

CAPITAL CASE

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

IN RE BENJAMIN COLE,

Case No. _____

****EXECUTION SCHEDULED FOR OCTOBER 20, 2022 10:00 AM CT ****

**PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS
AND REQUEST FOR STAY OF EXECUTION
BY A PERSON IN STATE CUSTODY
UNDER TITLE 28 UNITED STATES CODE SECTION 2241**

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INTRODUCTION

Petitioner Benjamin Cole is in danger of being executed by the State of Oklahoma while incompetent. He is incarcerated at the Oklahoma State Penitentiary under a sentence of death. His execution is imminent and set for Thursday, October 20, 2022, at 10:00 am Central Time. Mr. Cole invokes the original jurisdiction of this Court under Title 28 U.S.C. § 2241. *See, e.g., In Re Troy Davis*, 557 U.S. 952 (2009).

Counsel for Mr. Cole have diligently litigated Mr. Cole's incompetency to be executed. The Oklahoma state court and the federal district court have denied relief at every turn on procedural grounds—not on the important question of Mr. Cole's level of rational understanding of his current fate. *Cole v. Farris*, Case No. MA-2022-898 (Okla. Crim. App. Oct. 17, 2022); *Cole v. Farris*, Case No. 15-CV-0049 (N.D. Okla. Oct. 19, 2022)¹.

Mr. Cole suffers from severe, diagnosed mental illness and organic brain impairment. He is schizophrenic and has a significant brain lesion that worsens his symptoms making him paranoid and delusional. Mr. Cole has not named anyone from his legal team to witness his execution. Unless this Court grants this original petition and a stay of execution, there will be no one present at Mr. Cole's execution

¹ An appeal to the Tenth Circuit Court of Appeals was lodged soon after the denial of the habeas petition by the district court. As of the filing of this Original Writ, the Tenth Circuit has yet to rule. *Cole v. Farris*, Case No. 22-5093.

who will be able to advocate for his Eighth and Fourteenth Amendment rights. Oklahoma has no procedures in place during the hours leading up to the actual execution that would protect his rights. Counsel for Mr. Cole requests that this Court grant a stay of execution and remand to federal district court for a full hearing.

RELEVANT PROCEDURAL HISTORY

Mr. Cole was convicted of murder and sentenced to death by a Rogers County, Oklahoma jury in 2004. His mental health and adjudicative competency were in question throughout his trial, state post-conviction, and federal habeas proceedings. He was diagnosed with schizophrenia. Once his appeals were exhausted and an execution date set, Mr. Cole in 2015 requested that the warden of Oklahoma State Penitentiary (OSP) refer his case to the Pittsburg County District Attorney's Office for a jury trial on his competency to be executed, as required under Oklahoma statute when the *prima facie* burden of "good reason to believe" is satisfied. Okla. Stat. tit. 22, § 1005 (originally enacted 1910, amended 1913). The warden refused, and the trial court as well as the Oklahoma Court of Criminal Appeals (OCCA) denied Mr. Cole's requests to order the warden to undertake the referral through mandamus proceedings. Mr. Cole's execution was stayed indefinitely, however, amid investigation and litigation regarding Oklahoma's lethal injection protocol.

In 2022, after the lethal injection plaintiffs lost their case in federal district court, it was clear plaintiffs' executions were again imminent. Thus, on May 20,

2022, counsel for Mr. Cole contacted OSP Warden Jim Farris, who had replaced the warden from 2015, enclosing updated materials relevant to the execution competency issue. These included 2016, 2018, and 2022 reports from psychologist Dr. George Hough, Ph.D., ABPP, detailing Mr. Cole's severe mental illness, decompensated mental condition, and incompetency for execution, and a 2022 report from neuroradiologist Dr. Travis Snyder, DO, regarding Mr. Cole's abnormal MRI and brain lesion. Mr. Cole again requested the initiation of competency for execution proceedings per statute. See Attachment A, consisting of attachments that were filed with the state trial court, Exs. 1 (A4-A6), 6 (A23-45), 7 (A46-50), 8 (A51-54), 9 (A55-58), and 12 (A89-98). Counsel sent Warden Farris a supplemental letter on May 25, 2022, with an additional expert report from Dr. Snyder. Ex. 2 (A7) and 13 (A99-104). Warden Farris was thereby provided the "good reason to believe" that Mr. Cole's competency was in question, per statute. Okla. Stat. tit. 22, § 1005.

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

Counsel for Mr. Cole contacted the warden a third time, providing on August 1, 2022 a declaration from Dr. Hough that offered reason to doubt the accuracy and

methods of Dr. Orth's evaluation and report. Exs. 3 (A8) and 10 (A59-85). Nonetheless, on August 2, 2022, Warden Farris advised counsel for Mr. Cole that he was refusing to initiate the state court competency proceedings. Ex. 4 (A9-10). Despite Warden Farris acknowledging he is not a mental health professional, he stated he "carefully considered all information and material submitted by Mr. Cole's attorneys regarding his mental health," *id.*, but then he did not reference the reports from Drs. Hough and Snyder, quoting only a passage from Dr. Orth's report. *Id. See also* Attachment G, 9/30/22 Tr. at 32 (Warden Farris testifying "I relied extremely on Dr. Orth's report."). In his letter declining to initiate competency proceedings, the warden did not phrase his inquiry with the objective, threshold burden language of the statute, which requires the warden to act where "there is good reason to believe" "insanity," but instead, substituted his subjective determination of the ultimate competency question, misstating the statute as asking whether "I have good reason" to believe and concluding, "[I]t is my determination that Mr. Cole has not become insane." Appendix A, Ex. 4 (A10) (emphasis added).

On August 15, 2022, Mr. Cole filed a Petition for Writ of Mandamus in Pittsburg County District Court, asserting that the warden abused his discretion by failing to follow his statutory duty. Included in the contemporaneously filed Appendix of Exhibits were all the above-referenced expert reports, Oklahoma Department of Corrections ("DOC") records, and expert reports from earlier in Mr.

Cole's legal proceedings. Mr. Cole also filed a Motion for Evidentiary Hearing and Motion for Order Facilitating Proper Evaluation of Petitioner by Experts, in Pittsburg County District Court. *See In re Benjamin Cole*, CV-2022-140 (Pittsburg Cnty. Dist. Ct. Aug. 15, 2022). On August 23, 2022, the warden filed a motion seeking to strike or reschedule the status conference and further seeking that the proceedings be expedited. On August 26, 2022, Mr. Cole responded agreeing time was of the essence and seeking expedited discovery. On August 26, 2022, the warden responded to Mr. Cole's mandamus petition and motions, and on August 31, 2022, Mr. Cole replied to the same and moved for a stay of execution.

A limited evidentiary hearing to determine whether the warden had abused his discretion was held in Pittsburg County before the Honorable Judge Michael Hogan on September 30, 2022. At the hearing, counsel for Mr. Cole examined Warden Farris. Judge Hogan did not take testimony from other witnesses. On October 4, 2022, Judge Hogan denied mandamus. Attachment H1-4.

On October 10, 2022, counsel for Mr. Cole petitioned OCCA for a writ of mandamus. On October 17, 2022, OCCA issued an order denying relief, finding "Petitioner has provided no new evidence regarding his competence . . . we find there is not a reasonable probability that Petitioner lacks the competence to be executed." Attachment I, I23. This Court denied a petition for writ of certiorari on October 19, 2022. *Cole v. Farris*, Case No. 22-5848.

On October 18, 2022, counsel for Mr. Cole filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. *Cole v. Farris*, Case No. 15-CV-0049 (Doc. 62). The district court denied the petition on October 19, 2022. (Doc. 71). A notice of intent to appeal to the Tenth Circuit Court of Appeals was promptly filed. (Doc. 73). A motion for stay of execution was filed with the Tenth Circuit and is pending as of the filing of this original writ.

REASON THE ORIGINAL WRIT SHOULD BE GRANTED

This Court has the power to grant this writ of habeas corpus because “law and justice require” that it do so. *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022), *citing* 28 U.S.C. § 2241. There is no other remedy available to Mr. Cole. On September 27, 2022, the Oklahoma Pardon and Parole Board denied his request for clemency by a four-to-one vote. The Oklahoma courts have denied any procedural safeguards, and the federal district court found that it was not able to grant habeas relief under the Antiterrorism and Effective Death Penalty Act.

I. Oklahoma’s Execution Protocol Does Not Preclude the Execution of an Inmate Who Is Categorically Exempt from Execution.

A. There Is a Real Possibility that Mr. Cole Will Be Executed While Incompetent.

An execution protocol is unconstitutional under the Eighth Amendment’s cruel and unusual punishment clause when it allows the State to execute someone

who is categorically exempt from execution. Oklahoma's policy and written Execution Protocol contain no procedural safeguards or mechanisms by which the State will ensure that a condemned inmate whose execution is imminent is not incompetent to be executed. *See* Attachment F (Oklahoma execution protocol 2/20/2022). The warden knows, or should know, that the State's Execution Protocol contains no procedures or mechanisms to ensure that no execution will be carried out that is unconstitutional.

Competency is not etched in stone but is fluid. Mental illness itself "is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). Symptoms of serious mental illnesses like psychosis wax and wane over time depending on factors like treatment and stress. Douglas, K. S., & Skeem, J. L. (2005). *Violence risk assessment: Getting specific about being dynamic*. *Psychology, Public Policy, and Law*, 11(3), 347-383, available at <https://doi.org/10.1037/1076-8971.11.3.347>. As a person with untreated diagnosed paranoid schizophrenia, Mr. Cole has deteriorated significantly over the years. In the remaining hours and minutes leading to and including his execution, he will, in all likelihood, continue to deteriorate.

B. Mr. Cole's Constitutional Right Not to Be Executed When He Is Incompetent Is Not Protected by Oklahoma's Execution Protocol.

An execution protocol that allows the warden to execute Mr. Cole when he is categorically exempt from execution fails to fully ensure adherence to the Eighth Amendment's cruel and unusual punishments clause, and thus violates Mr. Cole's Eighth Amendment rights.

Mr. Cole suffers from paranoid schizophrenia, organic brain impairment, and paranoia. According to expert opinion, he will not, at the time of his execution, have a rational understanding of the state's reason for his execution and therefore is or will be incompetent to be executed under Eighth Amendment standards. Oklahoma plans to apply to Mr. Cole an Execution Protocol that contains no safeguards against such an unconstitutional execution.

The physical effects of Mr. Cole's brain lesion and his corporeally weakened and wheelchair bound body present an added dimension to the competency equation and overall constitutionality of his proposed execution. Mr. Cole's physical state separately strengthens both the cruelty and the unusualness of his proposed execution. For example, proceeding with the State's intention to execute Mr. Cole will entail the State lifting his frail body up out of a wheelchair and then strapping him down onto a gurney. Mr. Cole had to be strapped to a gurney and then have six guards carry him up the stairs when he was moved to the 35-day execution watch cell. Attachment G, 9/30/2022 Tr. at 134.

C. The Oklahoma Execution Procedure, OP-040301, Effective 2/20/2020.

Oklahoma's execution protocol has detailed instructions for how the State will execute one of its citizens. The 32 pages of the protocol (excluding the attachments) attempts to cover the different aspects of an execution. The OSP warden is "responsible for compliance with this procedure." Attachment F, Oklahoma Execution Protocol, Sec. X, at F32. By Warden Farris's own testimony, though, he is not aware of the basic requirements of the execution process and he does not realize he is not in compliance.

At the September 30, 2022, mandamus evidentiary hearing, there was discussion about the 35-day protocol initiated for Mr. Cole on September 15, 2022. Attachment G, 9/30/2022 Tr. at 24. The 35-day protocol is part of the Execution Procedures, OP-040301, effective date February 20, 2020, that was signed by Scott Crow, Director of the Oklahoma Department of Corrections. Attachment F. The Execution Procedures consists of ten sections: I. Definitions; II. Responsibility; III. Conduct and Selection of Staff for Execution Teams; IV. Execution Teams; V. Training; VI. Selection of Execution Witnesses; VII. Timeline of Events for Executions; VIII. Quality Assurance Review; IX. References; X. Action.

Although the ODOC claims in the Execution Procedure it wants to "[carry] out" an execution "in keeping with statute, case law and professional practices,"

there are no protocols in place for an inmate who may be incompetent to be executed.

Attachment F, at F2. In Section II. Responsibility, Policy II.A.1. reads:

The ODOC shall make every effort in the planning and preparation of an execution to ensure the execution process:

1. Faithfully adheres to constitutional mandates against cruel and unusual punishment, in according with Article II, Section 9 of the Oklahoma Constitution **and** the Eighth Amendment to the United States Constitution.

Id, at F2. However, the Procedure misstates the Oklahoma Eighth Amendment, which speaks to cruel *or* unusual punishment. The Procedures do not have the proper language, let alone “adhere” to the Oklahoma constitutional mandates.

Section VII.A.3. set outs the Warden’s duties including monitoring the inmate and advising the inmate of the prohibitions surrounding his execution and information the prison needs for disposal of his property, last meal, and body. Attachment F13.

Section VII.B. is the Thirty-Five (35) days prior to the day of execution procedure. This procedure is commenced when the warden meets with the inmate “along with other professionals” (Attachment G, 9/30/2022 Tr. 109) on H-Unit. The procedure has details about what the warden is expected to communicate with the inmate from reading of the death warrant by the warden, to establishing of observation log where every activity and movement of the inmate is logged. Section VII.B.1.a.(11) states: “The Warden shall be responsible for reviewing observation

logs once every twenty-four-hour period, excluding weekends and holidays.”

Attachment F16.

Warden Farris is apparently not familiar with these responsibilities under the Execution Procedure. Warden Farris was asked by Assistant Attorney General Burns: “And how often are you provided . . . with daily updates, or how often are you consulted or do you directly observe Mr. Cole?” Warden Farris’s response was:

I do my direct observation when I go to there [for the 35 day meeting] 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.

Attachment G 9/30/2022 Tr. at 86-87. Warden Farris did not indicate he had been reviewing the observation logs at least once every day or checking on Mr. Cole’s mental health. Warden Farris was instead focused on whether the inmate got his canteen, and property, during the 35-day period.

The Execution Protocol requires the inmate be monitored and his activities documented every 15 minutes. There are rules about his last meal and that he’s limited to \$25 to spend. There are details about who is invited to attend the execution

and who may not attend. There are steps laid out for the “IV Team” to place the intravenous lines that will deliver the medication to execute the inmate.

The section entitled Contingency Procedure states:

An Automated External Defibrillator (AED) shall be readily available on site **in the event the inmate goes into cardiac arrest at any time prior to initiating the administration of the chemicals** in accordance with Attachment D . . . **Trained medical staff shall make every effort to revive the inmate should this occur.**

Attachment F, at F23, Section VII.F.3. The ODOC has a plan to revive the inmate who has a heart attack just before the execution in order to allow his death by the State to go forward. But there is no plan if an inmate becomes incompetent to be executed in the hours preceding the execution. This violates the inmate’s constitutional rights under the Eighth and Fourteenth Amendments.

This is all exacerbated by the fact the protocol has no provision for the attorneys of a condemned and irrational inmate to witness their client’s execution. The inmate must designate witnesses from their allotment of just seven witnesses. *See* Attachment F at F10-12. This is a profound problem when the inmate is seriously mentally ill and does not have a rational understanding of the importance of having an attorney present to protect their interests at all critical stages, including the execution of the sentence. Unfortunately, that is a common scenario, as more and more of those being executed in the United States are executed while suffering from severe mental illness:

It has been estimated that half of all prisoners on death row suffer from a serious mental illness. While on death row, much of the prisoner's time is spent in complete isolation, and research shows that isolation is likely to exacerbate a schizophrenic person's symptoms. Combined with the research showing that a death row prisoner will wait an average of twelve years between his sentencing and his execution, the logical conclusion is that a mentally ill prisoner on death row is likely to have significant fluctuations in his psychiatric condition while awaiting his execution.

Danielle N. Devens, *Competency for Execution in the Wake of Panetti: Shifting the Burden to the Government*, 82 Temp. L. Rev. 1335, 1355–56 (2010).

This describes Benjamin Cole. Suffering from paranoid schizophrenia, Mr. Cole has designated no one from his legal team to witness the execution. This exacerbates the above-referenced protocol deficiency. The multiplication of error in the protocol creates an intolerable risk of an unconstitutional “savage and inhumane” execution that violates “the dignity of society itself.” *Ford*, 477 U.S. at 406, 410. If the execution goes forward, it is likely to be a “miserable spectacle.” *Id.* at 407.

D. Prior Execution Protocols Did Not have a “Contingency Procedure” Section.

The “Contingency Procedure” section of the current Execution Protocol first appeared in the September 30, 2014 edition of the protocol. Attachment E. The protocol that was in effect on April 14, 2014, did not have this section. Attachment D. Oklahoma attempted to execute Clayton Lockett on April 29, 2014, utilizing that protocol. Instead, Mr. Lockett died of a heart attack after the execution went terribly wrong.

E. Oklahoma DOC knows Mr. Cole is seriously mentally ill.

The “Procedures” put in place by Oklahoma after the failed Lockett execution was a recognition by Oklahoma that what they had before was not adequate to protect the dignity of the process to make sure it was not “savage and inhumane.”

The only witnesses presently planned for Mr. Cole’s execution are the media and the other “invited” guests. None of them will be able to speak up and advocate on his behalf should the need arise.

Oklahoma is fully aware of the possibility Mr. Cole may be incompetent for his execution. His mental health has been an issue throughout his litigation. Three years ago, most of the inmates on death row were moved from H-Unit, a solitary confinement unit with little to no contact with anyone other than prison staff, to A-Unit, a more open and less confined setting. This was the result of a lawsuit the ACLU was prepared to file against Oklahoma DOC about the conditions of confinement. A few death row inmates, such as Mr. Cole, were left on H-Unit because the prison identified them as having serious mental health issues.

However, when Oklahoma DOC released the document to counsel for Mr. Cole indicating he would remain on death row, the portion of the form detailing the reasons was redacted. Attachment B. The prison therefore knows but has decided to hide that from public scrutiny. B4.

II. The Original Writ, Though Extraordinary, is a Proper Remedy in this Case.

AEDPA “has not repealed [the Supreme Court’s] authority to entertain original habeas petitions.” *Felker v. Turpin*, 518 U.S. 651, 660 (1996). The Court’s power to grant an extraordinary writ like habeas corpus is very broad but reserved for exceptional cases in which “appeal is a clearly inadequate remedy.” *Ex parte Fahey*, 332 U.S. 258, 260 (1947). “To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.” R. 20.4(a).

As this Court held in *In Re Davis*, “[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently ‘exceptional’ to warrant utilization of this Court’s Rule 20.4(a), 28 U.S.C. § 2241(b), and our original jurisdiction.” 557 U.S. 952 (2009). Mr. Cole’s case is also that rare exception; this Court should exercise its discretionary powers to prevent an incompetent man from being executed.

III. Conclusion

Mr. Cole is a frail, seriously physically and mentally ill man. Executing him will result in a “savage and inhumane” process that will be a stain on the State of Oklahoma and the judicial process. This Court is Mr. Cole’s last hope for any

recognition for dignity and compassion. Counsel requests the Court grant a stay of execution to allow further proceedings and a full and fair hearing on Mr. Cole's competency to be executed.

Respectfully submitted,

/s/Vicki Werneke

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