptoms have worsened. Dr. Hayman recommended an MRI and PET scan. (1/16/15)

In the Declaration of Dr. Ruben Gur, Professor at the University of Pennsylvania School of Medicine and Senior National Institute of Health Researcher (NIH), he reviewed the raw data from the neuropsychological evaluation conducted by Dr. Basso. Dr. Gur applied these data to the Behavioral Imaging Algorithm, a computer program which helps to localize brain damage based upon various neuropsychological data (Vol. I., p. 292). Dr. Gur concluded that these findings indicated that Mr. Cole's neuropsychological test performance was well below average, with pronounced deficits identified in the frontal region of the brain, and with greater impairment in the left hemisphere. Significant damage to the left frontal-parietal lobe was identified. This pattern of neuropsychological findings was also noted to be consistent with findings of schizophrenia. Dr. Gur's final diagnosis: organic brain damage of moderate to severe levels resulting in neuropsychiatric illness. (5/11/09) It is also noted, parenthetically, that Mr. Cole's attorneys now inform that Mr. Cole is beginning to drop things frequently, a behavior often indicative of possible deterioration in gross motor control.

At Clemency Hearing on May 14, 2015 testimony was provided by evaluating psychiatrist Dr. Morris and neuroradiologist Dr. Anne Hayman. Dr. Morris noted progressive structural and biochemical abnormalities with Mr. Cole's brain that impair his ability to interact appropriately with his environment. There are structural lesions of the left globus pallidus, along with his chronic paranoid schizophrenia and left basal ganglia, and a prominence of "negative symptoms" of schizophrenia- are all related to abnormalities in the left global pallidus. Dr. Morris further opined at the Clemency Hearing that Mr. Cole would have been incompetent at his trial and that at that time he was suffering from schizophrenia, paranoid type, and that his delusions and paranoia would have prevented him from having coherent and rational discussions with his defense attorneys.

Previous Attorneys & Legal Staff

Mr. Cole's past and current attorneys have repeatedly noted that before, and especially after his capital sentence, that Mr. Cole has not been able to confer with them in a rational and coherent manner that has been of assistance with the case. Essentially, legal defense teams have had to work on his defense without his input. Each defense team after the death sentence have encountered the same set of issues: namely, his persistent religious delusions and preoccupation with the end of the world, all of which has made it impossible to hold rational conversations with him about his case. His litany of irrational decisions and months of non-communication with his attorneys, as well as his complete detachment from the legal process about his case, have been noted repeatedly across the years by his various legal teams as well as their investigators. Marked deterioration in Mr. Cole's functioning is observed particularly after 2008/2009.

Ranada Gentry had been employed as an investigator for the Office of the Public Defender and met with Mr. Cole (Vol. I., Affidavit, p. 380. (10/14/08). She described that on a visit to Mr. Cole in prison that he asked her about a book entitled, "*Strong's Concordance.*" She described that he was so excited about this book that he was behaving "similar to a 4 year old in a candy store" amidst his rapid breathing and

shaking. She elaborated that while she had had clients with similar religious preoccupations, she had never seen one as extreme as Mr. Cole.

Former defense attorney Gordon Lynn Burch III (Vol. I., Affidavit, p. 159) (1/13/15) described how when he had worked on Mr. Cole's case he had been concerned about Mr. Cole's ability to understand legal issues when the legal team tried to explain them to him. At that time he thought it was in Mr. Cole's best interest to plead guilty to avoid the death penalty and he had repeatedly tried to explain these sentencing options to him. However, Mr. Cole would not talk of anything but religion. He described that throughout his trial he never considered Mr. Cole competent to go to trial. He recalled that throughout his trial Mr. Cole's expression never changed and he remained completely detached from the court proceedings as they unfolded.

Attorney James Bowen (Vol. I., Affidavit, p. 162, p. 352) (1/13/15), who was Deputy Division Chief for the Tulsa Capital Division of the Oklahoma Indigent Defense System, described that competency issues at trial were apparent for some time because Mr. Cole could not assist in his defense due to his religious preoccupations. He described that during Mr. Cole's trial his only body movement was to blink his eyes. When the jury's verdict was read aloud he did not move.

Vicki Werneke, who had been the Chief of the Capital Post Conviction Division (CPC) of the Oklahoma Indigent Defense System (Vol. I., Affidavit, p. 165) (1/15/15) described similar experiences as described by the other referenced professionals as lead counsel. She noted that the only conversations she had with Mr. Cole were on religion. In these conversations she could not follow his thinking. She noted that she has had clients with severe mental illness issues before; yet, in her experience, Mr. Cole withdrew deeper into himself than the others with severe mental illness. Other inmates had told her about how Mr. Cole never came out of his cell and kept his cell dark inside all the time.

Anastasia Cesario had served as a Research Assistant for the Capital Post Conviction Division of the Oklahoma Indigent Defense System and had been on the defense team with attorney Vicki Werneke (1/25/07). She had interviewed Judge Steidley regarding Mr. Cole's behavior in court (Vol. I., Affidavit, p. 167) (2/26/07). On a scale of 1-10 (with 10 as worst) she reported that the judge placed his observations of Mr. Cole's dissociated behaviors at an 8-10 compared to others he had observed before the court. Judge Steidley told her he ranked Mr. Cole as demonstrating the highest level of disturbance he had seen in his court.

Timothy Wantland, JD had sat in on two days of the trial proceedings, and described that Mr. Cole had seemed distant and disinterested in them. It appeared to Mr. Wantland that Mr. Cole had impaired mental capacity (Vol. I., Affidavit, p. 170)2(/21/07).

Assistant Federal Public Defender T. Kenneth Lee represented Mr. Cole from 11/7/08 until he left the Federal Public Defender's Office on 8/8/14. (Vol. I., Affidavit, p. 180). As with other legal counsel, Mr. Lee's efforts to communicate with Mr. Cole were met with religious outpourings that were not productive, and which provided his legal team with no assistance. By the end of 12/08 and through 2009, Mr. Cole started refusing to meet with his legal team altogether. In 2009 Mr. Cole showed a distinct pattern, wherein if he came out of his cell to meet with counsel he only stayed a few minutes or would refuse to meet altogether. Most meetings were brief, lasting less than five minutes. Mr. Lee wrote an email to Mr. Cole's case worker at the prison who in responding acknowledged to Mr. Lee that Mr. Cole had not left his cell for over 2 ½ years. During his five years of representing Mr. Cole, Mr. Lee reported that he never had a substantive conversation with him that had not been eclipsed by his religiosity. Mr. Cole was never engaged in the case, and was never able to assist counsel in legal proceedings. He described how Mr. Cole's condition had regressed over time such that Mr. Cole's letters deteriorated from writing in complete sentences to producing mere fragments of thoughts written on scraps of paper. Mr.

Lee noted that Mr. Cole did not think he would be executed, as he made statements of the like that, "God would open the doors of the courthouse after his trial and he would be set free". Mr. Lee is not confident Mr. Cole understands the significance of being executed.

Anna Wright (Vol. I., Affidavit, p. 189) (1/13/15) has been employed with the Federal Public Defender's Office Habeas Corpus Unit since 11/08, and has reviewed the records collected on the Cole case. She described that Mr. Cole has been increasingly withdrawn since when she initially met him in 2008. He never made calls to their office unlike many clients. Over the past three years she has observed that he has sent small fragments of paper with only partial and incomplete sentences that never contained any reference to his case or court proceedings. She noted that "none of Mr. Cole's most recent notes indicate he is aware he is scheduled for execution." His most recent notes are nearly identical in content: "he asks for spare change for "important projects."

As Mr. Cole's execution date moved closer Ms. Wright described how on 1/18/15, for example, that his attorneys explained to him that he will have two more chances to get his religious message out; yet, nothing his attorneys said to him about his pending execution provoked any response or bodily movement. As she put it: "[e]ven in the face of our direct statements and queries to Mr. Cole, he never gave the slightest indication that he had any understanding, rational or irrational, of his pending execution or the reason for it." She elaborated that Mr. Cole's religious preoccupations interfered with all efforts at providing him with the basic information about his execution at the 35 days mark prior to the execution date. When discussing with Mr. Cole the basic provisions for his execution, such as what would be the content of his last meal, who he wanted to be on his visitor's list at his execution, who he wanted to assume the custody of his belongings after his death, and with other such final details as well, he would respond: "that's not really been decided [by God] yet", or "that's not really decided either." Ms. Wright further elaborated upon the frustration of getting Mr. Cole to realize that these lengthy discussions with him about his execution were not made in the abstract but pertained specifically to him personally: "I left the visits feeling like Mr. Cole did not appreciate the situation he was in regarding his upcoming execution and the process/arrangements surrounding this. Anything from Mr. Cole that may have initially appeared to reflect understanding was quickly diminished because of his underlying beliefs, which he could not explain." (1/29/15 Affidavit)

Prison Staff

Available records from the Oklahoma State Penitentiary at McAlester (OSP) were also reviewed. Mr. Cole's years of very poor hygiene and unwillingness to leave his cell are behaviors thoroughly documented by prison staff. Most of these clinical notes, however, reflect little more than casual observations of Mr. Cole's daily behavior in passing during the routine course of administering the prison's daily tasks. As Mr. Cole typically spent his entire day in his cell, and interacted with virtually no one, and since he did not create a behavioral disturbance that required staff attention or special intervention, his days went largely unnoticed and sparsely documented.

By 2014 Mr. Cole's prolonged isolation, abhorrent hygiene and deeply regressed and vegetative behavior could no longer be ignored by the prison clinical staff. Patti Stem, Clinical Coordinator with the Oklahoma Department of Corrections (Vol. I., # 10, p. 129), reported in the Mental Health Status Review (8/29/14) that Mr. Cole was presenting a low level of active psychotic symptoms, and that while he had previously refused meals (for self-reported religious reasons) he was now eating. Ms. Stem also noted that beginning in January 2014, Mr. Cole was showing behavior that evidenced clinical decompensation. Among other observations, she noted that at the current time of writing her clinical note that Mr. Cole had refused to engage with her. Other officers noted that Mr. Cole rarely spoke and would communicate with a simple "Yes' or "No" throughout daily routines.

The Department of Corrections Log (Vol. I., #11, dated 7/30/14; p. 401) documented numerous instances from March 2014, and thereafter, wherein Mr. Cole either refused to be seen by a staff member, remained mute when spoken to, refused to be weighed or accept medical care, and demonstrated increasingly poor eye contact and social withdrawal. In light of these staff observations reflected in the DOC Log, which had been entered by multiple observers on the H Unit, Dr. Kirby noted on 3/11/14 (Vol. I., p. 143) that "schizophrenia is a possible diagnosis" for Mr. Cole. Dr. Kirby went on to document his rationale for that inference by citing specific symptoms that are consistent with the diagnosis of schizophrenia. In his charted clinical notes, Dr. Kirby further exposed a clinical contradiction in the prison records. He indicated that the current mental health classification level as "zero" for Mr. Cole appeared incorrect; noting that if Mr. Cole had been designated as having a mental health level of "B" (implicating a higher level of severity) at age 39, then at age 49, his current mental health classification level could not now logically be at zero (Vol. I., p. 144-145). In other words, Mr. Cole's mental condition had not significantly improved over the last decade as would be implied by the classification rating in the records. Rather, it had declined.

As with other observers on 7/28/14 Dr. Patst also noted: "increasing mental health concerns" (Vol. I., p. 438).

As Mr. Cole's planned execution drew near, on 1/26/15 (Vol. I., p. 640) Patti Stem, Clinical Coordinator, accompanied the Prison Warden to meet with Mr. Cole. Ms. Stem documented the transaction following Mr. Cole's refusal to participate in the 35 Day Notification Hearing. Mr. Cole is described as explaining to both Ms. Stem and the warden that he did not come to the previous hearing because he was not prepared to make decisions pertaining to visitation, his last meal, and other details associated with his execution. He also told the warden he had to have a full body burial.

On 2/11/15 Patti Stem, Clinical Coordinator, again accompanied the Warden to CHSA to meet with Mr. Cole again and documented the transaction (Vol. I., p. 635). This note carefully documents how the warden had asked whether Mr. Cole knew that when an execution date was set that he would be executed by lethal injection; and he said "yeah." When asked if he knew why he was being executed he answered, "Yes."

A shift in the availability of Mr. Cole's records occurred in April 2015, effectively closing off any opportunity for his legal team to review them. On 4/6/15 (Vol. I., p. 5220) the Oklahoma Department of Corrections provided a Release of Protected Information document that authorized the release of medical records which reads as follows: "Entire medical record except mental health." A Mental Health Progress Note of 4/16/15 (Vol. I., p. 629), for example, further indicates that Mr. Cole agrees "to have his physical medical records [released], but apparently not his mental health." And that "he said that he had no needs from mental health or medical at this time, that he had seen enough doctors for a lifetime."

Despite Mr. Cole's reported unwillingness to have his mental health records released some were, nevertheless, released:

Beginning on 7/23/15 the Clinical Coordinator, Patti Stem documented the Warden's visit to Mr. Cole's cell and noted that he OK'd the execution date that had been set. In this detailed note, Mr. Cole is described as having many questions, and recalling numerous details from previous discussions when an execution date had been set. He is reported to have asked detailed questions, such as whether he would have to be cremated. He is reported to then correct himself by adding that, "I understand that isn't possible." He also asked whether he could have a Messianic Rabbi conduct his funeral. When asked if he knew why he was going to be executed, he responded, "my crime;" when asked what his crime was he responded "murder." He acknowledged he would cooperate with the 35 Day Notification Hearing (Vol. I., p. 723).

On 9/1/15 Clinical Coordinator, Patti Stem, again wrote very detailed observations of Mr. Cole's behavior during his 35 Day Notification Hearing and thereafter (Vol. I., p. 616). Ms. Stem reported that during this hearing Mr. Cole discussed details about the execution as well as wanting Kosher food for his last meal. At the 35 Day Notification Hearing she described Mr. Cole as clear and rational and able to talk about his spiritual advisor, his desired witnesses to the execution, as well as the details of the disposal of his body. He signed his name on the document as opposed to an "X" as on previous occasions. She elaborated that he gave no evidence of a thought disorder, was not attending to internal stimuli nor was he experiencing auditory or visual hallucinations. He acknowledged anxiety about the execution process and was provided with information about the availability of a mild anti-anxiety medication if he wanted it. Mr. Cole stated he used prayer and scripture to combat anxiety. The 35 Day Hearing and following assessment were noted as taking two hours to complete, during which Mr. Cole was described as actively engaged in the discussion.

The Oklahoma State Penitentiary (OSP) Execution Log provides a running observational assessment of an inmate's behavioral status every 15 minutes during the 35-day period immediately prior to the scheduled execution date. Mr. Cole's Execution Log began on 9/2/15 and stopped at 11:38 on 10/2/15 when an Indefinite Stay of Execution was implemented. Throughout this observational period during the countdown to his execution Mr. Cole primarily slept, sometimes did not eat, and he refused attorney visits.

On 9/15/15, while Mr. Cole would have been under the 35 day countdown to execution, it was noted on a Mental Health Assessment Form that he *crawled* [italics not original] to the cell door as he was provided with photos of the Holy Land and was appreciative of them. (Vol. I., p. 603). Such crawling behavior was reported again on a Mental Health or Mental Status Review, dated 9/24/15 (Vol. I., p. 594) which noted "Offender Cole got out of bed and crawled to the door to give this QMHP a piece of paper with updated phone information on it for his son." The writer of this clinical note, nevertheless, indicated that Mr. Cole is "feeling really good" this morning.

Prison Cellmates

There are several affidavits from Mr. Cole's former cellmates on H Unit at OSP. Each of these former cellmates found Mr. Cole's behavior to be bizarre and his hygiene highly offensive.

Former cellmate, Carlos Cuesta Rodriguez, noted in his affidavit (Vol. I., p. 148, 1/21/15) that not once in his entire year with Mr. Cole did he observe him attend to his hygiene by taking a shower or brushing his teeth. Throughout this year Mr. Cole talked to no one, kept to himself, and always had the TV on to a religious channel. He received stacks of mail from religious people throughout the world that Mr. Cole piled up in stacks within the cell. He would sometimes read his bible or write on the pages. As inmate Rodriguez succinctly put it: "Cole was not in his head."

Inmate Michael Edward Hooper had been Mr. Cole's cellmate for seven months, from 3/05 to 10/05. (Vol. I., Affidavit, #3, p. 354). Inmate Hooper variously described Mr. Cole as "repulsive", "anti-social, stayed to himself", "kinda [sic] nutty", "very moody" or "off in another world." Inmate Hooper described that he related to Mr. Cole in the same manner as he would to someone with Alzheimer's disease in a nursing home. Mr. Cole's hygiene was poor and inmate Hooper tried to show Mr. Cole how to wash himself. He described that Mr. Cole would go into what appeared to be "trance-like states" quite often. Mr. Cole preferred to keep the lights off and live in the dark. When watching television he felt that Mr. Cole couldn't follow the story being shown on the screen, that he was simply watching the visual movements without understanding anything else about the plot or characters. Mr. Cole would go on fasts, which ranged from one to 20 days in duration. Inmate Hooper said that Mr. Cole swore: "God put him in

prison and didn't seem to acknowledge the real reason he's here. He thinks God is going to release him from prison and says God took his family away." In October of 2005 he described how Mr. Cole attacked him, which led to Inmate Hooper being transferred to a different cell away from Mr. Cole. He described Mr. Cole's assault: "it wasn't him coming at me swinging, it was him coming at me with claws and he didn't know what to do." He noted that "I really don't think Mr. Cole understands the seriousness of the situation. He lives in his own little world and thinks everyone needs to take care of him."

Review of Transcript of Proceedings on 8/28/15 before Judge James Bland. (Begins on p. 849).

This is a very long and complex transcript. Provided here are but a few of the poignant exchanges with Mr. Cole in the courtroom that serve to illustrate aspects of his thinking as it pertains to the complex litigation about his future execution.

During questioning by attorney Michael Lieberman, one of Mr. Cole's defense attorneys, Mr. Lieberman pulled up his chair next to him in order to ask questions and to hear Mr. Cole's barely audible and frequently mute responses. Astonishingly, Mr. Cole said to the court that Jesus was coming back *today* [italics not original] (Vol. II., p. 868). Judge Bland asked Mr. Cole if he was aware that an execution date had been set, to which Mr. Cole replied: "October 7." "Go home. To be with Jesus. (Vol. II., p. 872)." Judge Bland asked him if he understood why he was sentenced to death; and Mr. Cole replied "death of daughter" (Vol. II., p. 873). On the one hand, it would be simple to assert that based upon Mr. Cole's succinct answers to Judge Bland's questions about execution that he does, in fact, know he is to be executed and why. Yet, if Mr. Cole believed that Jesus was returning "today," upon that very day in which he sat in the courtroom, then it cannot logically follow that he accepts that he would, in fact, actually be executed on the future date of October 7th. By Mr. Cole's logic he cannot be executed- he would have been taken by Jesus well before the execution.

Federal Public Defender Investigator Julie Gardner testified that throughout the case investigation Mr. Cole has not been able to assist his attorneys, and that he will talk exclusively about his ministry and religion (Vol. II., p. 878). She further elaborated upon the thousands of pages of Mr. Cole's religious materials, which includes 35 Bibles and two Concordances, he has collected since incarceration (Vol. II., p. 879). She has had to coordinate with prison officials to periodically collect these materials from Mr. Cole's cell since they tend to accumulate in large stacks in the cell. She admitted Mr. Cole has remained focused upon getting his spiritual message out, but she has not been able to understand from him what that message is. He has named his ministry "Seed Faith Ministries Highways and Byways Ezekiel Shepherture (sic)." The content of his messages focus on the "end times" for the world, and he has discussed other issues such as the "Bakersfield Prophesy" (Vol. II., p. 889). Specifically, the Bakersfield Prophesy refers to when Mr. Cole had become "born again" in Bakersfield, California in 1988/89. He had been at a revival meeting and someone a few pews ahead of him had told him: "the world will know you." When this statement was made to him a second time he became excited because he thought he was going to bring glory to God's name (Vol. II., p.893).Ms. Gardner further testified that Mr. Cole thought that his crime and execution, along with all the media coverage of both, was partial fulfillment of this prophesy, and he felt that God had made him do it [the homicide against his child] because he had backslidden twice from God.

Ms. Gardner further elaborated that Mr. Cole had thought he was "going home [to God]" today, in reference to Mr. Cole's above referenced assertion that Jesus was returning on this very day in time (Vol. II., p. 899). She described that the defense team had tried to see if Mr. Cole really understood that October 7th was his scheduled execution date. She described how when confronted with this specific information, "He was quiet for a while, did some sort of weird giggle, and then said 'you just have to wait, the Lord likes to show up sometimes at the very last second,' is what he said. Then he cited Luke 21:36 (Vol. II., p.

905)." The legal team then went through the biblical verse with him but still had no clear idea if Mr. Cole truly understood that he was going to be executed on October 7th.

The court denied the petitioner's request for the court to order the Department of Corrections to have the defendant sedated and transported for medical tests. The court also found no evidence the Warden had abused her discretion in the case with her determination that Mr. Cole was competent to be executed. Yet the court also acknowledged that it found some evidence that supports the position that the defendant is not competent or sane (Vol. II, 1097).

II: Evidence Review of Ben Cole's Personal Documents (consisting of 16 standard storage boxes of religious-themed materials (various bibles, books, pamphlets, tracts, post cards, essays, and hand written notes signed either by Mr. Cole or written by others to him)

The following clinical inferences are drawn from a review of these voluminous materials:

1. Mr. Cole is deeply obsessed with religious materials and he maintains his belief that he has a religious ministry. The nature of his religious preoccupations is consistent with the hyper religious delusions of grandeur that have been integral to his paranoid schizophrenic condition, and which has been in evidence for many years. These religious ideas are fantastical, apocalyptic, and on the extreme fringe far outside the mainstream of religious beliefs. These ideas are amplified and reinforced by his belief that God speaks directly to him. He also made numerous and detailed notes about prison canteen prices which became more intricate over time, often crowding many figures, symbols and lists of items onto a small slip of paper.

2. There has been superficial correspondence between Mr. Cole and various evangelical ministries throughout the United States, and with other writers internationally, who have reached out to him through various religious missions to provide him with their emotional support and pen-pal type correspondence. It is noted that in the early years of this correspondence, Mr. Cole's letters were written in a manner that was relatively clear, cogent and logical. In that correspondence he would often request money for stamps or stationary to support his continued efforts to correspond with various ministries. In late years, of course, his correspondence lacked the clarity and rationality of earlier years.

3. Mr. Cole demonstrates a very idiosyncratic method of making notations and cataloging all of his incoming correspondence regardless of the source. Over time this notation system showed less stylized cursive, and became increasingly complex and decipherable only to him. It is noted that a reversion to the use of increasingly cryptic and secret codes, or symbols, is a common symptom manifestation among chronic paranoid schizophrenics who can go on to develop a language system that consists of autistic logic and symbolism understood only by themselves and without shared social consensus.

4. Mr. Cole received from a wide variety of sources a large volume of religious books, pamphlets and tracts over the years. However, he seemed to have actually read very few of these materials. There was an absence of any kind of markings in most of the materials, or indications of turned or creased pages, or any other indications the materials had been handled and read. Mostly these materials were collected, cataloged, and stored in his cell but did not appear to have been read.

5. Those materials that were apparently read were very short religious tracts with less than 10 pages of content, or were animated cartoon type strips that convey a biblical theme. Given his documented educational history of reading problems, and low average verbal intelligence, it is

not surprising that this elementary level of reading material would be what he actually tried to read.

6. It appears that Mr. Cole kept all of the materials he received and threw nothing away. This hoarding behavior resulted in the prison facility needing to periodically request that Mr. Cole's attorneys come and take all of the materials out of his cell as the materials exceeded the amount inmates are allowed to keep pursuant to Department of Corrections regulations. Materials taken out of Mr. Cole's cell included empty plastic food wrappings pressed among his belongings, along with some of the books wrapped in cut-out paper bags.

7. Mr. Cole's penchant to collect everything and discard nothing from his cell is also consistent with classic hoarding behaviors observed among the obsessive compulsive conditions. The hoarder typically assumes they cannot part with anything since it may be needed later.

8. In his early years of incarceration Mr. Cole's penmanship can be described as generally neat, crisp and precise. In later years his writing shows crowding tendencies, indicative of increasingly impaired abilities with planning, organizing and sequencing written materials. Increasingly more information will become crowded onto a single page, or small corner of a page, comparable to micrographia (sometimes observed in neuropsychiatric conditions).

9. When Mr. Cole reviewed written materials/publications from earlier years (2005, 2006, 2007) his basic cognitive information processing abilities appeared relatively intact, as evidenced by his ability to underline biblical references on the pages, circle meaningful words, or make coherent notes in the margins. His cognitive processing skills became more impaired over time after those early years.

10. The themes and orientation of the religious literature Mr. Cole had requested from various ministries to send him were principally devoted to prophesy and apocalyptic themes, and other variations on the "end times." Over time, the content of the materials he requested were increasing divergent from mainstream religious themes, and moved more to the quasi-psychotic fringe of religious ideas. Among the fringe documents included numerous tracts of pseudo-science speculation, combined with apocalyptic themes of world destruction, which involve futuristic technologies that read like cartoons or elementary school-level pulp-fiction. These materials would appeal to an unsophisticated mind.

11. Mr. Cole requested numerous documents that pertain to popularized urban myths, and conspiracy theories. In an article in the New York Times (8/9/06) regarding universal health coverage, for example, Mr. Cole wrote comments in the margins about how this could be the forerunner of the biblical "Mark of the Beast" and made other apocalyptic notations about this topic.

12. There were few documents that contained biographical notations in the margins. Those that exist demonstrate copious notes indicating that the material he was reading had strong emotional resonation for him. In one document, for example, titled *"Dealing with Hindering Spirits"*, Mr. Cole underscored passages that pertain to demonic attacks. Such notations were not found in other texts. Though highly suggestive, firm conclusions cannot be drawn from this single text regarding whether Mr. Cole has ever felt personally attacked by demonic forces; though such biographical notations such as this one would certainly raise such questions.

13. There is a strong suggestion that at times Mr. Cole has tried to find existential meaning in his suffering while in prison. He would underline passages that describe how God guides us and

exposes us to suffering to wake us up spiritually, or how sinners can be forgiven and those who suffer from their guilt "will be given gladness of heart."

III: Mental Status Interview and Clinical Observations:

2/16/16. 1st Visit. 1.0 hour total time; Attempted Clinical Interview with Mr. Benjamin Cole- accompanied by Attorney Michael Lieberman and Investigator Julie Gardner:

At the H Unit at OSP, Supervising Officer J. Whala reported that Mr. Cole would not meet with us. Mr. Lieberman discussed with Officer Whala the manner in which Mr. Cole had been asked about whether he would agree to the visit. Officer Whala reported that he told Mr. Cole that his attorney and a doctor were here to meet with him. Officer Whala agreed to Mr. Lieberman's request to ask Mr. Cole for a second time if he would meet. Officer Whala returned with the same answer that Mr. Cole would not meet with us as requested. Officer Whala was informed that we would return tomorrow for another attempt to interview Mr. Cole and Officer Whala agreed to convey this information to Mr. Cole.

2/17/16. 2nd Visit. –2.0 hours total time. Clinical Interview with Mr. Benjamin Cole- accompanied by Attorney Michael Lieberman and Investigator Julie Gardner:

Mr. Cole was interviewed in H Unit's interview room, which was equipped with a table, four chairs and several stools situated behind the chairs. The walls were of an asbestos type material that completely insulates the walls. There was a large viewing window that looks outwards to an interior hallway within H Unit.

Clinical Observations of 2/17/16 Interview:

Mr. Cole was wheeled into the interview room in a wheel chair by one of the H Unit guards. He was in shackles on his feet and his hands. He was dressed in roughhewn clothing that appeared to be comparable to sweat clothing. He appeared very unkempt and had a long scraggly beard. His hair was very long and unwashed in a thick mat with what appeared to be a partial pony tail. He appeared very psychologically regressed and vegetative. He did not appear oriented in any sphere (time, place, person or situation). It was difficult to tell if Mr. Cole was actually asleep or not as he kept his eyes closed throughout the contact. It was not possible to tell if he was responding to internal stimuli, though there was no evidence of grimacing, mumbling to himself, or any other mannerisms typically correlated with this phenomenon. In the wheelchair he sat slumped over, leaning to the left, though still maintaining a very rigid posture. Such behaviors are commonly observed in the catatonic states, or other forms of neuropsychological compromise. His fingers were curled partially inward toward the palms, not unlike individuals with cerebral palsy. His head hung low and rested against his chest. Mr. Cole rarely made a verbal statement and when he did his speech was barely audible. He made vocal grunts when he was answering in the affirmative to a question. He never made eye contact with anyone. Most often he remained silent and non-responsive to any question posed to him. His lips did not move after he answered the first two questions (described below). After that he made no speech sounds whatsoever. These are the two questions posed to Mr. Cole that he did answer:

Question #1. Ms. Gardner opened the interview by asking Mr. Cole if he was in pain or upset? Mr. Cole replied: "just sleeping."

Question #2. Mr. Lieberman asked Mr. Cole if he recalled that he had been told that we were here yesterday? Mr. Cole replied: "not really."

Interactional Sequence following the above two questions that Mr. Cole answered:

Mr. Lieberman then proceeded to introduce this examiner and offered a general overview of why he was here. Mr. Lieberman further elaborated to Mr. Cole that they have been worried about him, and they brought Dr. Hough along to help them figure out some issues about him- specifically, whether there is a mental health issue with Mr. Cole, or whether he is so devoted to God it is hard to communicate with him. Mr. Lieberman further elaborated that they have also asked Dr. Hough to help them investigate the question of whether he is competent to be executed. Mr. Lieberman then asked Mr. Cole if he understood what had just been said to him. Mr. Cole did not respond verbally or physically to any of these questions or comments directed to him. It is, therefore, unknown if Mr. Cole understood what, if any, portion of Mr. Lieberman's comments directed to him.

After Mr. Lieberman had finished speaking to Mr. Cole, this examiner introduced himself to Mr. Cole, and offered a brief summary of his background and the purpose for today's interview. He went on to explain more fully that he has been asked to address the issue of whether he is currently psychologically competent to be executed. Mr. Cole was informed that the evaluation would consist of interviews, psychological testing if applicable, and a review of all available case evidence. This examiner then informed Mr. Cole that he had also brought an Informed Consent Document which he would like Mr. Cole to review with him, and after having all of his concerns and issues addressed, to please sign the document. He was further informed that the informed consent process is an ongoing process which he can revoke at any time, and that he should always feel that it is appropriate to raise any questions or concerns he may have about the evaluation and informed consent going forward. Thereafter, there ensued a long silence and Mr. Cole did not respond to this.

Mr. Lieberman then attempted to recruit Mr. Cole's attention by reading some scriptures from a bible he had brought with him. Mr. Lieberman read aloud from one of Mr. Cole's favorite biblical passages: Isaiah 53:5. Mr. Cole did not respond. Mr. Lieberman then read from Romans 8:28. Again, Mr. Cole did not respond. Mr. Lieberman asked him if he could help him understand the passages? Again, Mr. Cole did not move or respond.

Ms. Gardner asked if he has been eating better since he looked like he had been putting on some weight? Mr. Cole did not respond.

Mr. Lieberman asked where he wants his Bible's to be sent? To his mother? Ben Jr.? Mr. Cole did not respond.

Mr. Lieberman asked if he has met the new warden yet? Mr. Cole did not respond.

After a very long silence this examiner tried to return to the competency issue again. In an attempt to elicit his factual understanding regarding the specific issue of competency to be executed, the following questions were asked:

(1) "Ben, why does the state intend to execute you?" Mr. Cole did not respond.

(2) "What did you do that the state intends to execute you for?" Mr. Cole did not respond.

At that juncture this examiner decided to back up and try to elicit a more basic understanding of Mr. Cole's mental status orientation. He was asked the following questions: "Where are you located right now?" "What is the current date and time?" "What is the year?" "What is the name of this building you are in?" "Why are you in this building?" "What is your understanding of the situation and purpose of this meeting with us?" Mr. Cole was non-responsive to all questions.

Ms. Gardner commented about how Mr. Cole is a man of faith and the difficulty he has had in getting kosher meals. Mr. Cole did not respond to this comment.

Ms. Gardner asked Mr. Cole if he recalls when he was fasting in order to get his kosher meals? Mr. Cole did not respond to this question.

Ms. Gardner again asked if she can help him as he looked like he is in pain; and then asked whether it hurts to move? Mr. Cole did not respond to either of these questions.

This examiner then returned to the competency to be executed questions: "When you were talking to the warden and she asked you if you knew why the State was going to give you a lethal injection- do you recall what you said?" To this question Mr. Cole appeared to raise his head ever so slightly but did not answer.

It is noted that Ms. Gardner observed aloud that Mr. Cole has a hernia but he will not allow medical intervention for this condition. She further noted that the hernia is probably painful. Again, Mr. Cole was non-responsive to this comment as well.

After yet another period of prolonged silence, while Mr. Cole remained inert and non-responsive in his wheelchair, this examiner finally concluded that the current interview was not likely going to be any more verbally productive than it had been thus far and that it was time to conclude the interview. This examiner thanked Mr. Cole for his time, and told him that he planned to come back to see him again and that today had been a good start.

Clinical Impressions from 2nd visit:

Mr. Cole presents as a classic example of a severely regressed chronic schizophrenic patient (with catatonic features), whose condition is likely further compromised by the previously detected brain disorder captured by neuroimaging studies. His presentation is consistent with chronic and persistent mental illness (SPMI). His deeply regressed state is further compounded by years of chronic institutionalization (with very low levels of sensory stimulation and minimal social contact), and now with his chronological advance into his middle years. Current clinical observations are consistent with prior records and clinical observations reported by multiple observers over time. He is very non-responsive to external stimuli or to the vicissitudes of social interaction. There is no affirmative evidence from this interview that he is currently oriented to time, place, person or situation. There also is no affirmative evidence from this interview that he understands that he has been sentenced to be executed or that he understands the reason for the execution. There is no evidence to suspect that any of Mr. Cole's presentation today is a product of malingering.

3rd visit. 5/10/16. 1.0 hour total. Attempted Clinical Interview with Mr. Benjamin Cole- accompanied by Attorney Michael Lieberman and Investigator Julie Gardner:

At H Unit Mr. Lieberman, along with Ms. Gardner and this examiner, were greeted by Officer J. Whala, who waved his hand at us as we entered to signify that Mr. Cole would not meet with us today as scheduled. Officer Whala explained that he waved his hand at us in the same manner that Mr. Cole had waved to him when he told him his visitors had arrived. At Mr. Lieberman's request Officer Whala agreed to try one more time to ask Mr. Cole if he would come out of his cell to meet with us. Officer Whala returned with Mr. Cole's answer: "He said, nope, not seeing." Officer Whala also provided a

small hand written note that he reported was printed by Mr. Cole, which read: "not ready." The note was signed Benjamin Cole.

IV: Discussion and Integration:

This report is based upon three primary sources of data: first, a review of prior records and clinical evaluations that have accumulated over the years; second, a comprehensive review of written materials sent to Mr. Cole or generated by him. This review consisted of examining16 standard boxes full of materials; third, direct clinical interview and attempted interviews and observations of Mr. Cole on H Unit of OSP where Mr. Cole has resided now for well over 13 years. The combination of these three divergent sources of information complement and inform one another; yet each source of data is also unique and provides information somewhat different than the other sources. Analyses of these three divergent sources of data combine to provide convergent validity to this analysis, and the conclusions and opinions that follow are strengthened as no one single strand of data or source of data is considered fully controlling but is reliant upon cross-validation from all three sources.

Beginning with the brief synopsis of Mr. Cole's background reflected in the records review, it is evident that from its inception this has been a deeply troubled life course that had a most inauspicious start and which has assumed a progressively downward arc from the early years. Mr. Cole showed signs of mental disturbance from a young age, which was compounded and reinforced by an abusive and boundary-violating (incest) environment, and through his own use of toxic poly-substances from an early age (alcohol, gasoline fumes). Mr. Cole's academic difficulties, with several repeated grades and documented deficits in reading and auditory comprehension, are well noted. Compared to others his age, Mr. Cole's achievement scores were low. His later closed head injury from a hammer blow to the head may well have become an acquired organic brain deficit superimposed upon his limited native cognitive abilities. His emotional withdrawal and isolation was prominent by his late adolescence. Around this time, as well, he was showing overt signs of paranoia and believing rock bands were sending him messages through their music. Both his mother and brother described how he "snapped" by the time he was in the Air Force. Following his early incarceration for the physical abuse of his son, Mr. Cole became increasingly socially adrift, living as a homeless person in tents and under bridges. Unable to handle steady employment his progressive downward drift carried all the hallmarks of a slow prodromal decline into chronic schizophrenia. His alcohol use continued, which by this point in his 30's may have been a form of self-medication against the emerging psychosis. Mr. Cole sought refuge and understanding in fundamentalist religion and it was at a prayer meeting that he obtained his "Bakersfield Prophesy." His relationship with Susan Young produced a baby girl, Brianna Victoria Cole, whose life Mr. Cole tragically extinguished.

While Mr. Cole was evidently showing indications of emergent schizophrenia prior to arrest and incarceration, his psychological symptoms of growing paranoia and religiously themed delusions did not receive clinical attention until after his arrest and as he was moving forward to trial. In this context his legal counsel repeatedly questioned his ability to competently assist them in preparation of his defense. From the very beginning of his legal journey there are accounts of his emergent religiously themed delusions that continually interfered with rational communication with his attorneys. Early competency evaluations noted his religious preoccupations but would ultimately find that, nevertheless, he retained sufficient capacity to assist counsel in his defense.

Neuropsychological evaluations ultimately extended clinical understanding of Mr. Cole's behavior beyond the strictly psychological realm, and into the realm of brain based disorders. Beginning with Dr. Sharp's neuropsychological screening (10/25/03) and then on to Dr. Basso's full neuropsychological assessment (4/22/04), the obtained test data from these specialized evaluations strongly suggested underlying neuropsychological deficits. Follow up MRI studies (9/04) subsequently identified an 11 mm lesion located deep within the while matter of the frontal area of the left hemisphere. Subsequent analysis

of these findings by a range of experts confirmed the MRI finding, and all of these experts recommended that further follow up studies were necessary to determine if this lesion was continuing to grow. If the lesion continued to grow, such as might be the case if it were a tumor, then the lesion's encroachment upon other areas of the brain would subsequently impact brain functioning and have direct impact upon Mr. Cole's mental capabilities. That none of these recommended follow up studies have been conducted over the past 12 years is surprising. A review of whether medical standard of care is being met would be useful. Mr. Cole's attorneys have been prohibited from conducting the recommended evaluations on Mr. Cole's brain condition.

In the absence of this kind of medically indicated follow up evaluations, and without further information about the current status of this brain lesion, it is not possible to discern how much of Mr. Cole's current very regressed and deteriorated condition is due to the lesion and how much of his condition can be attributed to his schizophrenia. Without this follow up information it is also not possible to know what Mr. Cole's clinical response will be to any of the treatments that are provided for each of these conditions (paranoid schizophrenia and brain lesion) separately or if treated in tandem.

Since incarceration multiple legal teams have dealt with the frustration of not being able to adequately communicate with Mr. Cole. Their observations and complaints have invariably revolved around the same core issue: that his perseveration upon religiously-themed stifles all efforts to engage with him in rational discourse, to further the course of investigations on his behalf, to help him make rational and informed decisions about his legal case, and more. Attorney T. Kenneth Lee, to cite but one example, noted that in his over five years working with Mr. Cole, that at no time was he ever able to have a coherent discussion with Mr. Cole. Mr. Cole's legal teams over the years have learned to essentially live without his help or input since it has never been forthcoming due to his ongoing and persistent mental problems. These problems also appear to have assumed larger proportions after approximately 2008. Thereafter, Mr. Cole's refusal to come out of his cell to meet with his attorneys and to remain incommunicado with them became routine. Meetings with attorneys, when they did occur, were often less than five minutes then Mr. Cole would want to return to his cell. This pulling away from his attorneys is mirrored by his lifestyle in the prison, wherein he has become increasingly isolative, non-communicative, increasingly preoccupied with delusional religious ideas and oblivious to his personal hygiene.

Prison officials and several ex-cellmates have also offered narratives of Mr. Cole's behavior over time. These observations from within the prison itself essentially mirror and reinforce those observations provided by his past and current attorneys. In the prison system, Mr. Cole has become increasingly reclusive, and isolated, and his hygiene has deteriorated to the point of being intolerable to others. He has gone for long stretches of time of never leaving his cell, up to a reported period of 2 ½ years, all the while living secluded in his cell with the lights low or completely off. He has become completely immersed into his inner world of religiously themed delusions and surrounded by his mounds of books and papers, most of which have been cataloged and stored but never read.

Mr. Cole's voluminous collections of books, articles, pamphlets and various micrographic scribblings were reviewed and a conservative list of inferences were derived from this voluminous mass of materials. The magnitude of Mr. Cole's religious preoccupations is clearly evident as there is simply an absence of any material within these 16 boxes that pertained to any topic outside of the religious. Over time the content of these materials has moved increasingly to the fringe of religious ideas and into the realms of the fantastical and the delusional. That Mr. Cole perhaps derived some modicum of social support from his array of corresponders and well –wishers is quite likely. Still, Mr. Cole considered all of these materials part of his ministry. It is not clear from these materials what his ministry purported to accomplish aside from his requests for money to buy stamps and stationary. Mr. Cole has told his attorneys that all of his books and materials are part of his religious ministry and that the mother of his deceased child can do her ministry as well. Yet he does not attempt to provide ministry to others in his

local environment or otherwise reach out to spread his ministry. Mr. Cole wrote a letter, in July of 2015, to his mother and only recently did she open the letter. On the back of the letter he attached a strand of his hair and four of his teeth (personal communication from Julie Gardner, Investigator on Cole case).The content of these multiple stacks of materials, which ranged from the conventional to the outer edge of the religious fringe, also dilated particularly upon the apocalypse and end of the world. Curiously, Mr. Cole appears to have actually read very little of these materials and those he looked at are written like children's comic books. A steep decline in Mr. Cole's mental functioning was also inferred over time from these materials, as his writing became increasingly symbolic and cryptic, depicting a thought process decipherable only by him.

Despite the breadth of these materials reviewed, it is acknowledged that this report also contains limited direct interview data from Mr. Cole himself. This is despite the multiple attempts by this evaluator to interview him. The one interview available (2/17/16), albeit of limited duration and scope (as Mr. Cole remained inert and non-responsive to all attempts to engage with him), nevertheless provided a window into Mr. Cole's current mental status. My findings from these interview attempts and behavioral observations are consistent with multiple observations of prison staff (with the exception of Ms. Stem when accompanied by the warden; see below), with Mr. Cole's attorneys repeated efforts to engage with him over time, and with the more recent evaluation attempts by Dr. Morris in 2015. It is also noted that this examiner was denied the opportunity to attempt to interview Mr. Cole in his cell. On two of the three attempts to interview Mr. Cole he would not leave his cell. It is unknown as to whether an interview with him in the cell would have been more productive since it is his natural habitat. It is conceivable that he might have been more responsive since he would not have had to endure a painful move to the interview room.

The actual attempts to interview Mr. Cole, though invariably yielding a poverty of verbal statements (he answered a total two questions), were nevertheless quite informative in terms of the opportunity to observe Mr. Cole's behavior within a social context. Mr. Cole classically presents as afflicted with chronic and persistent mental illness that is severe and which is consistent with the previously offered diagnoses of chronic paranoid schizophrenia with delusions of grandeur and negative symptoms. The contribution of the above noted brain lesion is not currently known but must be understood to be factored in to the analysis. Such presentations, as observed with Mr. Cole, are typically observed among the back ward units of long term state hospitals where patients are no longer considered treatable and are merely provided custodial care. Mr. Cole appears to be receiving only custodial care in his current prison environment as well. Mr. Cole's presentation in his wheel chair, wherein he remained slumped over and non-responsive with eyes closed, is entirely consistent with prior evaluations (see Dr. Morris's several excellent evaluations in 2009 and again in 2015 for further amplification).

As noted previously, the original Clemency Application for Mr. Cole was submitted on 1/23/15 (Vol. I., p. 194). Since then concerns about Mr. Cole's declining mental and physical condition have increased significantly as well as the ability to independently assess his decline.

Finally, there are several miscellaneous topics that should be addressed. The first is that the issue of malingering has been raised by medical practitioners at OSP. Malingering is an affirmative psychiatric diagnosis and it must be established by a comprehensive psychological evaluation to assess this concern. There is no evidence from the records that this sort of psychological evaluation has been conducted; malingering is not a psychological diagnosis that is gratuitously established based merely upon casual observation during a routine physical examination.

The second observation concerns clinical documentation of Mr. Cole's condition within the prison system. Patti Stem, Clinical Coordinator (professional credentials not indicated in the records) wrote very detailed notes about the 35 Day Notification Hearing and thereafter. These notes are dense with

information and nuanced detail about Mr. Cole's mental functioning and the detailed questions about his execution he asked during these encounters. What is striking in these notes are their remarkable depiction of Mr. Cole as fully oriented and engaged with the interview process; these notes are in marked contrast to the sparsity of other clinical notes written by other prison staff over the years. They are also in contrast to the typical notes from other observers at the OSP and his attorneys over the years who portray Mr. Cole as rarely saying anything and as generally non-responsive to efforts to engage with him. Despite the years of such conversations his attorneys and professional evaluators have had with Mr. Cole, in none of those encounters was Mr. Cole able to so clearly and distinctly articulate his understanding of his pending execution as in these notes written by Ms. Stem. In these notes documenting conversations with the warden, Mr. Cole is remarkably depicted as fully competent to be executed as he understands in great detail why he is to be executed, when he will be executed, and the reason for his execution. Ms. Stem's notes do not explain or attempt to reconcile the large discrepancy between Mr. Cole's very high level of cognitive tracking and logical engagement as depicted during these several interviews with the warden, and the many years and multiple attempts during which others have tried and failed to achieve these same results.

If OSP staff has Mr. Cole's previous mental health records, which would include all of the evaluations and neuropsychological evaluations, as well as the expert opinions from the neuroimaging experts, there is no indication that these records have been clinically integrated into their formulations regarding his clinical presentation and clinical course. With the exception of Ms. Stem's notes (see above), the remainder of the clinical observations from the prison staff of Mr. Cole's daily behavior are sparse and consistent with custodial care. The exception to this practice was Dr. Kirby (3/11/14) alert to the contradiction in the prison records which documented that age 49 Mr. Cole's current level of mental functioning and concern was rated as "zero", while noting that at age 39 he had been classified at level "B." Mr. Cole's psychological condition has continued to deteriorate not improve.

A third observation is that schizophrenia is a severely debilitating mental disease. It is chronic in nature, though its course can be effectively managed with treatment when introduced in the early stages of the illness. There is no known cure for schizophrenia and the course is often progressive, especially if untreated. Mr. Cole's schizophrenia has not been treated in years. In his untreated state his condition will continue to become progressively worse. It will not spontaneously remit, or reverse course and improve. He demonstrates chronic and persistent mental illness (SPMI).

The currently observed negative symptoms of Mr. Cole's schizophrenia are different than the active symptoms of the illness. Active symptoms are demonstrated by the presence of auditory and visual hallucinations, active delusions, and often bizarre verbalizations and behavior. Active symptoms draw social attention and in prisons often require active staff management. Mr. Cole's stage of the schizophrenic illness has gone beyond this active and observable phase. The course of his illness has moved to the stage referred to in the common parlance as being a "burnt out schizophrenic." Such individuals remain socially avoidant, typically have intolerable hygiene, and appear mentally vacuous and empty, as though literally devoid of thought. Such individuals present as mere shells of their former selves, with an absence of identifiable personality features; in a word, they are no longer who they once were. Mr. Cole demonstrates the negative symptoms of schizophrenia, which is a manifestation of: having reached a chronic stage of the illness wherein he has lived with the illness now for many years; that the illness has not being treated for many years, if ever; that he has lived in a very low stimulation environment that is devoid of novelty and change and opportunities for meaningful human interactions. The end result of these various factors leads to an individual who lives almost exclusively in their own mental universe apart from the rest of humanity. That Mr. Cole's current condition has not required aggressive staff management and intervention by no means indicates that he is now no longer psychotic. To assume otherwise is to misread his psychopathology by examining only one side of the coin. Negative symptoms are a manifestation of the schizophrenic psychopathology and are considered part of the

psychosis, albeit at a different stage. An absence of overt behavioral problems that require staff management and intervention (such as use of isolation or special management) also does not equate to competence to be executed.

Summary of Clinical Condition:

1. Mr. Cole is diagnosed with chronic and persistent schizophrenia that is extreme in severity. Schizophrenia is a severe mental illness that typically takes a progressively deteriorating course. There is no known cure for schizophrenia though symptoms can be managed with currently available treatments.

2. In the absence of clinical treatment being provided to address Mr. Cole's schizophrenia, then further decline in his clinical course will continue.

3. Mr. Cole has a documented brain lesion located in the deep white matter of the frontal-parietal region of the left hemisphere of his brain that was discovered by neuroimaging studies in September 2004. Follow up studies of this lesion have not been completed as recommended by neuroimaging experts. The influence of this brain-based defect on Mr. Cole's current mental state, in combination with his schizophrenic illness is thus unknown. If the lesion is progressive then there will be greater impact than if it is static.

V: Current Diagnosis: DSM V (1)

295.90 Schizophrenia, Paranoid Type, Continuous, with chronic religiously themed delusions, (along with severe level negative symptoms)

293.89 Catatonic Features Associated with Schizophrenia: stupor, mutism and negativism

799.59 Unspecified Neurocognitive Disorder (with etiology not yet determined-11 mm brain lesion in the deep white matter of the frontal-parietal region of left hemisphere)

VI: Opinions:

1. Based strictly upon a review of the records and Mr. Cole's voluminous personal books and records, and from his behavior during evaluation, it is my professional opinion that at present Mr. Cole is not competent to be executed. There was no affirmative evidence from this evaluation that Mr. Cole does understand and appreciate that he may again be scheduled for execution or the reasons why that execution would take place.

2. If any future information should become available about Mr. Cole's response to a treatment(s) introduced for his schizophrenia, or about the follow up evaluation and any subsequent response to treatment that may be recommended for Mr. Cole's brain lesion- then all of these new sources of clinical information will be duly considered and my opinion at that time will be formulated based upon the availability and results of this new clinical information.

3. This opinion is offered within a reasonable degree of psychological certainty.

VII: Restoration of Competency:

The remedies to potentially restore Mr. Cole's capacity for competency will require that the following treatments be initiated:

1. Mr. Cole's chronic and untreated schizophrenia must be treated.

2. Mr. Cole's brain lesion must be re-evaluated and treated.

3. Mr. Cole's possible clinical responses to such treatments for these conditions are at present unknown.

4. Without attempting these treatments Mr. Cole's competency for execution will not be restored.

References:

(1) American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Arlington, VA. American Psychiatric Association, 2013.

VII: Documents Reviewed (Appendix A):

Clemency Information:

1. Pictures of Benjamin Cole
2. Federal Public Defender Clemency Packet
3. Federal Public Defender Supplemental Clemency Packet

Expert Reports:

4. Dr. LaFortune Evaluation 2/28/2003
5. Dr. Christopher Evaluation 7/24/03
6. Dr. Sharp Evaluation 2/17/04
7. Russell Risk Assessment 5/24/04
8. Dr. Basso Evaluation 6/15/04
9. Dr. Monroe Evaluation 8/30/04
10. Dr. Christopher Competency Evaluation 8/18/04
11. Dr. Hastings/Powers Radiology Report 2/3/07
12. Dr. Price Competency Evaluation 12/13/07
13. Dr. Morris Report 4/4/09
14. Declaration of Dr. Gur
15. Affidavit of Dr. Hayman 1/16/15
16. Dr. Morris Report 1/21/15

Affidavits:

17. Transcribed Interview of Leonard O'Neal 5/5/04
18. Affidavit of James C. Bowen 1/31/07
19. Affidavit of Timothy Wantland 2/21/07
20. Affidavit of Michael Hooper 2/23/07
21. Affidavit of Anastasia Cesario 2/26/07
22. Affidavit of Barbara Johnson 10/14/08
23. Affidavit of Cherry Peirce 10/17/08
24. Affidavit of Dawn Bettencourt 10/17/08

25. Affidavit of Ranada Gentry 11/3/08
26. Affidavit of Suzanne Nelson 5/1/09
27. Affidavit of G. Lynn Burch III 1/13/15
28. Affidavit of Anna Wright 1/13/15
29. Affidavit of Vicki Werneke 1/15/15
30. Affidavit of T. Kenneth Lee 1/16/15
31. Affidavit of Anna Wright 1/29/15

Prison Records:

32. 2004 to 2014 Mental Health excerpts
33. DOC Field Jacket Highlights
34. DOC Medical Records from 5/14 to 9/15
35. DOC Mental Health Records from 6/14 to 9/15
36. OSP Execution Log

Samples of Benjamin Cole's Writings:

37. Letter to Vicki Werneke 2007
38. Letter to Sandra Collette 2007
39. Letter to Candy 2008
40. Letter from Benjamin Cole 6/7/11
41. Letter to Letter to Anna Wright & Sarah Jernigan 9/20/11
42. Letter to Patti Ghezzi 6/12/13
43. Letter to Ken Lee 6/5/13
44. Letter to Tom Hird 4/4/14
45. Letter to Tom Hird 4/14/14
46. Letter to Michael Lieberman 2015

Miscellaneous Items:

47. Mandamus Transcript 8/28/15
48. Box Content 2011
49. ESH records on competency
50. Ford Petition
51. Hobbs Memo on Psych 2006
52. Religious Index
53. 16 standard storage boxes of religious-themed materials (various bibles, books, pamphlets, tracts, post cards, essays, written notes either by Mr. Cole or written by others to him

VIII: Professional Resources Consulted:

1. Zaph, P., (Boccaccini, M.T., Brodsky, S.L. (2003). Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist. *Behavioral Sciences and the Law*. 21; 103-120. Published online 2 July 2002 in Wiley Interscience (www.inyerscience.wiley.com). DOI: 10.1002/bsi.491

2. Gilfoyle, N.F.P., Hornberg, R.S., Ogden, D.W., Taranto, R.G. (2007). *In the Supreme Court of the United States. Panetti v. Quarterman Writ of Certiorari to the U.S. Court of Appeals for 5th Circuit.* Brief for Amici Curiae American Psychological Association; American Psychiatric Association and National Alliance in Support of Petitioner. No. 06-6407

3. Melton, G.B., Petrila, J., and Poythress, N.G. (1997). *Psychological Evaluations for the Courts. A Handbook for Mental Health Professionals and Lawyers*. 2nd Edition. The Guilford Press. New York.

4. Seeds, Christopher W. "The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Council". (2009). *Cornell Law Faculty Publications.* Paper 74. http://scholarship.law.cornell.eu/facpub/74

5. Small, Mark A. *"Performing "Competency to be Executed Evaluations: A Psychological Analysis for Preventing the Execution of the Insane".* Mark Small. Nebraska Law Review. (1988). Available at: http://digitalcommons.unl.edu/nlr/vol67/iss3/8

6. Mello, M. (2007). Execution of the Mentally Ill: When is Someone Sane Enough to Die? *Criminal Justice,* Volume 22 (3). Fall. Published by American Bar Association.

7. Blanks, R. and Pinals, D. (2007).Competence to be Executed. *Legal Digest.* Volume 35 (3), 381-384.

8. *American Psychological Association.* (2016). Panetti v. Quarterman. http://www.apa.org/about/offices/ogc/amicus/panetti.aspx

9. Zonana, H. (2003). Analysis and Commentary. Competency to be Executed and Forced Medication: Singleton v. Norris. *The American Academy of Psychiatry and the Law.*31:372-376.

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Competency to Be Executed Evaluation: Addendum

Client: Benjamin Cole
Date of Addendum Records Review: January 14, 2018
Current Location of Client Incarceration: Oklahoma State Penitentiary, McAlester, Oklahoma
Referral Source: Michael Lieberman, JD., Assistant Federal Public Defender Oklahoma City, OK.
Date of Report: January 16, 2018

I: REASON FOR REFERRAL:

Mr. Cole was previously referred for a psychological evaluation with this psychologist to document his current emotional and cognitive status, and to render a professional opinion as to whether he was currently competent to be executed by the State of Oklahoma. In brief, in that earlier report Mr. Cole was diagnosed with ongoing and severe paranoid schizophrenia, as well as catatonic features associated with schizophrenia and unspecific neurocognitive disorder. My opinion in that report was that Mr. Cole was not competent to be executed. See the previous report of October 13, 2016.

Given the extended length of time since that last report was provided it was considered necessary to provide an updated opinion upon Mr. Cole's mental status. To do so I reviewed available documentation provided by Mr. Cole's legal defense team regarding their ongoing observations of Mr. Cole's behavior and mental status. Updated records from the professional staff employed at the McAlester Prison have not yet been forthcoming for review.

II: PROCEDURES:

Review of Accompanying Background Clinical Records & Evidence: 2016-2017 Benjamin Cole Chronology of Interactions (Excerpted) - total of 43 pages

The Background of Clinical Records & Evidence: 2016-2017 is a 43 page document which provides a condensed description of the various observations of Mr. Cole provided by his legal defense team. These descriptions include direct observations on his behavior in person while visiting him at McAlester prison; notes from phone calls from Mr. Cole; notes from reported observations of Mr. Cole's behavior by others [other inmates, as well as prison officials], encompassing approximately 20 months. These reported observations provide a multi-dimensional and richly textured description of Mr. Cole's behaviors that overlap with and extend beyond this clinician's last encounter with Mr. Cole on May 10, 2016.

The Background of Clinical Records & Evidence:2016-2017 consists of the following forms of contact with Mr. Cole: 41 phone calls between his defense team & Mr. Cole; 8 contact visits with Mr. Cole at the Oklahoma State Penitentiary; 13 unsuccessful contacts with Mr. Cole at the Oklahoma State Penitentiary- [in these instances Mr. Cole refused contact with the visiting team members]; 9 phone conversations with other inmates at Oklahoma State Penitentiary who offered their own independent observations about Mr. Cole's behavior; 4 phone calls or reported observations with the Oklahoma State Penitentiary staff or Unit Manager; and 5 phone calls and/or observations by various members of Mr. Cole's defense team who were at the facility and were visiting other inmates at the Oklahoma State Penitentiary.

III: Discussion and Integration

(a). Consistent with the clinical data previously summarized in the earlier submitted report of October 13, 2016, throughout these current observations (phone calls, face-to-face-visits at the McAlester prison, as well as observations reported by other inmates and various prison officials), Mr. Cole continues to display strong evidence for the continuation of his severe psychosis. This observation in itself is not surprising, and is consistent with the clinically predictable nature and course of his ongoing and by now very chronic schizophrenic illness. All observers' report that Mr. Cole continues to frequently articulate his religiously-themed delusional ideas, and that these ideas invariably intrude into his discourse and over-ride his train of thought, and that they infuse all elements of his thinking. Consistent with his observed psychotic thought process in evidence for years now, the structure and coherence of his thinking is typically incomprehensible to the listener. Put differently, people usually do not know what he is talking about. Often he loses his train of thought, displays neologisms and confabulatory thinking [e.g. "hard markers" of psychotic process thinking], and will become discursive upon bizarre ideas that have no basis in reality. He continues to be preoccupied with such esoteric topics as the Mayan Calendar's prediction of our economic collapse, the World Trade Center, an evil Hindu Goddess Kali, and that Roman Catholics are evil but to name a few. Observers frequently comment upon how they cannot follow all these disjointed fragments of his thoughts nor piece them together in a rational, coherent manner. The intended meaning of Mr. Cole's thought processes can be understood only by Mr. Cole alone.

Mr. Cole's hygiene also continues to be poor and invariably he is observed as disheveled and unclean. His awareness of his surroundings and the individuals who are central to his prison environment remains minimal [e.g., he was not aware Warden Trammel or Director Patton were gone [1/6/16].

As previously noted, Mr. Cole frequently refused to come out of his cell to meet with his legal team. These refusals to meet with his attorneys occurred in a random, sporadic manner. There is no identified pattern as to when he would meet or not meet with representatives of his legal team. More often than not, he refused the professional visits [out of 21 visits, he refused 13 times]. The erratic pattern of his contact refusals and the frequency with which they occurred continue to suggest that his working-relationship with his legal team is tenuous, erratic, and subject to Mr. Cole's psychotic thought processes. Typically his requests of his team members revolve around obtaining simple items such as his pictures, chick tracts, envelopes or mailing materials, or with wanting staff members to start communicating with him in a secret code. Moreover, he acknowledged that he thought the legal team members were involved in his life to help him, not as part of a legal process, but as working with him on his ministry as his personal assistants. The amalgamation of the data from these records fully support that he is continuing to experience schizophrenic illness and that the course of this illness is chronic, unremitting, and continuing to deepen. In sum, there is no evidence from the records that Mr. Cole's mental status has improved; it has not.

(b). As to the issue of whether Mr. Cole is now competent to be executed, it is noted that these records do not constitute a formal psychiatric evaluation of that issue nor was their intended purpose to accomplish answering that question for the court. To fully assess that particular issue a comprehensive psychiatric evaluation would be required.

There is no way can any isolated comment by Mr. Cole can be extracted from the record, pars pro toto, as constituting affirmative proof that Mr. Cole has now been psychiatrically restored to full competence to be executed. Any attempt to extrapolate an isolated word or fragment of thought from the morass of Mr. Cole's ongoing psychosis would be illogical and professionally unethical. Moreover, from these records there is no evidence that any psychiatric interventions have been introduced since this evaluator last saw Mr. Cole that might offer the potential to effect this restoration. To my knowledge Mr. Cole has not been provided with psychotropic medications for his schizophrenia nor has he been re-evaluated by outside medical specialists to assess and treat his brain lesion. Given that the known course of untreated and chronic schizophrenic is for the patient to become progressively worse over time, there is no reason to assume that Mr. Cole's mental status has improved; nor is there reason to assert that his competence to be executed has been restored.

IV: Updated Current Diagnosis: DSM V (1) [There is no evidence to warrant changing these diagnoses].

295.90 Schizophrenia, Paranoid Type, Continuous, with delusions of grandeur related to religiosity (along with severe level negative symptoms)

293.89 Catatonic Features Associated with Schizophrenia: stupor, mutism and negativism

799.59 Unspecified Neurocognitive Disorder (with etiology not yet determined-11 mm brain lesion in the deep white matter of the frontal-parietal region of left hemisphere)

V: Updated Opinions: [There is no evidence to warrant changing these opinions]

1. Mr. Cole is diagnosed with chronic and persistent schizophrenia that is extreme in severity. Schizophrenia is a severe mental illness that typically takes a progressively deteriorating course. There is no known cure for schizophrenia though symptoms can be managed with currently available treatments.

2. In the absence of clinical treatment being provided to address Mr. Cole's schizophrenia, then further decline in his clinical course will continue.

3. Mr. Cole has a documented brain lesion located in the deep white matter of the frontal-parietal region of the left hemisphere of his brain that was discovered by neuroimaging studies in September 2004. Follow up studies of this lesion have not been completed as recommended by neuroimaging experts. The influence of this brain-based defect on Mr. Cole's current mental state, in combination with his schizophrenic illness, is thus unknown. If the lesion is progressive then there will be greater impact than if it is static.

4. Based upon currently available data at present, Mr. Cole is not competent to be executed. **[Nor is there any presented evidence that any efforts have been undertaken to restore competency to be executed].**This opinion is qualified by the recognition that there are two knowledge vectors that remain unanswered: (1) Mr. Cole's schizophrenia remains untreated and his potential for positive response, however modest, to currently available treatment cannot be known without a trial of such treatment; (2) the magnitude of impact that Mr. Cole's brain lesion may be having upon his current mental functioning (whether singularly or in combination with the schizophrenia) also remains unknown. Any potential treatments for the brain lesion, if any, as well as Mr. Cole's possible clinical responses to such treatments, are also at this point unknown.

5. If any future information should become available about Mr. Cole's response to a treatment(s) introduced for his schizophrenia, or about the follow up evaluation and any subsequent response to treatment that may be recommended for Mr. Cole's brain lesion-then all of these new sources of clinical information will be duly considered and my opinion at that time will be formulated based upon the availability of this new clinical information.

6. These opinions are offered within a reasonable degree of psychological certainty.

VI: Updated Recommendations: [There is no evidence to warrant changing these recommendations]

1. Mr. Cole should be evaluated by medical staff at McAlester Prison for a possible trial of treatment to address his schizophrenic condition. Mr. Cole's response to any treatments provided should be carefully documented.

2. Mr. Cole should be provided with a full complement of follow up brain imaging studies to evaluate the current status of his brain lesion. All prior neuroimaging experts in their reports have uniformly recommended follow-up studies. These studies can determine if the previously identified 11 mm lesion of the left hemisphere is static or progressive, and whether there are any possible treatments available for his condition. Mr. Cole's response to any treatments provided for this condition should be carefully documented.

3. Obtaining knowledge of Mr. Cole's mental status following the introduction of both of these treatment approaches would answer whether there is any future potential for restoration of his competency for execution (whether this treatment is obtained voluntarily or involuntarily).

4. Mr. Cole's mental status and capacity for execution is a process that, clinically and ethically, will require repeated evaluations if an execution date is re-imposed as mental status and competency may fluctuate (albeit within a relatively narrow band).

5. In any future clinical evaluations with Mr. Cole this evaluator should be permitted to evaluate Mr. Cole in his cell if he will not come out to be clinically interviewed in the interview room. If Mr. Cole cannot give consent to enter the cell, then guards should be authorized to let me in to his cell.

6. All available mental health records from McAlester prison to date should be made available to Mr. Cole's legal team. This would include all mental health records produced after April 2015.

7. In light of an absence of follow-up for the brain lesion as recommended, a review of whether medical standard of care is being met should be considered.

References:

(1) American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Arlington, VA. American Psychiatric Association, 2013.

George Hough, Ph.D., ABPP

George Hough, Ph.D., ABPP

AFFIDAVIT OF DAVID GEORGE HOUGH, PH.D., ABPP

I, Dr. David G. Hough, having the legal capacity to make this affidavit, hereby state under oath as follows:

1) I am currently employed as a clinical psychologist with the Base Operational Support Team (BOST) with the United States Air Force at Keesler Air Force Base, Biloxi, Mississippi. I have been in this position since July 2021. I have been accepted for a clinical psychologist position with the Fairview Oregon Veterans Administration Community Out-patient Clinic, in Fairview, Oregon. This later position will begin on 06 June 2022. I have a Ph.D. in Clinical Psychology and am Board Certified in Clinical Psychology by the American Board of Clinical Psychology;

2) Prior to this position at Keesler Air Force Base, I was employed as a clinical psychologist by the U.S. Air Force Europe at Royal Air Force (RAF) Lakenheath, the United Kingdom from June 2016 to July 2021. I was assigned to the Aerospace Medical & Flight Operations Clinic, where I diagnosed and treated active-duty members. Prior to my position at RAF Lakenheath, I worked as a clinical psychologist in the Embedded Mental Health Clinic at Ft. Riley Kansas and was employed by the Center for Deployment Psychology (CDP); before transferring to Ft. Riley, I worked as a clinical psychologist in the Family Health Clinic at Langley Air Force Base, Langley, Virginia;

3) Prior to my employment with the military (2013 to present), I was self-employed in the private practice of clinical and forensic psychology since 1990. In this capacity I diagnosed and treated patients of all ages and diagnoses, provided individual therapy, couples and family therapy, as well as psychoanalysis. In my forensic work I have consulted with both defense and prosecuting attorneys throughout the United States on primarily criminal cases. I have conducted extensive psychological evaluations and psychological testing on criminal defendants in all manner of facilities, from city jails to federal facilities and international venues. I have provided expert witness testimony in county, state, and federal courts and at the ICTY at The Hague, Netherlands on a war crimes case. I have consulted with the U.S. Department of Justice on domestic terrorism cases and a GITMO case. I have consulted with the U.S. Drug Enforcement Administration (DEA) as their Psychological Consultant for the Central United States.

4) I have conducted psychological evaluations and provided expert witness testimony on death penalty cases since 1995 in Kansas, Missouri, and Oklahoma. I have worked with attorneys on death cases throughout their representation of their clients. I am familiar with the procedures on death row at the Oklahoma State Penitentiary (OSP),

the housing issues specific to death row at OSP, and with the unique stressors unique to prisoners who are sentenced to death;

5) I am currently working with the defense team on Benjamin Cole's case and have done so since 2016. I have reviewed all available records on the case provided by current and previous counsel, and I am familiar with records collected by his counsel during the post-conviction process and direct appeal. I have also reviewed boxes of written materials sent to Mr. Cole and provided a qualitative analysis of the main themes contained within these materials as well as the written materials generated by Mr. Cole. I have also attempted to interview Mr. Cole on several occasions, though typically he has refused to leave his cell to speak;

6) My most recent attempt to interview Mr. Cole was on April 25th and 26th, 2022. On Monday, 25 April, Mr. Cole's attorney Mr. Tom Hird, and I made our first attempt to visit Mr. Cole on this trip to the H Unit at OSP. Standing outside Mr. Cole's cell door on the H Unit, Mr. Hird initially attempted to communicate with Mr. Cole by getting down on his hands and knees and speaking through the opened metal door through which Mr. Cole's meals are delivered (aka the "bean hole"). As Mr. Hird was attempting to communicate with Mr. Cole a guard shined a flashlight into the cell through the cell window. The cell was completely dark. I could see Mr. Cole huddled in the corner in his cell. He was wearing a rough-hewn prison outfit that appeared beige in color and was tattered and in poor repair. Mr. Cole appeared very unkempt with poor hygiene. His hair is tied in thick knotted braids and his beard is shaggy and extends to his chest. This is how I have perceived Mr. Cole in the past and the attendant correctional officers confirmed that Mr. Cole does not shower or attend to his personal hygiene. There were numerous scraps of paper and odd bits of trash that have collected outside of Mr. Cole's cell, which the correctional officers confirmed were dropped by Mr. Cole.

7) Mr. Hird continued to yell through the bean-hole to Mr. Cole, asking him to come out so we could talk with him. Mr. Cole slowly attempted to make his transfer on to his wheelchair, which was positioned between the two concrete slabs which serve as beds. The back of the wheelchair was facing toward us as we peered into the cell. Mr. Cole moved very slowly into the wheelchair. At no time did I observe Mr. Cole standing erect without grasping on to something for support. After several minutes transferring to his wheelchair, Mr. Cole began to peddle his wheelchair slowly back by pushing with his feet against the concrete floor. When he was within one to two feet from the cell door where we were located, he stopped peddling his wheelchair. At that point Mr. Hird said that he could hear Mr. Cole softly whisper, "No" twice. Mr. Cole's verbalizations were spontaneous and not prompted by any questions at that point. From my position at that point, I could see Mr. Cole but did not hear him speak. Mr. Hird again attempted to communicate with Mr. Cole as he was ambulating in his wheelchair back to his bed area. Mr. Hird said to Mr. Cole that if he

needed to go to the bathroom first to empty his bladder that would be OK, that we were patient and would wait for him.

8) A this point the Unit Manager, Ms. Terri Apala, told Mr. Hird and me that we could go into the interview room which was near Mr. Cole's cell where we could wait to see if Mr. Cole would change his mind and agree to meet with us. After we were seated in the interview room the Unit Manager advised that she give Mr. Cole 15 to 20 minutes to use the bathroom in his cell and to decide if he was willing to meet with us.

9) After approximately 15-20 minutes the Unit Manager returned to the interview room where Mr. Hird and I were waiting. The Unit Manager said that Mr. Cole would not come out.

10) On the following day, 26 April, Mr. Hird and I again attempted to visit with Mr. Cole on the H Unit at OSP. We were escorted by the Case Manager, Ms. Elizabeth Schlueter, to Mr. Cole's cell door. Upon arrival at Mr. Cole's cell door, Case Manager Schlueter, who escorted us, said that she did not have a key to the bean-hole. Case Manager Schlueter told us we could yell to Mr. Cole through a narrow crack located between the cell door and the adjacent concrete wall on both sides of the cell door. Mr. Hird and I alternately took turns yelling to Mr. Cole through this crack to come out to talk with us. Mr. Hird and I each emphasized to Mr. Cole that it was very important that he allow us to speak with him directly, and that we needed to hear his perspective on how he is doing.

11) Officer Brown then arrived, and she said she did have a key to the bean- hole, which she then opened for us to attempt to communicate with Mr. Cole. Mr. Hird got down on his hands and knees to speak through the bean-hole opening and yelled to Mr. Cole that it was very important to hear from him, that timing was of the essence in his legal case. Mr. Hird and I took turns getting on our hands and knees to yell to Mr. Cole through the bean- hole. Mr. Cole was lying in his bed and was non-responsive to our efforts to communicate with him.

12) The Case Manager, Ms. Schlueter, rapped vigorously on the plexiglass covering Mr. Cole's cell door, and yelled: "Cole, some people here to see you." Mr. Cole responded to this noise and then began to slowly rouse from his bed. I observed with the aid of Officer Brown's flashlight, that Mr. Cole was wearing a thick towel or turban-like article of clothing wrapped around his forehead which covered his eyes. Mr. Hird, while till on his hands and knees in front of the bean-hole, said "Ben, if you need to use the bathroom, that's alright". Mr. Cole then very slowly transferred himself from his bed to his wheelchair, which was located between the two concrete beds in the cell. This process of transferring himself took an exceptionally long time, as Mr. Cole's movements were very slow, and deliberate. After situating himself in his wheelchair, Mr. Cole the slowly transferred himself to the toilet seat which was

located within the same general living space between the two concrete beds. The Case Manager's flashlight batteries grew progressively weaker; nevertheless, I was able to observe Mr. Cole sitting on his toilet with his head slumped to the left side while his right hand remained resting against the right side of his head.

13) As we were leaving the waiting room, after being advised by the Unit Manager that Mr. Cole was a "refusal", Mr. Hird said that he needed to see for himself what Mr. Cole would say or gesture he would make. Mr. Hird then peered into Mr. Cole's cell and promptly declared that Mr. Cole did make the same gesture across his throat as described by the Unit Manager, Ms. Apala.

14) My current observations are consistent with my previous observations and with reports reflected in the medical records. Mr. Cole's overall behavior remains very regressed, and primitive, and refractory to efforts to communicate with him by others. I did not observe any behavior by Mr. Cole that I would consider rational or coherent, and his cognitive capacity is currently assessed as extremely impaired, and is consistent with my previous face-to-face observations of him on 16 February 2016. Mr. Cole's current clinical presentation is consistent with his diagnosis of severe and chronic schizophrenia with catatonia, as well as MRI-documented organic brain damage. He continues to meet criterion for severe and persistent mental illness (SPMI).I discern no clinical improvement whatsoever since my last face-to-face encounter; it has most likely worsened.

Further affiant sayeth not.

David G. Hough, Ph.D, ABPP

DAVID G. HOUGH, PH.D., ABPP

Subscribed and sworn to me on this 4th day of May, 2022.

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 63439 GREGORY LEWIS Commission Expires July 11, 2025 HARRISON COUNTY

NOTARY PUBLIC

My commission number is: #63439

My commission expires: 07/11/2025

AFFIDAVIT OF DAVID GEORGE HOUGH, PH.D., ABPP

I, Dr. David G. Hough, having the legal capacity to make this affidavit, hereby state under oath as follows:

1) I am currently employed as a clinical psychologist with the Base Operational Support Team (BOST) with the United States Air Force at Keesler Air Force Base, Biloxi, Mississippi. I have been in this position since July 2021. I have been accepted for a clinical psychologist position with the Fairview Oregon Veterans Administration Community Out-patient Clinic, in Fairview, Oregon. This later position will begin on 06 June 2022. I have a Ph.D. in Clinical Psychology and am Board Certified in Clinical Psychology by the American Board of Clinical Psychology;

2) Prior to this position at Keesler Air Force Base, I was employed as a clinical psychologist by the U.S. Air Force Europe at Royal Air Force (RAF) Lakenheath, the United Kingdom from June 2016 to July 2021. I was assigned to the Aerospace Medical & Flight Operations Clinic, where I diagnosed and treated active-duty members. Prior to my position at RAF Lakenheath, I worked as a clinical psychologist in the Embedded Mental Health Clinic at Ft. Riley Kansas and was employed by the Center for Deployment Psychology (CDP); before transferring to Ft. Riley, I worked as a clinical psychologist in the Family Health Clinic at Langley Air Force Base, Langley, Virginia;

3) Prior to my employment with the military (2013 to present), I was self-employed in the private practice of clinical and forensic psychology since 1990. In this capacity I diagnosed and treated patients of all ages and diagnoses, provided individual therapy, couples and family therapy, as well as psychoanalysis. In my forensic work I have consulted with both defense and prosecuting attorneys throughout the United States on primarily criminal cases. I have conducted extensive psychological evaluations and psychological testing on criminal defendants in all manner of facilities, from city jails to federal facilities and international venues. I have provided expert witness testimony in county, state, and federal courts and at the ICTY at The Hague, Netherlands on a war crimes case. I have consulted with the U.S. Department of Justice on domestic terrorism cases and a GITMO case. I have consulted with the U.S. Drug Enforcement Administration (DEA) as their Psychological Consultant for the Central United States.

4) I have conducted psychological evaluations and provided expert witness testimony on death penalty cases since 1995 in Kansas, Missouri, and Oklahoma. I have worked with attorneys on death cases throughout their representation of their clients. I am familiar with the procedures on death row at the Oklahoma State Penitentiary (OSP), the housing issues specific to death row at OSP, and with the unique stressors unique to prisoners who are sentenced to death;

5) I am currently working with the defense team on Benjamin Cole's case and have done so since 2016. I have reviewed all available records on the case provided by current and previous counsel, and I am familiar with records collected by his counsel during the post-conviction process and direct appeal. I have also reviewed boxes of written materials sent to Mr. Cole and provided a qualitative analysis of the main themes contained within these materials as well as the written materials generated by Mr. Cole. I have also attempted to interview Mr. Cole on several occasions, though typically he has refused to leave his cell to speak;

6) My most recent attempt to interview Mr. Cole was on April 25th and 26th, 2022. On Monday, 25 April, Mr. Cole's attorney Mr. Tom Hird, and I made our first attempt to visit Mr. Cole on this trip to the H Unit at OSP. Standing outside Mr. Cole's cell door on the H Unit, Mr. Hird initially attempted to communicate with Mr. Cole by getting down on his hands and knees and speaking through the opened metal door through which Mr. Cole's meals are delivered (aka the "bean hole"). As Mr. Hird was attempting to communicate with Mr. Cole a correctional officer shined a flashlight into the cell through the cell window. The attendant correctional officers confirmed that Mr. Cole does not shower or attend to his personal hygiene. There were numerous scraps of paper and odd bits of trash that have collected outside of Mr. Cole's cell, which the correctional officers confirmed were dropped by Mr. Cole.

7) After a few minutes of attempting to communicate with Mr. Cole, the Unit Manager, Ms. Terri Apala, told Mr. Hird and me that we could go into the interview room which was near Mr. Cole's cell where we could wait to see if Mr. Cole would change his mind and agree to meet with us. After we were seated in the interview room the Unit Manager advised that she would give Mr. Cole 15 to 20 minutes to use the bathroom in his cell and to decide if he was willing to meet with us.

8) After approximately 15-20 minutes the Unit Manager returned to the interview room where Mr. Hird and I were waiting. The Unit Manager said that Mr. Cole would not come out. Mr. Hird again explained the importance of seeing Mr. Cole. The Unit manager, Ms. Apala, repeated that Mr. Cole would not respond to her efforts to call him out of his cell when she yelled to him through the bean-hole. She said that Mr. Cole's non-response is equivalent to a "refusal", and that her orders for now are that if Mr. Cole does not want to voluntarily come out of his cell for a contact visit, then the staff are not going to force him to come out.

9) Mr. Hird and I left the H Unit and went to the OSP Administrative Building in an attempt to speak with the warden about access to Mr. Cole. In the front waiting area, we were met by Ms. Nancy Battles (Assistant to the Warden). We explained our situation with Mr. Cole and she agreed to make some phone calls on our behalf. When Ms. Battles returned, she explained that she had made a few calls (unspecified

to whom) and that for now, the prison is not going to compel or force Mr. Cole to come out of his cell if he does not want to.

10) On the following day, 26 April, Mr. Hird and I again attempted to visit with Mr. Cole on the H Unit at OSP. We were escorted by the Case Manager, Ms. Elizabeth Schlueter, to Mr. Cole's cell door. 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. Upon arrival at Mr. Cole's cell door, Case Manager Schlueter, who escorted us, said that she did not have a key to the bean-hole. Case Manager Schlueter told us we could yell to Mr. Cole through a narrow crack located between the cell door and the adjacent concrete wall on both sides of the cell door. Officer Brown then arrived, and she said she did have a key to the bean- hole, which she then opened for us to attempt to communicate with Mr. Cole.

11) The Case Manager, Ms. Schlueter, rapped on the plexiglass window covering Mr. Cole's cell door, and yelled: "Cole, some people are here to see you."

12) While standing at the door I asked Officer Brown and the Case Manager how difficult it would be to simply open the door to retrieve Mr. Cole for us. They acknowledged that it could easily be done, as they would simply assist Mr. Cole into his wheelchair and wheel him out to the interview room. They both acknowledged that in the case of Mr. Cole, being in his chronic and debilitated condition, they did not anticipate any sort of struggle with Mr. Cole and that it would not be difficult to bring him out.

13) Lieutenant Lumley then arrived and advised Mr. Hird and me that Mr. Cole is "not what he seems"; Lt. Lumley did not explain what he meant and I cannot draw any strong inferences from his statement. Lt. Lumley advised Mr. Hird and me that we could not be down on the floor peeking our heads into the bean- hole to talk since it is a safety hazard to do so. We were advised that we should attempt to communicate through the crack in the wall as we had done previously.

14) Ms. Apala, the Unit Manager, then arrived and said that we should wait in a waiting room, located to our immediate left, and she would give Mr. Cole a few minutes to decide whether he would come out of his cell to visit with us. The Unit Manager then returned in a few minutes and said that Mr. Cole would not come out and she made a gesture of sawing her hand across her throat to indicate that Mr. Cole had made this gesture to indicate that he refused to come out of his cell to meet with us.

15) As we were leaving the waiting room, Mr. Hird said that he needed to see for himself what Mr. Cole would say or what gesture he would make. Mr. Hird then peered into Mr. Cole's cell and promptly declared that Mr. Cole did make the same gesture across his throat with his hand as described by the Unit Manager, Ms. Apala. We

were then escorted back to the front processing area where we retrieved our licenses, returned the knife vests, and departed the H Unit.

Further affiant sayeth not.

David G. Hough, Ph.D. ABPP

DAVID G. HOUGH, PH.D., ABPP

Subscribed and sworn to me on this 4th day of May, 2022.

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 63439 GREGORY LEWIS Commission Expires July 11, 2025 HARRISON COUNTY

NOTARY PUBLIC

My commission number is: #63439

My commission expires: 07/11/2025

DECLARATION OF DAVID G. HOUGH., PH. D., ABPP
Diplomate of the American Board of Professional Psychology

I, Dr. David G. Hough, having the legal capacity to make this declaration, hereby state under oath as follows:

1. I am currently employed as a clinical psychologist with the Fairview Oregon Veterans Administration Community Out-Patient Clinic in Fairview, Oregon. In this position I diagnose and treat military veterans with evidence-based psychotherapies, addressing post-traumatic stress disorder (PTSD) in particular. I have a Ph.D. in Clinical Psychology and am Board Certified in Clinical Psychology by the American Board of Professional Psychology (ABPP).

2. Prior to this position, I was employed as a clinical psychologist with the Base Operational Support Team at Keesler US Air Force Base in Biloxi, Mississippi, from July 2021 to June 2022. Prior to this position at Keesler US Air Force Base, I was employed as a Clinical Psychologist with the US Air Force Europe (USAFE) at Royal Air Force (RAF) Lakenheath, in the United Kingdom from June 2016 to July 2021. I was assigned to the Aerospace Medical and Flight Operations Clinic, where I diagnosed and treated active-duty members.

3. Prior to my position at RAF Lakenheath, I worked as a clinical psychologist in the Embedded Mental Health Clinic at Ft. Riley, Kansas, and was employed by the Center for Deployment Psychology (CDP); before transferring to Ft. Riley, I worked as a clinical psychologist in the Family Health Clinic at Langley Air Force Base, Langley, Virginia.

4. Prior to my employment with the military and V.A. from 2013 to the present, I was self-employed in the private practice of clinical and forensic psychology since 1990. In this capacity, I diagnosed and treated patients of all ages and diagnoses, provided individual therapy, couples and family therapy, as well as psychoanalysis. In my forensic work, I have consulted with both defense and prosecution teams throughout the United States on primarily criminal cases. I have conducted extensive psychological evaluations and psychological testing on criminal defendants in all manner of facilities, from city jails to federal facilities and international venues. I have provided expert witness testimony in county, state, and federal courts and at the International Criminal Tribunal - Yugoslavia at The Hague, Netherlands, on a war crimes case. I have consulted with the U.S. Department of Justice on domestic terrorism cases within the United States and on a GITMO case. I have consulted with the U.S. Drug Enforcement Administration (DEA) and served as their Psychological Consultant for the Central United States.

5. I have conducted psychological evaluations and provided expert witness testimony on death penalty cases since 1995 in Kansas, Missouri, and Oklahoma. I have worked with attorneys on death penalty cases throughout their representation of their clients. I am familiar with the procedures on death row at the Oklahoma State Penitentiary (OSP), the housing issues specific to death row at OSP, and with the unique stressors experienced by prisoners who are sentenced to death.

6. I am currently working with the defense team on Benjamin Cole's case and have done so since 2016. I have reviewed all available records on the case provided by his current and previous counsel during the post-conviction process and direct appeal. I have also reviewed boxes of written material sent to Mr. Cole and have provided a qualitative content analysis of the main themes contained within these materials, as well as the written materials generated by Mr. Cole.

I have also attempted to interview Mr. Cole on multiple occasions, wherein he has refused to leave his cell to speak to me. Typically, the prison has not assisted with Mr. Cole leaving his cell to speak to me.

7. I am in receipt of a clinical report generated by Dr. Scott Orth, Psy.D., current Director of Forensic Psychology at the Oklahoma Forensic Center, Vinita, Oklahoma. The report is dated 14 July 2022 and is addressed to The Honorable Judge Gregory Frizzell, Judge of the United States District Court, Northern District of Oklahoma. I have reviewed this report generated by Dr. Orth and will hereafter respond with my observations of this report.

8. Dr. Orth's report made no reference to physically documenting his interactions with Mr. Cole, utilizing audio, or visual aids that would provide an independent record of the encounter for third-party independent analysis. If such exists, it has not been made available at this point. The reader is left to rely solely on Dr. Orth's description. The apparent absence of an independent record forecloses on the opportunity to verify Dr. Orth's report. Moreover, an evaluation with such high stakes, as in this case, ethically warrants a thorough, independent and fully transparent evaluation and record of the clinical encounter. As I have reviewed the professional literature, I am aware that an independent and fully transparent clinical evaluation is indicated for death penalty competency evaluations and concur with research which supports this assertion(See, e.g., Radelet ML, and Barnard GW: Ethics and the psychiatric determination of competency to be executed. Bull Am Acad Psychiatry Law 14:46-47, 1986).

10. Dr. Orth's describes Mr. Cole as being able to interact spontaneously, answer questions in complete sentences, track and comprehend the flow of the conversation logically and coherently. This clinical description of Mr. Cole is in radically sharp contrast to Mr. Cole's relational style, not only with this writer, but also with his current legal team, with Dr. Morris (evaluating psychiatrist), with current OSP observers (i.e., current Case Manager), and with the litany of legal teams before his current team. In contrast to this description by Dr. Orth, the typical experience of other observers and clinical evaluators over the course of years is one wherein Mr. Cole refuses to come out of his cell to talk and sits in his wheelchair, poorly groomed, head hung to the side, staring off and being non-responsive to verbal stimuli directed toward him. Any verbalizations he might offer are rare and heavily laden with religiosity and convey no meaning to the listener relevant to the matters being discussed. His focus upon religiously themed material cannot productively be redirected. The writer has discussed this with past and present legal team members, and it has consistently held true.

11. Dr. Orth describes Mr. Cole as essentially well groomed. Moreover, Dr. Orth describes that he was able to foster a high degree of positive rapport rather quickly with Mr. Cole. These descriptions present a discontinuity with the historical records among where there are many descriptions of Mr. Cole as presenting with poor hygiene and with a well-known and chronic history of non-relatedness.

During the interview Mr. Cole seems to interrupt Dr. Orth's explanation of limitations on confidentiality in a forensic context by spontaneously answering the two central competency questions required by the referring judge and the law (See p. 3, 2nd paragraph, under section Notification of Limits of Confidentiality). Specifically, Dr. Orth reports that when he asked Mr. Cole about his understanding of the reason for the current evaluation, that Mr. Cole responded as such: "he spontaneously state[d] '...to see if I'm competent and mentally fit to be executed... for court and competent here to see if I can go ahead and I guess be executed." Mr. Cole is then described as spontaneously going on about the pending order of executions coming up, why he is being executed for his daughter's death, and that he accepts responsibility for his actions. This type of spontaneous, verbally loquacious, and erudite verbalizations by Mr. Cole have rarely been observed, and have not been observed in recent times . 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 been 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 was prepped physically and verbally for this evaluation, yet Dr. Orth makes no reference to this. As noted under paragraph 8 above, there is no corroborating record available to provide objective evidence of this reported discussion between Mr. Cole and Dr. Orth.

12. In reviewing the records from OSP (4/15/2010 through 6/17/2022), Dr. Orth selectively cites records that would ostensibly support his overall assertion that Mr. Cole does not show signs of mental illness. In fact, there are numerous OSP records indicating serious mental health issues. Some examples are attached to this declaration. For example, but to cite a few:
03/11/14 Dave Kerby, Ph.D. noted that "Schizophrenia is a possible diagnosis. Disorganized behavior is suggested by his refusal to eat. Disorganized speech was not apparent today, but a mild looseness of association was noted in January when he was willing to speak ";

on the same day, 03/11/14, Dr. Kerby also reported that" The mental health level of zero appears to be incorrect. He had a mental health level of B at age 39, so his mental health level at age 48 should not be zero. His mild symptoms of January 2014 suggest a diagnosis of psychotic disorder. He was not floridly psychotic today; however, his refusal to speak and his oppositional behavior are consistent with the possibility of paranoid thinking; his conduct could also indicate the social isolation that is typical of schizophrenia.";

on 03/20/14 Dr. Kerby reports that" while offender could have been slow with sleepiness, the lack of eye contact and refusal to speak could suggest mental health problems.... Offender

currently has no mental health diagnosis, and records are lacking a history of mental illness. However, his recent change in behavior raises the possibility of a disorder....A psychiatry referral at this time seems appropriate."

On 08/29/14 Clinical Coordinator, Patti Stem, notes that "Beginning in January Mr. Cole has evidenced behavior indicating decompensation. Notes indicate he started out with conversation laced with religious themes and decreasing communication and eye contact with clinicians. In March when the meal refusals were reported he initially refused to allow vital signs to be taken , or to see the QMHP."

I am not aware of Mr. Cole ever having been referred for a formal psychiatry evaluation as was suggested by the writers of these records.

13. Absent from these records Dr. Orth selected is any mention of the negative symptoms of psychosis.

Negative clinical symptoms refer to the peculiar affect, social disconnectedness and other symptoms that are not as dramatic as flagrant hallucinations known as positive clinical symptoms of schizophrenia. Mr. Cole's negative symptoms, described in both the historical and current records, include 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. Such behaviors, as here mentioned, exist in the historical records but are afforded no weight by Dr. Orth. Such negative symptoms are behaviors that are observable, measurable, and in the aggregate, indicative of serious mental illness (i.e., most typically observed among the regressed and chronic schizophrenic population or among those with chronic and severe major depression). Affidavits from former cellmates, for example, have described how Mr. Cole stayed in the dark for an entire year, incommunicado, and stared blankly at the TV screen without appearing to track the storyline.

Dr. Orth does not 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. The notes cited by Dr. Orth, especially those describing "non-cooperation" as indications of an attitude problem (and thereby inferring not mental illness), and he does not 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.

14. Dr. Orth reports that while in prison, Mr. Cole's official psychiatric diagnosis according to the Fourth Edition Diagnostic and Statistical Manual of the American Psychiatry Association (DSM-IV) has always been "799.9 No Diagnosis." This statement regarding no diagnosis is factually incorrect. The DSM-IV diagnosis of 799.9 is entitled "Diagnosis Deferred". If Mr. Cole had been given no diagnosis, the DSM-IV code should have been V71.09 entitled "No diagnosis or condition on Axis I". Arguably the 799.9 Diagnosis Deferred implies Mr. Cole clinically exhibited some aspect of mental illness yet to be fully

evaluated. As noted above, there is no record of Mr. Cole ever being provided with a comprehensive psychiatric evaluation by the Department of Corrections to diagnose his condition.

It should be noted that the DSM-IV is an obsolete and out-of-date diagnostic source that is no longer a valid source of diagnostic nomenclature and not material to the current evaluation. The DSM-IV (published in 1994) has been surpassed by three further revisions. (DSM-IV-TR published in 2000; DSM-V, published in May 2013; and DSM-V-TR, published in May 2022). Each revision incorporates updated psychiatric research and advances to standard clinical practice. Up to date clinical assessment mandates using the Diagnostic and Statistical Manual V-Text Revision, referred to as the DSM-V5-TR, published by the American Psychiatric Association in Washington, DC.

It is important to note that the 799.9 diagnostic code was dropped with the 2013 publication of the DSM V. It has not been considered a valid diagnostic code since 2013, yet the prison medical records were not updated with an appropriate diagnosis. Dr. Orth does not address the use of an obsolete diagnostic code which has been incorrectly used in the historic records to denote no diagnosis rather than the correct diagnosis deferred. Dr. Orth does not provide a current diagnosis as would be reasonably expected for a competency evaluation of this nature.

15. It is standard practice for the forensic examiner to supplement their records review and direct face-to-face interviews with objective, statistically normed, psychological testing. Psychological testing is usually administered as a comprehensive battery of tests. The purpose of the testing is to provide evidence-based assessment of the patient's emotional, cognitive, and relational functioning. Psychological testing can typically elucidate personality features not discerned by interview or records review alone. In this regard, it is understood that psychological testing constitutes a recognized standard of practice for forensic evaluation. The data obtained from the testing is used to augment and reinforce conclusions and opinions derived from ancillary sources of date (e.g., records review, collateral interviews, and direct clinical interviews and mental status observations). It is well acknowledged with forensic evaluations that the psychometric data is more accurate than interview impressions. To conduct an evaluation without psychological testing is sub-substandard evaluation practice.

If Mr. Cole had been as conversational as described, then follow-up with objective, clinically normed psychological testing would have been indicated. Mr. Cole was not presented with any psychological testing in this evaluation.

16. Dr. Orth does not opine anywhere in his report the limitations of his clinical findings. As with any forensic psychological report, it is expected that the evaluator will acknowledge any limitations, circumstances, or missing data that could alter or change the reported outcome and conclusions of the report. For example, Dr. Orth does not acknowledge the limitations inherent in evaluating Mr. Cole on only one occasion versus, say, a series of interviews which would strengthen or potentially even refute his conclusions derived from a single evaluation. Dr. Orth

does not address any limitations of his report; every forensic evaluation, by definition, will contain some limitations. Some of them are crucial to assisting the Court to weigh the credibility of the report.

18. In summary, I have reviewed the work product of Dr. Orth's evaluation with Mr. Cole and find it flawed on numerous methodological grounds, as here detailed in this declaration. Such methodological deficits undermine the foundation upon which Dr. Orth's conclusions are derived. Dr. Orth does not opine as to what degree of psychological certainty he maintains that the conclusions embedded in his report can be relied upon by the reader. With Dr. Orth's report, confidence in these presented conclusions is considered by this writer as significantly low and should be relied upon, if at all, with a high degree of caution.

Executed on this 29thy day of July 2022 at

9254 SW Chopin Lane
Portland, Oregon 97225
(228) 239-7744
Georgehough4@gmail.com
Kansas License #708

David G. Hough, Ph.D., ABPP

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note SOAP - 10/15/14 15:57

Subjective Data:

Reason for this visit: Follow-up;
Referral source: Follow-up;
Current signs or symptoms and/or responses to treatment:
Offender said that he was doing good and was waiting for his new Bible. Thanks that it was a great Bible and he will be lossing sleep, with it ariving, he will enjoy it. He talk about passages in the Bible and what they mean. He talk about Vitamin's and Omega 3 what what it will do for you and how the different ones effect diderant parts of the body and mind.
Comments on Subjective Findings:
Offender was in a good mood and talk freely for about 40 minutes. Offender showed no signs of loose thought process. Offender remains alert and fully oriented with no evidence of thought disorde or neurological impairment. No auditory, visual, tactile, or olfactory hallucinations, with no suicide or homicidal ideation. He had working thoughts and able to express them well.

Objective Data:

Appearance: Appropriate;
Offender observed to have poor or declining health? No;
Behavior: Cooperative;
Mood: Normal;
Affect: Within Normal Limits;
Speech: Normal;
Perception: No Abnormalities;
Thought Process: Organized;
Thought content: Within normal limits;
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;
Oriented to person, place, time: Yes;
Concentration intact: Yes;
Memory intact: Yes;
Abstract thinking intact: Yes;
Insight and judgement intact: Yes;
Reliable history and information from Record: Yes;
Reliable history and information from Offender: Yes;

Assessment:

Plan:

Plan:
Offender will contenue to be monitorred and evaluated for changes in behavior.
Follow-up:
as needed
Return Visit: 1 month;

Signed Electronically by Bruce White, Psychological Clinician on 10/15/14 16:14
Cosigned Electronically by Patti Stem, Clinical Coordinator on 10/15/14 16:51 (requested by Bruce White, Psychological Clinician on 10/15/14 16:14)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note SOAP - 10/03/14 12:25

Subjective Data:

Reason for this visit: Initial;
Referral source: Medical staff;
Current signs or symptoms and/or responses to treatment:
Offender was seen at his cell door, he had just woken and would not talk, but the Unit Officer help get him talking. He talk of the bible and the songs from the bible. He told us of the different versis and how they came about. He requested a new Gient Print Kings James Bible because he can't read the other one.
Comments on Subjective Findings:
Offender and this QMHP, with the Unit Officer talk for about 30 minutes. His speech was organized, information was correct, with no sign of a loose thought process. His hair and face hair is not keep, but his property and cell is very clean. Staff stated that he doesn't talk to everyone, but people he chooses to, he has trouble comunicating with or voicing himself or his needs. He was very calm and talk frendly and respectfully. A bible will be found if posible. There was no observation that would indicate evedence of severe mental illness, he was alert and oriented to person, place, time, and situation.

Objective Data:

Appearance: Appropriate;
Offender observed to have poor or declining health? No;
Behavior: Calm; Cooperative;
Mood: Normal;
Affect: Within Normal Limits;
Speech: Normal; Soft;
Perception: No Abnormalities;
Thought Process: Organized;
Thought content: Within normal limits;
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;
Oriented to person, place, time: Yes;
Concentration intact: Yes;
Memory intact: Yes;
Abstract thinking intact: Yes;
Insight and judgement intact: Yes;
Reliable history and information from Record: Yes;
Reliable history and information from Offender: Yes;

Assessment:

Plan:

Plan:
Offender will contenue to be monitored and evaluated for changes in behavior.
Follow-up:
as needed
Return Visit: 1 month;

Signed Electronically by Bruce White, Psychological Clinician on 10/03/14 12:47
Cosigned Electronically by Janna Morgan, Chief Mental Health Officer, PhD on 10/03/14 14:47 (requested by Patti Stem, Clinical Coordinator on 10/03/14 14:40)
Cosigned Electronically by Patti Stem, Clinical Coordinator on 10/03/14 14:39 (requested by Bruce White, Psychological Clinician on 10/03/14 12:47)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID 489814
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review (Late Entry) - 08/29/14 12:07

Assessment:

Purpose of Review: Death row;
Offender cell, clothing, or body unkempt or unclean: NA;
Offender incoherent, bizarre, or unusually disorganized in speech or behavior: NA;
Offender disoriented to time, place or person: NA;
Offender demonstrate deficits in memory: NA;
Offender present any psychotic features: Low;
Offender appears sad or depressed: NA;
Offender displays symptoms of anxiety: NA;
Offender angry, hostile or threatening: Low;
Offender voice displays violent tendencies: NA;
Offender shows signs of euphoric or expansive mood: NA;
Offender reports or observation of suicidal ideation or behavior: No;
Offender observed in poor or declining health: No;
Comments: Offender Cole has been on the medical concern list since March, 2014 when it was reported he was refusing meals (according to him for religious reasons). (That is no longer the case. No recent incident reports of refused meals have been received). Prior to the first of this year the EHR lists no MH concerns either reported or observed. Beginning in January Mr. Cole has evidenced behavior indicating decompensation. Notes indicate he started out with conversations laced with religious themes, and decreasing communication and eye contact with clinicians. In March when the meal refusals were reported he initially refused to allow vital signs to be taken, or to see QMHP. He later was weighed, and placed on double portions. He is on the concern list, meaning he is observed each shift by a lieutenant daily and a report sent to this writer each time. His vitals are checked bi-weekly and he is seen by MH monthly. At the current time he refused to engage with this clinician. It was difficult to determine whether he was asleep or feigning sleep. Officers note that he rarely speaks, but will communicate with them with yes or no answers throughout the daily routines of feeding, showers, etc. He has refused to see the psychiatrist on two occasions. He also refused to see the psychologist sent on 7/30/14 through his attorney to do an independent evaluation; in spite of encouraging from this writer and the warden to come out. He will continue to be closely monitored.

Signed Electronically by Patti Stem, Clinical Coordinator on 09/18/14 13:06

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID 489814
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review - 07/30/14 09:15

Assessment:

Purpose of Review: Death row;
Offender cell, clothing, or body unkempt or unclean: NA;
Offender incoherent, bizarre, or unusually disorganized in speech or behavior: NA;
Offender disoriented to time, place or person: NA;
Offender demonstrate deficits in memory: NA;
Offender present any psychotic features: NA;
Offender appears sad or depressed: NA;
Offender displays symptoms of anxiety: Moderate;
Offender angry, hostile or threatening: NA;
Offender voice displays violent tendencies: NA;
Offender shows signs of euphoric or expansive mood: NA;
Offender reports or observation of suicidal ideation or behavior: No;
Offender observed in poor or declining health: No;
Comments: Went to cell door accompanied by Warden Trammell to inform Mr. Cole about upcoming evaluation by outside psychologist. Mr. Cole initially did not respond, but came to the door when the Warden made her presence known. He removed head covering when asked. When he was being informed about the evaluation he abruptly turned, waved this clinician away, and lay down on his bunk, turned his head away and refused to acknowledge or respond to any further questions or requests. This has been his typical response of late to any mental health contact. Of note, in spite of 3 documented tries, Mr. Cole did refuse to come out to speak to the outside psychologist. Will return Mr. Cole to the offender concern list for daily observation by security staff, and MH will continue to follow up per policy

Signed Electronically by Patti Stem, Clinical Coordinator on 08/05/14 14:21

OKLAHOMA DEPARTMENT OF CORRECTIONS
WAIVER OF TREATMENT/EVALUATION

Facility OSP Date 5-9-14 Time 0208

I certify that I am refusing to submit to treatment at my own insistence and against the advice of the health care provider.

1. I have been advised that it is necessary for me to undergo the following treatment/evaluation:
weight

2. Treatment/evaluation being refused was to be provided to me by: Kanla
(Facility Name and/or Provider)

3. I have been informed by a qualified healthcare professional of the risks attendant to my refusal. These include:
weight loss pain Kidney

4. I assume full responsibility for any results caused by my decision and I hereby release the institution, its employees, officers, and the provider from all legal responsibility and liability.

5. I certify that I am of sound mind and have read, or had read to me, and fully understand the above information concerning my refusal to accept treatment/evaluation and have had an opportunity to ask questions before I affix my signature.

Benjamin Cole	5-9-14		5-9-14
Offender Signature	Date	Witness (Health Care Staff)	Date
		BB	5-9-14
		Witness	Date

If the offender refuses to sign such a statement, he/she cannot be forced to do so legally nor may release be withheld until the offender signs. If this occurs, the form should be filled out, witnessed by two facility personnel and the statement documented on the form, "SIGNATURE REFUSED."

Offender's Name	DOC NO.
Benjamin Cole	489814

DOC 140117D (R 1/10)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note NARRATIVE - 05/06/14 12:20

Progress Note:

Note:
REFUSED TO SEE ME

Signed Electronically by James Howard, MD on 05/06/14 12:21

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note NARRATIVE - 05/01/14 20:32

Progress Note:

Note:
REFUSED TO SEE ME

Signed Electronically by James Howard, MD on 05/01/14 20:33

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review - 04/22/14 13:30

Assessment:

Purpose of Review:
Re-evaluation

Offender cell, clothing, or body unkempt or unclean:
NA

Offender reports or observation of suicidal ideation or behavior:
No

Comments:
(Late entry). Offender refused to come to door to speak on rounds today. He turned his back, peed in the toilet, and flushed.

Signed Electronically by Dave Kerby, PhD on 04/22/14 15:50

OKLAHOMA DEPARTMENT OF CORRECTIONS
WAIVER OF TREATMENT/EVALUATION

Facility OKLAHOMA STATE PENITENTIARY Date 4-22-14 Time 1315

I certify that I am refusing to submit to treatment at my own insistence and against the advice of the health care provider.

1. I have been advised that it is necessary for me to undergo the following treatment/evaluation: weight evaluation

2. Treatment/evaluation being refused was to be provided to me by: OKLAHOMA STATE PENITENTIARY DENTAL (Facility Name and/or Provider)

3. I have been informed by a qualified healthcare professional of the risks attendant to my refusal. These include: PAIN, INFECTION or DEATH, worsening of condition

4. I assume full responsibility for any results caused by my decision and I hereby release the institution, its employees, officers, and the provider from all legal responsibility and liability.

5. I certify that I am of sound mind and have read, or had read to me, and fully understand the above information concerning my refusal to accept treatment/evaluation and have had an opportunity to ask questions before I affix my signature.

Benjamin Cole 4-22-14
Offender Signature Date

Witness (Health Care Staff) 4-22-14
Date

Witness 4-22-14
Date

If the offender refuses to sign such a statement, he/she cannot be forced to do so legally nor may release be withheld until the offender signs. If this occurs, the form should be filled out, witnessed by two facility personnel and the statement documented on the form, "SIGNATURE REFUSED."

Offender's Name	DOC NO.
Benjamin Cole	489814

DOC 140117D (R 1/10)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

refused visit - 04/22/14 13:54

Subjective Data:

Chief Complaint:
refused visit, waiver signed.

Objective Data:

Assessment:

Plan:

Co-Payment Assignment (Select procedures - office clinic visit and/or medication(s) for co-payment)

Encounter: Medical Progress Note- SOAP
Date/Time of Service: 04/22/14 13:54
Location of Service: Oklahoma State Penitentiary
Provider: John Marlar, DO Authorizing Provider: John Marlar, DO

Signed Electronically by John Marlar, DO on **04/22/14 13:55**

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review: Medical Observation List - 04/18/14 19:45

Assessment:

Purpose of Review:
Other Medical Observation List

Offender cell, clothing, or body unkempt or unclean:
NA

Offender reports or observation of suicidal ideation or behavior:
No

Comments:
Offender would not respond to this clinician. Officers report that he seldom talks to anyone, but he does speak to some officers to the extent of answering yes-no questions, such as "Do you want a tray?"

Signed Electronically by Dave Kerby, PhD on 04/18/14 20:02

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID 489814
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review - 04/03/14 09:00

Assessment:

Purpose of Review:
Re-evaluation

Offender cell, clothing, or body unkempt or unclean:
NA

Offender appears sad or depressed:
NA

Offender voice displays violent tendencies:
NA

Offender shows signs of euphoric or expansive mood:
NA

Offender reports or observation of suicidal ideation or behavior:
No

Comments:
Offender was seen at his cell on the unit. While this clinician knocked at the door and repeatedly asked him to speak, the offender arranged neatly stacked papers, turned his back and peed, flushed the toilet, and arranged papers again. All this time he never even glanced or gestured an acknowledgement of this clinician's presence.

Signed Electronically by Dave Kerby, PhD on 04/03/14 09:50
Cosigned Electronically by Patti Stem, Clinical Coordinator on 04/03/14 15:32 (requested by Dave Kerby, PhD on 04/03/14 09:51)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note NARRATIVE - 04/03/14 20:05

Progress Note:

Note:
REFUSED TO SEE ME.

Signed Electronically by James Howard, MD on 04/03/14 20:05

OKLAHOMA DEPARTMENT OF CORRECTIONS
WAIVER OF TREATMENT/EVALUATION

Facility BJP Date 3/22/14 Time 3- 10:15

I certify that I am refusing to submit to treatment at my own insistence and against the advice of the health care provider.

1. I have been advised that it is necessary for me to undergo the following treatment/evaluation: EVAL

2. Treatment/evaluation being refused was to be provided to me by: [illegible] (Facility Name and/or Provider)

3. I have been informed by a qualified healthcare professional of the risks attendant to my refusal. These include: weight loss

4. I assume full responsibility for any results caused by my decision and I hereby release the institution, its employees, officers, and the provider from all legal responsibility and liability.

5. I certify that I am of sound mind and have read, or had read to me, and fully understand the above information concerning my refusal to accept treatment/evaluation and have had an opportunity to ask questions before I affix my signature.

Benjamin Cole 3-27-14
Offender Signature Date

[illegible]
Witness (Health Care Staff) Date

[illegible] 3-27-14
Witness Date

If the offender refuses to sign such a statement, he/she cannot be forced to do so legally nor may release be withheld until the offender signs. If this occurs, the form should be filled out, witnessed by two facility personnel and the statement documented on the form, **"SIGNATURE REFUSED."**

Offender's Name	DOC NO.
Benjamin Cole	489814

DOC 140117D (R 1/10)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health NARRATIVE: Referral to Psychiatrist - 03/20/14 16:26

Progress Note:

Note:
Offender Cole has shown increasingly poor eye contact, social withdrawal, refusal to cooperate with medical staff, and refusal to eat. A psychiatry referral at this time seems appropriate.

Signed Electronically by Dave Kerby, PhD on 03/20/14 16:29
Cosigned Electronically by Rose Gwin, LPN, LPN on 03/25/14 10:42 (requested by Dave Kerby, PhD on 03/20/14 16:29)
Cosigned Electronically by Patti Stem, Clinical Coordinator on 03/20/14 17:10 (requested by Dave Kerby, PhD on 03/20/14 16:29)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID 489814
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note SOAP - 03/20/14 15:38

Subjective Data:

Reason for this visit: Follow-up;
Referral source: Medical staff;
Chief Complaint:
Other:
Offender refuses to be weighed.

Current signs or symptoms and/or responses to treatment:
Offender was approach at his cell door on the unit. He did not respond from his bed when this clinician knocked at the door. When a guard came by doing checks and shone a light in the cell, offender rose from the bed and walked to the door.

His gait was stiff, and his steps small. His head was down, and his eyes were never raised for eye contact. He stood mutely at the door for about fifteen to twenty seconds, while this clinician spoke to him. He never replied, but turned slowly away. With the same stiff gait he went to the toilet and urinated, flushed, then he heavily lay down to bed again.

Comments on Subjective Findings:
While offender could have been slow with sleepiness, the lack of eye contact and the refusal to speak could suggest mental health problems. This clinician saw the offender on 3/11/14, and though he was socially withdrawn, he did not show motor retardation then, and he also spoke.

Objective Data:

Appearance: Bizarre;
Behavior: Other; Distant, withdrawn
Speech: Other; Mute
Perception: Other; Cannot be check due to no speech
Thought Process: Other; Cannot be checked due to no speech
Thought content: Other; Cannot be checked due to no speech
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;

Assessment:

Comments on Diagnosis:
Offender currently has no mental health diagnosis, and records are lacking a history of mental illness. However, his recent change in behavior raises the possibility of a disorder.

Plan:

Plan:
Continue to attempt to assess.

Signed Electronically by Dave Kerby, PhD on 03/20/14 15:53
Cosigned Electronically by Pat Sorrels, CHSA on 03/21/14 10:23 (requested by Patti Stem, Clinical Coordinator on 03/20/14 15:59)
Cosigned Electronically by Chris Kampas, RN on 03/22/14 13:09 (requested by Patti Stem, Clinical Coordinator on 03/20/14 15:59)
Cosigned Electronically by John Marlar, DO on 03/27/14 15:20 (requested by Patti Stem, Clinical Coordinator on 03/20/14 15:59)
Cosigned Electronically by Patti Stem, Clinical Coordinator on 03/20/14 15:58 (requested by Dave Kerby, PhD on 03/20/14 15:53)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health SOAP: Addendum - 03/11/14 15:46 [Addendum]

Subjective Data:

Objective Data:

Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;

Assessment:

Comments on Diagnosis:
Offender has been a mental health level zero and has had no mental health diagnosis. While the level zero appears to have been an error, reliable records do not exist regarding past mental illness.

Schizophrenia is a possible diagnosis. Disorganized behavior is suggested by his refusal to eat. Disorganized speech was not apparent today, but a mild looseness of association was noted in January when he was willing to speak. While no clear evidence of delusions are present, he may have some unexpressed beliefs that have led him to refuse food and to refuse to interact with staff. There was a clear absence of negative symptoms and of abnormal motor movements.

Plan:

Plan:
Offender will be monitored during rounds for symptoms to clarify the diagnostic picture, as he has been willing in the past to talk during rounds on the unit. He also needs to be monitored regarding his food intake.

Signed Electronically by Dave Kerby, PhD on 03/11/14 16:18
Cosigned Electronically by Patti Stem, Clinical Coordinator on 03/11/14 18:47 (requested by Dave Kerby, PhD on 03/11/14 16:18)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health SOAP: Mental health level B - 03/11/14 10:15

Subjective Data:

Reason for this visit: Follow-up;
Chief Complaint:
Other:
Assess mental status and physical status

Current signs or symptoms and/or responses to treatment:
Offender is a 48-yr-old white male with a mental health level of zero. Desipite this mental health level, offender during rounds in Jan 2014 showed minor symptoms of mental illness: poor eye contact, mild looseness of association in his speech, and some unusual religious content. In addition, a document dated 27 Dec 2004 when the offender was 39 years old and scanned into the EHR on 12 Sep 2011 contains information about mental health level. The document was signed by Ann Boyd, PhD, who gave the offender a mental health level of B.

Offender was seen today with Dr. Marlar in the medical room on H unit. When offender came to the door, he shook his head and said "I refuse." He repeatedly refused to participate, and steadily walked toward the door. He would not step on the scales to be weighed. He finally consented to sign a document that he refused all treatment.

His affect was not angry or irritable. Despite his oppositional conduct, his mood was in the normal range; indeed, he seemed in a good mood. His speech was too limited to obtain much impression. He mostly said simple phrases such as "I refuse" and "I'm not talking to you guys." His one statement of more than a few words referred to the meals here as "pig food", and he said that he should be receiving kosher food.

He signed a medical refusal form, showing no problems with muscle control. His gait appeared normal. There was no evidence of breathing difficulties, and his skin tone was in the normal range. Orientation and memory could not be fully gauged, due to lack of cooperation, but he showed no obvious deficits.

Comments on Subjective Findings:
The mental health level of zero appears to be incorrect. He had a mental health level of B at age 39, so his mental health level at age 48 should not be zero. His mild symptoms of January 2014 suggest a diagnosis of a psychotic disorder. He was not floridly psychotic today; however, his refusal to speak and his oppositional behavior are consistent with the possibility of paranoid thinking; his conduct could also indicate the social isolation that is typical of schizophrenia. He was not obviously psychotic today, but his mental status should continue to be monitored.

Objective Data:

Behavior: Other; uncooperative
Mood: Normal;
Affect: Within Normal Limits;
Speech: Other; Limited speech due to refusal to cooperate
Perception: No Abnormalities;
Thought Process: Other; Difficult to assess due to lack of cooperation
Thought content: Other; Lack of cooperation could suggest the possibility of paranoid thinking
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;

Assessment:

Plan:

Signed Electronically by Dave Kerby, PhD on 03/11/14 11:14
Cosigned Electronically by Janna Morgan, Chief Mental Health Officer, PhD on 03/11/14 15:29 (requested by Patti Stem, Clinical Coordinator on 03/11/14 11:22)
Cosigned Electronically by Pat Sorrels, CHSA on 03/21/14 10:23 (requested by Patti Stem, Clinical Coordinator on 03/20/14 16:14)
Cosigned Electronically by Patti Stem, Clinical Coordinator on 03/11/14 11:21 (requested by Dave Kerby, PhD on 03/11/14 11:14)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID **489814**
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

Mental Health or Mental Status Review - 01/29/14 11:00

Assessment:

Purpose of Review:
Re-evaluation

Offender cell, clothing, or body unkempt or unclean:
NA

Offender incoherent, bizarre, or unusually disorganized in speech or behavior:
NA

Offender disoriented to time, place or person:
NA

Offender demonstrate deficits in memory:
NA

Offender present any psychotic features:
NA

Offender appears sad or depressed:
NA

Offender displays symptoms of anxiety:
NA

Offender angry, hostile or threatening:
NA

Offender voice displays violent tendencies:
NA

Offender shows signs of euphoric or expansive mood:
NA

Offender reports or observation of suicidal ideation or behavior:
No

Comments:
Mental health level zero. Offender came to the cell door and spoke at some length. His eye contact was poor, as he had his face up to the door and never looked at this clinician. His speech was coherent, though there was a suggestion of a slight looseness of association. He mentioned some religious themes: for example, "The day of the Lord is at hand."

He had noticable bad breath, and he seemed aware of it. He asked for an indigent sack, so that he could have a toothbrush and toothpaste for oral hygiene. He mentioned several times his desire for better oral hygiene. (Follow-up with case manager indicates that he is not on the indigent list).

Signed Electronically by Dave Kerby, PhD on 01/29/14 14:38

OKLAHOMA DEPARTMENT OF CORRECTIONS
WAIVER OF TREATMENT/EVALUATION

Facility OSP Date 11-27-13 Time 12:05

I certify that I am refusing to submit to treatment at my own insistence and against the advice of the health care provider.

1. I have been advised that it is necessary for me to undergo the following treatment/evaluation: General Health

2. Treatment/evaluation being refused was to be provided to me by: Marla
(Facility Name and/or Provider)

3. I have been informed by a qualified healthcare professional of the risks attendant to my refusal. These include: Worsening of condition, decline of health

4. I assume full responsibility for any results caused by my decision and I hereby release the institution, its employees, officers, and the provider from all legal responsibility and liability.

5. I certify that I am of sound mind and have read, or had read to me, and fully understand the above information concerning my refusal to accept treatment/evaluation and have had an opportunity to ask questions before I affix my signature.

Refused to sign 11-27-13 — Offender Signature — Date

[signature] 11-27-13 — Witness (Health Care Staff) — Date

[signature] 11-27-13 — Witness — Date

... offender refused to be seen by Medical. Has Refused to sign Waiver.

If the offender refuses to sign such a statement, he/she cannot be forced to do so legally nor may release be withheld until the offender signs. If this occurs, the form should be filled out, witnessed by two facility personnel and the statement documented on the form, "SIGNATURE REFUSED."

Offender's Name	DOC NO.
Cole	489814

DOC 140117D (R 1/10)

Oklahoma Department of Corrections

COLE, BENJAMIN
OK DoC Offender ID 489814
4/8/1965 (49) M Caucasian
Oklahoma State Penitentiary

wellness check - 11/26/13 22:30

Progress Note:

Progress Note:
officer K Hughes asked for offender to be evaluated during med pass. offender refused to come to cell door for evaluation. . officer hughes stated earlier in the day offender had been helped to shower and offender appeared to be very thin and weak. offender has not stated a hunger strike but appears to not be eating an adequate amount of food at this time. Dr. Marlar will be notified.

Encounter:	SIMPLE Narrative Note
Date/Time of Service:	11/26/13 22:30
Location of Service:	Oklahoma State Penitentiary
Provider:	Bill Savage, RN Authorizing Provider: Bill Savage, RN

Signed Electronically by Bill Savage, RN on 11/26/13 22:37
Cosigned Electronically by John Marlar, DO on 11/27/13 11:04 (requested by Bill Savage, RN on 11/26/13 22:37)

AFFIDAVIT OF LINDA ANNE HAYMAN, M.D.

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

I, Linda Anne Hayman, M.D., state as follows:

1. I am a Board certified Radiology specialist with additional years of subspecialty training in Neuroradiology. I have been licensed to practice in the State of Texas since 1973.

2. I am currently the medical director of Anatom-e which makes software for analysis of the brain anatomy and function. This company is headquartered at 7505 Fannin, Suite 426, Houston Texas 77030. A copy of my resume is attached hereto.

3. All of my experience and practice has specifically involved the review and analysis of radiological scans of the brain/spine and assessment of neurological damage and injury to the brain/spine. My experience in assessing neurological brain damage is inclusive of determining the physiological and behavioral effects of damage to the various regions of the brain. From 1996-2003 I held the position of a joint tenured professorship in the Departments of Radiology and Psychiatry and Behavioral Sciences at Baylor College of Medicine in Houston, Texas. I taught brain function at the Medical School during those years. In addition I am the author of "Clinical Brain Imaging; Normal Structure and Functional Anatomy," which is a 449 page authoritative textbook on brain imaging and function. In 2002, my imaging laboratory published the lead article in the preeminent international journal, *Radiology*. The article described the imaging correlates of brain damage to the frontal lobe.

4. At the request of the Office of the Federal Public Defender for the Western District of Oklahoma, I have conducted a review of the following materials and records pertaining to death row inmate Benjamin Cole:

a) MRI of brain 9-22-04;
b) Report of Matthew Powers, M.D., radiologist;
c) Report of John D. Hastings, Neurologist;
d) Declaration of Ruben C. Gur, Ph.D., neuropsychologist;
e) Report/Consultation of Raphael Morris, M.D., psychiatrist;
f) Affidavit of Cherry Peirce;
g) Samples of correspondence written by from January, 2006 and December, 2014;
h) Oklahoma Department of Corrections medical records 2014; and,

l) Memorandum and affidavit memorializing the defense team's effort to communicate with Mr. Cole January 8, 2015.

5. Based on my review of the enumerated records and my analysis of the images of Mr. Cole's brain, it is my professional opinion that in all medical probability Mr. Cole has progressive structural and biochemical abnormalities that severely impair his ability to interact appropriately with his surroundings. My training and expertise applies to the structural lesion which is seen Mr. Cole's MR images in his left globus pallidus. This structure is part of the basal ganglia which is a relay station in the pathway connecting the left frontal lobe with the anterior thalamus. Disruption of this pathway could produce the frontal lobe symptoms described by Dr. Gur. The schizophrenia which is also present in Mr. Cole's medical history is a biochemical imbalance which has associations with inherited defects and chaotic family conditions. All of these predisposing conditions are present in Mr. Cole's medical records.

6. The synergistic effects of Mr. Cole's schizophrenia and the left basal ganglia lesion are supported by the predominance of his "negative symptoms," which have been related specifically to abnormalities in the left globus pallidus. [Proc. Natl. Acad. Sci. USA Vol. 84, pp. 561-563, January 1987 Medical Sciences]. The term "negative symptoms" refers to an absence of behaviors or feelings that are usually present. Negative symptoms may be noted as inexpressive faces, blank looks, monotone and monosyllabic speech, few gestures, a seeming lack of interest in the world and other people, and an inability to feel pleasure or act spontaneously. The two medical conditions associated with negative symptoms are *Alogia* and *Avolition.* Alogia is a condition affecting thought and speech. A person experiencing alogia will have difficulty thinking clearly. The person's speech will be reduced because the person will have difficulty speaking with others. Sometimes, the person's speech will be reduced to short answers. Avolition is when a person doesn't feel like doing anything at all. A person may sit for long periods of time, showing little interest in participating in work or everyday activities, like bathing or getting dressed. Alogia and avolition are increasingly present in Mr. Cole.

7. The lesion detected 10 years ago has likely progressed. I hold this opinion because Mr. Cole's clinical symptoms have progressed. A new MRI and PET are strongly recommended. Indeed, it is my opinion that new brain imaging is essential to both medical evaluation and legal representation of Mr. Cole..

8. In conclusion, it is my expert opinion that Mr. Cole has observable brain damage. His brain lesion renders him unable to respond in a normal way to his environment. The lesion and symptoms are worsening.

FURTHER AFFIANT SAYETH NOT.

Anne Hayman, M.D.

Subscribed and sworn to before me this 16 day of January, 2015.

NOTARY PUBLIC

My commission number is: 4-2-2015

My commission expires: 01121500.8

DECLARATION OF TRAVIS SNYDER, DO

I, Travis Snyder, DO, declare:

1. I am a physician who is board-certified in Radiology with additional board certification and added qualifications in Neuroradiology. I completed residency at Michigan State in 2014 and a fellowship in Neuroradiology at the University of Miami in 2015. I am over 18 years old.

2. I am Adjunct Professor of Radiology at Michigan State University, Adjunct Assistant Professor of Neuroradiology and Radiology at Touro University Nevada, Touro University California, and University of Nevada Reno School of Medicine and a clinical professor of Radiology at the UNLV School of Medicine. I am program director of the HCA sunrise consortium NV radiology residency. I am in clinical practice specializing in Neuroradiology. I have given and authored over 50 presentations, abstracts and articles in the field of Radiology and Neuroradiology. I have attached a copy of my Curriculum Vitae.

3. I have reviewed the MRI on Benjamin Cole (DOB 4/8/65) performed at Oklahoma State University on 3/30/22. This is a markedly abnormal MRI which demonstrates multiple pathologic findings as follows:

- 11 x 11 x 15 mm (AP, T, CC) prominent left basal ganglia lesion centered in the left globus pallidus which involves the putamen and left genu and posterior limb of the internal capsule, portions of the lentiform nucleus and the most superior anterior aspect of the midbrain. There is a small amount of central decreased SWI signal consistent with associated hemosiderin (old hemorrhage) or calcification. There is no abnormal enhancement. While this lesion was present on the 11/22/04 MRI, it likely has mildly increased in size by comparison of available key images and radiologist measurement at the time (11 mm). This is highly consistent with toxic exposure to chemicals substances, including carbon monoxide. This lesion impacts multiple regions with predominant motor function. Parkinsonism, including delayed onset) has been well described as occurring in 9.5% of patients with Carbon Monoxide (CO) and is likely much more prevalent in CO patients

with globus pallidus lesions, as only 20% of patients with CO poisoning have globus pallidus lesions (Jeon, Sohn et al. 2018) (Choi 2002). Some degree of left sided motor dysfunction would be expected given the extent of the lesion in this location and Parkinsonism would be highly consistent with this lesion. The globus pallidus also acts as a relay system connecting the frontal lobes and thalamus. There is research indicating the globus pallidus is involved in pathways affected by schizophrenia (Williams 2017) with cognitive associations well described (Li, Zhao et al. 2021). Motor, cognitive and memory symptoms have been well described in patients with strokes to these regions (Giroud, Lemesle et al. 1997).

- There is large diffuse increased FLAIR/T2 signal consistent with gliosis (scarring) involving the bilateral posterior corona radiata, the posterior centrum semiovale and posterior periatrial trigones measuring 5.3 cm on the left and 3 cm on the right in maximal dimension. This finding is also consistent with a chemical type insult, as this is one of the most common locations affected in toxic insults including carbon monoxide poisoning. Delayed neurological sequela, a demyelinating inflammatory condition occurring in approximately 24.1% of patients following a toxic exposure is associated with these imaging findings (Chang, Han et al. 1992, Pepe, Castelli et al. 2011). The corona radiata has been described as *"pivotal hubs for the neural circuitry in charge of voluntary emotional expression and cognition processing. Damage to the corona radiata disconnects the functional circuitry between the frontal cortex and brain stem, disturbing voluntary emotional expression."* (Jiang, Yi et al. 2019) Given the size of this diffuse increased bilateral signal, symptoms are highly likely. It is possible this is a new finding, as it is not mentioned in the 11/22/04 MRI report by the interpreting radiologist Dr. Powers or a subsequent review by a neurologist Dr. Hastings or neurordiologist Dr. Hayman, however it is most likely this finding was present previously, just better visualized due to superior resolution of the current study. The 2004 images are not available directly for comparison.

- There is limitation in the current viewable 3/30/22 imaging, more sensitive volumetric analysis and diffusion tensor imaging has not yet been able to be analyzed. 3D reformats of various sequences are not yet possible and would be of benefit to asses some regions in the anterior right frontal lobe. I reserve the right to supplement this report when these analyses are available.

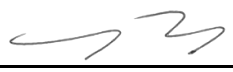
4. The clinical record is highly concordant with the imaging findings described. Dr. Gur's 2009 neuropsychiatric evaluation analysis demonstrated frontal lobe deficits, greater on the left, highly concordant with the imaging findings (Dr. Gur page 3). Ben Cole has been diagnosed with chronic and persistent severe schizophrenia (Dr. Hough page 20). The effect of the left globus pallidus centered lesion may be exacerbating this condition in addition to inherent symptoms from the damage. Mr. Cole is reported to be in a wheelchair, without reported medical cause, which may relate to the motor function of the described left globus pallidus centered lesion and possible Parkinsonism (Dr. Hough page 13).

5. Multiple providers have stated that Benjamin Cole is not competent to understand legal proceedings and have recommended a follow-up MRI to the 2004 MRI. Given the high concordance of the imaging with the clinical record, the imaging reviewed is supportive of their opinions.

6. Key images and references below.

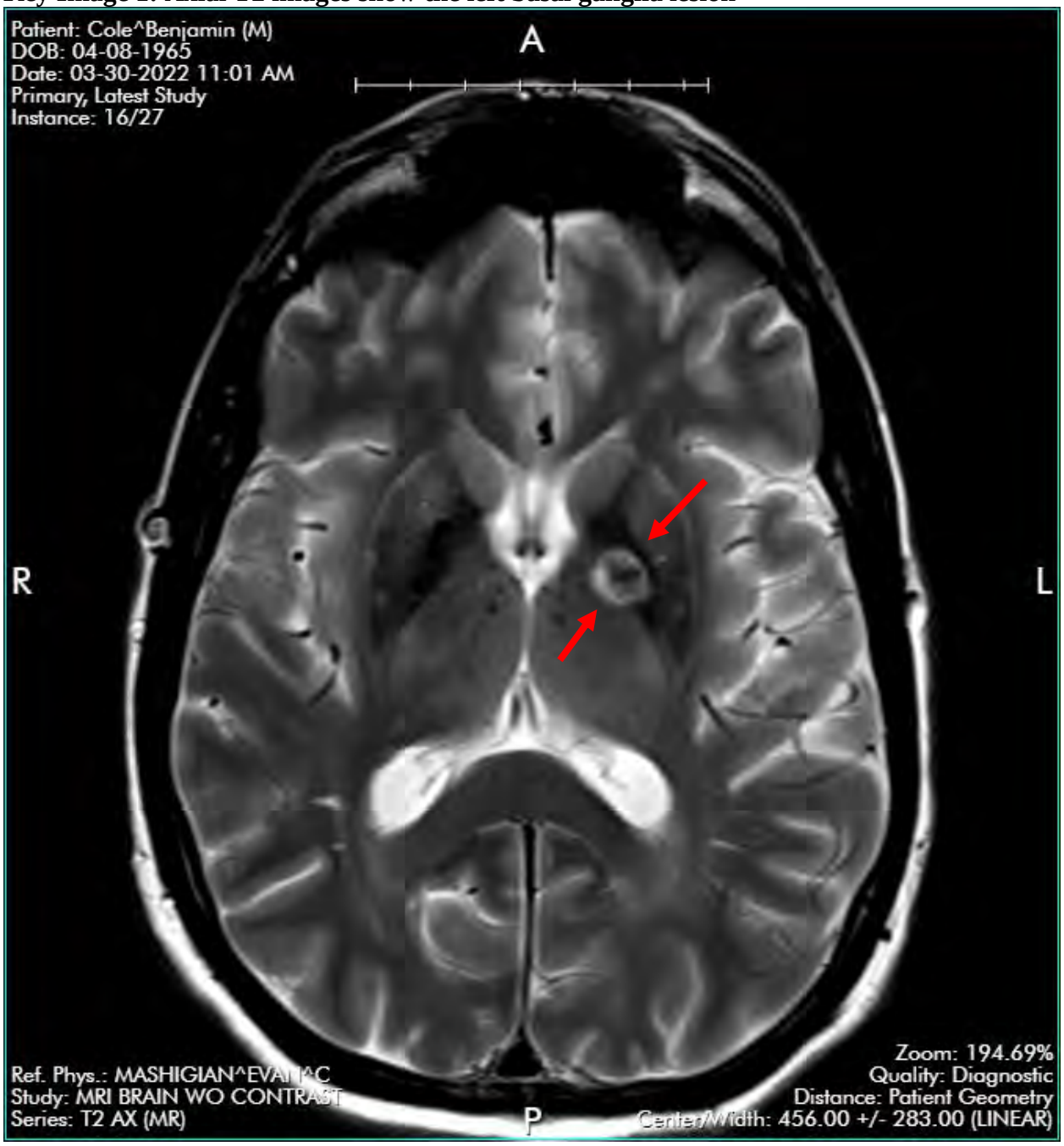
I declare under penalty of perjury under the laws of the Oklahoma that the foregoing is true and correct.

Executed on May 11th, 2022, at Las Vegas, Nevada.

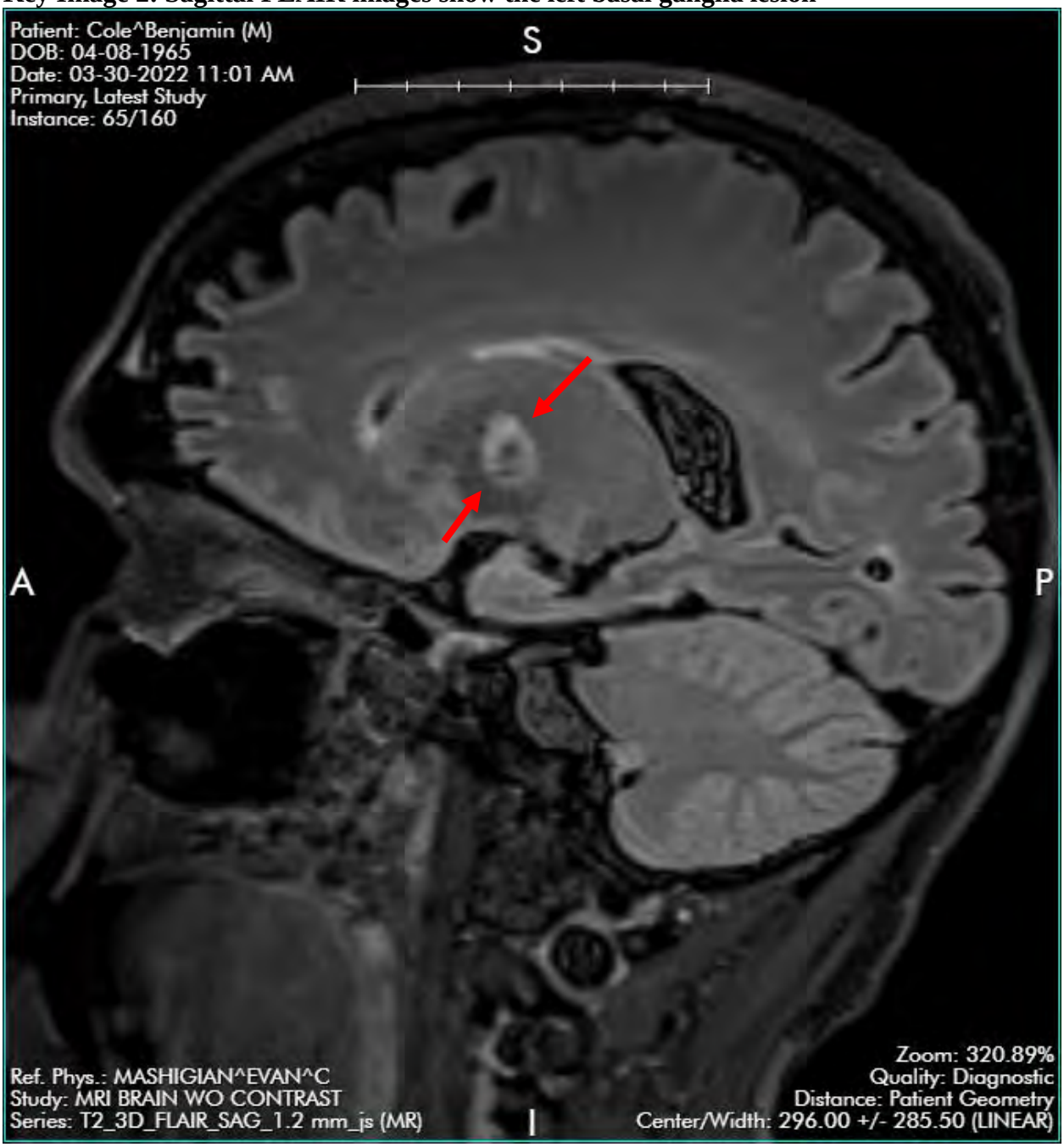


Travis Snyder, DO

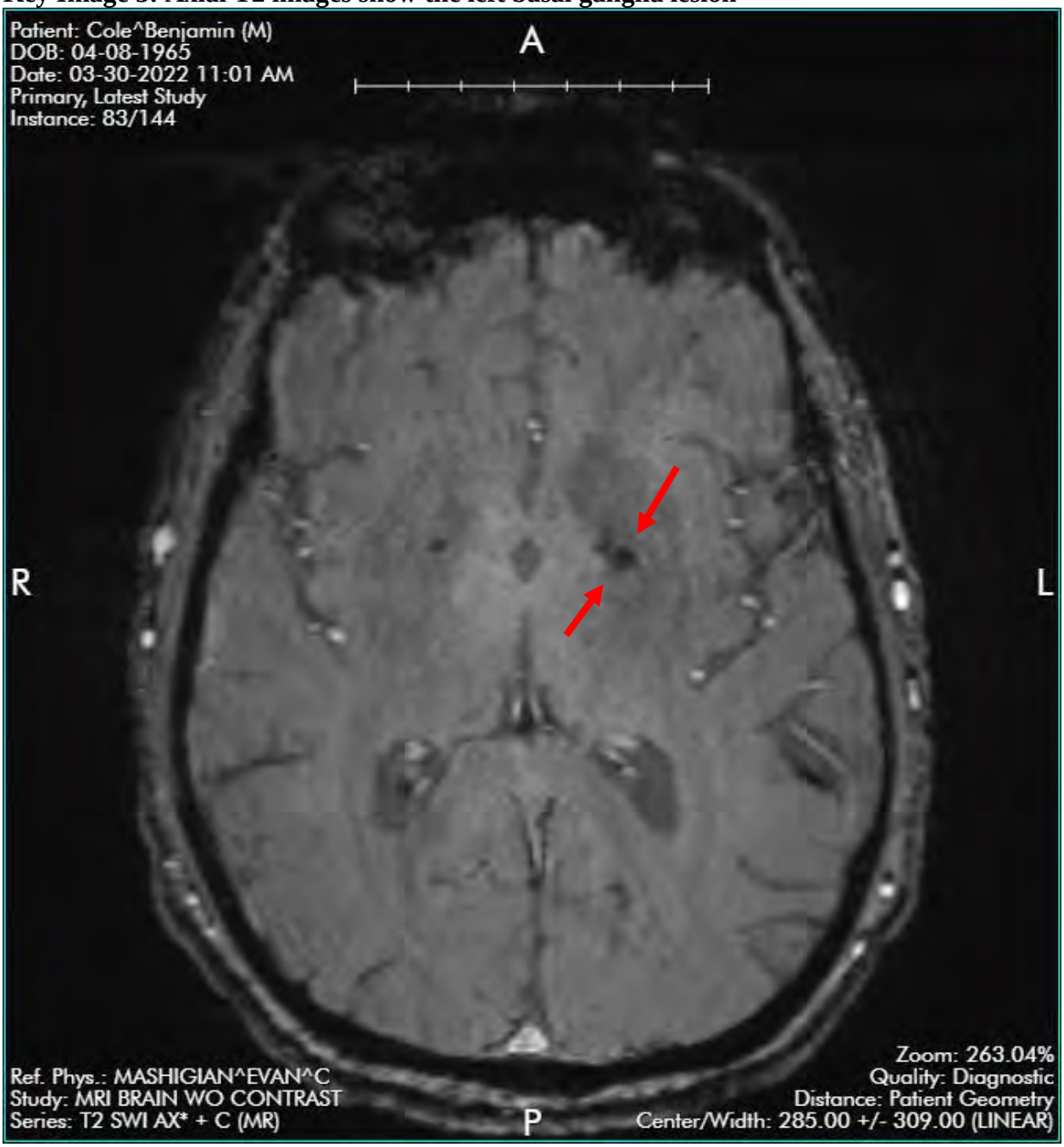
Key Image 1: Axial T2 images show the left basal ganglia lesion



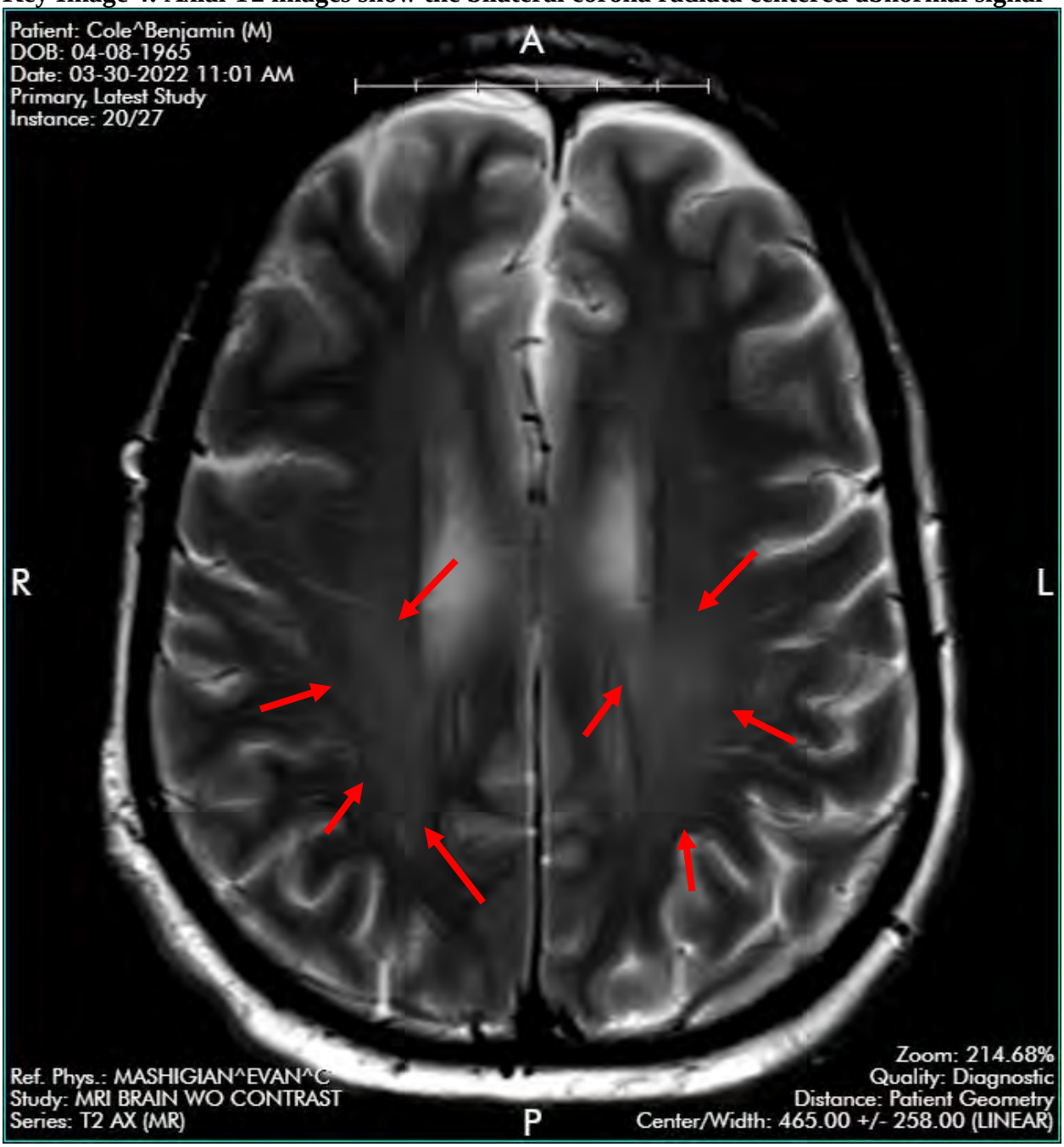
Key Image 2: Sagittal FLAIR images show the left basal ganglia lesion



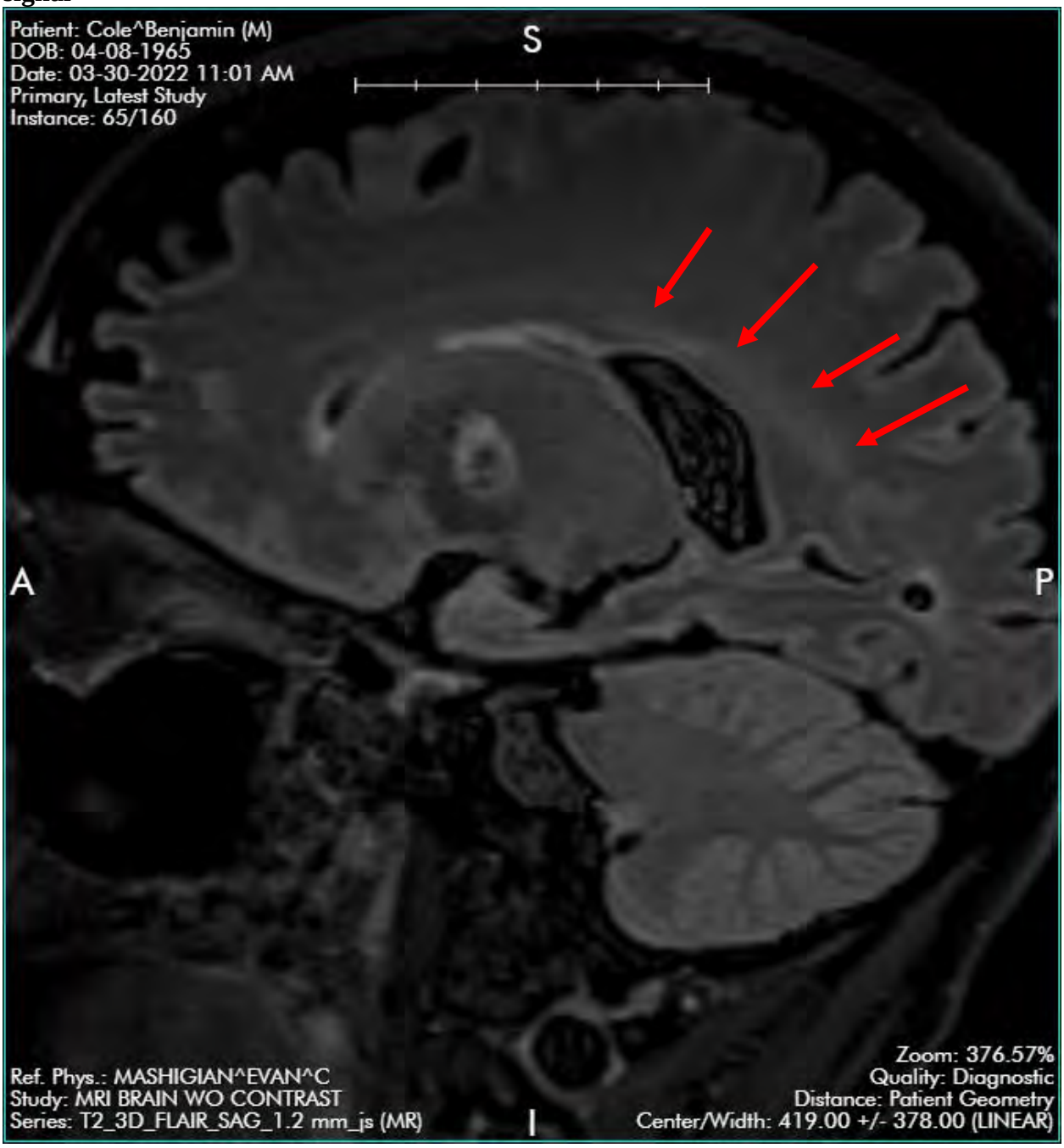
Key Image 3: Axial T2 images show the left basal ganglia lesion



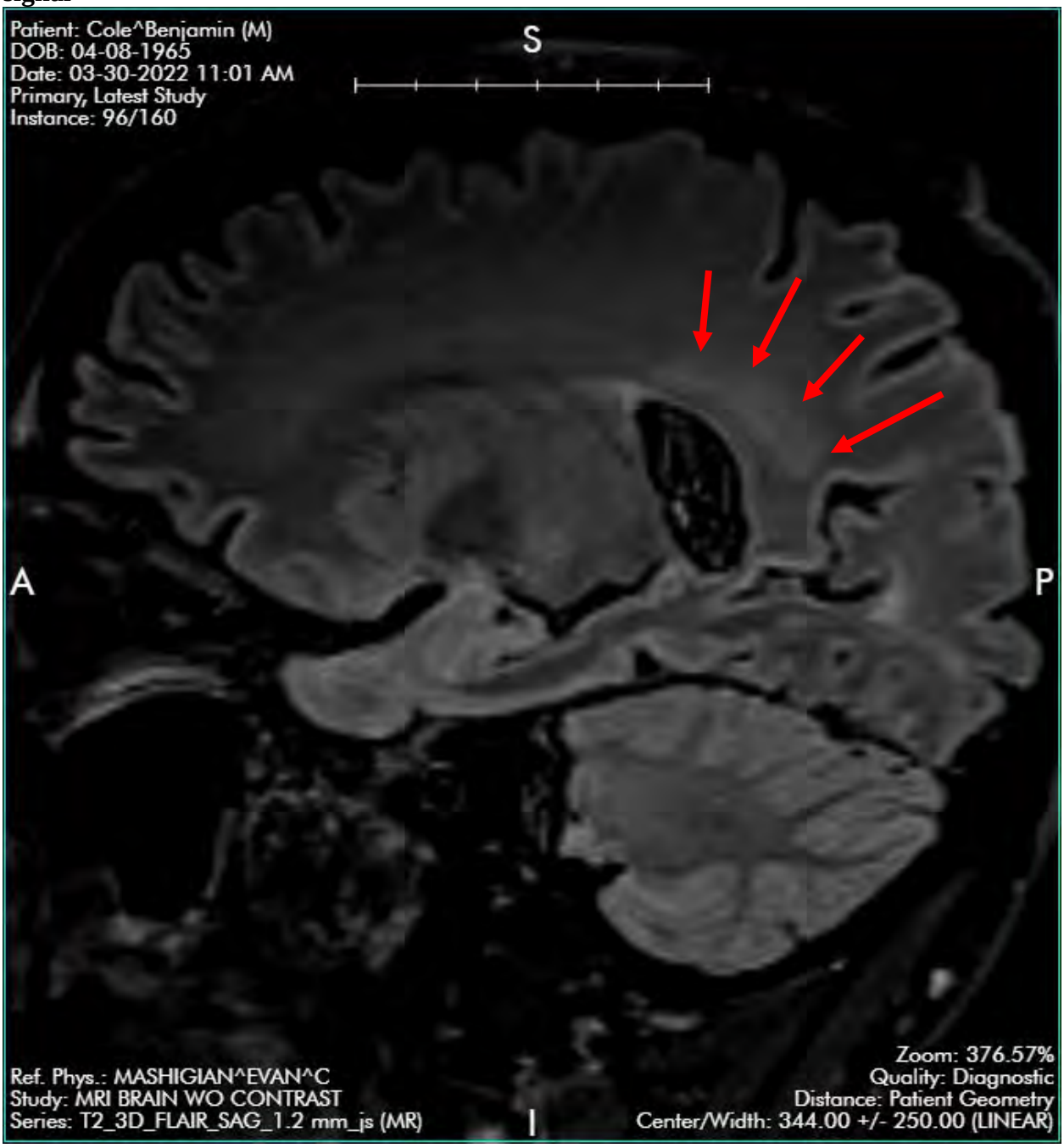
Key Image 4: Axial T2 images show the bilateral corona radiata centered abnormal signal



Key Image 5: Sagittal FLAIR images show the right corona radiata centered abnormal signal



Key Image 6: Sagittal FLAIR images show the left corona radiata centered abnormal signal



References

Chang, K. H., M. H. Han, H. S. Kim, B. A. Wie and M. C. Han (1992). "Delayed encephalopathy after acute carbon monoxide intoxication: MR imaging features and distribution of cerebral white matter lesions." Radiology **184**(1): 117-122.

Choi, I. S. (2002). "Parkinsonism after carbon monoxide poisoning." Eur Neurol **48**(1): 30-33.

Giroud, M., M. Lemesle, G. Madinier, T. Billiar and R. Dumas (1997). "Unilateral lenticular infarcts: radiological and clinical syndromes, aetiology, and prognosis." J Neurol Neurosurg Psychiatry **63**(5): 611-615.

Jeon, S. B., C. H. Sohn, D. W. Seo, B. J. Oh, K. S. Lim, D. W. Kang and W. Y. Kim (2018). "Acute Brain Lesions on Magnetic Resonance Imaging and Delayed Neurological Sequelae in Carbon Monoxide Poisoning." JAMA Neurol **75**(4): 436-443.

Jiang, C., L. Yi, S. Cai and L. Zhang (2019). "Ischemic Stroke in Pontine and Corona Radiata: Location Specific Impairment of Neural Network Investigated With Resting State fMRI." Front Neurol **10**: 575.

Li, P., S. W. Zhao, X. S. Wu, Y. J. Zhang, L. Song, L. Wu, X. F. Liu, Y. F. Fu, D. Wu, W. J. Wu, Y. H. Zhang, H. Yin, L. B. Cui and F. Guo (2021). "The Association Between Lentiform Nucleus Function and Cognitive Impairments in Schizophrenia." Front Hum Neurosci **15**: 777043.

Pepe, G., M. Castelli, P. Nazerian, S. Vanni, M. Del Panta, F. Gambassi, P. Botti, A. Missanelli and S. Grifoni (2011). "Delayed neuropsychological sequelae after carbon monoxide poisoning: predictive risk factors in the Emergency Department. A retrospective study." Scand J Trauma Resusc Emerg Med **19**: 16.

Williams, M. (2017). "An introduction to the Globus Pallidus in schizophrenia." CNS 2017: 3:(2).

2ND DECLARATION OF TRAVIS SNYDER, DO

I, Travis Snyder, DO, declare:

1. I am a physician who is board-certified in Radiology with additional board certification and added qualifications in Neuroradiology. I completed residency at Michigan State in 2014 and a fellowship in Neuroradiology at the University of Miami in 2015. I am over 18 years old.

2. I am Adjunct Professor of Radiology at Michigan State University, Adjunct Assistant Professor of Neuroradiology and Radiology at Touro University Nevada, Touro University California, and University of Nevada Reno School of Medicine and a clinical professor of Radiology at the UNLV School of Medicine. I am program director of the HCA sunrise consortium NV radiology residency. I am in clinical practice specializing in Neuroradiology. I have given and authored over 50 presentations, abstracts and articles in the field of Radiology and Neuroradiology. Please see previously disclosed Curriculum Vitae.

3. The Diffusion Tensor Imaging (DTI) and NeuroQuant volumetric analysis performed as part of the 3/30/22 Oklahoma State University MRI brain exam on Benjamin Cole (DOB 4/8/65) is now available for interpretation. These analyses are markedly abnormal and concordant with the previously described abnormal MRI findings, demonstrating multiple pathologic findings as follows:

4. Diffusion Tensor Imaging analysis of the corpus callosum:

- DTI analyzes how water flow along tiny axons. The corpus callosum is the largest fiber tract in the brain and the only significant fiber tract connecting the right and left brain. The corpus callous is the most researched and validated fiber tract in the brain for DTI and the easiest for technologists to analyze. FA (Fractional Anisotropy) is a numerical value given to how water is flowing and the values obtained relate to the overall health of the fiber tract and axons. 5 regions of the corpus callosum were analyzed.
- In Benjamin Cole FA values for the anterior inferior fiber tracts were

0.431, the anterior fiber tracts were 0.459, the midbody fiber tracts was 0.523, the posterior fiber tracts were 0.512 and the posterior inferior fiber tracts were 0.550 and the total fiber tracts were 0.516. These values are abnormal and indicate damage to the corpus callosum and are concordant with the additional findings previously described. Cognitive associations have been well described in patients with decreased FA corpus callosal values using the same protocol performed in Benjamin Cole (Asturias 2021, Hanks 2018).

- 3D reconstructions of the fiber tracts demonstrate corpus callosal axonal gaps and thinning which correspond to the decreased FA values and also match the corona radiate damage previously described.

5. Volumetric Analysis using NeuroQuant (NQ)
    - Thin T1 imaging is used to identify 48 volumetric regions of the brain and, after accounting for head size, is compared to normative age and sex matched controls.
    - In Benjamin Cole, there is diffuse cortical thinning/atrophy; the whole brain cortex is in the 5th percentile as compared to age and sex matched controls, which is two standard deviations below the mean. This means that only 5 of 100 normal patients would have cortical volumes as low as Benjamin Cole. The cortex is the thin grey matter which lines the outside of the brain and contains neurons where electrical signals are generated. This finding is concordant with the additional imaging findings previously described.
    - The right globus pallidus is in the 1st percentile as compared to age and sex matched controls. This means only 1 of 100 normal subjects would have a globus pallidus this small. This finding has been well described following toxic exposures and is consistent with the additional findings described and is consistent with injury secondary to the same process

which caused the previously described left basal ganglia and left globus pallidus lesion (Pulsipher 2006).

- Segmentation color schemes were reviewed and there is only mild discongruity indicating overall accuracy of the exam and analysis.

6. The clinical record remains highly consistent with the imaging findings as previously described. DTI and NQ are concordant with other MRI sequences and upgrade the damage identified.

7. Multiple providers have stated that Benjamin Cole is not competent to understand legal proceedings, the imaging reviewed remains supportive of their opinions.

8. Key images and references below.

I declare under penalty of perjury under the laws of the Oklahoma that the foregoing is true and correct.

Executed on May 25th, 2022, at Las Vegas, Nevada.

Travis Snyder, DO

References:

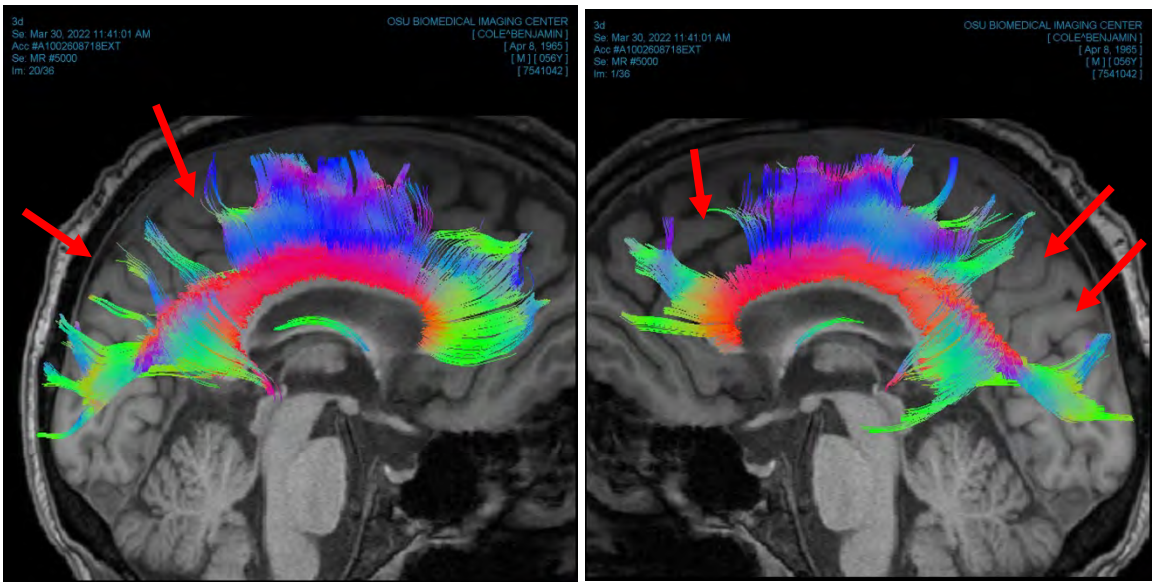
1. Asturias, A., Vanier, C., Rodriguez, A., Le Tohic, C., Barrett, B., Eisenberg, M., Gibbert, R., Zimmerman, L., Knoblauch, T., Parikh, S. Germin, L. Fazzini, E., Snyder, T. H. (2021). Association of Corpus Collosum Diffusion Imaging Data and Clinical Outcomes in Mild Traumatic Brain Injury, RSNA 2021, Oral presentation

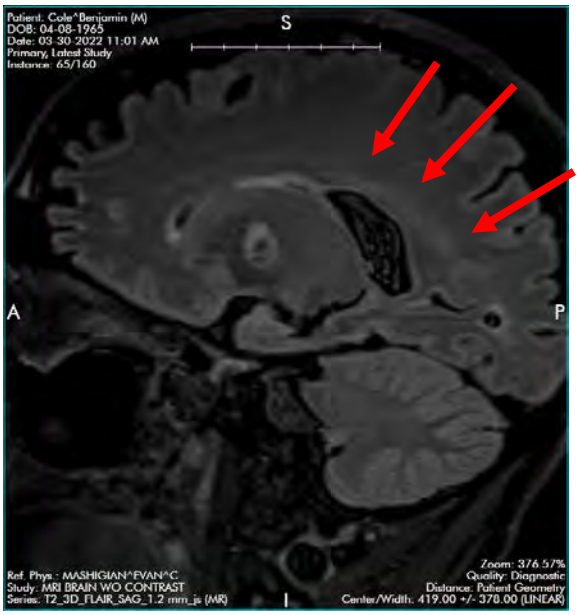
2. Robin Hanks, Scott Millis, Selena Scott, Ramtilak Gattu, Nolan B. O'Hara, Mark Haacke & Zhifeng Kou
   The relation between cognitive dysfunction and diffusion tensor imaging parameters in traumatic brain injury
   Brain Injury, 33:3, 355-363, Dec, 2018

3. Pulsipher DT, Hopkins RO, Weaver LK.
   Basal ganglia volumes following CO poisoning: A prospective longitudinal study.
   Undersea Hyperb Med. 2006 Jul-Aug;33(4):245-56.

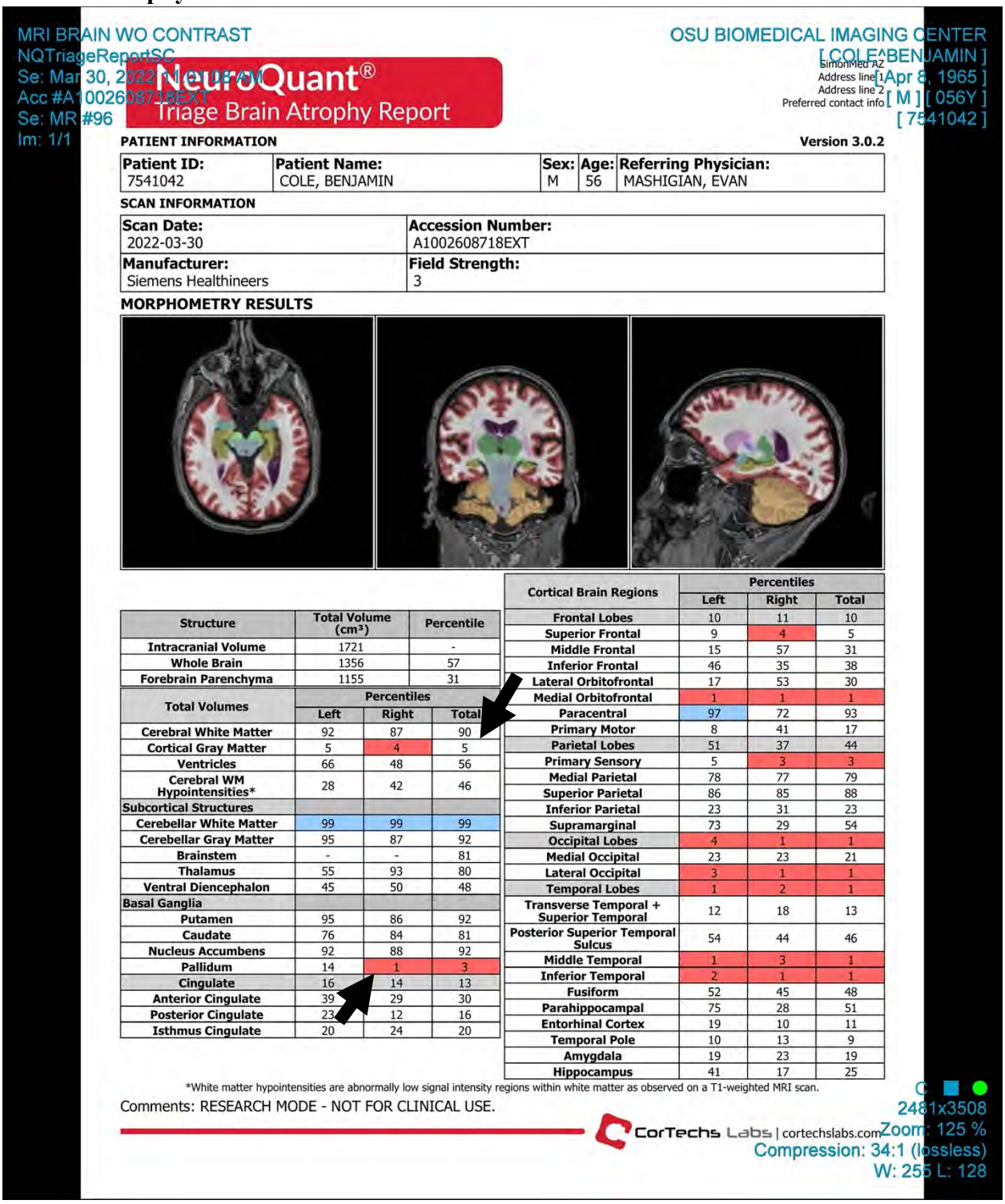
Key Image 1: Segmentation of the Corpus Callosum with calculated FA values

Key Image 2: 3D reconstructions of the Corpus Callosum DTI fiber tracts show axonal gaps and thinning which correspond to the FA values and the posterior corona radiata white matter abnormalities (bottom right image).





Key Image 3: NeuroQuant Volumetric Analysis Demonstrating Cortical and Globus Pallidus Atrophy:



MRI BRAIN WO CONTRAST
NQTriageReportSC
Se: Mar 30, 2022 [illegible] AM
Acc #A1002608718EXT
Se: MR #96
Im: 1/1

OSU BIOMEDICAL IMAGING CENTER
[COLE^BENJAMIN]
SimonMed AZ
Address line 1
Address line 2
Preferred contact info
[Apr 8, 1965]
[M] [056Y]
[7541042]

NeuroQuant®
Triage Brain Atrophy Report

PATIENT INFORMATION Version 3.0.2

Patient ID:	Patient Name:	Sex:	Age:	Referring Physician:
7541042	COLE, BENJAMIN	M	56	MASHIGIAN, EVAN

SCAN INFORMATION

Scan Date:	Accession Number:
2022-03-30	A1002608718EXT
Manufacturer:	**Field Strength:**
Siemens Healthineers	3

MORPHOMETRY RESULTS

Structure	Total Volume (cm³)	Percentile
Intracranial Volume	1721	-
Whole Brain	1356	57
Forebrain Parenchyma	1155	31

Total Volumes	Percentiles		
	Left	Right	Total
Cerebral White Matter	92	87	90
Cortical Gray Matter	5	4	5
Ventricles	66	48	56
Cerebral WM Hypointensities*	28	42	46
Subcortical Structures			
Cerebellar White Matter	99	99	99
Cerebellar Gray Matter	95	87	92
Brainstem	-	-	81
Thalamus	55	93	80
Ventral Diencephalon	45	50	48
Basal Ganglia			
Putamen	95	86	92
Caudate	76	84	81
Nucleus Accumbens	92	88	92
Pallidum	14	1	3
Cingulate	16	14	13
Anterior Cingulate	39	29	30
Posterior Cingulate	23	12	16
Isthmus Cingulate	20	24	20

Cortical Brain Regions	Percentiles		
	Left	Right	Total
Frontal Lobes	10	11	10
Superior Frontal	9	4	5
Middle Frontal	15	57	31
Inferior Frontal	46	35	38
Lateral Orbitofrontal	17	53	30
Medial Orbitofrontal	1	1	1
Paracentral	97	72	93
Primary Motor	8	41	17
Parietal Lobes	51	37	44
Primary Sensory	5	3	3
Medial Parietal	78	77	79
Superior Parietal	86	85	88
Inferior Parietal	23	31	23
Supramarginal	73	29	54
Occipital Lobes	4	1	1
Medial Occipital	23	23	21
Lateral Occipital	3	1	1
Temporal Lobes	1	2	1
Transverse Temporal + Superior Temporal	12	18	13
Posterior Superior Temporal Sulcus	54	44	46
Middle Temporal	1	3	1
Inferior Temporal	2	1	1
Fusiform	52	45	48
Parahippocampal	75	28	51
Entorhinal Cortex	19	10	11
Temporal Pole	10	13	9
Amygdala	19	23	19
Hippocampus	41	17	25

*White matter hypointensities are abnormally low signal intensity regions within white matter as observed on a T1-weighted MRI scan.

Comments: RESEARCH MODE - NOT FOR CLINICAL USE.

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Zoom: 125 %
Compression: 34:1 (lossless)
W: 255 L: 128

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INDEPENDENT PSYCHIATRIC CONSULTATION

Date:
April 4, 2009

RE:
Benjamin Cole v. Marty Sirmons, Warden, Northern District of Oklahoma Case No. 08-CV-0328-CVE-PJC

Age of Defendant:
43

Date of Birth:
April 8, 1965

Address where evaluation was conducted:
Oklahoma State Penitentiary
McAlester, OK. 74502

Referred by:
T. Kenneth Lee
Assistant Public Defender, Federal Public Defender Office
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102

Circumstances of the Assessment:
Federal Habeas Corpus Proceedings - evaluation requested by defense attorney

I. SUMMARY OF FINDINGS

Based on my review of the records and information provided to me by the Office of the Federal Public Defender, my interviews with members of Mr. Cole's family, and my interviews with past members of Mr. Cole's legal teams; it is my expert opinion, which is based on a reasonable degree of medical certainty, that Mr. Cole is currently and was incompetent during his state court proceedings to assist his attorneys. Mr. Cole's inability to assist his attorneys stems from Mr. Cole's schizophrenia, paranoid type, with grandiose delusions, which have manifested as Mr. Cole's hyper-religiosity. In this context, his inability to assist is not under his control and his behavior towards his legal team is not based on rational thought. In his current mental state, there is no logical incentive for giving up his grandiose delusions or the comfort of being saved by Jesus in order to assist his attorneys in saving his life. It is these primitive coping mechanisms that allow Mr. Cole to avoid having to struggle with the trauma and loss associated with his past behaviors. Unfortunately, for Mr. Cole these symptoms leave him in a stalemate with his legal team and result in his refusal to assist his attorneys in any manner.

II. INTRODUCTION:

Mr. Cole stands convicted of Murder in the First Degree and has been sentenced to death. The charges arose out of allegations that he caused the death of his nine month old daughter on or about 12/20/02. Although there was physical evidence that implicated him and he confessed to the charges in a videotaped confession, he decided to plead Not Guilty and move forward with a trial even after he was offered a plea that would have guaranteed him life in prison. He was and has continued to be uncooperative with a variety of leads that his legal teams have attempted to follow up on, which would have supported the presence of mitigating factors including: (1) his own history of being a victim of physical and sexual abuse, (2) his family history of mental illness, and (3) his own psychiatric symptoms as previously noted by mental health evaluators. The Federal Public Defender's Office contacted me to reassess his mental status in the context of his refusing visits with members of his past legal teams, evidence of worsening social withdrawal, odd idiosyncratic behaviors, expressed paranoia and grandiose statements regarding his ability to teach scripture and spread religious teachings, and most importantly because he continues to actually interfere with efforts made on his behalf in his legal case.

The following psychiatric legal issues were presented to me for consideration:

1. Does Mr. Cole suffer from a diagnosable mental disorder?

2. Does Mr. Cole have the capacity to assist in his current habeas proceedings?

3. Are Mr. Cole's actions, which obstruct his legal team's efforts on his behalf, a reasoned decision or driven by underlying delusional thought content?

4. Did Mr. Cole suffer from symptoms of his mental disorder at the time of the instant offense?

5. Did Mr. Cole lack capacity to assist in his defense at the time of his original trial and throughout his appeals process?

6. Does the fact that Mr. Cole does not have an extensive documented history of psychiatric treatment negate the presence of mental illness?

7. How does the defendant's substance abuse history factor into an understanding of the trajectory of the defendant's life and illness?

For this evaluation, I interviewed Mr. Cole both alone and with his attorney over a two day period in December, 2008. I reviewed the available mental health records, investigation reports, prior mental health evaluations, and witness affidavits. I interviewed multiple relatives and members of his past legal teams, and reviewed letters he has written. Because he was mostly uncooperative with direct questioning and insisted on spending the majority of the interview time discussing scripture and hoping to convince me of my ignorance, I was forced to utilize the collateral data made available to me to review his past personal history including his education, his employment, his misuse of alcohol, his relationships, and his reaction to the deaths of three of his siblings. I evaluated his current mental state, observing his appearance, his behavior, and his attitude. I noted what he said and the way in which he said it. I assessed his intelligence, and whether he was

oriented to all spheres. I assessed his insight into the presence of illness. Finally, I assessed his judgment and the extent of his ability to control his impulses.

My qualifications to conduct this evaluation include my faculty appointment at New York University School of Medicine, my three years as the Director of Forensic Services at Bellevue Hospital Center in New York City, my two years as the Chairman of the Hospital Forensic Committee at Kirby Forensic Psychiatric Center in New York, and my board certification in forensic psychiatry. At Bellevue Hospital Center, I conducted and supervised psychiatrists and trainees in court-ordered evaluations for the New York Criminal and Supreme Courts. At Kirby Forensic Psychiatric Center, I conducted over 100 court ordered evaluations. I have experience evaluating and treating inmates from my work on the Bellevue Hospital Prison Wards, working at Sing Sing Correctional Facility, and my work at Lincoln Correctional Facility in New York. I was a principal faculty member for New York University's forensic psychiatry residency training program and was the site supervisor for visiting medical students and residents on the prison wards. I have authored a chapter on teaching forensic psychiatry to medical students and have lectured to both medical and legal audiences on problems related to restoring competency and maintaining competency in correctional settings and forensic hospitals. My qualifications are further detailed in my curriculum vitae.

III. SUMMARY OF OPINIONS:

1. Does Mr. Cole suffer from a diagnosable mental disorder?

Yes, Mr. Cole suffers from Schizophrenia, Paranoid Type (DSM IV TR 295.30). Schizophrenia is a disorder characterized by disturbances of thought, behavior, judgment, and cognition and leads to impairments in social and occupational functioning. Mr. Cole's prominent symptoms are persecutory and grandiose delusions. In addition, one must also consider the possibility of Posttraumatic Stress Disorder and Alcohol Abuse. Posttraumatic Stress Disorder is a syndrome that develops as a result of a trauma or series of repeated trauma, with accompanying withdrawal, and heightened arousal states. It is marked by avoidance of reminders of a trauma and an exaggerated startle response that can occur with or without reminders of the traumatic events. Alcohol Abuse involves a maladaptive pattern of alcohol use that can harm relationships, cause one to miss work, and individuals may continue to drink even when they know that it is causing problems.

2. Does Mr. Cole have the capacity to assist in his current habeas proceedings?

No, Mr. Cole's paranoia towards his legal team and towards this evaluator, his grandiose delusions of his connection to Jesus, and of his own importance continue to interfere with his capacity to assist counsel. His delusions lead to rigid thinking that keeps him from discussing any past traumas or even discussing the events leading up to the instant offense and leaves him with significant cognitive distortions about his legal situation as basic as insisting that he was never offered a plea bargain in the case. His paranoia keeps him from visiting with his legal team and from currently signing releases because of his fear that this evaluator would be given the information. Mr. Cole's paranoia, coupled with his delusions, prevents him from disseminating relevant and important information to his attorneys that would illuminate the circumstances surrounding the instant offense and those problems which interfered with his life's trajectory. Given that he spent over 90% of our interview time quoting scripture and attempting to educate me and could not be redirected by me or by his attorney, his current legal team is unable to have coherent discussions with him regarding the preparation of habeas corpus proceedings.

3. Are Mr. Cole's actions which obstruct his legal team's efforts on his behalf a reasoned decision or driven by underlying delusional thought content and fears?

It is Mr. Cole's rigid delusional thinking that causes him to obstruct the efforts of his legal team. This is not in his control and it is driven by his untreated mental illness. Religious fervor and spirituality cannot alone explain his longstanding resistance to discussing any and all topics that could help explain the instant offense or provide mitigating evidence.

4. Did Mr. Cole suffer from symptoms of his mental disorder at the time of the instant offense?

Given evidence of paranoia and unstable moods and bizarre behaviors during adolescence and that the age of onset for this illness is generally during adolescence, it is clear that he suffered from his mental disorder long before the instant offense.

5. Did Mr. Cole lack capacity to assist in his defense at the time of his original trial and throughout his appeals process?

Based on my interview of his past attorneys and affidavits from his past legal teams, it is clear that his incapacity dates back as far as his original trial. Even the strategy of moving forward with trial after being offered a life sentence places his mental status in question as the following was already established: he confessed, there was extensive physical evidence, and he had previously been incarcerated for child abuse.

6. Does the fact that Mr. Cole does not have an extensive documented history of psychiatric treatment negate the presence of mental illness?

No, despite longstanding psychotic symptoms along with deficits in social and occupational functioning, Mr. Cole's total lack of insight into his illness, while preferring to maintain grandiose delusional thinking, and the limits of the correctional mental health system with respect to comprehensive psychiatric evaluation have interfered with access to treatment during his incarcerations and in the community.[1] [2] [3] Mr. Cole was also raised in such an abusive unsupportive environment that there was no chance that he could have been encouraged to consider mental health treatment on his own. The absence of treatment is also consistent with President Bush's 2004 Freedom Commission on Mental Health Report which states,

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[1] More than half of all prison and jail inmates have a mental health problem compared with 11 percent of the general population, yet only one in three prison inmates and one in six jail inmates receive any form of mental health treatment. James DJ, Glaze LE: Mental health problems of prison and jail inmates. Washington, DC: Department of Justice, Bureau of Justice Statistics Special Report, September, 2006.

[2] There are, however, many offenders with current or past psychiatric illnesses who do not have dramatically apparent symptoms. Nevertheless, such psychiatric illnesses may place the newly incarcerated offender at increased risk of clinical deterioration, disciplinary concerns, or suicide attempts. Trestman RL et al. Current and Lifetime Psychiatric Illness Among Inmates Not Identified as Acutely Mentally Ill at Intake in Connecticut Jails. Journal of the American Academy of Psychiatry and the Law, 2007; 35:490-500.

[3] Many jails now screen for mental illness, but most do so based on non-standardized protocols, that may fail to detect serious mental health problems. Trestman RL et al. Current and Lifetime Psychiatric Illness Among Inmates Not Identified as Acutely Mentally Ill at Intake in Connecticut Jails. Journal of the American Academy of Psychiatry and the Law, 2007; 35:490-500.

"Stigma frequently surrounds mental illness, prompting many people to hide their symptoms and avoid treatment. Sadly, only 1 out of 2 people with a serious form of mental Illness seeks help for the disorder."

7. How does the defendant's substance abuse history factor into an understanding of the trajectory of the defendant's life and illness?

Mr. Cole's substance abuse is consistent with what one would expect in untreated patients with psychotic disorders. His substance abuse has directly and indirectly exacerbated his mental illness in two ways. First, it distracted him from seeking treatment for underlying anxiety and paranoia as alcohol often helps minimize acute paranoia, sleep problems, and anxiety in the short term. Second, his alcohol abuse and poor impulse control alienated him from his family, other potential support people - like any of his wives, left him more unable to maintain stable living arrangements, pursue appropriate entitlements, or be motivated for treatment.[4]

IV. SOURCES OF INFORMATION:

In arriving at my opinions, I relied in part on the following sources of information:

1. Nine hours of contact visit: interviews of Mr. Cole between 12/14/08 and 12/15/08 by Raphael Morris, M.D., including observing the interaction between Mr. Cole and Ken Lee, one of his current federal habeas attorneys.
2. Telephone interview of Vicki Werneke, who represented Mr. Cole in state post-conviction proceedings, conducted on 2/19/09.
3. Telephone interview of Sandra Tussey, Mr. Cole's first wife, on 2/22/09.
4. Videotaped confession of Mr. Cole on 12/21/02.
5. Telephone interview of Vickie O'Neil, Mr. Cole's biological mother, conducted by Dr. Morris on 3/8/09.
6. Telephone interview of Barbara Johnson, Mr. Cole's step-mother, conducted by Dr. Morris on 3/8/09.

[4] The 1-year prevalence rate for schizophrenia in the United States is 1.5%, and approximately 50% of these individuals have a comorbid alcohol, cocaine, or marijuana use disorder. Reiger, DA et al. Comorbidity of mental disorders with alcohol and other drug abuse: results from the Epidemiologic Catchment Area Study. JAMA, 1990; 264:2511-2518.

7. Autopsy Report of for Brianna Cole.
8. Incident Reports regarding Brianna Cole's death.
9. Videotaped interview of Vickie O'Neil (Mr. Cole's mother); Benjamin Cole, Jr. (first son, and victim of the child abuse case that sent Mr. Cole to prison in California); and Robbie Cole (Mr. Cole's brother).
10. Competency Evaluation prepared by Dr. Price, dated 12/13/07.
11. Psychological Evaluation prepared by Dr. Basso, dated 6/15/04.
12. Psychological Evaluation prepared by Dr. Sharp, dated 10/23/03.
13. Psychological Evaluation prepared by Lisa Sneden and Kathy LaFortune, dated 7/23/03.
14. Psychological Evaluation prepared by Dr. Christopher, dated 8/18/04.
15. Memorandums concerning Ms. Gardner's interviews of Philip Hancock and Maximo Salazar, both former cellmates of Mr. Cole in prison, conducted 12/10/08 and 12/12/08 respectively.
16. Memorandums from Anna Wright and Julie Gardner, investigators/mitigation specialists with the Federal Public Defender's Office.
17. Application for Post Conviction Relief prepared by Vicki Werneke.
18. Index of Mr. Cole's religious materials, which he had kept in his cell at Oklahoma State Penitentiary.
19. Affidavit of Steve Leedy, Mr. Cole's trial investigator.
20. Affidavit of Dawn Bettencourt, daughter of Barbara Johnson and Mr. Cole's step-sister.
21. Affidavit of Cherry Pierce, daughter of Barbara Johnson and Mr. Cole's step-sister.
22. Affidavit of Barbara Johnson, Mr. Cole's step-mother
23. Affidavit of Ranada Gentry, investigator with the Federal Public Defender's Office.
24. Affidavit of Susan Young, Mr. Cole's common law wife, and the mother of Brianna Cole.
25. Statement of Susan Enea, paternal first cousin.
26. Statement of Benjamin Carl Cole, Mr. Cole's biological father.
27. School Records.
28. Military Records.
29. Defendant's letters.
30. Plea Offer and Response to Termination of Attorneys.
31. Oklahoma State Penitentiary Medical Records.
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41. Montoya ID. Treatment Noncompliance in Patients With Co-Occuring Mental Illness and Substance Abuse. Psychiatric Times, January, 2006, 23-24.
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44. Dackis, C. The Neurobiology of Cocaine Dependence and Its Clinical Implications. Psychiatric Times, March 2007: 62-67.
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61. Grady, D et al: Dimensions of War Zone Stress. An Empirical Analysis: Journal of Nervous and Mental Disease: 1989; 177:6 347-350.
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V. CONFIDENTIALITY:

Mr. Cole never fully cooperated with answering the general disclaimer statements made at the start of most forensic psychiatric interviews as he almost immediately wanted to delve into his religious themes and his frustration with his current legal team's inability to meet his needs for finding a religious guide to visit with him in the prison and being unable to help Ken Lee, one of his current habeas attorneys, be "saved by Jesus." I was however able to assess that he appreciated that I was conducting a psychiatric evaluation for this Court at the request of his attorney as

he referenced the many prior evaluation meetings he had undergone and repeatedly referred me to their reports to learn about his relevant past history.

VI. RELEVANT PAST SOCIAL, FAMILY, PSYCHIATRIC AND SUBSTANCE ABUSE HISTORY:

Of note, is the fact that Mr. Cole had become estranged from his family years ago and has had virtually no contact with his family for years. He has only spoken to his mother every few years and has been completely cut off from his father for over 20 years. His father has even indicated that he does not care if he dies or not.

Mr. Cole was one of five children born to Benjamin and Vickie Cole. Mr. Cole's parents both abused methamphetamine, and his father also abused alcohol and did not want to be involved in his life. At the age of seven, his parents divorced when Mr. Cole's mother became physically and romantically involved with Mr. Cole's father's close friend Mike O'Neil. From the time of their divorce until late adolescence, he had limited contact with his biological father and was raised primarily by his mother and her new husband, Mike O'Neil. According to his mother, Mr. Cole has always blamed her for the divorce; but at around 18, he became more hostile towards her over the divorce.

According to his mother and some of his other relatives, he was well liked and appropriate in school and motivated to complete his school work and socialize. He graduated from Geyserville High School in California. However, Dawn Bettencourt, Mr. Cole's step-sister, described him as "introverted, depressed, and ... not having a lot of friends." According to his other step-sister, Cherry Pierce, Mr. Cole "lacked any desire to actually do anything."

In 2004, Mr. Cole revealed to Jeanne Russell, clinical psychologist, that his step-father was a strict disciplinarian and that the attention had to be divided among the 6 children in the family, with at least one of the children being mentally retarded. It was only around the age of 18 that he became more isolative and withdrawn and subsequently destroyed all of his mother's canning supplies in a fit of rage. Neither his mother nor his step-father had any explanation for the change or what forces were driving that behavior. Following a confiscation of some of his things after that event, he went to stay with his father.

Although, Mr. Cole was primarily raised by his mother and his step-father, Mike O'Neil, he did stay for a short period with his father and his step-mother Barbara

Johnson. According to Barbara, Mr. Cole appeared not to have any future plans and was unmotivated to work. In fact, Barbara described Mr. Cole as "lazy and worthless." Barbara also mentioned that she was particularly disturbed by the fact that despite his being a guest, he was unwilling to follow basic rules related to the conservation of water in their home which were in place to protect the septic system and avoid financial ruin from damages to the home. He seemed totally unrelated to their concerns and also frustrated them with his unwillingness to find employment and his lack of ambition. According to Barbara, she was not concerned that Mr. Cole was a danger to her children.

Most notable in the review of the social history in this case is the rampant incest, sexual and physical abuse, and inappropriate relationships that occurred throughout all of the families that were in contact with Mr. Cole. According to Barbara and her daughters, the defendant's father molested both of his step-daughters and later physically abused his 4 year-old step granddaughter. Cherry Pierce added that Mr. Cole's father would give her "meth and dope" from age 13 to 22 and that she also had sexual relations with the defendant on one occasion when they were around 14 years old. It was also reported that Mr. Cole was molested by a cousin when he was 8 years old. Further, Leonard O'Neil, Mr. Cole's step-brother, reported that Tom Wright, one of Mike O'Neil's close friends, molested the children in the family. It is also notable that Cole family is rife with other inappropriate relationships: for example – the first husband of Barbara Johnson (Mr. Cole's step-mother) was Kenneth Dearmore who is Mr. Cole's father's uncle by marriage; Mr. Cole's step-brother Leonard O'Neil's ex-wife married Tom Wright, the man who was molesting the Cole children; and Mr. Cole's biological mother left her husband to be with Mike O'Neil, her husband's close friend. Despite corroboration of these boundary problems, Mr. Cole refused to address his thoughts on any of these relationships.

According to affidavits, Mr. Cole's father and step-father were physically and verbally abusive towards him. For example, Mr. Cole's father would yell vulgarities at him on a regular basis and his step-father Mike O'Neil would beat him with a bull whip.

Leonard O'Neil described one occasion where both he and the defendant suffered from loss of consciousness after being knocked off a motorcycle. In addition, Leonard stated that he sniffed gas with Mr. Cole when they were teenagers until they began to hallucinate and stopped doing it. Other collateral sources support that Mr. Cole was a binge drinker and according to Susan Young, Mr. Cole's common law wife, he was a heavy drinker during their relationship. According to

Sandra Tussey, his first wife, and Candy Lewis Cole, his second wife, alcohol use was problematic as well.

As mentioned earlier, Mr. Cole's mother did not consider him to have behavioral disturbances until he was 18 years old. She maintained only limited telephone contact with him over the years. Consistent with Mr. Cole's withdrawal and changes, his step-brother Leonard never met any of Mr. Cole's wives and at the time of his affidavit did not even know of Mr. Cole's first incarceration. Further, at the time of Mr. Cole's trial he had not seen his brother Robert for 20 years in part due to his new religious preoccupations. During our telephone interview, Vickie O'Neil could not explain why they had become estranged and why he had changed around age 18.

Mr. Cole's employment history is significant because it shows long periods of unemployment and short-term positions. His brief military career was complicated by difficulties tolerating his assignments and his refusal to be promoted from an E2 to an E3 Airman. It was around this time that he was experiencing difficulties in the Air Force and with his first wife, Sandra Tussey, that he abused his first son, Benjamin Cole, Jr., and was sent to prison. It is at this time that Mr. Cole demonstrated a severe deterioration in his functioning and emotional state.

To determine the extent of Mr. Cole severe deterioration in his functioning and emotional state, I conducted a telephone interview with Sandra Tussey, reviewed her affidavit, and reviewed military records that reveal there were altercations between Mr. Cole and Sandra in November, 1986. By January, 1987, Mr. Cole was noted to have engaged in the Child Abuse of his first son while he was supposedly supervising the child. When his wife returned and found the baby, she took the child to the hospital over his objections. He was convicted and sentenced to 2 years in the California DOC, starting 4/16/87. During his incarceration, they were divorced. By 9/9/88, Mr. Cole was discharged from the United States Air Force under other than honorable reasons. He was paroled from DOC on 2/24/88.

A review of his schooling indicates that he had intermittent poor grades and although there is no evidence that he was expelled or suspended, some reports indicate that he needed improvement in his conduct and work habits.

In 1988, Mr. Cole attended some classes at Bakersfield College and later worked as a welder for the Cotterman Company. By 1989, he is arrested for public drunkenness. By 1990, he is romantically involved with Candy Lewis, with whom he has 2 children. Once again, Mr. Cole experiences a severe deterioration in his

functioning and emotional state. According to Candy his attitude changed, he was no longer the man she married, and was abusing alcohol and was unemployed while living with her.

By 1998, Mr. Cole has taken up with Susan Young while she is pregnant with someone else's child. Given his past conviction, Susan's parents and Department of Human Services (DHS) expressed concerns regarding the safety of this child. Susan's parents were particularly concerned given that they were aware that prior to moving in with Susan, Mr. Cole had been living under a bridge or in a tent by the river.

On 10/26/98, Taylor Young, a neighbor of Susan Young, reported that Mr. Cole had refused to help Susan when she was in pain. By 10/27/98, DHS notes that Mr. Cole is being evicted for being unable to pay rent and that he had lived down by the river before.

By 12/9/98, a treatment plan was created for Mr. Cole to go to the Bill Willis Health Facility for assessment and treatment but there is no evidence that he followed through with this plan.

By 7/2/99, it was noted that Susan Young was unable to care for her son and the child was given to relatives. By 8/31/99, a notification concerning findings of child neglect had been filed against Mr. Cole and Ms. Young.

From 1998 through 1999, his work history included short lived jobs as a welder, laborer, bottle maker, and putting in rolling racks.

In 2002, Mr. Cole and Ms. Young had Briana, the decedent in this case. By 7/18/02, there are already signs of possible abuse, with bruising under Brianna's arms. Child Protective Services (CPS) came and started to evaluate the situation. At that point no other interventions were recommended. Ms. Young reported that Mr. Cole remained unemployed and was drinking heavily. By 12/20/02, Briana was dead.

On top of the incest, traumas, and two siblings who were mentally impaired Mr. Cole has suffered further tragedy with the death of three of his siblings: two by drowning, and one being killed in a hit and run.

RELEVANT DATA THAT SUPPORTS THE PRESENCE OF MENTAL ILLNESS INDEPENDENT OF THE EVALUATIONS OF MENTAL HEALTH PROFESSIONALS:

- In any psychiatric assessment, the role of genetic factors and genetic loading for mental illness should be assessed. Although Mr. Cole's father was physically and sexually abusive and had chemical dependency problems, he was not officially diagnosed with mental illness. Two of Mr. Cole's paternal cousins were diagnosed as having schizophrenia, and two of Mr. Cole's siblings were mentally impaired.

- As for the relatives who were formally diagnosed, Susan and Joseph Enea were both diagnosed with schizophrenia. Joseph told the family that Jehovah told him to stab himself and he subsequently stabbed himself in the stomach with a knife. Susan Enea reports that she had been hospitalized for schizophrenia and has to take medication for it.

- There is an extensive history of Mr. Cole being isolative, disconnected and having severely impaired judgment. According to Sandra Tussey, his first wife, he was not motivated to get a drivers license. He repeatedly demonstrated poor judgment when it came to coordinating travel plans around Sandra's pregnancy. She was also shocked by his poor judgment when he suggested that they could reconcile after his incarceration given how he had behaved towards their child. In addition, Mr. Cole's isolationism is so severe that he does not keep in contact with his family. Of note, his step-brother Leonard never met any of Mr. Cole's wives and at the time of Leonard's affidavit, Leonard did not even know of Mr. Cole's first incarceration. Mr. Cole also has not seen or talked to his brother Robert or his father for at least 20 years. The only exception is his mother who he called intermittently every couple of years. Further, Mr. Cole has not had contact with his family since his trial and subsequent conviction for the death of Brianna.

- Candy Cole Lewis, his second wife, recalls major fluctuations in his mood, stating that she saw him staying up all night, cleaning the house.

- Susan Young, his common law wife and the mother of Brianna, commented on Mr. Cole's relationship with Kathy Morgan, the DHS caseworker,

stating, "Ben thought Kathy was out to get him and he didn't want her around."

- Mr. Cole's taped confession suggests some psychopathology as he appears sad but is not able to explain what led to the instant offense.

- His mother described that Mr. Cole went into a depression following her divorce from his father and that later on his behavior became increasingly odd leading to very limited contact over the past 18 years. His brother Robert noted that Mr. Cole deteriorated towards the end of high school and started using alcohol.

- During the 2004 Competency Trial, John Dalton, his attorney, said,

> *"Well, I was concerned, as his attorney, that he wasn't very engaged or he wasn't very involved in preparation, in trial preparation. He was distant and he was very obsessed with religious, grandiose ideas that the end of the world was approaching. And he believed that - - well, basically, he wasn't giving me information to help defend him. He couldn't answer basic - - or he couldn't make decisions or he wouldn't make decisions that were related to defense strategy. When I advised him about the law that was involved in the case, everything that he should be aware of and he should be participating in preparation for his defense, he was removed from it."*

- Regarding whether Mr. Cole would testify, Attorney Dalton added,

> *"The most recent time - - I discussed that with him on numerous occasions, but the most recent time that I asked him how he felt about testifying and advised him what his rights were with regard to testifying and not testifying at his trial, his response was that he didn't know. He couldn't make that decision. And we talked about it some more and he finally stated that he wanted to testify. And when I asked him, you know, what - - because at this point in time I still didn't have enough information from him to build a defense and I wanted to know what he would be testifying to at his jury trial. He stated that he would give a five-minute speech on the word of God."*
>
> *"I explained to him that this criminal trial was really about the*

evidence that he was up against and defending him in court, whatever defense that was to present. He still remained focused on preaching the word of God at his trial. And that would be the only thing that he would have to say at his trial."

"Something to the effect that he doesn't understand the law, that God's law is what matters and that's the law that's going to govern his trial. And it's going to govern all of us, God's law will."

- Evidence of grandiose thinking and deficits in reality testing which I noted at the time of my evaluation in 2008 are suggested when Attorney Dalton states,

  "I think on one occasion he stated that [his trial] would touch the hearts of everyone that was involved in this case and that he may be set free because of it."

  "He can quote scripture for hours at a time and that's what he did when I would try to confront him with witness statements."

- The dangers to Mr. Cole that he experienced related to working with his legal team were noted even back in 2004 when Attorney Dalton explains what happened when he attempted to get Mr. Cole to focus on the witnesses in the case.

  "That he wouldn't hear it or that he couldn't hear it. I think he said both, that he wouldn't hear it and he couldn't hear it. And when I asked him what he meant, he said he couldn't understand it. And when I asked him why he couldn't understand it, I'm reading it to him, he indicated to me that - - either that God wouldn't let him because that would cause him to be less Christ centered or that he just couldn't mentally understand it because he would be less centered on Christ."

- In response to Attorney Dalton's efforts to encourage Mr. Cole to shave for his trial, he encountered resistance from Mr. Cole who commented that he would eventually cut his hair but that it would be a sacrifice to God.

- In a letter to James Bowan, his former trial attorney, Mr. Cole expressed his paranoia towards the chaplain, his lack of awareness of how others perceive

him, his lack of awareness of his son's needs, his lack of understanding of his attorney's role, and his relief that he has been saved by Jesus.

> *"... I have a funny suspicion that we are going to have a shakedown soon and I have accumulated my share and more of studies-paperwork. Do you know of a Christian and maybe backup?* ***I don't trust the chaplain here****, just as much as I can throw him by his tail and the churches seem to be scared to death of us! A spiritual dad would be perfect or as the Lord leads. I'm hoping in the end that Ben Jr. would be able receive all that is sent to him. If he can afford it. In your last letter to me sounds pretty good! I give God all the thanks and praises for everything.* ***Jesus saved me from the grasps of hell eternity in the lake of fire.****"*

- As recently as his October 5, 2008 letter to Candy Cole Lewis, he expressed that he will not be accepting any further visitors outside of him seeking a trustworthy friend to discuss religion. Throughout the letter he referenced multiple biblical passages some of which I will include sections of to provide some insight into the intensity of his thoughts. He apparently attempted to make the point that his harming others had a positive aspect to it since he has been able to give the Lord his undivided attention. Most of the passages he references speak of evil and spirits and hearts of stone.

Matthew 12:45

Then it goes and brings with it seven other spirits more evil than itself, and they enter and dwell there, and the last state of that person is worse than the first. So also will it be with this evil generation.

Matthew 13:22

As for what was sown among thorns, this is the one who hears the word, but the cares of the world and the deceitfulness of riches choke the word, and it proves unfruitful.

He mentions to Candy Lewis in his letter that he prayed Ezekial 38:26 for her and the young family.

And I will give you a new heart, and a new spirit I will put within you. And I will remove the heart of stone from your flesh and give you a heart of flesh.

Mark 11:23 (English Standard Version)

Truly, I say to you, whoever says to this mountain, 'Be taken up and thrown into the sea,' and does not doubt in his heart, but believes that what he says will come to pass, it will be done for him.

- According to Maximo Salazar, a former cellmate of Mr. Cole's at the Oklahoma State Penitentiary, Mr. Cole exhibited the following symptoms and behaviors in prison:
    - He never left his cell to take a shower
    - He did not sleep much
    - He never went to the yard
    - He seemed afraid to leave his cell
    - He told him that demons will try to make you do things you shouldn't
    - He asked him to read a book about demons controlling peoples minds

- Mr. Cole has also expressed grandiose delusions regarding his ability to change things in Iraq. According to Mr. Cole, the army should issue him fatigues, and arm him with a bible so that he would be able to spread the word of God. Once he began to spread the word of God, peace would be restored to the region.

- Following my evaluation of Mr. Cole in December, 2008, he developed paranoia towards me, refusing to sign releases, and stating to his legal team that he did not want me to have access to the data. In addition, he expressed the delusion that God had sent me a message to save the Jewish people and that I did not want to hear that message. He then requested that his team find him a Pentecostal psychiatrist.

- Since 2008, Mr. Cole has repeatedly referred to himself as Benjamin from the Benjamite Tribe when speaking with Attorney Lee.

VII. SUMMARY OF RELEVANT DATA FROM PRIOR MENTAL HEALTH ASSESSMENTS SINCE INCARCERATION:

- By 2/28/03, Dr. LaFortune noted clinically significant impairment on his ability to distinguish between facts which are more legally relevant or less legally relevant.

- By 7/11/03, his legal team suspected psychiatric illness and requested a competency evaluation after he waived his preliminary hearing and appeared depressed, shutting down and not following the recommendations of counsel.

- During the hearing on July 16, 2003 before the Honorable Judge L. Joe Smith regarding an application for a competency hearing, Attorney Lyman, stated,

> *"Your Honor, we've had several occasions, numerous occasions, over the period of time since we were appointed to represent Mr. Cole, to confer with him, to discuss his case, to advise him of matters in the case, and it has progressively gotten worse, as far as, in our opinion, his ability to assist us and to understand what we're talking about.*

- During Dr. Christopher's 105 minute interview on July 23, 2003, she noted,

> *Mr. Cole states that he trusts his attorneys and has confidence in their abilities to represent him, noting, 'I believe they are good at what they do.' It should be noted that when questioned as to how he might help his attorneys, Mr. Cole replies, 'I don't know how I can.' He elaborates, 'I don't see any point to an attorney. Just let me judged ...God appointed people to judge, so let them judge.' He explains that he wants to bypass a preliminary hearing because, 'I already know what evidence there is' and elaborates 'I'll do whatever they feel, whatever needs to be done.' When questioned if he lacked motivation to defend himself Mr. Cole replied, whatever will be done, will be done. It is turned over to God. Whatever judgment comes down I'll accept from our Heavenly Father. It is not a lack of anything, it is just trust in him.' Mr. Cole explains, 'I put it in the Lord's hands."*

- Dr. Sharp elicited the following symptoms upon screening during his 10/25/03 examination:

  a. Feeling that you are watched or talked about by others
  b. Feeling fearful
  c. Feeling that most people cannot be trusted
  d. Trouble concentrating
  e. Feeling uneasy when people are watching or talking about you

- On 5/24/04, Jeanne Russell, Ed.D. conducted an evaluation to better understand the impact of both psychological and sociological factors on the instant offense. She noted that he stayed focused about 80% of the time on his religious beliefs. She also ruled out the presence of psychopathy, writing,

  > *Mr. Coles's overall score of "10" on the PCL-R falls at the 9.4 percentile rank with 90.6% of male offenders scoring equal to or higher than the defendant. In summary, Mr. Cole fails to meet the criteria associated with psychopathy.*

- Dr. Russell noted that Mr. Cole scored low on both the HCR20 and the VRAG, violence risk assessment tools that help predict risk for future dangerousness, citing alcohol and romantic relationships as factors increasing risk.

- In Dr. Basso's 6/15/04 report he noted,

  > *"Overall, his pattern of neuropsychological performance and clinical history suggest the presence of impaired brain function. Severity of this dysfunction may be characterized as mild, and maximally present in the left temporal-parietal region."*

- Dr. Basso went on to mention,

  > *"Owing to apparent difficulties involving executive function, he may require some assistance in implementing or maintaining the use of such devices. Additionally, he seems prone to difficulties when confronted with novel, unfamiliar, or complex problems."*

- Dr. Basso also did not think that Mr. Cole was a malingerer, stating,

  > *"Regarding symptom validity, there were no indications that Mr. Cole exaggerated symptoms of mental illness during this evaluation. The SIRS includes several scales that are specifically designed to detect such response biases. In no case did his responses suggest these biases."*

- During the 2004 Competency Trial, Dr. Monroe's testimony touched on why he wanted a trial when he stated,

> *"I do recall that he said that people's hearts would be touched at his trial, by God."*

- Dr. Monroe also spoke to Mr. Cole's judgment when he stated,

> *"...he did have the idea that it was possible that a miracle could happen, that God could conduct some kind of miracle in this case."*

- By 9/24/07, Dr. LaFortune noted that he was consumed by religiosity to the exclusion of all other discussions of his case. She noted that Mr. Cole told her, "God wanted to catch my attention." She noted his speech to be tangential and that he asserted that the right reason to be in prison is to learn about Jesus Christ.

- On 11/19/07, Dr. Price opined that Mr. Cole was incompetent to assist his attorneys.

- In her 11/19/07 report, Dr. Price stated,

> *"Very little relevant information was obtained during this interview due to Mr. Cole's impaired mental status. He spoke of little else other that scripture and his need for religious materials from the free world. He denied any mental or emotional dysfunction. He essentially refused to relate any information about his life during this interview. He said that to talk about his past was 'like putting Jesus on the cross again and again which is like doubting his own forgiveness.' At another time in the interview, he said 'that wearing your heart on your sleeve is dragging it through the mud and hanging Jesus on the cross again.' He maintained that his only responsibility in his appeal is to pray...not to bring things back up from his past."*

- Dr. Price went on to mention,

> *"... he rambled on and on in a grandiose manner about his religious purpose in life. He stated that he needs someone in the free world to receive copies of his religious writings and preserve them for the*

future in an archival fashion. His answers to questions mostly consisted of a scripture that might be vaguely related to the questions, but often it was unrelated in any discernable fashion. Along with his hyper-religiosity, Mr. Cole revealed delusional thinking. He reported, 'I see myself as David in Psalms 51.' During this interview, Mr. Cole spoke only of scripture, and when this examiner attempted to engage him in discussions of the Bible, he resisted, preferring to be the only one who could speak and attempting to ridicule this examiner's lack of awareness of certain scriptures or of Christian television personalities."

- In her 11/19/07 report, Dr. Price notes that Mr. Cole does not leave his cell and does not use the showers. In her mental status exam, she identified a somewhat suspicious attitude, pressured speech, poor insight and judgment, euphoric mood, illogical and tangential thought process, and delusional thought content.

- Also in her 11/19/07 report, Dr. Price diagnoses Mr. Cole with Delusional Disorder, Grandiose Type DSM IV TR 297.1, Obsessive Compulsive Disorder 300.3, Alcohol Dependence 303.90, and Caffeine Intoxication. In giving him a Global Assessment of Functioning (GAF) score of 30-40 she commented on his impairment in reality testing, communication, and delusional thinking.

- Dr. Price mentions,

"The defendant reported that he cannot discuss his life history or the events surrounding the death of his daughter with attorneys, investigators, or psychologists. He related that to do so is the same as trying to crucify Jesus again. He maintained that his only responsibility in his legal situation is stay 'as close to prayer and God as possible.'"

VIII. MENTAL STATUS EXAM:

Mr. Cole presented dripping wet with a slender build with a long thick beard, and with long slicked back hair on both days of interviewing. He was oriented to person place and time. He was somewhat intrusive, delving right into scripture before we had even had the opportunity to sit and he could not allow me to complete the usually confidentiality disclaimers. He described his mood as good

and his affect was expansive in range. His speech was pressured, over-inclusive and filled with biblical references and references to passages from the Bible and could not be redirected for the most part. He was completely guarded regarding his family of origin, his trauma background and any and all past psychiatric symptoms or family history. He was guarded regarding any discussion of the instant offense and of his past crime that led to incarceration. He denied current suicidal ideation or homicidal ideation. He denied the presence of hallucinations. He was coherent but ruminative over being saved by Jesus and wanting me and his lawyer to be saved. He was tangential as he could not answer most direct questions and would move back towards religious themes regardless of the topic of the question. He expressed grandiose delusions regarding his ability to change things in Iraq were he there now, recommending that the army should issue him fatigues and arm him with a bible so that he would be able to spread the word of God. He was preoccupied with being unable to obtain a host of nutritional supplements. He was uncooperative with attempts to more closely assess his cognitive status. His judgment was poor based on him insisting that I could get all the data I wanted from his past reports, and given that he spent the majority of our 2 days together talking about scripture. His insight into the existence of a mental illness was poor. It could not be determined what his insight was into the driving forces behind the instant offense.

IX. PSYCHIATRIC FORMULATION:

I am of the opinion with a reasonable degree of medical certainty that Mr. Cole suffers from Schizophrenia, Paranoid Type according to the DSM-IV-TR (2000). This untreated mental illness has resulted in a deterioration of his mental state over the course of the past 20 years. The overall course of his illness has been a downward one and even prior to the instant offense, he had been living a marginal existence, rarely holding jobs, at times being homeless, and estranged from most of his family, even from those members of his family who were not abusive.

In the context of the isolation of death row and the self imposed isolation that he initiated by refusing to leave his cell for the most part; he has deteriorated even further over the past 3 years. There is now no contact with his family or children in part because of his paranoia with the associated self imposed isolative behaviors and in part because his letters were so foreign to them that they were alienating. In addition, for some time he has been preoccupied with finding a spiritual advisor and has been dissatisfied and unrealistic regarding the available resources. His current schizophrenic paranoia and grandiose thinking and social impairments and

impaired judgment and distortions far exceed what could reasonably be attributed to accepted religious concepts or attitudes.

In 2004, he was still able to allow for superficial evaluations by mental health evaluators, but the intensity of his untreated paranoia has escalated to the point that he cannot even participate in an evaluation superficially. Given that his delusions provide him some comfort given his current life situation, he has become attached to these thoughts despite the fact that they are at times getting in the way of assisting his legal team. It has come to the point that he no longer cooperates with evaluations, will not provide any information to his legal team, or discusses legal strategy. This was certainly evident during Dr. Price's assessment in 2007 and was even worse by the time I evaluated him in 2008. At this point his evaluators are being pulled into his systematized delusional systems, believing that I was mocking him or that I was rejecting God's direct message to me to save the Jewish people.

The essential features of schizophrenia are a mixture of characteristic signs and symptoms that have been present for a significant portion of time and these signs and symptoms are associated with marked social or occupational dysfunction. These symptoms affect behavior, perception, and judgment. The onset of illness is usually between early adolescence and the late twenties. Generally there is a marked deterioration in interpersonal functioning. Mr. Cole has suffered from both positive symptoms (delusions) and passive or negative symptoms, which are more subtle and can be misinterpreted as laziness or depression, or that the person is being actively and purposefully uncooperative. For individuals with schizophrenia, it is often difficult to maintain relationships and people often turn away from them out of fear or discomfort. Families often have trouble coping with the deterioration seen and often tend to get angry and frustrated, with high levels of expressed emotion hoping to motivate the afflicted family member. It is generally difficult for patients to form alliances especially in stressful environments such as correctional settings. Although Dr. Basso did not diagnose schizophrenia, he did note significant problems in executive functioning which is consistent with the diagnosis. Although there is mental health literature regarding the challenges of parenting with mental illness, in the context of his symptoms, lack of insight, and lack of family supports, adequate services were not mobilized to identify his mental illness or provide the support necessary when a mentally ill person has parenting responsibilities. In this case it is notable that DHS was involved but failed to implement adequate services despite his felony conviction history and lack of motivation for treatment.

In Mr. Cole's case, locating the precise onset of specific psychiatric symptoms is somewhat complicated by his trauma background and his own substance abuse. Despite these factors, by all accounts there was a significant change in his personality at the age of 18: from someone who was friendly, according to his mother, to paranoia and intense hostility for no clear reason. It was around this age, he started to destroy supplies in his mother's home.

His current symptoms include paranoid delusions towards the requests of his legal team and their motives which have spread to the belief that I refused an assignment from Jesus. There are delusions regarding his capacity to affect the war in Iraq and delusional thinking with respect to clear cut well documented decisions made in his legal case. In addition to delusional thinking there is a long history of autistic-like behaviors consistent with schizophrenia. Some of the autistic-like symptoms have included the way in which he has related to his legal teams, his family, his wives, his children, and the examiners. He has been consistently poorly related, a symptom commonly seen in patients with schizophrenia, and has displayed no interest in connecting with his lawyers or his examiners. He has been hypersensitive to sounds including the crying of his babies. We know that the crying of his babies has been a precipitating stressor in both of his felony cases; however, at this point, more data relevant to Mr. Cole's trauma background would be necessary in order to determine if in fact symptoms associated with Posttraumatic Stress Disorder (PTSD) were driving forces in the commission of the instant offense, i.e. exaggerated startle or flashbacks. Patients with PTSD have been known to react violently on occasion and if you add exaggerated startle to a person already suffering with the paranoia and poor judgment associated with schizophrenia it would be even more difficult to cope with a crying infant. Despite having children with 3 different women, he never demonstrated any interest in connecting with the needs of these women or the children, whether it be in terms of helping with childcare or even with ensuring family safety. It is notable that his history was the primary factor in Susan Young losing custody of her son. In our meetings, these negative symptoms and autistic like symptoms were noted in the restricted range of topics he would discuss, which were limited to the following: scripture, what religious material he could be provided from his legal team, and how to get access to more nutritional supplements. He was unmotivated to discuss why he had lost touch with family or why so many of his relatives have lost interest in him. He has demonstrated idiosyncratic behaviors including bathing in the sink and saving food that tends to go bad in his cell.

His current psychiatric symptoms are likely exacerbated by his current legal stressor, the traumas of his youth, the genetic loading for illness, his lack of

insight, and the lack of family supports that made prior psychiatric treatment impossible. In addition, his only models for childrearing were disturbed ones and left him void of any positive parenting instincts. Although alcohol is generally a violence risk factor, it is likely that alcohol was acting as his only "psychiatric medication" for many years. Paranoid individuals are generally anxious and alcohol can in the short run help reduce anxiety and help with sleep disturbances. In addition to some genetic loading in his family for psychosis, there is genetic loading for his alcohol abuse as well.

In the community, he never maintained friends, and for years he never bothered to get a drivers license. Despite appearing legitimately saddened following Brianna's death during his taped confession in 2002, he has apparently never been able to process how he could have been involved in these tragedies.

It is my opinion, to a reasonable degree of medical certainty, that Mr. Cole's refusals to meet with his legal teams, sign release forms, or cooperate with this evaluator is involuntary and without a knowing appreciation of its consequences. His rigidity and lack of cooperation with his legal team has been complicated by his death row status, his perception of limited cooperation from the prison, his lack of family contacts in part due to his disappointment in their "lack of interest in scripture" and the turnover of his legal teams over the years, necessitating that some issues be repeated and explored over and over.

Although Mr. Cole is not overtly hostile towards Mr. Lee, his attorney, I observed for several hours how Mr. Cole made it impossible for Attorney Lee to engage him in any meaningful discussion about his case. In fact, Mr. Cole's only agenda, when talking to Attorney Lee, is focused on religion, the scripture and how familiar Attorney Lee is with passages in the Bible, trying to save Attorney Lee's soul, and complaining about how his legal team has failed in not finding him a spiritual advisor to write and visit him in prison. Any attempt by Attorney Lee to get Mr. Cole to discuss Mr. Cole's life history, or legal strategy was met with silence. Mr. Cole refused to speak about any issues outside of his religious agenda; stating something along the lines that God had said in the scriptures that one must not look back when sowing the field, because if one does that, then the lines in the field would not be straight.

In spite of my best efforts to engage him, which included listening to his religious preaching for hours, and my accepting that he would not cooperate with the majority of my questions, I learned subsequently that he was particularly frustrated with the evaluation, and demanded that his legal team find him a Pentecostal

forensic psychiatrist. He was apparently fearful of my diagnosis and refused to sign releases to obtain his prior neuro-imaging studies for fear that I would be given access to them. It is my opinion, to a reasonable degree of medical certainty, that Mr. Cole is convinced that any cooperation or acceptance of a psychiatric diagnosis, discussion of past trauma or substance abuse, discussion of past risk behaviors, or discussion of legal strategies would undermine his faith in Jesus and undermine his current "saved" status.

When conducting mental health evaluations for the court, one must always consider the possibility that a defendant is malingering psychiatric symptoms for the purpose of supporting a legal defense. In this case, no evidence of malingering was detected. In fact, Mr. Cole does not attempt to report any psychiatric symptoms and is unwilling to discuss any and all past traumatic events including his own victimization, corroborated by multiple witnesses, and the instant offense itself, or the abuse that led to his first incarceration. In addition, Dr. Basso assessed for malingering and ruled it out based on psychological testing criteria.

The assessment of Competency to Stand Trial is generally focused on present competency. The evaluator first attempts to determine if the defendant appreciates their legal predicament, the charges, and the roles of courtroom personnel. The evaluator attempts to determine if the defendant has both a factual and rational appreciation of these issues. Next, the evaluation focuses on the defendant's capacity to assist legal counsel. An assessment of any psychiatric symptoms that could interfere with the ability to make use of counsel is made. In simple cases, this can often be done by reviewing the case with the defendant and discussing hypothetical legal scenarios to assess the flexibility of the defendant's thinking and to assess whether the defendant's legal strategies are reasonable.

When a defendant has a documented psychiatric history or speaks in a disorganized fashion, the evaluator usually explores the history further and may not simply accept statement from the defendant at face value. In fact, there are many scenarios where it is crucial that an assessment of the interaction between defendant and attorney be witnessed by the evaluator so the evaluator can actually see how actual strategies in the case are processed and agreed upon. In Mr. Cole's case, crucial information was missed by past evaluators because they did not include the attorney in the consultation with the defendant and did not watch how they interacted.

Here, the inconsistencies in Mr. Cole's statements including trusting his attorneys and then stating that he did not understand the purpose of one in his case and that

he wanted to bypass hearings, were never addressed by evaluators. A greater focus on Mr. Cole's actual strategies and how in contrast they were to his legal team's goals and even some rationale for why he wanted a trial despite his confession and all the physical evidence would have likely led to discovering that he in fact has been suffering from symptoms of his schizophrenia throughout his legal process.

Although some earlier mental health evaluators missed the presence of major mental illness, Dr. Price noted delusional thinking in the 2007 evaluation. I can speculate that there are multiple reasons for why an evaluator could miss the delusions. First, Dr. Christopher only had 105 minutes with Mr. Cole and did not observe him with his attorneys. Second, she was asking generic questions about legal strategy and may not have understood where the conflicts between Mr. Cole and his legal team lay. Had Dr. Christopher observed Mr. Cole's interaction with his legal team, it might have opened up more areas of exploration that would have demonstrated his psychopathology more clearly. In my evaluation, I had the opportunity to meet with Mr. Cole for 9 hours and was able to see the conflicts that arise with defense counsel in person. Third, delusions are not always accessible early in an interview. Psychotic patients can refrain from revealing them for periods of time unlike other psychotic symptoms which are generally recognizable early on in the interview including disorganized speech or being distracted by auditory hallucinations. Fourth, the intensity of delusions can fluctuate over time and by the time I evaluated Mr. Cole, he had suffered through 5 more years of untreated schizophrenia. Fifth, Mr. Cole was not being treated in the jail and there was no known mental health treatment history that would usually raise the index of suspicion that the defendant may suffer from a major mental illness. Sixth, in the context of updates in psychiatric training which insures that psychiatrists are culturally and religiously sensitive, one is cautious before labeling any evidence of hyper-religiosity as delusional; however, in this case, even his chaplain is unable to follow his religious ideas, and he is unable to make use of the prison chaplain out of paranoia. Incorporating his forensic psychiatrist into his delusional system indicates more than simply being devout or religiously committed.

There is no evidence from Dr. Sharp's report that he attempted to explore any of the significant symptoms that he in fact elicited during his screening or evidence that there was an attempt to better understand the factors that led to Mr. Cole's estrangement from his family or the driving factors involved in the instant offense. Even the defendant's denial of being a victim of abuse is taken at face value without inquiring about why so many other family members have claimed abuse. Although the objective testing revealed suspiciousness and referential thinking, there is no evidence from the written report that these symptoms were explored.

Had these areas been explored by Dr. Sharp, it would have revealed how pervasive Mr. Cole's delusional thinking is.

In Dr. Christopher's report, none of Mr. Cole's odd statements are challenged or even questioned and Dr. Christopher accepts that he will cooperate with counsel at his word despite counsel's concerns. The report does not indicate that competency needed to be addressed. This is significant given that all of the lawyers who worked with Mr. Cole have struggled, a pattern which I witnessed first hand during my interviews with him in 2008. Dr. Christopher never asks Mr. Cole why he would go forward with a trial given his confession, all the physical evidence, and his past child abuse charges. In this case, it was necessary to observe the interaction between Mr. Cole and his attorneys to adequately assess his capacity to assist at the various stages of his case. Dr. Christopher's report suggests that he does in fact possess a superficial appreciation of the roles of courtroom personnel; however, this is not the significant factor that makes him currently incompetent or previously incompetent. The problem in this case, has always been Mr. Cole's inability to assist his attorneys and his constant interference with his attorney's ability to defend him against these charges. Although Dr. Christopher's report does delve into whether Mr. Cole appreciates or realizes his precarious situation and how unlikely he is to prevail at trial given the evidence; there is no commentary to suggest that there may be some problems in reality testing. This is especially important because of Mr. Cole's belief that he will get parole, and in counting the days until his release. In the report, Dr. Christopher seems to minimize the extent of his psychopathology suggesting that his biggest problem is the effects of alcohol, and that she would recommend that his future interactions with children be monitored. In addition, there is no evidence that the family history is taken into consideration in ruling out psychiatric disorders.

Dr. Russell's report serves to rule out the presence of psychopathy, which was apparently the sentiment at the time of trial given the nature of the criminal charges and that he received a death sentence. Unfortunately, Dr. Russell did not elicit the delusional thinking that was elicited by Dr. Price and myself, which in my opinion is the logical explanation for Mr. Cole's life trajectory and his current approach to his dealings with his legal teams.

In summary, Mr. Cole was born into a substance abusing, incestuous, non-supportive, and violent family atmosphere. By adolescence Mr. Cole was showing signs of a prodromal psychotic disorder, namely schizophrenia. His illness worsened without treatment over the years and unfortunately did not come to the attention of the mental health system even after he was first incarcerated for child

abuse. By the time he was making babies with his 3rd wife, when he was in his thirties, he was abusing alcohol and unable to function as a parent or at a job. He was isolated from all family and was mostly estranged from his many children, having been abused himself before either being incarcerated or forced to leave. It was in this context that the horrible tragedy of the death of a 9 month old Brianna occurred. It is particularly tragic in that DHS was monitoring this couple and should have made earlier interventions given the existing risk factors. Had Mr. Cole been forced to go for psychiatric treatment, his chronic illness might have been detected in time to have prevented the death of his daughter.

It is my opinion, to a reasonable degree of medical certainty, that at this point in Mr. Cole's life, based on his background and illnesses, he is unable to establish an alliance with anyone on his legal team. In addition, a more comprehensive understanding of his mental status at the time of his past offenses is compromised by his rigid delusional thinking and autistic like behaviors. Also, in his current mental state, there is no logical incentive for giving up his grandiose delusions or the comfort of hoping to be saved by Jesus. In fact these primitive coping mechanisms for Mr. Cole are somewhat adaptive for him as they actually help him avoid having to struggle with the trauma and loss associated with his past behaviors. Unfortunately, these same symptoms leave him in a stalemate with his legal team which can not assist him until his psychosis has resolved. Reaching a state of competency would require some treatment with anti-psychotic medications. Currently, he is unmotivated to follow any of the recommendations of his legal team and given his refusals to sign releases and his statements regarding mental illness, it is clear that he is unable to accept the presence of illness which interferes with any attempts by his legal team to discuss the role mental illness has played in his legal case to date, the role it played in the commission of the instant offense, or even in any discussion of mitigating factors.

Respectfully submitted,

Raphael Morris, M.D.

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UPDATED INDEPENDENT PSYCHIATRIC CONSULTATION

Date:
January 21, 2015

RE:
Benjamin Cole Competency To Be Executed

Age of Defendant:
49

Date of Birth:
April 8, 1965

Location of Defendant:
Oklahoma State Penitentiary
McAlester, Oklahoma

Referred by:
Tom Hird
Assistant Federal Public Defender
Capital Habeas Unit
Federal Public Defender-Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102

Circumstances of the Assessment:
Post sentence, pending execution

I. INTRODUCTION:

Mr. Benjamin Cole stands convicted of Murder in the First Degree and has been sentenced to death. The charges arose out of allegations that he caused the death of his 9 month old daughter on or about 12/20/02. Although there was physical evidence that implicated him and he confessed to the charges in a videotaped confession, he decided to plead Not Guilty and move forward with a trial even after he was offered a plea that would have guaranteed him life in prison.

When I first met Mr. Cole in December 2008, I had been asked to evaluate his mental state in the context of his having been uncooperative with a variety of leads that his legal team attempted to follow up which would have supported the presence of mitigating factors including his own history of being a victim of physical abuse, his family history of mental illness, and his own psychiatric symptoms, previously noted by mental health evaluators.

Although the records indicated that he had been previously diagnosed with mental illness, the Federal Public Defender's Office asked me to evaluate him in 2008 in the context of his refusing visits, evidence of worsening social withdrawal, odd idiosyncratic behaviors, expressed paranoia and grandiose statements regarding his ability to teach scripture and spread religious teachings, and because he was actually interfering with efforts made on his behalf in his legal case.

In my 2009 report, I opined that Mr. Cole was suffering from Schizophrenia, Paranoid Type, that he lacked the capacity to participate in his habeas proceedings, that delusional rigid thinking was the driving force behind him sabotaging his legal team; and that the symptoms of his schizophrenia dated back to before the instant offense and were present and active throughout his trials. In that report, I summarized mental health evaluations that detected mental illness and demonstrated that mental illness was evident even before 2003 and has persisted to the present. I pointed out why he had not sought treatment and hypothesized based on my experience working in correctional and forensic facilities why his schizophrenia was not more proactively treated.

It is my understanding that Mr. Cole has not received any treatment for his schizophrenia in the more than 6 years since I met with him. By all accounts he has deteriorated even further, refusing to come out of his cell to meet with evaluators or his legal team. He almost never leaves his cell and stopped bathing.

In 2014, I was asked to evaluate Mr. Cole's competency to be executed. I was informed that the warden did not agree that he has schizophrenia and despite traveling all the way to the prison from San Diego, I was not allowed to meet with the defendant even after requesting to observe him at his cell.

In preparing this supplemental report, I reviewed multiple affidavits of clinicians and other individuals who have had contact with him over the past 6 years, reviewed the neurological evidence (his MRI of the brain) that supports his brain disorder, and reviewed the medical literature that describes his disorder and the reasons his untreated symptoms have undermined his legal defense and have caused even further deterioration in his condition and his capacities to make reasoned decisions and appreciate his situation rationally.

My qualifications to conduct this evaluation include my faculty appointment at New York University School of Medicine, my three years as the Director of Forensic Services at Bellevue Hospital Center in New York City, and my two years as the Chairman of the Hospital Forensic Committee at Kirby Forensic Psychiatric Center in New York. At Bellevue Hospital Center, I conducted and supervised psychiatrists and trainees in court-ordered evaluations for the New York Criminal and Supreme Courts. At Kirby Forensic Psychiatric Center, I conducted over 100 court ordered evaluations. I have experience evaluating and treating inmates from my work on the Bellevue Hospital Prison Wards, working at Sing Sing Correctional Facility, and my work at Lincoln Correctional Facility in New York. I was a principal faculty member for New York University's forensic psychiatry residency training program and was the site supervisor for visiting medical students and residents on the prison wards. I have authored a chapter on teaching forensic psychiatry to medical students and have lectured to both medical and legal audiences on problems related to restoring competency and maintaining competency in correctional settings and forensic hospitals. My qualifications are further detailed in my curriculum vitae.

II. SOURCES OF INFORMATION:

In arriving at my opinion, I relied in part on the following sources of information:

1. Psychiatric Consultation Report prepared by Raphael Morris, M.D., dated 4/4/09 which was based in part on the 9 hours of interviewing Mr. Cole between 12/14/08 and 12/15/08.
2. Brain MRI, dated 9/22/04.
3. Conversation with the Warden on 8/30/2014 informing me that I would not be authorized to meet with Mr. Cole and could not be escorted to his cell and was told that the warden did not think r. Cole was suffering from schizophrenia.
4. Affidavit summarizing the legal team's effort to discuss his case on 1/8/15.
5. Affidavit of Linda Anne Hayman, M.D. (Radiologist) from 2015.
6. Affidavit of Anna Wright, dated January 13, 2015.
7. Declaration of Robert C. Gur, Ph.D., (Neuropsychologist)
8. Report of Matthew Powers, M.D.
9. Report of John D. Hastings, M.D.
10. List of attempted visits by the legal team from 2010 through 2014.
11. Competency Evaluation prepared by Dr. Price, dated 12/13/07.
12. Psychological Evaluation prepared by Dr. Basso, dated 6/15/04.
13. Psychological Evaluation prepared by Dr. Sharp, dated 10/23/03.
14. Psychological Evaluation prepared by Lisa Sneden and Kathy LaFortune, dated 7/23/03.
15. Psychological Evaluation prepared by Dr. Christopher, dated 8/18/04
16. Defendant's letters
17. Plea Offer and Response to Termination of Attorneys
18. Oklahoma State Penitentiary Medical Records through 2014.
19. Trial Transcripts
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31. President Bush's 2004 Freedom Commission Mental Health Report.
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33. The DSM IV-TR (American Psychiatric Association, 2000)
34. Marder SR et al. Schizophrenia, IX: Cognition in Schizophrenia-The MATRICS Initiative. American Journal of Psychiatry, 2004: 161:25.

35. Vries PJ et al. Dementia as a complication of schizophrenia. Journal of Neurology, Neurosurgery, and Psychiatry, 2001; 70:588-596.
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III. Review of my 2009 Report:

In my description of his mental status examination, I reported that he was somewhat intrusive, delving right into scripture before we had even had the opportunity to sit and he could not allow me to complete the usual confidentiality disclaimers. His affect was expansive in range. His speech was pressured, over-inclusive, and filled with references to passages from the Bible. He could not be redirected for the most part. He was completely guarded regarding his family of origin, his trauma background and any and all past psychiatric symptoms or family history. He was guarded regarding any discussion of the instant offense and of his past crime that led to incarceration. He was ruminative over being saved by Jesus and wanting me and his lawyer to be saved. He was tangential as he could not answer most direct questions and would move back towards religious themes regardless of the topic of the question. He expressed grandiose delusions regarding his ability to change things in Iraq were he there now, recommending that the army should issue him fatigues and arm him with a bible so that he would be able to spread the word of God. He was preoccupied with being unable to obtain a host of nutritional supplements. He was uncooperative with attempts to more closely assess his cognitive status. His insight into the existence of mental illness was poor.

I opined that Mr. Ben Cole suffered from Schizophrenia, Paranoid Type and that by the time of the evaluation in 2008, his untreated mental illness had resulted in a deterioration of his mental state over the course of 20 years. The overall course of his illness has been a downward one and even prior to the instant offense, he had been living a marginal existence, rarely holding jobs, at times being homeless, and estranged from most of his family, even from those members of his family who were not abusive. I noted that in the 3 years leading up to our 2008 interview, he had deteriorated even further, refusing to leave his cell for the most part with no contact with family. I noted that his delusions and distortions surrounding religion far exceeded what could reasonably be attributed to accepted religious concepts or attitudes. I noted that back in 2004, he had still been able to participate in superficial mental health evaluation. I noted that by 2008, those who attempted to evaluate him were being pulled into his systematized delusional

systems, believing that I was mocking him or that I was rejecting God's direct message to me to save the Jewish people.

I noted that Mr. Cole has suffered from both positive symptoms (delusions) and passive or negative symptoms, which are more subtle and can be misinterpreted as laziness or depression, or that the person is being actively and purposefully uncooperative. I noted that he had paranoid delusions towards the requests of his legal team and their motives which have spread to the belief that I refused an assignment from Jesus. He was delusional at that time regarding his capacity to affect the military in Iraq and had delusional thinking with respect to clear-cut, well documented decisions made in his legal case. I noted a long history of autistic-like behaviors consistent with schizophrenia. He has been consistently poorly related, a symptom commonly seen in patients with schizophrenia. I noted multiple idiosyncratic behaviors including bathing in the sink and saving food that tends to go bad in his cell.

I noted how for several hours Ken Lee, his attorney at the time, was unable to engage him in any meaningful discussion about his case. He refused to speak about any issues outside of his religious agenda. I reviewed how, in spite of my best efforts to engage him, which included listening to his religious preaching for hours, and my accepting that he would not cooperate with the majority of my questions, I learned subsequently that he was particularly frustrated with the evaluation, and demanded that his legal team find him a Pentecostal forensic psychiatrist. He was apparently fearful of my diagnosis and refused to sign releases to obtain his prior neuro-imaging studies for fear that I would be given access to them. I later learned from his legal team that he expressed to them the delusion that God had sent me a message to save the Jewish people and that I did not want to hear that message.

I was able to rule out any malingering in his case and noted that in no way did Mr. Cole attempt to report any psychiatric symptoms.

I opined that he was incompetent to assist in his habeas proceedings.

I concluded that for him to have any chance of becoming competent, he would have needed treatment with anti-psychotic medications. In 2008, he was unmotivated to follow any of the recommendations of his legal team. Given his refusals to sign releases and his statements regarding mental

illness, I opined that he was unable to accept the presence of illness which interfered with any attempts by his legal team to discuss the role mental illness has played in his legal case to date, the role it played in the commission of the instant offense, or even in any discussion of mitigating factors.

I reviewed the neuropsychological evidence presented to me from Dr. Basso who wrote in 2004:

> *"Overall, his pattern of neuropsychological performance and clinical history suggest the presence of impaired brain function. Severity of this dysfunction may be characterized as mild, and maximally present in the left temporal-parietal region."*

IV. REVIEW OF UPDATED RECORDS:

Dr. Hayman reviewed Mr. Cole's Brain MRI and referred to his behaviors and symptoms in her affidavit:

She noted the lesion in the left basal ganglia in his case and correlated it with the medical literature that supports the presence of negative symptoms of schizophrenia with this finding. These negative symptoms would include his blank looks, his lack of motivation, his mutism, his lack of interest in the outside world. These are all symptoms that have interfered with his legal defense team's efforts and with his capacity to review his legal situation and consider the reasons for his punishment in a coherent and logical manner. Dr. Hayman recommended a follow up MRI and PET scan given that his neurologic symptoms have progressed.

The affidavit of Anna Wright notes that she found him increasingly withdrawn since first meeting him in 2008. She reported how her office contacted the prison in the context of his weight loss and him indicating that he not going to eat anything. He refused to meet with his legal team during the summer of 2014. She noted that in July, 2014, he refused to meet with Dr. Morris, the forensic psychiatrist who came from San Diego to reevaluate him. During the 55 minutes that the team sat with him in a 2015 meeting, he kept his eyes closed and was mostly silent, providing no evidence to his legal team that he understood that he was being executed or why.

Prison records from 2014 note that he refused to leave the cell.

V. CONCLUSIONS:

I continue to opine that Mr. Ben Cole suffers from Schizophrenia, Paranoid Type. Although I was confident that he suffered from this diagnosis over 6 years ago, there is even more evidence available at this time. Schizophrenia is a neurochemical disorder which damages the brain causing both positive symptoms of delusions in his case and prominent negative symptoms of avolition, anhedonia, autistic behaviors, alogia and social withdrawal in his case. Serial clinical interviews and psychological testing in the past have been consistent with his schizophrenia. At the time I assessed him in 2008, I relied on the clinical history, his mental status examination which included expressed delusions, disorganization, and his prominent negative symptoms. I had access to multiple evaluations of the mental health professionals who had noted signs and symptoms of his mental illness not to mention the difficulties all of his attorneys have experienced in trying to have rational discussions with him.

My review of the available medical records at this point finds even more objective evidence that he in fact suffers from a neuro-chemical illness with actual neuroimaging findings that in fact provide even more objective evidence to explain the severity of his symptoms. The lesion in his basal ganglia found in 2004 is consistent with many of his clinical findings as supported by the schizophrenia literature and clinical research which I cite in the sources of information section of this report.

The medical literature explains how individuals with schizophrenia deteriorate even more without treatment. This is consistent with his worsening social withdrawal and his unwillingness to communicate.

I note that the fact that he has not become violent with prison staff , has not been threatening suicide, and remains in his cell does not in any way suggest that he is not ill from schizophrenia. His social withdrawal and not outwardly expressing delusions out loud is likely to be the main reason the prison has not elected to medicate him on their own. The prison appeared to appreciate that he needed his own cell and for an extended period of time he has not been forced to share a cell.

The neurologic consultation has recommended that his brain be re-scanned. I agree with this recommendation particularly given his diagnosis and what is obvious deterioration over the last 9 years. His active symptoms of paranoia, rigidity and withdrawal interfere with any meaningful medical or psychiatric workups and have undermined his mental health and his legal situation for many years.

Another important thing to note is that it is highly likely that it will be difficult to extract him from his cell for his execution in the context of his paranoia.

He was incompetent to participate in habeas proceedings when I met with him in 2008, he has not had any treatment since then, and there is evidence of further deterioration in his Schizophrenia with respect to negative symptoms and cognitive decline, consistent with what we understand about this neuro-chemical disease.

I can find absolutely no objective evidence to suggest any improvement in his condition during the interim time period.

Although I was not allowed to evaluate Mr. Cole in person in 2014 to assess his competency to be executed, his competency to be executed must be questioned under these circumstances given all the evidence of a deteriorating course of schizophrenia.

Respectfully submitted,

Raphael Morris, M.D.

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Date of Birth: December 13, 1951. Benton Harbor, Michigan.

EDUCATION:

2003-2010	Graduate Studies in Global & International Studies-University of Kansas, Lawrence, KS.
1991-2000	Graduate of Adult Psychoanalysis Program-Topeka Institute for Psychoanalysis, Topeka, KS
1987-1989	Postdoctoral Fellowship in Clinical Psychology Menninger Clinic, Topeka KS
1982-1987	Ph.D. in Clinical Psychology California School of Professional University of Alliant International University-San Francisco, CA. (formerly California School of Professional Psychology-Berkeley, CA)
1980-1981	San Francisco State University, San Francisco, CA
1973-1978	University of Michigan-Flint, MI B.A. in General Studies, with Honors

MILITARY SERVICE:

1970-1973	United States Army Special Forces Radio Communications Specialist. 46th Special Forces Company. Thailand

PROFESSIONAL WORK AND TRAINING EXPERIENCE:

Base Operational Support Team (BOST) Psychologist-Keesler Air Force Base, Biloxi, MS. (7/21-present). Full Time 40 hours Weekly. Clinical Psychologist for Keesler AFB BOST Team.
Currently serve as the team psychologist for a four-member Base Operational Support Team (BOST) that physically embeds within designated units identified as at high risk at Keesler AFB (embedment's are typically 3-5 months duration). Embedment is informed by a wide array of gathered analytic measures &interventions are tailored to meet the specific mission & training requirements of the designated unit's unique program or unit. During embedment spend extended observation periods to build relationships, conduct evaluations and consultations to enhance unit morale and cohesion, as well as devise interventions to address individual member's human performance challenges and bolster resilience. Provide limited scope counselling to address trauma or vicarious or secondary traumatization when indicated. Provide psychological health surveillance of potential problems to keep leadership aware of unit morale as well as provide primary and secondary preventative counter-

measures before psychological health concerns impact readiness. Conduct regular command consultations with unit and wing commanders on how to leverage their skill set effectively, in line with applicable medical requirements with guidance. Develop and maintain multiple relationships, preserving positive rapport with supported unit/personnel while maintaining appropriate professional ethics and boundaries. Educate, coach, and counsel individuals regarding sub-clinical problems, such as stress, substance misuse, and family situations. Attend and participate in Mental Health Clinic Treatment Team Meetings, High Interest and Multi-disciplinary Clinical Case Staffing's regarding unit members. Provide support for personnel preparing for or returning from deployment. Unit level crisis interventions. Also concurrently assigned to the Keesler AFB's Aerospace Medical Squadron to provide periodic mental health assessments (MHA"s) and coordinate care with Military Treatment Facility (MTF) primary care providers and clinic support staff regarding service members in need of additional clinical care.

Behavioral Health Optimization Specialist-RAF Lakenheath, United Kingdom. (6/16-7/21). Full Time 40 hours Weekly. Clinical Psychologist-Behavioral Health Optimization Specialist for 48th Medical Group at RAF Lakenheath Hospital's Family Health Clinic (covering Internal Medicine & Pediatrics Clinics). Provide evidence-based short-term & solution-focused behavioral interventions and behavioral health analysis for active-duty military as well as dependents (adults, adolescents and children as well as families and couples) and retirees. Provide immediate on-site diagnostic and behavioral analysis feedback and consultations to referring primary care physicians and nursing staff, emergency room personnel, behavioral health clinicians (other psychologists, psychiatrists, social workers, substance abuse counselors and Family Advocacy Services) , and flight commanders regarding patient care and treatment recommendations. Provide crisis interventions and stabilization services, differential diagnosis, & deployment-related evaluations. Maintain basic working clinical knowledge of psychopharmacological issues, which include recognition of and interventions for substance/ prescription abuse and dependence. Liaison with hospital referral services regarding patient referrals for specialty services within the British National Health Service (NHS). Attend flight command meetings, high-interest patient meetings, participate in and delivered presentations on relevant behavioral health topics, and other duties as assigned. Initiated ongoing process improvement projects with statistical analysis to obtain ongoing analysis of behavioral health needs. Maintain BHOP Provider Certification from U.S. Air Force.

Clinical Psychologist- Champion Consultants Program with the Center for Deployment Psychology. Henry M. Jackson Foundation. Irwin Army Community Hospital (IACH). Ft. Riley Kansas (10/14-6/16). Full Time 40 hours Weekly. Provide individual and group-format clinical consultation and program evaluation for IACH clinicians to promote facility-wide use of DoD approved Evidence- Based Psychotherapies (EBP's to address issues within military population. Serve as resident subject matter expert on clinical and theoretical aspects of EBP's and conduct literature reviews of treatment efficacy for various EBP applications. Conducted comprehensive analysis and statistical plan for all clinical outcome measures to be used with a newly developed Intensive Out-Patient Program (IOP). Consult with command staff and behavioral health clinicians, as well as primary care providers about EBP's, and augment clinical implementation of EBP's throughout the facility. Provide clinical workshops and development of "tool-kit" learning modules about EBP's. Conduct clinical Program Evaluations and Needs Assessments regarding clinical utilization of services. Attend medical command meetings at IACH Main Hospital and the Embedded /Aviation Clinics throughout the facility. Provide statistical analysis of electronic records using Behavioral Health Data Portal (BHDP) to create trauma symptom reports and treatment efficacy analysis reports with traumatized populations. Complete Psycho-educational Toolkit Projects and present Grand Rounds presentations as assigned for continued education for IACH providers and clinic leadership.

Clinical Psychologist-Irwin Army Community Hospital (IACH). Ft. Riley Kansas (1/14-10/14). Full Time 40 hours Weekly. Clinical Psychologist for Outpatient Behavioral Health Unit at IACH. Provide short-term behavioral interventions and behavioral health analysis as an embedded clinician for active- duty military. Provide individual and group psychotherapy, psychological testing and psycho-diagnostic evaluations, crisis interventions and stabilization, differential diagnosis, & deployment-related evaluations for patients with developmental, emotional and behavioral disorders as well as deployment-related and combat stress conditions. Consult to military commanders regarding troop disposition, Psychological Profiles (temporary and permanent), Disciplinary Chapter Proceedings, suitability for various military schools (e.g., Sniper, Drill Instructor, Recruiter, Special Forces and Ranger) and necessity for referral to and presentations to Fitness for Duty (FFD) Panels, and Medical Evaluation Boards (MEB) to determine suitability for continued military service. Attend medical command meetings, provide after-hours on-call emergency services on scheduled rotation.

Behavioral Health Optimization Specialist-Joint Base Langley-Eustis (3/13-12/13). Full Time 40 hours Weekly. Clinical Psychologist-Behavioral Health Optimization Specialist for 633rd Air Wing Medical Group at Langley AFB Hospital's Family Health Clinic (covering Internal Medicine, Family Health, Women's Health, and Labor and Delivery, Pediatrics & Flight Medicine). Provided evidence-based short-term & solution-focused behavioral interventions and behavioral health analysis for active duty military as well as dependents (adults, adolescents and children as well as families and couples) and retirees using the U.S. Air Force's Behavioral Health Consultant Model. Provide immediate on-site diagnostic and behavioral analysis feedback and consultations (verbal and written) to referring DoD and civilian primary care physicians and nursing staff, emergency room personnel, behavioral health clinicians (other psychologists, psychiatrists, social workers, substance abuse counselors and Family Advocacy Services) , and flight commanders regarding patient care and psycho-legal implications of treatment recommendations as well as capacity to return to duty or referral for Medical Evaluation Boards (MEB's). Provide crisis interventions and stabilization services, differential diagnosis, & deployment-related evaluations. Provided short-term group psychotherapy for depressed active- duty members. Maintained basic working clinical knowledge of psychopharmacological issues, which included recognition of and interventions for substance/ prescription abuse and dependence. Provided after hours on-call services (telephonic and face-to-face consultation) with emergency room personnel and command staff as part of routine clinic rotation. Liaison with community providers and treatment programs regarding patient referrals for specialty services. Attend flight command meetings, high-interest patient meetings, participated in and delivered presentations on relevant behavioral health topics, and other duties as assigned. Obtained BHOP Provider Certification from U.S. Air Force.

Clinical Psychologist. Psychology Private Practice - Topeka, KS **(1/91-3/13). Full Time 40+ hours Weekly.** Psychological testing, psychotherapy (psychodynamic and cognitive-behavioral approaches) & psychoanalysis with children, adolescents, and adults with full spectrum of diagnoses. Couples, family therapy and group therapy. Crisis management and liaison with community providers and emergency services. Corporate management evaluations, forensic & independent psychological consultations. Psycho-legal evaluations (interviews, psychological testing, neuropsychological screenings, drug- treatment evaluations & psycho-legal research to address specific psycho-legal issues) and provide expert witness testimony. Provide comprehensive forensic evaluations (with court-testimony). Provide behavioral health care research with international NGO's regarding psychological assessment and research of best practices with psychological testing & interview approaches to assist with the documentation of allegations of torture, political and religious discrimination, and violations of human rights.

Hospital Psychologist - The Menninger Clinic (.5 FTE, 20 hours weekly), Topeka, KS (4/97- 8/98). Staff Psychologist on Professionals in Crisis and Addictions Recovery Program.

Director of Pre-Doctoral Psychology Internship Training -Topeka State Hospital, Topeka, KS (9/90- 9/92). Full Time 40 hours Weekly.

Crisis Worker - Shawnee County Community Mental Health Center, Topeka, KS (4/89-10/90) Part-Time 10 hours Weekly.

Post-Doctoral Fellowship in Clinical Psychology -The Menninger Clinic, Topeka, KS (9/87-9/89). Full Time 40 hours Weekly.

Mental Health Worker - Comprehensive Child Psychiatric Crisis Service, Children's Hospital, San Francisco, CA (10/86-7/87). Part Time-5 hours Weekly.

Adolescent Counselor - La Chaim Residential Adolescent Treatment Program, Berkeley, CA (9/86-7/87). Full Time 40 hours Weekly.

Milieu Counselor - Westside Lodge Residential Treatment Program, San Francisco, CA (9/86-5/87). Part-Time 10-15 hours Weekly.

APA-Approved Pre-Doctoral Internship in Clinical Psychology - Langley Porter Psychiatric Institute, Adolescent and Young Adult In-Patient Unit, University of California, San Francisco, CA. (9/85-7/86). University of California, San Francisco (9/83-9/84).

Psychology Internship - Oakland Community Counseling. Oakland, CA (9/84-7/85). Part Time 20 hours Weekly.

Psychology Internship- San Francisco General Hospital. Methadone Maintenance Program. Department of Psychiatry, University of California, San Francisco (9/83-9/84). Part Time 20 hours Weekly.

CONSULTATION EXPERIENCE:

American Civil Liberties Union (ACLU) of Kansas and Western Missouri

American Psychological Association. APA Member-Initiated *Task Force to Reconcile Policies Related to Psychologists' Involvement in National Security Settings.* Washington, DC.

Bosnian Initiatives for Local Development (BILD), Bosnia

Chubb Group of Insurance Companies, Chicago, IL.

City of Topeka Police Department, Topeka, KS

CyBar, Inc., Minneapolis, MN.

Death Penalty Defense Unit, State of Kansas, Topeka, KS

Federal Office of the Prosecutor, Topeka, KS.

Federal Probation Office, Topeka, KS.

Federal Probation Office, Wichita, KS.

Federal Public Defenders Office, Topeka, KS.

Federal Public Defenders Office, Kansas City, KS.

Federal Public Defenders Office, Madison, WI.

Federal Public Defenders Office, Salt Lake City, Utah

Federal Public Defenders Office, Wichita, KS.

International Criminal Tribunal for the Former Yugoslavia (ICTY)
At The Hague, The Netherlands

Heartland Works, Topeka, KS.

Kansas Advocacy and Protective Services-Topeka, KS.

Kansas City Police Department-Kansas City, MO.

Kansas National Education Association (KNEA) - Topeka Chapter, Topeka, KS.

Lyon County District Attorney's Office. Emporia, KS.

Menninger Leadership Center, Menninger Clinic, Topeka, KS.

Missouri Supreme Court. Board of Examiners. Jefferson City, MO.

National Football League (NFL) at Menninger Clinic, Topeka, KS.

NE Kansas Conflicts Office-State of Kansas, Topeka, KS.

National Rehabilitation Center, Abu Dhabi, United Arab Emirates

Northwestern Mutual Insurance Co.

Office of the United States Attorney, District of Kansas. Topeka, KS.

Office of the Public Defender- Capital Defense Division, Western Division, Kansas City, MO.

Office of the Public Defender-Western Appellate/PCR Division A-Area 52, Kansas City, MO.

Office of the Public Defender-Western District of Oklahoma. Capital Habeas Unit. Oklahoma City, OK.

Physicians for Human Rights Asylum Network, Cambridge, MA.

Professional Renewal Center, Lawrence, KS.

Psychological Resources (subcontract with U.S. Drug Enforcement Administration), Los Angeles, CA.

Shawnee County Court Services, Topeka, KS.

Shawnee County District Attorney's Office, Topeka, KS.

Shawnee County Public Defender, Topeka, KS.

Shawnee County Regional Prevention & Recovery Services, Topeka, KS.

Southwestern Bell Telephone Company, Topeka, KS.

State of Iowa Office of Disability Determination & Referral Services, Des Moines, KS.

State of Kansas Board of Indigent Defense Services, Topeka, KS.

State of Kansas Office of Disciplinary Administrator, Topeka, KS

State of Kansas Juvenile Justice Authority, Topeka, KS.

State of Kansas Mental Health & Developmental Disabilities Forensic Services, Topeka, KS.

State of Kansas Office of Disability Determination & Referral Services, Topeka, KS.

State of Kansas Office of SRS-Legal Department, Topeka, KS

State of Kansas Office of Vocational & Rehabilitation Services, Topeka, KS.

State of Kansas Supreme Court, Topeka, KS.

State of Missouri Office of Disability Determination & Referral Services, Kansas City, MO.

United Arab Emirates University, Al Ain, UAE

University of Kansas School of Law- Paul E. Wilson Public Defender Project

University of Nebraska, Department of Athletics (Football), Lincoln, NE.

Unum Provident Corporation

U.S. Department of Justice, Division of National Security, Washington, D.C.

U.S. Department of Justice, Immigration Court Competency Mental Health Referral Project, Washington, D.C. (under Project Leadership of Judge Jack Weil, Alexandria, VA.)

U.S. Drug Enforcement Administration-Psychological Consultant, Central U.S. (Chicago, Dallas, Denver, Detroit, Houston, Kansas City, Miami, St. Louis)

Wyandotte County District Attorney's Office, Kansas City, KS.

Wyandotte County Public Defender's Office, Kansas City, KS.

RESEARCH EXPERIENCE:

Project Co-Investigator - "Family Support for Astronaut Families During Exploration Class Missions to Mars." Co-investigator with research team (4 researchers) tasked to provide an initial comprehensive literature review and structured interviews (with astronauts, astronaut family members and key members of NASA Family Support Office) to address best ways to provide family support to families when an astronaut family member is deployed on Mars expeditions and assess how personal relations and interactions (family, friends and colleagues) affect astronauts' behavioral health and performance during pre-mission stage of exploration class missions (Mars Missions). This project is identified as addressing Knowledge Gap No. Eight (8) with the Human Research Program, Behavioral Health & Performance Element. (Behavioral Medicine Risks. Risk of Adverse Cognitive or

Behavioral and Psychiatric Disorders). Research Contract awarded to Center for Deployment Psychology in coordination with National Aeronautics and Space Administration (NASA). Johnson Space Center, Houston, TX. (5/15-6/16).

Project Assistant- Provided comprehensive review of psychological interviewing, psychological testing approaches, psychological testing instruments, psychological standards of care, and psychological best practices for the evaluations of torture victims. This research was used in the compilation of the book: *A Clinician's Guide to Physical and Psychological Evaluations of Torture and Ill Treatment.* (2012). Physicians for Human Rights (PHR).

Co-Investigator – "Changing Borderline Mothers' Representations of their Child's Internal Worlds" - Menninger Clinic Child & Family Center, Topeka, KS (8/96-9/97).

Research Assistant – "The California Verbal Learning Test (CVLT) Norming Project for Children", San Francisco, CA (4/85 -7/86).

Research Assistant – "The Joint Custody Project" of Jewish Family Services, San Francisco, CA (3/84-11/84).

Research Assistant – "The Brief Therapy Project" of the Mount Zion Psychotherapy Research Group, San Francisco, CA (8/83-5/86).

Project Assistant - N.I.D.A. funded research project "Community Network Approach to Drug Abuse Treatment." Department of Psychiatry, University of California, San Francisco General Hospital. (9/8-9/84).

TEACHING EXPERIENCE:

Instructor - Federal Emergency Management Agency (FEMA) Community Emergency Response Team -CERT Instructor (4/01- 1/1/09). Teach Principles of Disaster Psychology.

Instructor - Heritage Mental Health Clinic (9/02-5/05). Teach Antisocial Personality and Psychopathy Module to pre-doctoral interns.

Teaching Faculty - Kansas City Institute for Psychoanalysis (10/97 to 3/06). Co-teach various courses in psychoanalytic theory and technique

Teaching Faculty - Topeka Institute for Psychoanalysis (6/96 – 6/2000). Co-taught various courses in psychoanalytic theory and technique.

Adjunct Assistant Professor - Washburn University, Topeka, KS (1/92-5/94). Taught semester course in "Abnormal Psychology" to undergraduates.

Faculty Instructor & Director - Topeka State Hospital Pre-Doctoral Internship Program in Clinical Psychology, Topeka State Hospital, Topeka, KS (9/89-9/92).

Instructor - Karl Menninger School of Psychiatry, Menninger Clinic, (6/88-4/89). Taught principles of psychological testing to post-baccalaureate practicum students

PUBLICATIONS: Articles

Hough, G. (2017). Impact on Military Children When a Parent Deploys While Living Overseas: A brief Scope of the literature. Psychology and Behavioral Science International Journal 7(5): 55722. DOI: 10.19080/PBSIJ.2017.07.555722

Hough, G. & Twemlow, S. (2016). War Criminals and Other "Ordinary Men": A Case Report. International Journal of Applied Psychoanalytic Studies. Volume 14 (1): 35-53.

The Centre for Deployment Psychology. (2015*) Lessons Learned Manual: A Framework for Addressing Barriers to Evidence-based Psychotherapy Utilization in the Defence Department.* Contributors(Riggs, D; Cook, J; French, L.; Mann; J.; Adkins,J.; Baima, G.; Cho-Stutler, L; Fearing, T.; Frick, A.; Hough, G.; Kleoppel. E; McDermott, J.; Ordway, K.; towel, K.; Williams, S.)

Hough, G. (2012).Psychologists obtain training on human rights law and evaluation of torture survivors. Psychology International Newsletter: The American Psychological Association. June 2012, Volume 3, (2), 9-10.

Hough, G. (2008). Sojourn to Night: Srebrenica. International Journal of AppliedPsychoanalytic Studies 5 (1):16-22

Twemlow, S. & Hough, G. (2008). The Cult Leader as an Agent of a Psychotic Fantasy of Masochistic Group Death in the "Revolutionary Suicide" in Jonestown. Psychoanalysis and Psychotherapy, Vol. 24, (4), Winter, 222-239.

Hough, G. (2006). American Terrorism and the Christian Identity Movement: A Proliferation Threat From Non-State Actors. International Journal of Applied Psychoanalytic Studies, Vol. 3 (1), 79-100.

Hough, G. (2004).) Does Psychoanalysis Have Anything to Offer an Understanding of Terrorism? Journal of the American Psychoanalytic Association, 52 (3), 813-828.

Twemlow, S., Sacco, F. & Hough, G. (2003). A Socio-Psychoanalytic Perspective on Group Dynamics, Cults and Terrorism Part 1: The Context of Terrorism. Socio-Analysis The Journal of the Australian Institute of Socio-Analysis, 5, 57-78.

Twemlow, S., Sacco, F. & Hough, G. (2003). A Socio-Psychoanalytic Perspective on Group Dynamics, Cults and Terrorism Part 2: A Note on Possible Antidotes. Socio-Analysis The Journal of the Australian Institute of Socio-Analysis, 5, 79-87.

Holigrocki, R.J., Frieswyk, S.H., Kaminski, P.L., & Hough, G. (1999). FCIA: Parent-Child Interaction Assessment Technical Report NO. 099-1046. The Menninger Clinic, Family and Children Center. Topeka, KS.

Wilkinson, S. & Hough, G. (1996). Lies as Narrative Truth in Abused Adopted Adolescents. Psychoanalytic Study of the Child (51), 580-596.

Hough, G. (1995) A Clinician with a Schizophrenic Family Member: A Case Report. Bulletin of the Menninger Clinic, 59 (3), 345-356.

Hough, G. (1995) Transactions of the Topeka Psychoanalytic Society: Paper by Dr. Theodore J. Jacobs entitled "Analysis, Mutual Analysis, and Self-Analysis: On the Interplay of Minds in the Analytic Process". Bulletin of the Menninger Clinic, 59, (3), 395-397.

Hough, G. (1991) When confidentiality mandates a secret be kept: A case report. International Journal of Group Psychotherapy, 42 (1), 105-115.

Hough, G. (1987) "The Emergence of Creativity in Painters after Age Fifty: An Exploratory Study." Unpublished Dissertation.

PUBLICATIONS: Book Chapters

Hough, G. (2020). A Child's First Rose. In G. Eick & C. Poage (Eds.), "The Death Project: An Anthology of These Times" (pp. 63-69). Wichita, Kansas. Blue Cedar Press.

Hough, G. (1996). A Clinician with a Schizophrenic Family Member: A Case Report. In J.G. Allen & D.T. Collins (Eds.), Contemporary treatment of psychosis healing relationships in the "Decade of the Brain" (pp. 61-72). Northvale, New Jersey: Aronson.

PUBLICATIONS: Book Reviews

Hough, G. (2002) Book review: Dangerous Sex Offenders: A task force report of the American Psychiatric Association. Bulletin of the Menninger Clinic, 66 (1), 86-87.

Hough, G. (2002) Book review: Dispatches from the Freud Wars. By John Forrester. Bulletin of the Menninger Clinic, 64 (1), 125-127.

Hough, G. (2002) Book review: The psychology of stalking. Clinical and forensic perspectives. By Reid R. Meloy (Ed.). Bulletin of the Menninger Clinic, 65 (2), 277-278.

Hough, G. (1998). Book review. The Clinical exchange: techniques derived from self and Motivational systems. By J.D. Lichtenberg & F.M. Lachmann. Bulletin of the Menninger Clinic, 62, (2), 270-271.

Hough, G. (1997) Book review. The many faces of deceit: Omissions, lies, and disguise in psychotherapy. By H.K. Gedimann & J.S. Lieberman. Bulletin of the Menninger Clinic, 62 (2), 113-115.

Hough, G. (1997) Book review: A Meeting of Minds: Mutuality in Psychoanalysis by Lewis Aron. Bulletin of the Menninger Clinic, 61 (3), 15-16.

Hough, G. (1996) Book review: The Psychoanalyses and the Psychotherapies: The Talking Cures. By Robert Wallerstein. Bulletin of the Menninger Clinic, 60 (4), 552-554.

Hough, G. (1996) Book review: Posttraumatic stress disorder in litigation: Guidelines for forensic assessment. Edited by Robert I. Simon. Bulletin of the Menninger Clinic, 60 (1), 126-128.

Hough, G. (1995) Book Review: Surviving mental illness, stress, coping, and adaptation. By Agnes B. Hatfield & Harriet P. Lefley. Bulletin of the Menninger Clinic, 59 (1), 122-124.

Hough, G. (1993) Book Review: The personal myth in psychoanalytic theory. Edited by Peter Hartocollis & Ian David Graham. Bulletin of the Menninger Clinic, 57 (2), 268-270.

Hough, G. (1990) Book Review: Systematic treatment selection: Toward targeted therapeutic interventions, by Larry E. Butler & John F. Clarkin. Bulletin of the Menninger Clinic, 55 (3), 408-409.

Hough, G. (1990) Book Review: Creative aspects in psychotherapy, by Albert Rothenberg. Bulletin of the Menninger Clinic, 54 (2), 276-278.

Hough, G. (1990) Book Review: Self-mutilation: Theory, research & treatment, by Barent W. Walsh & Paul M. Rosen. Bulletin of the Menninger Clinic, 54 (4), 559-560.

PRESENTATIONS: (to large audiences)

Hough, G. (7/19/19). "Re-Thinking the 'Ordinary Man' Paradigm of the War Crimes Perpetrator." Paper presented at 14th Annual International Association of Genocide Scholars "The Missing Picture": Rethinking Genocide Studies & Prevention American University of Phnom Penh. Rutgers Center for the Study of Genocide and Human Rights. Phnom Penh, Cambodia.

Hough, G. & Cook, J. (2/26/16). Moral Injury Among Military Veterans. Presented to Psychology Department at Irwin Army Community Hospital at Ft. Riley, KS.

Brim, W., Weinstock, M. and Hough, G. (2/8/16). Family Support for Long Duration and Exploration Missions (#7041). NASA 2016 Human Research Program Investigator's Workshop. Frontiers in Human Space Exploration Research. Galveston Island Convention Center. Galveston, TX.

Hough, G. (8/27/15). Resilience and Burnout. Move to Health Conference: Changing the Conversation in Army Medicine. Sponsored by U.S. Office of the Surgeon General at Riley Conference Center. Ft. Riley, KS.

Hough, G. (8/27/15). Mindful Awareness & Power of the Mind. Move to Health Conference: Changing the Conversation in Army Medicine. Sponsored by U.S. Office of the Surgeon General at Riley Conference Center. Ft. Riley, KS.

Hough, G., Cook, J. & Parish, R. (4/24/15). Outcome Measures in Evidence Based Psychotherapies. Presented at Clinical Grand Rounds to Irwin Army Community Hospital at Ft. Riley, KS.

Hough, G & Alarid, J. (8/11/14) Symposium: Human Rights-Armed Conflict-Criminal Law: Transnational Crime. *Understanding the Mind of the Modern War Criminal: Pre and Post-Conviction Evaluations.* Presented at American Society of International Law. Northwestern University School of Law. Chicago, Il..

Hough, G. & Alarid, J. (8/10/14). Symposium: Psychological Evaluation of an ICTY War Criminal at The Hague. Presented at 2014 American Psychological Association's Annual Convention. Symposium 4157. Washington, DC.

Hough, G. & Kivlahan, C. (9/23/12). Learning To Do Combined Physical and Psychological Evaluations. Workshop: Advanced Forensic Training for Experienced Volunteers: Techniques for Increased Effectiveness of Evaluations and Testimony. Physicians for Human Rights. Held at American Association for the Advancement of Science (AAAS). Washington D.C.

O'Brian, S. & Hough, G. (7/21/12). Trauma Issues in Death Penalty Cases. Panel Discussion at Workshop: Capital Punishment/Death Penalty Defense. Held at Washburn University School of Law. Topeka, KS.

Hough, G. Forensic Issues in the Substance Abuse Rehabilitation Setting. (6/6-7/12). Two Day Workshop Presented to National Rehabilitation Center Clinical Staff & Invited Guests. Abu Dhabi, United Arab Emirates.

Hough, G.; Maag, J.; Irogonegaray, P.; Beale, D.; Maxfield, A. (2/26/12)).Radical Religion in Our Times. Panel Discussion. First Congregational Church, Topeka, KS.

Hough, G.; Albott, W.; Maag, J.; Kerns, K.; & Rudy, M. (11/9/11). American Terrorism and Radical Religion. Panel Discussion. Friends University. Wichita, KS.

Harder, R.; Holcombe, T.; McCollough, J.; Schlingensiepen, T.; Schlingensiepen, F.; Shaw, A. & Hough, G. (11/8/11). "Bonhoeffer in New York. Faith and Politics." Panel Discussion. First Congregational Church. Topeka, KS.

Hough, G. (10/4/11). Physicians for Human Rights and Case Discussion of an Afghan Asylum Case. Kansas University School of Medicine. Kansas City, KS.

Hough, G. & Blakeley, D. (10/19/2010). Genocide and Ordinary Men: Analysis of a Convicted War Criminal. Presented to The Greater Kansas City Psychoanalytic Society, Kansas City, MO.

Hough, G., Beale, D., Blakeley, D, Kerns, K. & Maag, J. (4/17/2010). The Psychology of War Criminals: Case Presentation of a Convicted War Criminal Evaluated at the ICTY. Case Presentation and Panel Discussion Presented to Psychiatry Grand Rounds, Stormont-Vail West Hospital, Topeka, KS.

Hough, G. (2/8/10). The Community Reinforcement and Social Networking Approach to Post-Incarceration Substance Abusers: Treatment Value and Lessons Learned. Presented at The National Rehabilitation Center Conference on Treatment in Criminal Justice Systems. Abu Dhabi, United Arab Emirates.

Hough, G., Beale, D., Benalcazar, B., Butler-Smith, A. (5/20/08). Moderator for Panel Discussion of The Political Brain: The Role of Emotion in Deciding the Fate of the Nation-authored by Drew Weston, Ph.D. Presented to The Greater Kansas City Psychoanalytic Society, Kansas City, MO.

Hough, G. (6/26/05). Panel Discussant of Topeka Civic Theatre's stage performance of *"How I Learned to Drive".* Topeka, KS.

Hough, G. & Albott, W. (06/6-7/05). Introduction to Consultation with Mental Health Professionals. State of Kansas Board of Indigents' Defense Services. Criminal Defense June CLE. Topeka, KS. & Wichita, KS.

Hough, G. & Evans, Ron (5/20/05). Using Mental Health Experts in Death Penalty Cases. Kansas Medical Education Foundation. Psychiatry Grand Rounds at Stormont-Vail Hospital. Topeka, KS.

Wilkinson, S. & Hough, G. (5/4/2005). When and How to Refer to Mental Health Professionals. Counseling Arabia 2005 Conference. Al-Ain, United Arab Emirates.

Hough, G., Miller, R., Miller, D., Benalquasar, B and Irogonegaray, P. (3/30/05). "A Civil and/or Religious Right: A Forum on the Proposed April 5th Amendment." Panel Discussion Participant at Washburn University, Topeka, KS.

Hough, G. & Albott, W. (10/29/04). Psychological Testing and Sex Offenders. Kansas Association of Trial Lawyers CLE Program Topeka, KS. .

Hough, G. (3/2/04). American Terrorism and the Christian Identity Movement: A Proliferation Threat from Non-State Actors. Greater Kansas City Psychoanalytic Institute. Kansas City, MO.

Hough, G. & Sookram, J. (7/22/03). Adolescent Development and Mental Health. Fourth Annual Governor's Conference on Juvenile Justice. Topeka, KS.

Hough, G. & Albott, W. (06/9-10/03). Introduction to Consultation with Mental Health Professionals. State of Kansas Board of Indigents' Defense Services. Criminal Defense June CLE. Topeka, KS. & Wichita, KS.

STATE LICENSES:

Kansas	License No. 708
Missouri	License No. 2001027153 (currently placed on voluntary inactive status).

HONORS:

Topeka Institute for Psychoanalysis Candidate's Writing Award for Outstanding Professional Publication (1/96).

PROFESSIONAL BOARDS:

Genocide Watch Board of Advisors (9/13-9/16)

Valeo Behavioral Health Care, Community Residence Program (CRP) Topeka, KS. (4/08 to 3/13)

Valeo Behavioral Health Care, Topeka, KS. (10/06 to 3/13)

Region II Representative. Kansas Psychological Association Board of Governors. (1/95-1/98-three-year term). Topeka, KS.

Psychoanalytic Society of Topeka- Vice President (former). Topeka, KS. (9/95-9/96).

Board of Directors Membership. Community Youth Homes, Inc. Topeka, KS. (10/90-10/91).

EDITORIAL BOARDS:

Psychiatric Services (Formerly Hospital and Community Psychiatry) - Reviewer

Journal of Applied Psychoanalytic Studies- Reviewer

American Journal of Psychotherapy-Reviewer

PROFESSIONAL CERTIFICATIONS:

American Board of Professional Psychology-Diplomate in Clinical Psychology (ABPP)

Certification as Internal Behavioral Health Consultant in Primary Care (IBHOP) with United States Air Force

PROFESSIONAL AFFILIATIONS:

American Board of Professional Psychology-Member

Fellow of the American Academy of Clinical Psychology

Physicians for Human Rights-Asylum Network

International Association of Genocide Scholars

INTEROFFICE MEMORANDUM
Oklahoma State Penitentiary

DATE: October 23, 2019

TO: Scott Crow, Interim Director - Approved 10-24-19
Oklahoma Department of Corrections

THRU: Mike Carpenter, Acting Director of Institutions

FROM: Tommy Sharp, Interim Warden
Oklahoma State Penitentiary

SUBJECT: **Relocation of Death Row Inmates**

The staff at Oklahoma State Penitentiary are currently in the planning/preparation process of relocating death row inmates to A-Unit of the Oklahoma State Penitentiary. The plan includes moving all qualifying death row inmates to A-Unit by October 30, 2019. This plan remains fluid as the process moves forward and has taken place in the following phases:

It is noted that a maintenance emergency has required the movement date to change from starting on October 23. A hot water leak has been found under the slab of A-4 pod, and the floor must be busted through to repair the leak. It is now expected the movement date would start on October 28 and be concluded by October 30.

Phase 1

A-Unit Pod 4 has been identified as the housing location for inmates affected by this plan. There are currently 44 inmates sentenced to death at OSP and A-Unit Pod 4 can house up to 56 inmates. These inmates will be the only inmates housed on this pod. A-Unit was chosen because it currently houses the Phase Program and classroom space is readily available for potential future program availability.

Phase 2

Inmates previously housed in A-4 have been moved to other maximum security pods on A&C Units. This process was completed the week of October 14, 2019. Once the pod was emptied, maintenance staff was able to address any maintenance issues on the pod. A paint crew began painting the cell walls the morning of October 21, 2019, with the intent to paint all cells prior to moving the inmates into the cells. This work is now complete.

PETITIONER'S EXHIBIT 25

Phase 3

The Warden, Deputy Warden, Chief of Security, Mental Health Services, H-Unit Manager and H-Unit Case Manager have conducted individual meetings with the inmates on death row. These meetings began the week of September 23, 2019 and the plan to move death row inmates to A-Unit was discussed with each inmate.

Topics of discussion included:

- The idea that just because someone is sentenced to death does not mean they have to be managed differently than someone who has been given any other sentence.
- The benefits of moving to A-Unit such as contact visiting, a cell with a window, outside exercise, job opportunities, etc.
- The fact that death row currently has the option to single cell and that option will not be available on A-Unit. Also discussed the pros/cons of having a cell partner.
- What will happen if they refuse to move or refuse to have a cell partner. We first explained the fact we will not force them to do something we believe would be dangerous for them. We understand they are on death row for a reason and many have been there for a long time.
- They were asked if they know of inmates currently on death row they would prefer to live with. We also offered the opportunity for them to begin living together now in order to get used to the living conditions prior to moving to A-Unit.
- Address any concerns/questions the inmate has and expend our best effort to put a positive outlook on the future move.

OSP staff spent approximately 2 hours each morning interviewing the inmates over a 2-3 week period. The purpose of these meetings was to give the inmate plenty of notice of the move and time to process the information. It also gave staff the opportunity to identify those inmates who would not be candidates to move to A-Unit (i.e. mental health, risk of victimization, high profile, etc.) These discussions and decisions were made using the existing administrative segregation decision process used for other administrative segregation inmates throughout the years.

Inmate interviews were completed on October 10, 2019. Based on these interviews, each inmate's management history and the experience of the facility staff involved, it was determined which inmates would initially be moved to A-Unit and which inmates would be placed in administrative segregation on H-Unit:

Moving to A-Unit (32 inmates total)

Martinez, Mica #679077	Johnson, Albert #129369
Tryon, Isaiah #615351	Grissom, Wendell #575281
Harmon, Marion #581143	Smith, Roderick #156394
Fuston, Ronnie #769086	Sanchez, Anthony #275098
Harris, Jimmy #408711	Pavatt, James #455677
Simpson, Kendrick #568612	Harris, Donnie #688359
Fairchild, Richard #241527	Frederick, Darrell #88910
Bosse, Shaun #667410	Coddington, James #194169
Bench, Miles #713261	Posey, Derek #842726
Wood, Tremaine #271967	Mitchell, Alfred #206964
Cuesta-Rodriguez, Carlos #563531	Murphy, Patrick #372682
Johnson, Raymond #207742	Postelle, Gilbert #585999
Littlejohn, Emanuel #190341	Rojem, Richard #146688
Underwood, Kevin #576482	Hancock, Phillip #126307
Goode, Clarence #227935	Eizember, Scott #497824
Davison, Dustin #687068	Davis, Nicholas #414338

Administrative Segregation (12 inmates Total)

[redacted]

[redacted]

Cole, Benjamin #489814 – Staff believes the inmate has [redacted] and his age makes him susceptible to victimization.

[redacted]

It is important to note any inmate placed on administrative segregation is reviewed monthly in accordance with OP-040204 entitled "Segregation Measures" and may be returned/placed on A-Unit at any time after being approved by the warden.

Phase 4

Upon approval of the Director, qualifying death row inmates will be moved from H-Unit to A-Unit Pod 4. These moves will most likely be completed in 1-2 business days.

One cell at a time, facility CERT will inventory the inmate's property while it is being packed. Once the property is packed and inventoried, the inmate and their property will be escorted from H-Unit to A-Unit. The escort will be conducted by two (2) CERT members and supervised by a Shift Captain. All other movement on the yard will be ceased during these moves.

- Death row inmates will remain in maroon scrubs while housed on A-Unit.
- During this move, staff will ensure all inmate property is compliant with OP-030120 entitled "Inmate Property."
- Inmates will be allowed to store or mail out excess property in accordance with policy as are all other inmates.
- While housed on A-Unit, inmates will receive the same access to contact visiting, recreation, programs and jobs as all other inmates housed on A-Unit.
- Staff on A-Unit will be evenly split between staff normally assigned to A-Unit and staff normally assigned to Southwest. In this, we will have staff normally working

with the inmates present which increases our likelihood of noticing a developing issue or managing an incident prior to full escalation. The facility recognizes the stress this move places on the inmates involved and efforts will be taken to mitigate these stressors through familiar staff being available.

Facility staff anticipate one or more inmates may refuse to move when the time comes. In instances where inmates refuse to move, they will be addressed as any other inmate refusing to accept a housing assignment. The inmate will be issued a misconduct and placed on segregated housing status. Once that process is complete, the inmate will be given another opportunity to accept the housing assignment.

Inmates remaining on H-Unit Southwest will be categorized as all other administrative segregation inmates housed on H-Unit. This includes all conditions of confinement and expectations for staff and inmate found in current policy. As noted above, all inmates confined in this category are reviewed in thirty day cycles for continued placement and, through these reviews, can remain in administrative segregation or be moved to A-Unit as the inmates' status dictates.

OSP facility staff is prepared to finalize these moves once the plan is finalized and approved.

Once moves are complete the facility and Director of Institutions staff will convene a working group to study the security considerations and conditions of confinement rules for beds made empty by this move. Great care must be exercised that a normal officer working a normal shift can know with certainty the rules affecting inmates housed in this area. These newly empty beds will be converted to some form of administrative segregation housing and inmates with like security considerations will house there. Creating a policy dictating these conditions and rules will be required before the beds can be filled.

If additional information is needed please advise.

tws

INTEROFFICE MEMORANDUM
Oklahoma State Penitentiary

DATE: October 29, 2019

TO: Scott Crow, Interim Director
Oklahoma Department of Corrections

THRU: Mike Carpenter, Director of Institutions 10/29

FROM: Tommy Sharp, Warden TSP
Oklahoma State Penitentiary

SUBJECT: **Relocation of Death Row Inmates**

On the morning of October 29, 2019, OSP began moving eligible death row inmates from H Unit to A Unit Pod 4. This move was conducted by OSP CERT under the supervision of Deputy Warden Chris Rankins and Captains Bill Quick and Chad Morgan. Dr. James Smash, Psych Services, was also on-site to address any potential issues. Inmates were previously provided with boxes in order to have their property ready to move. Inmate movement began at approximately 8:45 a.m. and was completed at approximately 12:00 p.m. without issue. The following inmates are now housed on A-Unit Pod 4:

(33 inmates total)

Martinez, Mica #679077	Johnson, Albert #129369
Tryon, Isaiah #615351	Grissom, Wendell #575281
Harmon, Marion #581143	Smith, Roderick #156394
Fuston, Ronnie #769086	Sanchez, Anthony #275098
Harris, Jimmy #408711	Pavatt, James #455677
Simpson, Kendrick #568612	Harris, Donnie #688359
Fairchild, Richard #241527	Frederick, Darrell #88910
Bosse, Shaun #667410	Coddington, James #194169
Bench, Miles #713261	Posey, Derek #842726
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Johnson, Raymond #207742	Postelle, Gilbert #585999
Littlejohn, Emanuel #190341	Rojem, Richard #146688
Underwood, Kevin #576482	Hancock, Phillip #126307

Goode, Clarence #227935 Eizember, Scott #497824

Davis, Nicholas #414338

[redacted]

Administrative Segregation (11 inmates Total)

[redacted]

[redacted]

Cole, Benjamin #489814 – Staff believe the inmate has [redacted] issues, [redacted] issues and age which make him susceptible to victimization.

[redacted]

It is important to note, any inmate placed on administrative segregation is reviewed monthly in accordance with OP-040204 entitled "Segregation Measures" and may be returned/placed on A-Unit at any time after being approved by the warden.

The fact these moves were made in under 4 hours without incident is a testament to the work and dedication demonstrated by OSP staff over the past 6 weeks. Many hours were spent interviewing death row inmates in addition to the time spent by unit staff on a daily basis addressing inmate issues and concerns leading up to this move. In addition, CERT operated very professionally and efficiently during the move.

I anticipate we will have to address issues over the next few weeks as these inmates adjust to their new environment. I have no doubt the staff at this facility will handle those issues with the utmost respect and professionalism as is expected from them.

If additional information is needed please advise.

tws

COLE, BENJAMIN
OK DoC Offender ID **489814**
04/08/1965 (57) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note NARRATIVE - 03/29/22 03:09 PM
Progress Note:
Note:
Inmate was seen in his cell as he was being moved to medical for a shower. Inmate cell was moderately filthy. The door floor area had condiment bottles filled with liquids at the base of his door. There were trays of food that he had not turned in for pick up. He had more trays, food unopened and food opened in the corner by the bunk that he doesn't sleep in. Inmate was unable to fully position himself in the wheel chair without help from security officers. Inmate clothing looked dingy and perhaps dirty. However, his fingernails were clean and so was his hair. His beard was free of debris and looked combed as well as brushed. His sweats and top were dingy looking. There were no unpleasant odors surprisingly.

Signed Electronically by James Smash, Clinical Coordinator, PhD on 03/29/22 03:21 PM

wellness and weight check - 03/27/19 03:22 PM
PROGRESS NOTE:
Vitals:

Measurement	03/27/19 10:23 AM
Weight (lbs)	177.0
Temperature (F)	98.4
Pulse Sitting (BPM)	81
Respirations (BPM)	18
PulseOx - Room Air (%)	98.0
SBP (sitting)	131
DBP (sitting)	81

Progress Note:
I/m appears catatonic / noted to have selective mutism in past / unkempt, keeps head down and does not assist in attempt to weigh him / weight on Hoyt lift was 193; on scale squatting 162 / my estimate is 167 / best estimate may be the average of two weights ie about 175 / has large hydrocele he has prev indicated he does not want repaired / I reviewed his MH and medical entries to 2014, essentially unchanged / there does not appear to be any acute problem
CO-PAYMENT ASSIGNMENT ONLY (Select procedure 99211-office visit and/or medication(s) for co-payment)

Encounter: SIMPLE NARRATIVE NOTE
Date/Time of Service: 03/27/19 03:22 PM
Location of Service: Oklahoma State Penitentiary
Provider: Dennis Deakins, MD, MD Authorizing Provider:Dennis Deakins, MD, MD
Signed Electronically by Dennis E. Deakins, MD, MD on 03/27/19 03:27 PM

Oklahoma Department of Corrections Private and DOC: ODOC Formulary Group Number:

COLE, BENJAMIN
OK DoC Offender ID **489814**
04/08/1965 (57) M Caucasian
Oklahoma State Penitentiary

MENTAL HEALTH PROGRESS NOTE - SOAP - 04/03/17 07:29 PM

SUBJECTIVE DATA:
Reason for this visit: Follow-up;
Referral source: Medical staff;
Chief Complaint:
Other:
Extremely poor hygiene, hoarding his Kosher meals
Current signs or symptoms and/or responses to treatment:
Inmate refused to speak, or make eye contact, until physician discussed cutting his hair and beard because he was filthy, hair and beard extremely unkempt. Inmate resisted, and said, "Wash and comb, wash and comb." Physician reminded inmate he has promised to improve his hygiene without doing so. Inmate continued to repeat, "Wash and comb, sink and toilet," appearing to indicate he bathes in the toilet as well as the sink. Inmate placed in medical observation following refusal to cooperate in getting his weight, or work with physician or mental health staff in any way. Filthy socks were removed, and new ones were being obtained. When asked about the hoarded food inmate did not respond. When asked what he was eating if not his meals, and inmate responded, "canteen." Inmate was weighed utilizing wheelchair/scale but resisted being lifted out of the wheelchair so the chair could be weighed alone, attempting to lie on the floor, however officers assisted him onto the exam table. Subtracting the weight of the wheelchair it was determined that inmate Cole has not lost weight.
OBJECTIVE DATA:
Appearance: Dishelved;
Offender observed to have poor or declining health? No;
Behavior: Other; Uncooperative
Mood: Anxious;
Affect: Blunted;
Speech: Mumbled; Other; poverty of speech
Perception: Other; Unable to determine
Thought Process: Other; Unable to determine
Thought content: Other; Unable to determine
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;
Insight and judgement intact: No;
Reliable history and information from Record: Yes;
ASSESSMENT:
Problems:

Problem	Code	Source	Status	Begin	Resolved	Notes
Diagnosis or Condition Deferred on Axis I	799.9	DSM IV	Suspected	01/26/2015		Offender has not cooperated with this QMHP to adequately assess for a diagnosis.

Vitals:
Measurement 01/18/17 09:40 AM
MH Level: B

EDUCATION:
Medication Education: Instructed offender on risks and benefits of medication adherence / non-adherence? Not applicable. Offender on no medications.;
PLAN:
Plan:
Consult policy for options regarding poor hygiene
Consult with Chief Mental Health Officer regarding possibility of 15 day O&E on the MHU
Consult with primary QMHP
Follow-up:
With primary QMHP

Signed Electronically by Patti Stem, Clinical Coordinator on 04/03/17 07:38 PM
Cosigned Electronically by Janna Morgan, Chief Mental Health Officer, PhD on 04/06/17 10:26 AM (requested by PattiStem, Clinical Coordinator on 04/03/17 07:38 PM)
Cosigned Electronically by April Taylor, Behavioral Health Clinician on 04/04/17 09:47 AM (requested by PattiStem, Clinical Coordinator on 04/03/17 07:38 PM)

COLE, BENJAMIN
OK DoC Offender ID **489814**
04/08/1965 (57) M Caucasian
Oklahoma State Penitentiary

Mental Health Progress Note NARRATIVE - 04/03/17 04:50 PM

Progress Note:

Note:

Inmate had 147 kosher meals in his cell and canteen foods. He said that he has been eatting cateen, when ask by the Medical Doctor, what has he been eatting. His appearence and weight, doesn't show to have changed. His hair, beard and body needs bathing.

Signed Electronically by Bruce White, Behavioral Health Clinician on 04/03/17 04:58 PM

Mental Health SOAP: Mental health level B - 03/11/14 10:15 AM
Subjective Data:
Reason for this visit: Follow-up;
Chief Complaint:
Other:
Assess mental status and physical status
Current signs or symptoms and/or responses to treatment:
Offender is a 48-yr-old white male with a mental health level of zero. Desipite this mental health level, offender during rounds in Jan 2014 showed minor symptoms of mental illness: poor eye contact, mild looseness of association in his speech, and some unusual religious content. In addition, a document dated 27 Dec 2004 when the offender was 39 years old and scanned into the EHR on 12 Sep 2011 contains information about mental health level. The document was signed by Ann Boyd, PhD, who gave the offender a mental health level of B.

Offender was seen today with Dr. Marlar in the medical room on H unit. When offender came to the door, he shook his head and said "I refuse." He repeatedly refused to participate, and steadily walked toward the door. He would not step on the scales to be weighed. He finally consented to sign a document that he refused all treatment.

His affect was not angry or irritable. Despite his oppositional conduct, his mood was in the normal range; indeed, he seemed in a good mood. His speech was too limited to obtain much impression. He mostly said simple phrases such as "I refuse" and "I'm not talking to you guys." His one statement of more than a few words referred to the meals here as "pig food", and he said that he should be receiving kosher food.

He signed a medical refusal form, showing no problems with muscle control. His gait appeared normal. There was no evidence of breathing difficulties, and his skin tone was in the normal range. Orientation and memory could not be fully gauged, due to lack of cooperation, but he showed no obvious deficits.
Comments on Subjective Findings:
The mental health level of zero appears to be incorrect. He had a mental health level of B at age 39, so his mental health level at age 48 should not be zero. His mild symptoms of January 2014 suggest a diagnosis of a psychotic disorder. He was not floridly psychotic today; however, his refusal to speak and his oppositional behavior are consistent with the possibility of paranoid thinking; his conduct could also indicate the social isolation that is typical of schizophrenia. He was not obviously psychotic today, but his mental status should continue to be monitored.
Objective Data:
Behavior: Other; uncooperative
Mood: Normal;
Affect: Within Normal Limits;
Speech: Other; Limited speech due to refusal to cooperate
Perception: No Abnormalities;
Thought Process: Other; Difficult to assess due to lack of cooperation
Thought content: Other; Lack of cooperation could suggest the possibility of paranoid thinking
Suicidal thoughts or behavior: No;
Homicidal thoughts or behavior: No;
Self injury thoughts or behavior: No;
Assessment:
Plan:

Signed Electronically by Dave Kerby, PhD on 03/11/14 11:14 AM
Cosigned Electronically by Janna Morgan, Chief Mental Health Officer, PhD on 03/11/14 03:29 PM (requested by PattiStem, Clinical Coordinator on 03/11/14 11:22 AM)
Cosigned Electronically by Pat Sorrels, CHSA on 03/21/14 10:23 AM (requested by PattiStem, Clinical Coordinator on 03/20/14 04:14 PM)
Cosigned Electronically by Patti Stem, Clinical Coordinator on 03/11/14 11:21 AM (requested by DaveKerby, PhD on 03/11/14 11:14 AM)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BENJAMIN COLE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 15-CV-0049-GKF-CDL**
	)	
JIM FARRIS, Warden, Oklahoma State Penitentiary,	)	
	)	
Respondent.	)	

ORDER FOR MENTAL HEALTH EVALUATION

This matter is before the Court on Petitioner Benjamin Cole's Motion for Order Facilitating Mental Health Evaluation (Dkt. 49), filed May 23, 2022, and the parties' Notice of Agreed Proposal for Mental Health Evaluation (Dkt. 53), filed June 13, 2022.

Upon review of Cole's Motion and the parties' Notice, and for good cause shown, the Court finds that Cole's Motion shall be **GRANTED** and that the parties shall facilitate a mental health evaluation for Cole **under the terms agreed upon by the parties in the Notice.**

IT IS THEREFORE ORDERED BY THE COURT that:

1. Cole's Motion (Dkt. 49) is **granted**.

2. Under the terms agreed upon by the parties in the Notice (Dkt. 53):

a. Petitioner shall be transported as soon as practicable to the Oklahoma Forensic Center in Vinita, Oklahoma, to undergo a mental health evaluation regarding his competency to be executed. The Oklahoma Forensic Center, rather than the parties, shall choose a qualified and appropriate forensic examiner to evaluate Petitioner.

b. The parties shall equally split the costs related to Petitioner's transportation to and from the Oklahoma Forensic Center, as well as any required security.

c. The forensic examiner shall determine whether Petitioner has a "rational understanding": 1) "of the reason [Petitioner] is being executed"; and 2) "[t]hat [Petitioner] is to be executed and that execution is imminent."

d. The forensic examiner selected to evaluate Petitioner at the Oklahoma Forensic Center shall be provided the following documents by the parties:

i. Letter from forensic psychologist Dr. Samina Christopher, Ph.D, to the Honorable J. Dwayne Steidley, Associate District Judge, dated July 24, 2003;

ii. Letter from forensic psychologist Dr. Samina Christopher, Ph.D, to the Honorable J. Dwayne Steidley, Associate District Judge, dated August 18, 2004;

iii. Transcript of the Jury Trial on Competency held on September 13-14, 2004, before the Honorable J. Dwayne Steidley, Associate District Judge, Rogers County;

iv. Transcripts of Proceedings (regarding Petitioner's competency for execution) held on August 25, 2015, and August 28, 2015, before the Honorable James Bland, District Judge, Pittsburg County;

v. The October 2, 2015, OCCA opinion regarding Petitioner's competency for execution. *See Cole v. Trammell*, 358 P.3d 932 (Okla. Crim. App. 2015);

vi. "Independent Psychiatric Consultation" of Raphael Morris, M.D., dated April 4, 2009;

vii. "Updated Independent Psychiatric Consultation" of Raphael Morris, M.D., dated January 21, 2015;

viii. "Competency to Be Executed Evaluation" of David George Hough, Ph.D., ABPP, dated October 13, 2016;

ix. "Competency to Be Executed Evaluation: Addendum" of David George Hough, Ph.D., ABPP, dated January 16, 2018;

x. Curriculum vitae of David George Hough, Ph.D., ABPP;

xi. "First Declaration" of neuroradiologist Travis Snyder, D.O., dated May 11, 2022;

xii. "Second Declaration" of Travis Snyder, D.O., dated May 25, 2022;

xiii. Curriculum vitae of Travis Snyder, D.O.;

xiv. First Affidavit of David George Hough, Ph.D., ABPP, dated May 4, 2022;

xv. Second affidavit of David George Hough, Ph.D., ABPP, dated May 4, 2022;

xvi. Affidavit of Sergeant Ashley Barrett, dated June 2022;

xvii. Affidavit of Captain Randy Lumley, dated June 2022.

e. In the event the parties seek to include additional documents for the forensic examiner's review, the parties shall provide such documents only through agreement or Court order.

f. The forensic examiner at the Oklahoma Forensic Center shall complete the evaluation and provide his or her report to the Court, and to counsel for Respondent and Petitioner, as soon as practicable.

g. Petitioner "waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether [Petitioner] is mentally incompetent to be executed." OKLA. STAT. tit. 22, § 1005.1(H) (2022).

h. The Court further orders that Department of Corrections employees, staff, and anyone with whom it has contracted regarding Petitioner's mental health is hereby authorized, but not required, to disclose information regarding Petitioner's mental health to the forensic examiner. Further, in light of the Court's finding that, by putting his competence at issue, Petitioner has waived any claim of privilege with respect to his mental health and medical records, the Department of Corrections is authorized to release any such records to the forensic examiner at the Oklahoma Forensic Center. The forensic examiner shall maintain the confidentiality of these records. Any information provided to the forensic examiner must be provided to both parties.

i. Respondent Farris's duty to respond or make inquiry, to the extent that such duty exists, regarding Petitioner's competency—following counsel for Petitioner's letters attempting to initiate competency proceedings under OKLA. STAT. tit. 22, § 1005 (2021)—is suspended until after the evaluation of Petitioner at the Oklahoma Forensic Center is complete.

j. The forensic examiner at the Oklahoma Forensic Center is hereby authorized to contact counsel for Respondent or Petitioner in order to seek information he or she deems necessary to the evaluation. The forensic examiner is further authorized to discuss the contents of the report with

counsel for Respondent or Petitioner after the report is submitted. However, in the event the forensic examiner contacts counsel for either party at any time, the forensic examiner shall include or copy counsel for the other party.

IT IS SO ORDERED this 13th day of June, 2022.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE