NO. 22A317
CAPITAL CASE

IN THE
Supreme Court of the United States

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

To the Honorable Brett Kavanaugh,
Associate Justice of the Supreme Court of the United States
(Justice Gorsuch, Circuit Justice for the United States Court of Appeals for the Tenth Circuit, is recused)

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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

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INTRODUCTION

On December 20, 2002, just days before Christmas, Applicant Benjamin Cole murdered his nine-month-old daughter, B.V.C., by violently folding her in half, causing her spine to snap in half and her abdominal aorta to tear completely through. Cole committed the fatal attack because B.V.C. woke from her nap and interrupted his video gaming with her cries. *Cole v. State*, 164 P.3d 1089, 1092-93 (Okla. Crim. App. 2007). A jury convicted Cole of first-degree child abuse murder and sentenced him to death in 2004. *Id.* 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.

Now, Cole seeks a stay of his execution pending the filing and disposition in this Court of a petition for certiorari review of the Oklahoma Court of Criminal Appeals's ("OCCA") (as of yet not issued) decision on his claim of incompetence to be executed. Cole plans to seek review of whether Oklahoma's procedures for determining competency are constitutional. Appl. i. His focus on procedure is unsurprising given that his substantive claim of incompetence is patently without merit—a neutral, court-appointed psychologist recently interviewed Cole, reviewed more than 1,000 pages of records, and concluded unequivocally that Cole is competent to be executed. Without making a substantial showing of incompetence, Cole is not entitled to further due process on his incompetence claim; thus, his case is an inappropriate vehicle for the examination of Oklahoma's competency procedures. In any event, Cole received an evidentiary hearing in state district court, more process

than he was even entitled to, and he presents no compelling issue for this Court to consider as to Oklahoma's procedures. Cole's application for a stay should be denied.

STATEMENT OF THE CASE

"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 this case. Cole's challenges to his competence have mainly revolved around his communication issues with counsel and anyone affiliated with counsel, his 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). Subsequently, 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. 233a-234a, 367a-370a. 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. 11a-22a.

Not satisfied with the results of the agreed-upon neutral evaluation, 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 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. 4a-8a, 23a-85a, 89a-104a. 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. 9a-10a.

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. 320a-323a. 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).[1]

At the September 30, 2022, evidentiary hearing, Cole's counsel presented a multitude of exhibits and called only one witness, Warden Farris. Pet. Appx. 161a, 167a-243a, 289a-297a. While Cole himself was present at the hearing—and the state

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

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. 299a.

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. 320a-323a. 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. 320a-323a.

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. 327a-370a. On October 12, 2022, the State responded in opposition to Cole's requests for mandamus relief and a stay of execution. As of this writing, the OCCA has not yet ruled on Cole's mandamus petition or stay application.[2]

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[2] Notably, seemingly inconsistent with federal statute and this Court's Rules, Cole has sought a stay of execution from this Court before giving the OCCA a reasonable opportunity to rule on his requests for mandamus relief and a stay of execution. *See* 28 U.S.C. § 2101(f) (stay of a final judgment in order to enable a petition for writ of certiorari); *see also* Sup. Ct. R. 23.2

ARGUMENT

This Court will not grant a stay pending the filing and disposition of a certiorari petition unless the applicant establishes:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (*per curiam*); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Evans v. Alabama*, 461 U.S. 1301, 1302 (1983) (Powell, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

"A stay is not a matter of right, even if irreparable injury might otherwise result," and is "instead an exercise of judicial discretion," "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. Moreover, in the execution context, the decision whether to grant a stay "must be sensitive to the State's strong interest in enforcing its criminal judgments." *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also Murphy v. Collier*, 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting); *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992) (*per curiam*) (each state has a "strong interest in proceeding with its

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(stay of enforcement of a final judgment), 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.").

judgment"). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Last-minute execution stays are especially disfavored. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019); *Hill*, 547 U.S. at 584.

Here, Cole cannot show a reasonable probability that certiorari review will be granted, let alone a significant possibility of reversal. Moreover, Cole cannot demonstrate the likelihood of irreparable harm or that the balance of equities weighs in his favor. Finally, Cole's argument based on the All Writs Act, 28 U.S.C. § 1651, is without merit, as the All Writs Act does not excuse Cole's burden to demonstrate he is entitled to a stay. Cole's requested stay must be therefore denied.

I. Cole cannot meet his burden to demonstrate that he is entitled to a stay of execution.

A. Cole is unlikely to receive certiorari review, let alone a reversal of the OCCA's decision.

For a number of reasons, Cole has not shown a reasonable probability that four members of this Court will be of the opinion that the issues are sufficiently meritorious to warrant a grant of certiorari, let alone a significant possibility of reversal of the OCCA's decision. *Hollingsworth*, 558 U.S. at 190.

First, his case is an exceedingly poor vehicle for consideration of the issues raised because, 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).[3] 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. 11a-22a.

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. 13a. 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. 13a (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. 13a.

Dr. Orth determined that Cole "has a rational understanding of the reason he is being executed by the State of Oklahoma." Pet. Appx. 20a-21a. *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

[3] Indeed, even the *Panetti* Court considered stays in the context of competence claims and noted, "[t]he requirement of a threshold preliminary showing, for instance, will, as a general matter, be imposed *before a stay is granted* or the action is allowed to proceed." *Panetti*, 551 U.S. at 946-47 (emphasis added).

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. 21a. 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. 19a. 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. 21a. 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. 20a-21a.

Given Cole's statements during Dr. Orth's evaluation and Dr. Orth's unequivocal conclusions therefrom, the state district court was clearly correct in concluding Cole had not made a substantial showing of incompetence entitling him to further due process on his incompetence claim. Cole's reliance on *paid* defense experts Drs. Hough and Snyder does not demonstrate a compelling question as to his competence or that Dr. Orth's conclusion is an "outlier."[4] Appl. 7. To be sure, Dr. Orth

[4] 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 (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).

is the *only* expert that has recently and successfully interacted with Cole as to Cole's understanding of his execution. Cole has refused to meet with Dr. Hough since 2016. Even in that 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. 36a. Nonetheless, Dr. Hough concluded there was no affirmative evidence showing Cole was competent, Pet. Appx. 42a, ignoring the *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 sentence is to be carried out");[5] *see also Cole*, 358 P.3d at 939 ("There is a presumption that the prisoner is competent."). Dr. Snyder has *never* met or interacted with Cole and yet has concluded, based predominately on an MRI of Cole's brain, that he is incompetent. *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").[6]

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[5] 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").

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

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").

Second, Cole admits that, imminently, a new statute goes into effect repealing § 1005 and removing the Warden from Oklahoma's procedure for determining competence. Appl. 5, 7-8. *See* Okla. Stat. tit. 22, § 1005.1 (eff. Nov. 1, 2022).[7] Thus,

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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. 38a. Cole's diagnosis with schizophrenia should therefore be viewed with a great deal of skepticism.

[7] The State disagrees with Cole's insinuation that Oklahoma's statutory procedures were changed to remedy a "constitutional defect." Appl. 5. 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-

even assuming Cole demonstrates constitutional infirmity in § 1005, 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").[8]

Third, 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

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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) (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 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.

[8] The same can be said for Cole's repeated assertion that the state district court erred in finding both that he failed to make a substantial threshold showing of incompetence *and* that he failed to ultimately show incompetence. Appl. 5-7. This is a mere request for error correction. *See* Sup. Ct. R. 10. In any event, the state district court did not require Cole to show he was incompetent. Rather, the court applied the proper substantial threshold showing test and then *further* affirmatively determined that Cole was competent.

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). Further, § 1005 is plainly distinguishable from the invalidated Arkansas statute pointed to by Cole, Appl. 8 n.7—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. There is no conflict in the law, no compelling reason to grant certiorari review, and no likelihood this Court would ultimately reverse the OCCA.

Fourth, Cole's case further fails to present a compelling issue for certiorari review or potential reversal 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 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. 160a-319a. 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).[9] *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 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 report 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

[9] Cole's insinuation that he was limited in his presentation of evidence at this hearing, Appl. 4, 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. 320a-323a.

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 shown neither a compelling issue for certiorari review nor a likelihood of reversal.

B. Cole cannot demonstrate the likelihood of irreparable harm or that the balance of equities weighs in his favor.

Lastly, Cole has not shown the likelihood of irreparable harm if he is not granted a stay, nor has he shown that the balance of equities and harms weighs in his favor. *Hollingsworth*, 558 U.S. at 190. With respect to the likelihood of irreparable harm, Cole's arguments are without merit. Cole claims that the State is "likely" about to execute an incompetent inmate who has been deprived of his constitutional rights. Appl. 9. However, Cole entirely failed to present a substantial threshold showing of incompetence to the state courts, and, *to this day*, he has zero evidence that he currently does not rationally understand his execution or the reasons for it. *Panetti*, 551 U.S. at 958-60; *Ford*, 477 U.S. at 410. Considering his failure to meet the required threshold burden of incompetence, Cole fails to show that there is a likelihood of irreparable harm if he is not granted a stay. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (inmate demonstrated likelihood of irreparable harm without a stay (to challenge Texas's act of barring his spiritual advisor from laying hands on him during the execution), "because he w[ould] be unable to engage in protected religious exercise in the final moments of his life").

Moreover, Cole fails to show that a balancing of the equities and harms weighs in his favor. While Cole claims a stay will only result in a "brief[]" delay of his

execution, Appl. 10, the balance of equities and harms weighs in the State's favor, as this Court "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. As previously noted, B.V.C., and those that survive her, have been waiting nearly two decades for justice. Thus, "[t]he people of [Oklahoma], the surviving victims of Mr. [Cole]'s crimes, and others like them deserve better," especially when Cole's justifications for a stay are entirely without merit. *Bucklew*, 139 S. Ct. at 1134. *See also Ramirez*, 142 S. Ct. at 1282 (the "balance of equities and public interest" weighed in the inmate's favor, especially when he made a "tailored" request and did "not seek an open-ended stay of execution" (quotation marks omitted)).

C. Conclusion.

Ultimately, in light of the foregoing, Cole has not met his burden to show that he is entitled to a stay of execution pending the filing and disposition of a petition for certiorari. *Hollingsworth*, 558 U.S. at 190.

II. The All Writs Act does not relieve Cole of his burden to show he is entitled to a stay.

As a final matter, Cole's argument that this Court can "preserve" its "potential" jurisdiction from becoming "moot" by issuing a stay of execution is without merit. Appl. 10-12. To be true,

> [a]n appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent," preserved in the grant of authority to federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," All Writs Act, 28 U.S.C. § 1651(a).

Nken, 556 U.S. at 426.[10] However, the All Writs Act does not simply allow federal courts to dispense with the normal stay or injunction requirements. *See Dunn v. McNabb*, 138 S. Ct. 369 (2017) (injunction was improperly granted by federal district court because "[i]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits," and the "All Writs Act does not excuse a court from making these findings" (citation omitted)).

Regardless of Cole's concern about his claims becoming "moot," the All Writs Act cannot be used to circumvent this Court's existing requirements and procedures concerning stays of execution. *See Cooey v. Strickland*, 589 F.3d 210, 234 (6th Cir. 2009) (rejecting inmate's argument that circuit court could issue stay of execution to prevent case from becoming moot despite inmate's failure to meet his burden, as the All Writs Act was meant as a "residual source of authority," not a way to circumvent existing procedures); *Lambert v. Buss*, 498 F.3d 446, 454 (7th Cir. 2007) ("There is no reason why the All Writs Act can or should be used to thwart the proper application of the factors associated with the issuance or denial of a preliminary injunction."); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 367 (7th Cir. 1983) ("The intent of the Act is to effectuate established jurisdiction, not to enlarge it."). Because Cole cannot meet his burden of demonstrating his entitlement to a stay of execution pending the filing and disposition of a petition for certiorari, Cole's request for a stay of execution should be denied.

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[10] *See* Sup. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.").

CONCLUSION

This Court should deny Cole's stay application.

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