

No. _____

IN THE
Supreme Court of the United States

Richard Stephen Fairchild,
Applicant,

v.

Jim Farris, Warden,
Oklahoma State
Penitentiary, *Respondent*

**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
NOVEMBER 17, 2022 AT 10:00 A.M.**

November 16, 2022

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QUESTION PRESENTED¹

Should a fifteen-day-old and untested state statute be applied to defeat review of an execution competency claim under *Ford v. Wainwright* and *Panetti v. Quarterman*, when the claim was factually unavailable under the former statutory scheme?

¹ As of the time of this filing, the Oklahoma Court of Criminal Appeals has not yet ruled on Petitioner's Motions Alleging Incompetency for Execution and for a Stay of Execution. Assuming that these are denied, undersigned counsel submits the following question would be presented to this Court in a petition for certiorari.

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

Petitioner, Richard Stephen Fairchild, respectfully requests a stay of his execution, which is scheduled for **November 17, 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. Fairchild 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. Fairchild 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

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. Fairchild'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. Fairchild has presented this claim as diligently as possible.

RELEVANT BACKGROUND

Mr. Fairchild is scheduled to be executed by the State of Oklahoma November 17, 2022, at 10 a.m. He was convicted of first-degree, child-abuse murder and sentenced to death in 1996 in Oklahoma County District Court Case Number CF-93-7103. Mr. Fairchild's competency to stand trial was raised on November 23, 1994. The trial court found there was a doubt as to competency. After a court-ordered evaluation, psychologist Dr. Kelly Shannon found Mr. Fairchild competent to stand trial.

Throughout federal habeas proceedings, Mr. Fairchild was evaluated numerous times. In April of 2002, board-certified neuropsychologist Dr. Barry Crown attested Mr. Fairchild suffers from "significant neuropsychological impairment" and "functional deficits reflecting damage primarily associated with the fronto-temporal portions of the brain." App. 22b. Further, Dr. Crown noted Mr. Fairchild suffers from "late onset schizoaffective disorder with loose reality contact." App. 27b. Dr. Crown again evaluated Mr. Fairchild in 2014 and 2018. When Dr. Crown saw Mr. Fairchild in 2014, Fairchild was "floridly psychotic." *Id.* In 2018, Dr. Crown described Mr. Fairchild as "psychotic" and that Fairchild's "present psychotic disorder is consistent with schizoaffective disorder, a major mental illness." App. 27b-28b. Similar to Dr. Crown's findings, in 2014 board-certified psychiatrist Bhushan Agharkar evaluated Mr. Fairchild and concluded he suffers from "serious psychotic mental illness best described in the schizophrenia spectrum disorders." App. 29b. According to Dr. Agharkar, Mr. Fairchild was "paranoid, extremely delusional, and experience[ed]

auditory hallucinations.” *Id.* Dr. Agharkar further opined that Mr. Fairchild had “several prominent grandiose and persecutory delusions which cause him great distress and impair his ability to relate to others rationally.” *Id.*

Despite these diagnoses, Dr. Crown opined in August of 2022 that Mr. Fairchild had not reached the narrow forensic standard of incompetency to be executed under *Ford*. However, as Dr. Crown also made clear, competency is a fluid determination and, especially when accounting for likely decompensation as Mr. Fairchild’s execution date drew closer, this could be subject to change. App. 15b.

Dr. Crown was prescient. In the days leading up to Mr. Fairchild’s scheduled execution, evidence indicates Mr. Fairchild has become incompetent to be executed. On November 9, 2022, Kari Hawkins, General Counsel for Oklahoma Department of Corrections, contacted Mr. Fairchild’s investigator and expressed that prison personnel were having trouble communicating with Mr. Fairchild about the funeral home that would pick up his body after execution. App. 14b. According to Ms. Hawkins, Mr. Fairchild had a “visceral reaction” upon learning that the funeral home he had chosen was no longer in business. *Id.* Ms. Hawkins requested the help of Mr. Fairchild’s legal team in getting Mr. Fairchild to sign the proper paperwork for his funeral arrangements. *Id.*

On November 14, 2022, Assistant Federal Public Defender Tricia Russell and Investigator Mark Jacobs visited Mr. Fairchild at the Oklahoma State Penitentiary for approximately two hours. App. 14b. According to Mr. Jacobs, Mr. Fairchild “was completely out of touch with reality. [Fairchild] expressed that he had met with

Warden Farris prior to our visit and told him that his brother Max had moved his execution date up which robbed him of two years of his life.” *Id.* Mr. Jacobs attested that Mr. Fairchild believes his brother Max is “selling drugs inside the prison,” and that Max is torturing Mr. Fairchild “with a video voice recorder that is located in his cell.” App. 15b. Mr. Fairchild believes “his brother Max accelerated his execution date and has been trying to kill him for years.” *Id.* Mr. Jacobs noted a considerable and sudden decline in Mr. Fairchild’s present competency:

During our last few visits with Richie, it has become almost impossible to carry on any rational conversation. Richie’s grasp of reality is slipping. In the past we were able to discuss legal proceedings and case decisions in a limited fashion. On our last visit, we were unable to discuss anything about his upcoming execution. Richie’s delusions now encompass his entire thinking process.

App. 15b.

As a result of the quickly evolving circumstances surrounding Mr. Fairchild’s present competency to be executed, Ms. Russell contacted Dr. Crown and discussed the team’s concerns. Dr. Crown offered the following in a signed declaration:

2. On the morning of November 15, 2022, Tricia Russell, habeas counsel for Richie Fairchild, contacted me and informed me that during her visit on November 14, 2022, Mr. Fairchild had mentally decompensated since my last evaluation in August of this year and was floridly psychotic. That is not surprising, as these mental states—to include mental competency—can be very fluid. That is why I informed his legal team they should constantly monitor his present competency.
3. According to Ms. Russell, Mr. Fairchild now believes his brother is constantly tormenting him and that his brother is responsible for requesting his execution date. This marks an escalation of Mr. Fairchild’s long-standing delusions and paranoia.
4. In simple terms, Mr. Fairchild has schizophrenia, is psychotic, and suffers from delusional ideation. He does not appear to be competent to

be executed because he no longer has any rational understanding of the reason for his execution, but rather, believes it is at the request of his brother. In short, my previous opinion that Mr. Fairchild did not meet the *Ford* and *Panetti* execution incompetency standards has changed.

App. 17.

Given the Oklahoma competency-to-be-executed statute's exceedingly recent transformation, *see* 22 O.S. 2002, § 1005.1, and concern about the time limit imposed by the new statute, Mr. Fairchild attempted to initiate competency proceedings under the prior statutory regime on November 15, 2022. On November 16, through Kari Hawkins, the warden refused, citing the statute's repeal. App. 32. Later that same day, Mr. Fairchild sought relief from the Oklahoma Court of Criminal Appeals (OCCA) by filing an Emergency Application for Stay of Execution and Brief in Support, App. 1a-4a, and a Motion Alleging Incompetency To Be Executed, App. 5b-13b. As of the date of this filing, the OCCA has not ruled on Mr. Fairchild's motions.

ARGUMENT

I. MR. FAIRCHILD 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. Fairchild'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. Fairchild's case presents the question of whether Oklahoma can, and did, apply its new statute in a way passing constitutional muster—a question no federal court has had a chance to consider in this or any case, given that Oklahoma's new statute went into effect just fifteen days ago. Without this Court's intervention pending an OCCA

decision, then, any violation of Mr. Fairchild's Eighth and Fourteenth Amendment protections under *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007), will be allowed to stand without any federal review.

Second, there is a fair prospect that a majority of the Court will conclude that a decision by the court below to deny Mr. Fairchild an opportunity for the competency hearing required by the plain language of the new statute once a motion supported by evidence is presented, as it was here, is erroneous. Mr. Fairchild followed the letter of the new law in presenting affidavits from his long-time investigator and a neuropsychologist who has seen him repeatedly over the years, alleging that recent conversations demonstrate his delusions and paranoia have caused him to finally cross the threshold from severely mentally ill to subsequently incompetent for execution. *See* App. 6b-8b. *See also* 22 O.S. 2002, § 1005.1(E) ("The person shall attach [to their motion alleging incompetency to be executed] affidavits, records, or other evidence supporting such allegations."); *id.* at § 1005.1(F) ("In the order of the Court of Criminal Appeals setting the execution date, the Court shall remand the issue of mental competency to be executed to the trial court where the person was originally tried and sentenced."). Mr. Fairchild has presented the evidence that he is presently unable to have a rational understanding of the reason for his execution envisioned in subsection (E), and thus meets the mandatory remand language of subsection (F).

An OCCCA denial hinging on the timing of his presentation under either § 1005.1(D) or § 1005.1(O) will violate *Ford* and *Panetti*, a line of jurisprudence

developed in response to the necessarily late-arising and ripening nature of execution competency claims. *Panetti* thus speaks to dismissal of “last-minute filings *that are frivolous*,” 551 U.S. at 946; this distinction is necessary because not *all* last-minute filings can simply be dismissed as frivolous in the execution competency context. As Mr. Fairchild argued below, competency is by nature a fluid determination, as understood by courts and clinicians alike. *See* App. 9b-10b. Here, Mr. Fairchild presented his claim only after the facts developed to support it, as the law requires; he could not have brought his claim until now without making a frivolous, unsupported filing. Once he had the basis for a claim, the Oklahoma Department of Corrections and OCCA barred him from vindicating his right to process under either the just-repealed statute or the new scheme.

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 the lay and expert evidence submitted raising doubt as to his present competency, and his Fourteenth Amendment right to due process given this showing. The denial of a stay will fail to ensure that Mr. Fairchild will ever receive the hearing mandated by Oklahoma’s new statute.

Finally, balancing the equities to explore the relative harms to Mr. Fairchild, Warden Farris, and the interests of the public weighs in Mr. Fairchild’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. Fairchild has never had the benefit of an execution competency adjudication so the public cannot be assured that his proceedings have adhered to the Constitution. The State will not be harmed by briefly delaying Mr. Fairchild'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. Fairchild'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.

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

Mr. Fairchild 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. Fairchild’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 synopsisized 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. Fairchild’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. Fairchild 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. Fairchild's favor, and thus Mr. Fairchild requests this Court enter an emergency stay of execution to permit it to preserve jurisdiction to review the final judgments of the lower court, which will otherwise become moot by his execution.

/s Emma Rolls

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