No. _____

IN THE
Supreme Court of the United States

Benjamin Cole,
Applicant,
v.
Jim Farris, Warden,
Oklahoma State Penitentiary,
Respondent

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

EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH IMMINENT EXECUTION SCHEDULED FOR OCTOBER 20, 2022 AT 10:00 A.M.

October 14, 2022

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EMERGENCY APPLICATION FOR STAY OF EXECUTION

QUESTIONS PRESENTED[1]

1. Whether it violates the Eighth Amendment and this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), for a state court to bypass procedural safeguards when there are disputed issues of fact?

2. Whether it violates the Fourteenth Amendment for a warden, who is directly in charge of carrying out the execution, to also assume the role of gatekeeper to the execution competency process?

3. Whether the State of Oklahoma's procedural framework for determining competency to be executed violates the Eighth Amendment, and the Court's decisions in *Ford v. Wainwright*, and *Panetti v. Quarterman*?

[1] As of the time of this filing, the Oklahoma Court of Criminal Appeals has not yet ruled on Petitioner's Petition for Writ of Mandamus and Motion for Stay. Assuming that these are denied, undersigned counsel submits the following questions would be presented to this Court in a petition for certiorari.

APPLICATION FOR STAY

To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Petitioner, Benjamin Cole, respectfully requests a stay of his execution, which is scheduled for **October 20, 2022, at 10:00 A.M. CST**, at Oklahoma State Penitentiary. Petitioner asks this Court to stay his execution to maintain the status quo and preserve the Court's eventual jurisdiction to review a petition for certiorari to the Oklahoma Court of Criminal Appeals pursuant to 28 U.S.C. § 1254(1). The issues to be raised will become moot if Mr. Cole is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring); *see also Murphy v. Collier*, 139 S. Ct. 1475 (2019) (staying the execution pending the timely filing and disposition of a petition for a writ of certiorari). Under Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted. In the alternative, Mr. Cole requests a stay under the All Writs Act to preserve this Court's jurisdiction to review the case following orderly appellate proceedings in the Oklahoma Court of Criminal Appeals.[2] 28 U.S.C. § 1651.

[2] Counsel recognizes that the matter now before this Court and pending before the Oklahoma Court of Criminal Appeals was presented close-in-time to Mr. Cole's scheduled execution date and that this Court has a significant interest in deterring late-stage filings in capital cases. *Dunn v. Ray*, 139 S. Ct. 661 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Given the inherently late-ripening nature of the execution competency question, Mr. Cole has presented this claim as diligently as possible, including seeking initiation of state competency proceedings at the first suggestion of execution imminence.

RELEVANT BACKGROUND

Mr. Cole was convicted of killing his nine-month-old daughter 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.[3] 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.

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[3] The statute 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.

Id.

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. App. 4a-6a, 23a-58a, 89a-98a. Counsel sent Warden Farris a supplemental letter on May 25, 2022, with an additional expert report from Dr. Snyder. App. 7a, 99a-104a. 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, the 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), as agreed to by both parties. 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. App. 59a-85a. Nonetheless, on August 2, 2022, Warden Farris advised counsel for Mr. Cole he was refusing to initiate the state court competency proceedings. App. 9a-10a. 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.* at 9a, but then he did not reference the reports from Drs. Hough and Snyder, quoting only a passage from Dr. Orth's report. *Id.* at 9a-10a. *See also* App. 191a (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." App. 10a (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. App. 1a-159a. 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. App. 167a-243a, 289a-297a. Judge Hogan did not take testimony from other witnesses. On October 4, 2022, Judge Hogan denied mandamus. App. 320a-323a.

Grafting the standard for the ultimate competency determination on to the abuse of discretion determination, Judge Hogan began, "The purpose of this Order is to adjudicate whether Benjamin Cole has become incompetent to be executed." *Id.* at 320a. He concluded, "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." *Id.* at 323a.

On October 10, 2022, counsel for Mr. Cole petitioned the Oklahoma Court of Criminal Appeals (OCCA) for a writ of mandamus. App. 327a-370a. As of the filing of this Motion for Stay of Execution, the petition remains pending.

ARGUMENT

I. MR. COLE SATISFIES THE *ROSTKER* STANDARD FOR A STAY PENDING THE FILING OF A PETITION FOR CERTIORARI.

The standard set out in *Rostker v. Goldberg*, 448 U.S, 1306, 1308 (1980), governs Mr. Cole's application. Applying that four-part standard here requires a stay. First, there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Mr. Cole's case presents the question of whether a pre-*Ford* state statute imbuing the death row warden—the same official charged with carrying out executions—with the duty of gate-keeper to execution competency proceedings can pass constitutional muster. A new state statute that removes and remedies this constitutional defect will go into effect *eleven days* after Mr. Cole's execution. Beginning November 1, 2022, the warden will no longer have decision-making power over the initiation of competency proceedings. App. 324a-326a. Mr. Cole's case also presents the related

question of whether, under this Court's dictates in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), a decision made in this already questionable regime, conflating the ultimate competency determination with the substantial threshold burden intended to open the door to further proceedings, can constitutionally stand. These are the questions Mr. Cole will ask this Court to review in his petition for certiorari, assuming OCCA denies relief.

The U.S. Court of Appeals for the Tenth Circuit ten years ago upheld Oklahoma's mechanism as constitutional because of the availability of mandamus review. *See Allen v. Workman*, 500 F. App'x 708, 711 (10th Cir. 2012) (unpub.) (Oklahoma regime comports with *Ford*, despite role of warden, because "a jury is the ultimate arbiter of sanity, and both the state trial court and the OCCA reviewed the warden's gatekeeping function").[4] This Court did not review that decision, *see Allen v. Trammell*, 568 U.S. 1005 (2012) (mem.), and the proceedings in Mr. Cole's case underscore the flaw in Oklahoma's system, which now require this Court's intervention.

Though Oklahoma's statute casts "a jury as the ultimate arbiter of sanity," the warden has instead placed himself in that role, making a decision that Mr. Cole is competent and therefore refusing to initiate proceedings. He did this with an

[4] This decision, unlike the one that this Court would issue in reviewing OCCA's decision, came within the 28 U.S.C. § 2254(d)(1) framework of deference to the OCCA decision below, denying OCCA unreasonably applied *Ford* in upholding the state mechanism. *See Madison v. Alabama*, 139 S. Ct. 718, 725 (2019) (internal citation and quotation marks omitted) (reversing state court decision for potential legal error in applying *Ford* and *Panetti*, while recognizing decision from the prior year upholding federal court denial of relief "was premised on AEDPA's demanding and deferential standard").

admitted emphasis on the court-appointed expert, Dr. Orth, despite the outlier nature of that report, which was in contrast to the several defense expert reports finding Mr. Cole severely ill with schizophrenia, possessing a damaged brain, and incompetent to be executed. *See Panetti*, 551 U.S. at 949 ("As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity 'appear[ed] to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.'"). That here, that determination was made when Mr. Cole need only have met the threshold standard, makes Mr. Cole's case sufficiently meritorious for this Court's review.

The district court duplicated the warden's misunderstanding of his statutory role, also casting itself as "ultimate arbiter of sanity" in purporting to "adjudicate whether Benjamin Cole has become incompetent to be executed" (App. 320a) and finding Mr. Cole "competent to be executed as currently scheduled." App. 323a. Both the warden and state trial court, in ostensibly deciding whether Mr. Cole met the substantial burden for entitlement to competency proceedings, held him to the burden of the ultimate question of incompetency. Presuming OCCA's eventual opinion fails to rectify these errors, Mr. Cole's claim will never have been reviewed under the proper constitutional standard.

Mandamus review does not render Oklahoma's mechanism constitutional. That the legislature recently passed a statute removing the warden from the process changes the landscape from that before the Tenth Circuit in 2012. As it stands, Oklahoma appears to be the only state that names the death row warden sole gate-

keeper of competency proceedings.[5] This is an inherent conflict, in the same vein as that recognized in *Ford*, where the warden is also charged with carrying out an inmate's execution and thus "cannot be said to have the neutrality that is necessary for reliability" in what the warden and the state courts have turned from threshold determination to "factfinding proceeding." 477 U.S. at 416. The state's recognition of a flawed system needing change, and Mr. Cole's resulting execution by a state mechanism that will no longer exist eleven days later, is impermissibly arbitrary. There is also, given the clear inability of mandamus review to bring the statute within constitutional confines, a reasonable probability four Justices will consider the question of whether Oklahoma's mechanism is unconstitutional under *Ford* sufficiently meritorious to grant a stay pending Mr. Cole's application for certiorari review.

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[5] Arkansas, Missouri, Nebraska, Nevada, and Utah provide statutory authority to the Director of Corrections of their respective state prison systems, though not to the death row warden. *See* ARK CODE ANN. § 16-90-506(d)(1)(A)(i)(a)-(b) (West 2019); MO. ANN. STAT. § 552.060(2) (West 1963); NEB. REV. STAT. ANN. § 29-2537(1) (West 1973); NEV. REV. STAT. ANN. § 176.425(1) (West 1967); UTAH CODE ANN. § 77-19-202 (West 1980).

A previous version of Arkansas's statute, which, like Oklahoma's, did not include any express mechanism ordering the Director to consider supporting evidence offered by an inmate's counsel, was invalidated as unconstitutional because it was "devoid of any procedure by which a death-row inmate has an opportunity to make an initial substantial threshold showing of insanity . . . to trigger the hearing process." *Ward v. Hutchinson*, 558 S.W.3d 856, 864-65 (Ark. 2018) (internal citation and quotation marks omitted). California previously had a statute giving the warden sole authority similar to Oklahoma's, but the governor recently signed Assembly Bill 2657, which further charges counsel having reason to believe a client is incompetent for execution with the duty to file a petition in the court of conviction alleging same. *See* CAL. PENAL CODE § 3701, *repealed by* 2022 Cal. Legis. Serv. Ch. 795 (A.B. 2657) (West), *available at* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2657&.

Second, there is a fair prospect that a majority of the Court will conclude that a decision by the court below not to order the warden to initiate execution competency proceedings is erroneous under *Ford*, *Panetti*, and related cases. Mr. Cole can show he made a "substantial threshold showing of insanity," *Panetti*, 551 U.S. at 950, and therefore was "entitled to these [due process] protections." *Id.* As detailed above, Mr. Cole submitted multiple reports from psychological experts of various disciplines detailing his severe mental illness and resulting incompetency. Whether his evidence will ultimately be seen to render him incompetent for execution is an issue for a competency jury as trier of fact under state statute; it was not a decision for the warden or trial judge to make in the guise of determining the existence of "good reason to believe" insanity had developed.

Third, irreparable harm is likely to result from the denial of a stay. *See Wainwright*, 473 U.S. at 935 n.1 (Powell, J., concurring) (stating that the requirement of irreparable harm if stay is not granted "is necessarily present in capital cases"). Without a stay, the State of Oklahoma will likely execute a prisoner who has been denied his Eighth Amendment right to be free of cruel and unusual punishment, given his *prima facie* showing of execution incompetency, and his Fourteenth Amendment right to due process given this showing. The denial of a stay will fail to ensure that Mr. Cole ever receives adjudication of his claim of incompetency if the OCCA denies mandamus relief, given the clearly erroneous decisions of the state trial court and of the prison warden in his role as competency proceeding gate-keeper.

Finally, balancing the equities to explore the relative harms to Mr. Cole, Warden Farris, and the interests of the public weighs in Mr. Cole's favor. A stay is in

the interest of the public because all citizens have an interest in ensuring that the Constitution is upheld. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). The public interest is even greater where, as here, the ultimate punishment of death might be inflicted upon a person who is constitutionally exempt from execution. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). Here, Mr. Cole has never had the benefit of an execution competency adjudication, despite his meeting the substantial threshold entitling him to same, so the public cannot be assured that his proceedings have adhered to the Constitution. The State will not be harmed by briefly delaying Mr. Cole's execution to allow the proceedings pending below to be appropriately resolved, and to preserve this Court's jurisdiction over certiorari review.

The Court stayed Mr. Murphy's execution in *Murphy v. Collier*, "unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution." 139 S. Ct. 1475. Likewise, this Court should stay Mr. Cole's execution until Oklahoma affords him a hearing on his competency to be executed that comports with the Eighth Amendment, and Fourteenth Amendment due process safeguards.

II. ALTERNATIVELY, THIS COURT SHOULD EXERCISE ITS AUTHORITY UNDER ITS INJUNCTIVE POWER AND THE ALLWRITS ACT TO GRANT A STAY OF EXECUTION.

Mr. Cole requests a stay of execution to permit orderly appellate proceedings in the Oklahoma Court of Criminal Appeals to preserve the Court's jurisdiction to review this case. The All Writs Act, 28 U.S.C. § 1651, empowers this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[] and

agreeable to the usages and principles of law." This includes the power to "hold an order in abeyance," *Nken v. Holder*, 556 U.S. 418, 426 (2009), and the power to issue a stay of execution, S. Shapiro *et al.*, Supreme Court Practice 926 (10th ed. 2013).

The All Writs Act has been expansively interpreted to allow this Court to issue writs in aid of its *potential* jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (explaining that a court's exercise of power under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (explaining that a court's authority to issue writs in aid of its jurisdiction "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected"); *see also La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (holding that because a court could at some stage of the proceedings entertain appeals, it has the power to issue writs of mandamus reaching them); S. Shapiro *et al.*, Supreme Court Practice 661 (10th ed. 2013) ("The Supreme Court can issue extraordinary writs not only in aid of its jurisdiction over a case pending before it, but also in aid of its potential jurisdiction over a case pending before a court over which it has direct appellate power, and even in aid of its potential jurisdiction over a case pending before a court over which it lacks direct appellate power but may ultimately be able to review after a decision by an intermediate court."). Stated otherwise, this Court can issue writs to prevent a case from becoming moot and protect its ultimate jurisdiction. *See, e.g., Mikutaitis v. United States*, 478 U.S. 1306, 1309-10 (1986) (Stevens, Circuit Justice) (granting application to extend the stay of

a district court contempt order because lack of a stay "may have the practical consequence of rendering the proceeding moot").

Mr. Cole's imminent execution qualifies as the "critical and exigent circumstances," *Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968) (Steward, J.), in which it is appropriate for the Court to exercise this power. *See, e.g.*, *Am. Trucking Ass'ns, Inc., v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J.) (granting preliminary injunction ordering state agents to escrow defendants' contributions to state's Highway Use Equalization (HUE) tax while Arkansas Supreme Court considered merits of plaintiffs' challenge to that tax under 42 U.S.C. § 1983). This Court subsequently synopsized Justice Blackmun's decision with approval:

> In an opinion issued August 14, 1987, Justice Blackmun, acting as Circuit Justice, concluded there was a significant possibility that the Arkansas Supreme Court would find the HUE tax unconstitutional under Scheiner or, failing that, that this Court would note probable jurisdiction and strike down the HUE tax. *American Trucking Assns., Inc. v. Gray*, 483 U.S. 1306, 1309 (in chambers). He further concluded that, because "there is a substantial risk that [petitioners] will not be able to obtain a refund if the [HUE] tax ultimately is declared unconstitutional," *ibid.*, petitioners would suffer "irreparable injury absent injunctive relief." *Ibid.* Justice Blackmun therefore ordered Arkansas to "escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached." *Id.* at 1310.

American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 173-74 (1990) (brackets in original).

Absent a stay of execution, Mr. Cole's attempts to vindicate his right to due process on his Eighth Amendment claim of execution incompetency will not be resolved before his execution, causing irreparable injury for which Mr. Cole cannot seek any redress.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the considerations for granting a stay of execution weigh entirely in Mr. Cole's favor, and thus Mr. Cole requests this Court enter an emergency stay of execution to permit it to preserve jurisdiction to review the final judgments of the lower courts, which will otherwise become moot by his execution.

Respectfully Submitted: October 14, 2022

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