NO. 22-5848
CAPITAL CASE

IN THE
Supreme Court of the United States

BENJAMIN ROBERT COLE, SR.,
Petitioner,
v.
JIM FARRIS, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Execution Scheduled for October 20th, 2022 at 10:00 a.m. CT

CAPITAL CASE
QUESTIONS PRESENTED

After the state district court held an evidentiary hearing on Petitioner Benjamin Cole's claimed incompetence, the Oklahoma Court of Criminal Appeals held that Cole failed to make a substantial threshold showing that he is incompetent to be executed. In particular, the court noted that the experts relied upon by Cole did not have the benefit of having had actual conversations with him. By contrast, Cole willingly engaged with a neutral expert at a state-run hospital and very clearly expressed his rational understanding of his punishment and the reasons therefore. The questions presented are:

1. Whether this Court should review the state courts' handling of factual disputes concerning competence to be executed when Cole received more due process than he was entitled under this Court's precedents, and this case presents neither a compelling case for review nor a proper vehicle for review.

2. Whether Oklahoma's statutory and procedural framework for determining claims of competence to be executed, including designation of the Warden as gatekeeper, is constitutional where it does not conflict with, or run afoul of, any case of this Court or any other court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State respectfully urges this Court to deny Petitioner Benjamin Robert Cole's Petition for Writ of Certiorari to review the unpublished opinion of the Oklahoma Court of Criminal Appeals ("OCCA") entered in this case on October 17, 2022. *Cole v. Farris*, Case No. MA-2022-898, slip op. (Okla. Crim. App. Oct. 17, 2022) (unpublished). Pet. Appx. 1-24.

STATEMENT OF THE CASE

A. Factual Background.

The OCCA set forth the relevant facts in its opinion on direct appeal:

> [Cole]'s nine-month-old daughter, [B.V.C.], was murdered on December 20, 2002. According to the State Medical Examiner, [B.V.C.]'s spine had been snapped in half, and her aorta had been completely torn through due to non-accidental stretching. The official cause of death was described as a fracture of the spine with aortic laceration.
>
> [Cole] eventually admitted causing the fatal injuries. In a statement he gave to police, [Cole] said he'd been trying, unsuccessfully, to get the child, who was lying on her stomach, to stop crying. [Cole] eventually 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 fatal injuries.
>
> Evidence was admitted that [Cole] took no remedial action just after this incident happened. He went and 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. (He did, however, attempt CPR when the situation turned grave, before the ambulance arrived.) Only after rescue efforts had failed and an autopsy was performed did the medical personnel learn that [B.V.C.]'s spine had been snapped. The autopsy physician testified that the injury required a great amount of force and would not be the result of normal back-bending by a nine month old. The death was eventually ruled a

> homicide. When told of this fact by the authorities, [Cole] asked, "How many years am I looking at?" At this point, [Cole] confessed his responsibility for the injuries.

Cole v. State, 164 P.3d 1089, 1092-93 (Okla. Crim. App. 2007) (paragraph numbers omitted).

B. Procedural Background.

In 2004, a jury convicted Cole of first-degree child abuse murder and sentenced him to death, finding the existence of two aggravating circumstances (that Cole was previously convicted of a felony involving the use or threat of violence to another[1] and that B.V.C.'s murder was especially heinous, atrocious, or cruel). *Cole*, 164 P.3d at 1092. After exhausting all state and federal appeals, Cole is now scheduled for execution on October 20, 2022, nearly two decades after murdering B.V.C. But Cole claims he is currently incompetent to be executed.

"Few capital cases have a more developed record on the issue of competency." *Cole v. State*, Case No. PCD-2005-23, slip op. at 3 (Okla. Crim. App. Jan. 24, 2008) (unpublished). Indeed, Cole's *unsuccessful* challenges to his competence have been a common theme throughout the lifetime of his case, as Cole's "competence has been litigated throughout this case." *Cole*, Case No. MA-2022-898, slip op. at 8; *see also* Pet. Appx. 8. Cole's challenges to his competence have mainly revolved around his communication issues with counsel and anyone affiliated with counsel, his

[1] This aggravating circumstance was supported by evidence that Cole had previously been convicted of aggravated child abuse in California for the horrific abuse of his then six-month-old-son. *Cole*, 164 P.3d at 1094. The injuries to Cole's infant son "consisted of a cigarette burn to the eyelid, bruises on the head, older bruises to the arms and torso, bruising to the genitals, and a broken ankle." *Id.*

disagreements with counsel, his refusal to assist counsel, and his dedication to his religion. Counsel for Cole often cast Cole's communication issues with counsel, and anyone affiliated with counsel, as well as his "extreme religiosity," as signs of incompetence and greater mental health issues; but the state and federal courts considering Cole's incompetence claims have *consistently* found that Cole's actions "demonstrate[] an uncooperative, albeit bizarre, defendant making deliberate choices." *Cole*, Case No. PCD-2005-23, slip op. at 4; *see also Cole*, 164 P.3d at 1093-94, *cert. denied*, *Cole v. Oklahoma*, 553 U.S. 1055 (2008); *Cole*, Case No. PCD-2005-23, slip op. at 3-5; *Cole v. Workman*, No. 08-CV-0328-CVE-PJC, 2011 WL 3862143, at *7-20 (N.D. Okla. Sept. 1, 2011); *Cole v. Trammell*, 755 F.3d 1142, 1148-54 (10th Cir. 2014), *cert. denied*, 574 U.S. 891 (2014). Thus, the courts have consistently rejected Cole's claims of incompetence.

Cole was initially scheduled to be executed in 2015. In state-court competency proceedings at that time, both the state district court and OCCA rejected Cole's claims of incompetence to be executed and determined Cole failed to make the required substantial threshold showing of incompetence. *See Cole v. Trammell*, 358 P.3d 932, 936-37 (Okla. Crim. App. 2015). In rejecting Cole's claims, the OCCA provided a succinct summary of Cole's well-established history of competence:

> [Cole]'s competence has been a central issue in this case. His strong religious beliefs have caused his legal team to challenge his competence. During the pre-trial proceedings, defense counsel, twice, raised a doubt as to [Cole]'s competence. Both the State's and the defense's psychologist concluded that [Cole] was competent. Ultimately, a jury determined that [Cole] was competent to stand trial. *Cole v. State*, PCD-2005-23, unpub. disp. (Okla.Crim. Jan. 24, 2008); *Cole v. Trammell*, 755 F.3d at 1149-50. Afterwards, [Cole] was less inclined to

speak to defense counsel. *Cole v. State*, 2007 OK CR 27, ¶¶ 10-11, 164 P.3d at 1093-94.

[Cole] attempted to raise issues concerning his competency during the post-conviction proceedings. Those claims were rejected. *Cole v. State*, PCD-2005-23, unpub. disp. (Okla.Crim. Jan. 24, 2008).[3] After counsel challenged [Cole]'s competency, [Cole] was less inclined to speak with post-conviction counsel. *Cole v. Trammell*, 2015 WL 4132828, at *2-3 (N.D.Okla. July 8, 2015).

> [3] As a prisoner's sanity to be executed must be judged as to his present mental state when execution is imminent, we directed [Cole] to raise any claims of competency to be executed in the District Court at such time as an execution was scheduled. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45, 118 S.Ct. 1618, 1622, 140 L.Ed.2d 849 (1998).

The Federal Public Defender's Office proceeded with these same claims during federal habeas corpus review. The claims were rejected. *Cole v. Workman*, 2011 WL 3862143 (N.D.Okla. Sept. 1, 2011). Initially, [Cole] willingly spoke with the attorneys, investigators, and experts the federal public defender employed in his case. However, [Cole] stopped meeting with anyone from that office after attorney, Ken Lee, investigator, Julie Gardner, and Dr. Raph[ae]l Morris, criticized his ministry. Because Gardner did not understand [Cole]'s religious beliefs, she determined in her mind that [Cole] was irrational. Dr. Morris admitted that [Cole] might have been offended when he cited [Cole]'s "comfort of being saved by Jesus" as a "primitive coping mechanism" in his report.[4]

> [4] At the time of the evidentiary hearing, [Cole] identified as a "Messianic Jew." (Evid. Hrg. Tr. 102-04). Dr. Morris testified that [Cole]'s desire for Kosher meals was illogical because [Cole] was not raised Jewish. (Evid. Hrg. Tr. 186-87).

[Cole] had the ability and intelligence to speak to his legal team. His refusal to speak to certain individuals appeared to be a choice on his part. When [former Warden Anita Trammell] attempted to persuade [Cole] to visit with his attorneys, [Cole] informed her that he did not want to visit with them. In July of 2014, Dr. Morris attempted to meet with [Cole] for the purpose of evaluating his competency to be executed, [Cole] indicated that he had seen Dr. Morris before and did not have any

> more information for him. When [Cole] met with Dr. Morris pursuant to the District Court's order, [Cole] refused to talk to Morris.
>
> In contrast, [Cole] willingly spoke with [former Warden Anita Trammell] and the psychologists employed by the Oklahoma Department of Corrections . . . .

Cole, 358 P.3d at 936-37 (paragraph numbers omitted). After the OCCA denied Cole relief, however, at the request of the State, Cole's execution was indefinitely stayed due to ongoing litigation concerning Oklahoma's execution protocol (with which this Court is very familiar, *see, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015); *Crow v. Jones*, 142 S. Ct. 417 (2021)).

In January 2022, in anticipation of the conclusion of the execution protocol litigation (and the potential setting of an execution date), Cole reinitiated competency proceedings in federal district court before proceeding to state court to exhaust his claims of incompetence to be executed. Ultimately, the federal habeas court, based on the *agreement* of the parties in anticipation of state court competency proceedings, ordered Cole to be evaluated by a neutral mental health expert at the Oklahoma Forensic Center ("OFC"). Pet. Appx. 361-64. In July 2022, Dr. Scott Orth, Director of Forensic Psychology at the OFC, evaluated Cole and found him to be competent to be executed. Pet. Appx. 199-210.

Not satisfied with the results of the agreed-upon *neutral* evaluation,[2] Cole's counsel repeatedly sent letters to the Warden of Cole's prison, Warden Jim Farris, requesting Warden Farris to find, based on the opinions of Drs. David George Hough

[2] The OCCA made a specific finding that Dr. Orth was a "neutral evaluator" selected by the OFC following the federal habeas court's order. *Cole*, Case No. MA-2022-898, slip op. at 19; *see also* Pet. Appx. 19.

and Travis Snyder, that there was "good reason" under Okla. Stat. tit. 22, § 1005 (2021) to refer this matter for competency proceedings in the state district court. Pet. Appx. 192-96, 211-73, 277-92, 335-47. Pursuant to § 1005, if the Warden has "good reason to believe" a capital defendant has become incompetent, then he must initiate jury trial proceedings in state district court on the issue of competency. *See* Okla. Stat. tit. 22, § 1005 (2021). On August 2, 2022, however, Warden Farris informed Cole's counsel that after "carefully consider[ing] all information and material submitted by Mr. Cole's attorneys regarding his mental health and conditions of confinement," as well as the examination report of Dr. Orth, the Warden did not have good reason to believe Cole is incompetent pursuant to § 1005. Pet. Appx. 197-98.

Cole then filed a mandamus action in state district court, requesting the court to order Warden Farris to initiate competency proceedings pursuant to § 1005. Following extensive briefing by the parties, and over the State's objection, the state district court determined it would hold an evidentiary hearing to determine whether Cole met his *prima facie* burden of incompetence (*i.e.*, whether Cole made a substantial threshold showing that he did not have a rational understanding of his execution or the reasons for it) (09/07/2022 Tr. 26-27). *See also Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); Pet. Appx. 25-28. After a discussion about the scope of the testimony to be presented at the hearing, Cole's counsel privately conferred and then announced to the court that they wished to call only two witnesses: Warden Farris and Cole himself (09/07/2022, Court Minute).[3]

[3] *See also* Oklahoma State Courts Network ("OSCN"), Docket and Case Information for *In re Benjamin R. Cole*, District Court of Pittsburg County Case No. CV-2022-140,

At the September 30, 2022, evidentiary hearing, Cole's counsel presented a multitude of exhibits and called only one witness, Warden Farris. Pet. Appx. 36-112, 158-66. While Cole himself was present at the hearing—and the state district court was therefore able to observe him—his attorneys did not call him to testify as originally announced (09/07/2022, Court Minute). The State called no witnesses and rested on the extensive report of Dr. Orth. Pet. Appx. 168.

On October 4, 2022, the state district court denied mandamus relief, noting that it had reviewed all relevant case law, all briefing, the "voluminous record," "observations of those who have interacted with" Cole, expert reports, the testimony of Warden Farris, medical records, and psychiatric records. Pet. Appx. 25-28. Ultimately, placing greater weight on the expert report of Dr. Orth (*i.e.*, as will be explained, the only expert that has recently spoken to and successfully evaluated Cole about Cole's understanding of his execution), the state district court determined that Cole did not meet the required *prima facie* burden of incompetence and "is competent to be executed as currently scheduled on October 20, 2022." Pet. Appx. 25-28.

On October 10, 2022, Cole filed a petition for writ of mandamus and application for stay of execution in the OCCA, contending both that he had made a substantial threshold showing of incompetence entitling him to a jury trial and that § 1005 is constitutionally infirm because it allows the Warden, as part of the executive branch, to serve as gatekeeper of execution competency claims. Pet. Appx. 1, 13. On October

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https://www.oscn.net/dockets/GetCaseInformation.aspx?db=pittsburg&number=CV-2022-00140&cmid=328425 (last visited Oct. 15, 2022).

12, 2022, the State responded in opposition to Cole's requests for mandamus relief and a stay of execution. Pet. Appx. 1.

On October 14, 2022, prior to any adjudication of Cole's mandamus appeal by the OCCA, Cole filed an Emergency Application for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari in this Court. That same day, the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court, ordered the State to respond on October 17, 2022. On October 17, 2022, the State responded in opposition to Cole's request for an emergency stay of execution.

Shortly after the filing of the State's response in this Court, on October 17, 2022, the OCCA denied mandamus relief and rejected Cole's request for a stay of execution. After reviewing the evidence presented to it on appeal, including the transcript of the evidentiary hearing and accompanying exhibits, the OCCA concluded that Cole did not overcome the presumption of competence, and "neither [Warden Farris] nor the District Court abused their discretion in finding Petitioner failed to meet the required 'substantial threshold' showing of insanity." *Cole*, Case No. MA-2022-898, slip op. at 17, 23; *see also* Pet. Appx. 17, 23. Notably, the OCCA found Cole's evidence of alleged incompetence unimpressive, as Cole primarily relied upon the opinions of experts that were *never* "able to converse with [Cole] regarding his incompetence." *Cole*, Case No. MA-2022-898, slip op. at 9; *see also* Pet. Appx. 9. Ultimately, the OCCA determined, in "[r]eviewing the evidence adduced at the hearing, it is clear that [Cole], 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." *Cole*, Case No. MA-2022-898, slip op. at 18-19; *see also* Pet. Appx. 18-19.

On October 18, 2022, Cole filed a Petition for Writ of Certiorari with this Court seeking review of the OCCA's decision.

REASONS FOR DENYING THE WRIT

Cole asks this Court to grant certiorari to consider the constitutionality of Oklahoma's statutory procedures for determining competency to be executed in Okla. Stat. tit. 22, § 1005 (2021). Pet. i. "A petition for a writ of certiorari will be granted only for compelling reasons," such as to resolve conflicts in the law among federal circuit courts and/or the highest state courts or between this Court and lower courts. Sup. Ct. R. 10(a)-(c). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Here, Cole's case presents neither an appropriate vehicle nor a compelling issue for this Court's review. As previously noted, Cole's claim of incompetency rests on experts who have not had actual conversations with him concerning his execution; in contrast, Cole willingly engaged with a neutral expert at a state-run hospital and very clearly expressed his rational understanding of his punishment and the reasons therefore. Cole's failure to make a "substantial threshold showing" of incompetence—a prerequisite under this Court's precedents to be entitled to due process on his competence claim—makes his case a very poor vehicle for consideration of the constitutionality of § 1005. Cole's challenge to § 1005 is further unworthy of this

Court's review because a new statute goes into effect in mere days that removes the Warden from Oklahoma's procedure for determining competence. Thus, even assuming *arguendo* there is any weight to Cole's constitutional arguments, he has not identified a reoccurring problem necessitating this Court's intervention.

In any event, Cole's constitutional arguments are patently without merit—let alone do they present any compelling question warranting further consideration. The OCCA and the Tenth Circuit Court of Appeals have both consistently upheld the constitutionality of § 1005 against arguments identical to Cole's. Finally, Cole received an evidentiary hearing below—more process than he was actually entitled to under this Court's precedents given his failure to make a substantial threshold showing of incompetence—so his heavily fact-bound challenge to § 1005 and the OCCA's denial of relief is entirely unworthy of this Court's review.

The Petition for Writ of Certiorari should be denied.

CERTIORARI REVIEW ON THESE QUESTIONS PRESENTED SHOULD BE DENIED BECAUSE THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW, IDENTIFIES NO ISSUE WORTHY OF THIS COURT'S INTERVENTION, POINTS TO NO CONFLICT IN THE LAW, AND OTHERWISE PRESENTS NO COMPELLING CASE FOR REVIEW.

A. Cole's case is a poor vehicle for consideration of the issues raised.

Cole's case is not entitled to certiorari review because his case is an exceedingly poor vehicle for consideration of the issues raised. Regardless of the constitutionality of Oklahoma's procedures for determining competence to be executed under Okla. Stat. tit. 22, § 1005 (2021), Cole has not made the "substantial threshold showing" of incompetence necessary to entitle him to said procedures. *Panetti*, 551 U.S. at 949

(quotation marks omitted); *see also Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986). As described above, Dr. Orth—a neutral court-appointed expert who evaluated Cole after *the parties agreed* to a forensic evaluation of Cole at the OFC—found Cole to be competent to be executed. Pet. Appx. 199-210.

During the July 2022 evaluation by Dr. Orth, when asked of his understanding of the reason for the evaluation, Cole stated, "'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.'" Pet. Appx. 201. Cole then recited the scheduled execution dates of the two inmates who were scheduled to be executed before him and then stated his execution was scheduled for October, "possibly the 20th. . . ." Pet. Appx. 201 (quotation marks omitted). "[T]hey 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." Pet. Appx. 201.

Dr. Orth determined that Cole "has a rational understanding of the reason he is being executed by the State of Oklahoma." Pet. Appx. 208-09. *See Panetti*, 551 U.S. at 958-60 (the Eighth Amendment bars as cruel and unusual the execution of a capital inmate who is incompetent and therefore lacks "a rational understanding of the reason for the execution"). Similarly, Cole was aware of the date of his execution, that "the State of Oklahoma will execute him via a lethal injection . . . in the 'execution

chamber' at OSP," 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." Pet. Appx. 209. Further, Cole never referenced a belief that, "when his execution is carried out, that any sort of supernatural, otherworldly, mystical, and/or divine, or prophetic event will transpire." Pet. Appx. 207. Rather, Cole expressed that after his execution, his "corporeal form will cease to exist . . . but note[d] that his 'spirit' will 'hopefully (as he expresses)' return 'to my Father in Heaven.'" Pet. Appx. 209. Dr. Orth further concluded that 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." Pet. Appx. 208-09.

Given Cole's statements during Dr. Orth's evaluation and Dr. Orth's unequivocal conclusions therefrom, the state district court and the OCCA were clearly correct in concluding Cole had not made a substantial threshold showing of incompetence entitling him to further due process on his incompetence claim. Pet. Appx. 13-23, 25-28. Cole's reliance on *paid* defense experts, such as Drs. Raphael Morris, Hough, Anne Hayman, and Snyder, does not demonstrate a compelling question as to his competence or that Dr. Orth's conclusion is an "outlier."[4] Pet. 12-18, 21. To be sure, Dr. Orth is the *only* expert that has recently *and* successfully

[4] To the contrary, rather than being an outlier, Dr. Orth's evaluation is entirely consistent with the previous state and federal court opinions in this case. *See generally Cole*, 358 P.3d at 936-37 (quoted above, discussing Cole's claims of incompetence from trial through state and federal appeals, including the fact that a state psychologist, a defense psychologist, *and a jury* determined that Cole was competent to stand trial).

interacted with Cole as to Cole's understanding of his execution. Dr. Morris received little to no cooperation from Cole from 2008 to 2015 and yet, despite this, Dr. Morris nonetheless opined that Petitioner was incompetent and suffered from "Schizophrenia, Paranoid Type." Pet. Appx. 333-34. Importantly, however, in its 2015 opinion and in the 2022 opinion now at issue, the OCCA rejected Dr. Morris's views as suspect, considering his "minimal interaction" with Cole, and it pointed out that Dr. Morris testified, in 2015, that "[Cole] 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*, Case No. MA-2022-898, slip op. at 21; *Cole*, 358 P.3d at 939; *see also* Pet. Appx. 21.

Additionally, Cole has refused to meet with Dr. Hough from 2016 to 2022.[5] Even in their 2016 meeting, when Dr. Hough asked Cole "why does the state intend to execute you" and "[w]hat did you do that the state intends to execute you for," Cole refused to answer. Pet. Appx. 224. Nonetheless, Dr. Hough concluded there was no affirmative evidence showing Cole was competent, Pet. Appx. 230, ignoring the well-established *presumption* of competence. *See Ford*, 477 U.S. at 426 (Powell, J., concurring) (a state "may properly presume that petitioner remains sane at the time

[5] Cole's assertion, particularly centered around Dr. Hough's visit to the prison in April 2022, that the Oklahoma Department of Corrections refused to "facilitate" in-person interviews with Cole is disingenuous. Pet. 15. Indeed, Warden Farris testified that prison staff "[n]ever" attempted to prevent communication between Cole and his legal team. Pet. Appx. 151-52. Rather, prison staff was unwilling to *forcefully* remove Cole from his cell or *force* Cole to communicate with his legal team against his will without a court order. Pet. Appx. 151-52. Any lack of communication between Cole and his legal team is a "choice on his part." *Cole*, Case No. MA-2022-898, slip op. at 22; *Cole*, 358 P.3d at 936; *see also* Pet. Appx. 22.

sentence is to be carried out");[6] *see also Cole*, 358 P.3d at 939 ("There is a presumption that the prisoner is competent."). Indeed, the OCCA repeatedly discussed its overall skepticism of Dr. Hough's opinions and diagnoses considering Dr. Hough "never received cooperation from [Cole] despite numerous attempts to evaluate him beginning in 2016," and Dr. Hough's "opinions about [Cole]'s competence are based upon not even one interview with him . . . ." *Cole*, Case No. MA-2022-898, slip op. at 21-23; *see also* Pet. Appx. 21-23.

Finally, Drs. Hayman and Snyder have *never* met or interacted with Cole and have nonetheless concluded, based predominately on 2004 and 2022 MRI images of Cole's brain, that he is incompetent and/or exhibiting severe symptoms of mental illness and brain damage. Pet. Appx. 275-92. *But see* Hal S. Wortzel, *Advanced Neuroimaging and Mild Traumatic Brain Injury Litigation*, *Revisited*, The Journal of the American Academy of Psychiatry and the Law, Vol. 50, No. 3, Sept. 1, 2022, at 338 (according to the Radiological Society of North America, "[a]t present, there is insufficient evidence supporting the routine clinical use of these advanced neuroimaging techniques for diagnosis and/or prognostication at the individual patient level").[7] Notably, the OCCA expressed marked skepticism regarding Dr.

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[6] Although this language stems from Justice Powell's concurrence, this Court has already determined that since there was no majority opinion in *Ford*, Justice Powell's concurrence, "which also addressed the question of procedure, offered a more limited holding," and therefore controls. *Panetti*, 551 U.S. at 949; *see also Cole v. Roper*, 783 F.3d 707, 711 (8th Cir. 2015) (presumption of competence exists per *Ford*); *Barnard v. Collins*, 13 F.3d 871, 876 (5th Cir. 1994) (adopting the "standard as enunciated by Justice Powell as the *Ford* standard").

[7] Much like his brain lesion provides zero basis for finding him incompetent, Cole's diagnosis with schizophrenia—by *paid* defense experts, Drs. Morris and Hough—likewise provides zero basis for finding him incompetent, as "*Panetti* framed its test . . . in a way utterly indifferent

Snyder's opinions in particular, noting that Dr. Snyder was willing to opine as to Cole's competence despite "never having met with [Cole] or examin[ing] him." *Cole*, Case No. MA-2022-898, slip op. at 22; *see also* Pet. Appx. 22.

Given Cole's total failure to make a substantial threshold showing of incompetence to the state courts, his case is not an appropriate vehicle to consider whether Oklahoma's procedures for determining competence to be executed—for those prisoners who have made a substantial showing—are constitutional. *See McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821) ("question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed"); *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly").

B. Cole's case is not entitled to certiorari review because it does not identify a reoccurring problem warranting this Court's intervention.

Cole's case also is not entitled to certiorari review because Cole has not provided an issue warranting this Court's intervention. Cole openly admits that, imminently, a new statute goes into effect repealing § 1005 and removing the Warden

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to a prisoner's specific mental illness," and "[t]he *Panetti* standard concerns, once again, not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019). Moreover, notably, despite the fact that Cole was evaluated by multiple experts prior to trial and, later, in anticipation of direct and post-conviction appeal, "[n]one of those experts concluded that Cole suffered from paranoid schizophrenia," *Cole*, 755 F.3d at 1162, even though Dr. Hough claims that Cole "was evidently showing signs of emergent schizophrenia prior to arrest and incarceration" for B.V.C.'s murder. Pet. Appx. 226. Cole's diagnosis with schizophrenia should therefore be viewed with a great deal of skepticism.

from Oklahoma's procedure for determining competence. Pet. 7-10. *See* Okla. Stat. tit. 22, § 1005.1 (eff. Nov. 1, 2022).[8] Thus, even assuming Cole demonstrates constitutional infirmity in § 1005 (which he cannot), he has not identified a reoccurring problem warranting this Court's intervention. Rather, he seeks, at bottom, error correction, which is not a worthy basis for this Court's review. *See Halbert v. Michigan*, 545 U.S. 605, 605 (2005) (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function").

Cole's argument that his "execution by a state mechanism that will no longer exist eleven days later is impermissibly arbitrary," Pet. 10, was neither pressed to nor passed upon by the OCCA.[9] Thus, this constitutional claim is not properly before

[8] The State disagrees with Cole's insinuation that Oklahoma's statutory procedures were changed to remedy a "constitutional defect." Pet. 6-7. Instead, the amendment of § 1005—rather than indicating the prior version is somehow unconstitutional—serves to modernize Oklahoma's procedures. This modernization takes a variety of forms. For example, the modernized process ensures that competency litigation is heard in an inmate's county of conviction rather than county of confinement. Okla. Stat. tit. 22, § 1005.1(F) (eff. Nov. 1, 2022). Currently, because all Oklahoma inmates are housed in McAlester, Oklahoma, all competency claims are heard in Pittsburg County. As another example, the modernized process streamlines the timeline of competency claims in order to prevent frivolous, last-minute claims of incompetence intended to delay execution. Okla. Stat. tit. 22, § 1005.1(D) (eff. Nov. 1, 2022). Currently, § 1005 imposes no time limits on claims of incompetence. Importantly, however, none of this modernization indicates that the current version of § 1005, or the case law interpreting it, is constitutionally deficient. *Cf. Pavatt v. Carpenter*, 928 F.3d 906, 928 (10th Cir. 2019) (*en banc*) (circuit court found instruction on aggravating circumstance sufficient to narrow jury's discretion; in so doing, circuit court discussed how state court amended jury instruction (after petitioner's trial) on aggravating circumstance to "more fully inform" juries, but the state court emphasized that this did not render the prior instruction unlawful or unconstitutional). And, irrespective of the modernizing amendment to § 1005, the OCCA and the Tenth Circuit have already found that § 1005 complies with constitutional mandates, as discussed herein.

[9] The most Cole did was note the statute's amendment as alleged evidence the current statute was unconstitutional. *Cole v. Farris*, No. MA-2022-898, *Petitioner Benjamin Cole's Combined Petition for Writ of Mandamus and Brief in Support* at 10 (OCCA Oct. 10, 2022). He did not make, or so much as hint at, an argument that it was unconstitutionally arbitrary to subject him to a statute that was changing imminently.

this Court, both statutorily and jurisprudentially. *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (*per curiam*) ("Under [28 U.S.C. § 1257(a)] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." (quotation marks omitted)); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address argument "not addressed by the Court of Appeals" because "we are a court of review, not of first view").

C. Cole's case is not entitled to certiorari review because he has shown no conflict between § 1005 and the precedent of this Court.

Cole's case is likewise not entitled to this Court's review because Cole has not identified any conflict between § 1005 and any precedent of this Court or any other court. *See* Sup. Ct. R. 10(c)(b) ("A petition for a writ of certiorari will be granted only for compelling reasons," including for example where a state court's decision on a federal issue conflicts with another state or federal court). In fact, the case law is unanimously against Cole, as the OCCA and the Tenth Circuit have consistently rejected identical constitutional challenges to § 1005 and held that the statute does not violate *Ford*, *Panetti*, or the Constitution (including, previously, *in Cole's very case*). *See Ochoa v. Trammell*, No. 12-6310, 504 F. App'x 705, 708 (10th Cir. Dec. 3, 2012) (unpublished); *Allen v. Workman*, No. 12-6253, 500 F. App'x 708, 710-12 (10th Cir. Oct. 18, 2012) (unpublished); *Cole*, 358 P.3d at 938-39; *Allen v. State*, 265 P.3d 754, 756 (Okla. Crim. App. 2011). Indeed, in the very opinion Cole is now challenging, the OCCA reaffirmed its previous findings, as well as the Tenth Circuit's previous

findings, and recognized "the propriety of the procedure under Section 1005 and the adequacy of mandamus review on the issue of competence to be executed." *Cole*, Case No. MA-2022-898, slip op. at 15-16; *see also* Pet. Appx. 15-16.

Further, § 1005 is plainly distinguishable from the invalidated Arkansas statute pointed to by Cole in his argument, Pet. 9—which delegated to the department of corrections director the initiation of competency proceedings *without* providing the death-row prisoner access to the courts to make a substantial threshold showing, *see Ward v. Hutchinson*, 558 S.W.3d 856, 865 (Ark. 2018)—because in Oklahoma "both the state trial court and the OCCA review[] the warden's gatekeeping function" through mandamus review. *Allen*, 500 F. App'x at 711.[10] There is simply no conflict in the law.

D. Certiorari review should be further denied because Cole does not present a compelling case for certiorari review and instead alleges, at bottom, erroneous factual findings and the misapplication of a properly stated rule.

Finally, Cole fails to present a compelling issue for certiorari review because he received *more* due process in state court than he was even entitled to under *Ford*, *Panetti*, and the Constitution. According to this Court, only after he or she meets the "high" burden of making a substantial threshold showing of incompetence is a capital

[10] Petitioner's claim that § 1005 is unlike any other statute in the nation is unconvincing. Pet. 8. For starters, he admits that several other states "provide statutory authority to the Director of Corrections of their state prison systems, though not to the death-row warden," to initiate competency proceedings, Pet. 8, but he does not explain why a warden and a department of corrections director are materially different for constitutional purposes. Furthermore, as explained above, Oklahoma's scheme permits mandamus review—indeed, Cole's very case illustrates this mechanism of review at work. Cole's attorneys disagreed with the Warden's decision not to initiate competency proceedings, so they filed a mandamus action that resulted in an evidentiary hearing in state district court.

defendant entitled to a fair, impartial hearing complying with procedural due process. *Panetti*, 551 U.S. at 949, 952 ("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"; for example, "[a]fter a prisoner has made the requisite [substantial] threshold showing, *Ford* requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court."); *see also Ford*, 477 U.S. at 417; *Bedford v. Bobby*, 645 F.3d 372, 380 (6th Cir. 2011) ("A claimant is entitled to additional procedures once he has made a 'substantial' showing of insanity, not merely because he has shown a conflict in the record." (citation omitted)).

Here, despite not initially making such a threshold showing to the state district court, Cole *did* receive an evidentiary hearing in state court to have an *additional* opportunity to make that showing. Pet. Appx. 29-188. At that hearing, Cole received an opportunity to be heard (via extensive briefing prior to the hearing *and* in-person argument during the hearing), as well as an opportunity to present evidence countering the opinion of the court-appointed expert (Dr. Orth).[11] *Panetti*, 551 U.S. at 949, 952 (minimum due process requires an inmate the opportunity to be heard and present evidence *after* meeting the substantial threshold showing). At that

[11] Cole's insinuation that he was limited in his presentation of evidence at this hearing, Pet. 5, is disingenuous. The state district court provided Cole the option to call his experts to testify in a way that did not "regurgitate" their reports (09/07/2022 Tr. 26-28); nonetheless, Cole's attorneys made the conscious decision not to call any expert witnesses or (tellingly) Cole himself. Moreover, it was not as if the state district court refused to consider expert evidence—the court certainly considered and studied numerous written expert reports in making its determination. Pet. Appx. 25-28.

hearing, Cole's evidence fell far short of making the substantial threshold showing or overcoming the presumption of competence. In fact, the only witness Cole called was Warden Farris, who testified he did not believe Cole to be incompetent. And, as explained above, Cole's expert reports indicated Cole was incompetent based on a lack of evidence to the contrary, rather than on affirmative evidence of incompetence. While Cole seems to (incorrectly) think he was entitled to a jury trial on the issue, "a constitutionally acceptable procedure [in the competency context] may be far less formal than a trial." *Panetti*, 551 U.S. at 949 (quotation marks omitted). Considering he received more due process than he was entitled, Cole has not presented this Court with a compelling issue for certiorari review.

Cole also hints at issues with the standard applied by the courts below, including that §1005 pre-dates *Ford* and that the OCCA failed to correct the overly high burden to which the state district court allegedly held him. Pet. 10-11, 18-21. But the OCCA undeniably applied the correct standard from this Court's precedents, even citing those precedents:

> 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)[.]

Cole, Case No. MA-2022-898, slip op. at 13-14; *see also* Pet. Appx. 13-14. The OCCA repeatedly noted Cole had failed to make the requisite substantial threshold showing of incompetence. *Cole*, Case No. MA-2022-898, slip op. at 16-17, 23; *see also* Pet. Appx. 16-17, 23. Thus, Petitioner's request for certiorari review identifies, at best, "the

misapplication of a properly stated rule of law," Sup. Ct. R. 10, an unworthy basis for this Court's review.

In any event, Cole's arguments rest on an incorrect premise—the state district court did not require him to show he was incompetent. Rather, the court applied the proper substantial threshold showing test and then *further* affirmatively determined that Cole was competent. As Cole admits, the OCCA itself "repeatedly looked to district court's sole reference to 'substantial threshold' burden." Pet. 20. In other words, Cole admits that the OCCA applied the correct standard, and it is the OCCA's decision—not the state district court's—of which he seeks review. Further, even assuming *arguendo* the state district court did make any errors, the OCCA was not required to grade its opinion line by line and expressly discuss every complaint raised by Cole on appeal. *See Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. . . . [B]ut we have no power to tell state courts how they must write their opinions.").

As to Cole's final legal argument, his fleeting Sixth Amendment claim—that he is entitled to a jury finding on competency under *Ring v. Arizona*, 536 U.S. 584 (2002), because competency determines his "eligibility" for the death penalty, Pet. 19-20 n.5—is not properly before this Court. For starters, Cole does not identify this Sixth Amendment claim within his questions presented, which focus entirely on his Eighth Amendment based *Ford*/*Panetti* claim. Pet. i. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 537 (1992) (refusing to consider "question *related* to the one

petitioners presented, and perhaps *complementary* to the one petitioners presented," where question was nevertheless "not fairly included" within the question actually presented (quotation marks omitted, emphases in original)). Moreover, as before this Court, Cole made the argument only briefly, in a footnote, to the OCCA, *Cole v. Farris*, No. MA-2022-898, *Petitioner Benjamin Cole's Combined Petition for Writ of Mandamus and Brief in Support* at 9 n.4 (OCCA Oct. 10, 2022), and that Court did not expressly discuss the claim. *See Cutter*, 544 U.S. at 718 n. 7 (declining to consider argument where, although the argument was raised below, the federal appellate court did not address it, as this Court is "a court of review, not of first view").

Finally, Cole's remaining attacks are entirely fact bound and are therefore not entitled to certiorari review pursuant to this Court's Rules. *See* Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). In any event, Cole's fact-based complaints are absolutely unsupported by the record. Particularly, his criticism of the reliance on Dr. Orth's "outlier" report by Warden Farris, the state district court, and the OCCA—despite the "several defense expert reports finding Mr. Cole severely mentally ill with schizophrenia, possessing a damaged brain, and incompetent to be executed"—is unsupported by the record. Pet. 18. His related claim that the OCCA "errantly" found that Cole presented "no new evidence regarding his competence" is likewise unsupported. Pet. 21.

As summarized above, unlike Dr. Orth, *none* of Cole's experts have recently *or* successfully interacted with him with respect to his competence to be executed, and

much of the evidence that Cole submitted to the state district court and the OCCA was previously presented to the OCCA (and rejected by the OCCA) in 2015, such as the opinion of Dr. Morris. The OCCA found as such:

> [Cole] admitted several expert reports at the [evidentiary] hearing. The most striking aspect of these reports is that none of them were based upon the experts' personal interactions with [Cole]. A recurring theme in these materials is that [Cole] holds strong religious beliefs and generally refuses to communicate with counsel, or anyone associated with counsel.
>
> . . . [discussing Cole's experts]
>
> [Cole] attempted to discredit [Dr.] Orth's evaluation by submitting [Dr.] Hough's critique of it. However, the main thrusts of his critique are that [Dr.] Orth's report is based upon a single interview with [Cole], rather than a series, and his skepticism that [Cole] would communicate so freely with [Dr.] Orth. Given the fact that [Dr.] Hough's opinions about [Cole]'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 [Cole] was initially willing to speak with his defense team; but after reading a report prepared by [Dr.] Morris during federal habeas proceedings, disparaging [Cole]'s beliefs as a "primitive coping mechanism," he refused to interact with them.[] It seems clear that [Cole] viewed [Dr.] Orth, not a member of [Cole]'s defense team, but a neutral evaluator, as someone who held no pre-conceived notions about him.
>
> [Cole] 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 [Cole] lacks the competence to be executed. Accordingly, we conclude neither [Warden Farris] nor the District Court abused their discretion in finding [Cole] failed to meet the required 'substantial threshold' showing of insanity.

Cole, Case No. MA-2022-898, slip op. at 20-23; *see also* Pet. Appx. 20-23. Thus, as found by the OCCA, aside from Dr. Orth's report finding him competent, Petitioner truly presented no *new* evidence to the state courts relevant to his competence.

Furthermore, contrary to Cole's claims, the state district court and the OCCA did not simply reject all of Cole's evidence based on Dr. Orth alone. Rather, the state courts' opinions were based on the extensive history of Cole's competence (discussed above), Dr. Orth's neutral examination, and Warden Farris's *recent* interactions with Cole. As the OCCA found:

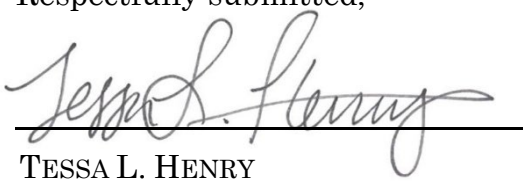
> [Warden Farris] testified at the hearing and indicated he had never observed [Cole] to be dirty and that [Cole] was very specific in ordering food items from the canteen and voicing complaints if the order was incorrect. On September 15, 2022, [Warden Farris] had [Cole] moved to an execution cell as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

Cole, Case No. MA-2022-898, slip op. at 11-12, 20; *see also* Pet. Appx. 11-12, 20. Clearly, Cole's fact-based arguments are unsupported by the record before this Court.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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October 18, 2022