No. 22A439
CAPITAL CASE

In the

SUPREME COURT OF THE UNITED STATES

RICHARD FAIRCHILD, *Applicant*,

-vs-

JIM FARRIS, WARDEN, *Respondent*.

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

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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 November 17th, 2022 at 10:00 a.m. CT

INTRODUCTION

On November 13, 1993, Applicant Richard Fairchild ("Petitioner") murdered his girlfriend's three-year-old son, A.B., by punching him repeatedly, burning both sides of his body on a wall furnace, and throwing him against a drop-leaf table. *Fairchild v. State*, 998 P.2d 611, 615-16 (Okla. Crim. App. 1999), *as corrected on denial of reh'g* (May 11, 2000). A jury convicted Petitioner of first-degree child abuse murder and sentenced him to death in 1996. *Id.* at 616. After exhausting all state and federal appeals, Petitioner is now scheduled for execution on November 17, 2022, nearly three decades after murdering A.B.

However, at the very last minute, Petitioner 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' ("OCCA") (as of yet not issued) decision on his claim of incompetence to be executed. On November 16, 2022, 20 hours before his scheduled execution, Petitioner filed a motion in the OCCA for a competency determination. Petitioner's motion in the OCCA is wholly unsupported and dilatory. Petitioner's application for a stay should be denied.

STATEMENT OF THE CASE

In 2016, Petitioner exhausted all challenges to his conviction and death sentence. However, due to pending litigation in federal court regarding Oklahoma's execution protocol, an execution date was not set until July 1, 2022, when the OCCA scheduled Petitioner's execution for November 17, 2022.

Petitioner's competence to be tried was challenged on direct appeal. *Fairchild*, 998 P.2d at 617-18. However, similar to the present situation discussed below, "[t]he

only evidence supporting a finding of lack of competence came from statements by Fairchild's attorney[.]" *Id*. at 617. "The opinion of counsel, unsupported by any facts, does not meet this burden [of showing incompetence]." *Id*. at 618.

Thereafter, Petitioner presented no new evidence or claims of incompetence (although he did unsuccessfully challenge the OCCA's resolution of his trial competency claim in federal habeas proceedings). In fact, at Petitioner's clemency hearing on October 12, 2022, Petitioner's counsel—while claiming he was mentally ill—admitted Petitioner was competent to be executed. *See* Pet. App'x B, Bates No. 9.

Then, on November 15, 2022, Petitioner's counsel asked Warden Jim Farris of the Oklahoma State Penitentiary to initiate competency proceedings under 22 O.S. § 1005, *a statute that was repealed on November 1, 2022*. The Warden declined based on the repeal of § 1005.

Having wasted precious time, Petitioner filed a motion for a competency determination in the OCCA pursuant to the new statute, 22 O.S.2022, § 1005.1, at 2:00 p.m. CT, *approximately 20 hours before his scheduled execution*. Petitioner also requested a stay of execution. The State immediately filed a response.

According to the letter sent to the Warden, Petitioner's counsel have been concerned about his competence for the last 90 days. The letter further indicates counsel's concern is based on "recent conversations"—plural. Yet, Petitioner offers no dates for these conversations, much less attempt to explain why he waited until the day before his execution to initiate proceedings. At the very least, the allegations in the Petition establish that this claim could have been brought in the OCCA, at the

latest, on November 14, 2022.

As of this writing, the OCCA has not yet ruled on Petitioner's motion or stay application.[1]

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

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[1] Notably, seemingly inconsistent with federal statute and this Court's Rules, Petitioner 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 (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.").

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

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

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

Petitioner 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.

Petitioner seeks a stay of execution so that he might later ask this Court to grant certiorari to consider his claim that Oklahoma's statutory procedure is inadequate to address his claim that he is not competent to be executed. "A petition for a writ of certiorari will be granted only for compelling reasons," such as to resolve conflicts in the law among federal circuit courts and/or the highest state courts or between this Court and lower courts. Sup. Ct. R. 10(a)-(c). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioner's case is a poor vehicle for his anticipated future challenge to the constitutionality of Oklahoma's competence to be executed statute for a number of reasons: Petitioner has not challenged the statute in state court; Petitioner includes an argument anticipating the OCCA might violate state law, which will be unreviewable by this Court; Petitioner seeks mere error correction; and Petitioner has failed to satisfy this Court's prerequisites for obtaining proceedings to determine competence to be executed. At bottom, Petitioner merely predicts that he will disagree with the OCCA's decision. This Court rarely grants a writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *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"). Petitioner has failed to present a compelling question for this Court's review.

1. Legal Standards for Competence to be Executed.

Pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Eighth Amendment bars as cruel and unusual the execution of a capital inmate who is incompetent and therefore lacks "a rational understanding of the reason for the execution." *Panetti*, 551 U.S. at 958-60; *Ford*, 477 U.S. at 410. "To have a rational understanding, the prisoner's mental state must not be so distorted by delusions or mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 958-59.

Significantly, the bar for competence to be executed is extremely low, as "the mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered 'normal,' or even 'rational,' in a layperson's understanding of those terms." *Panetti*, 551 U.S. at 959-60. Indeed, even diagnosis with a mental illness or psychotic disorder does not automatically indicate that a petitioner lacks a rational understanding. Rather, the *Ford* and *Panetti* standards "focus on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution." *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019) (emphasis in original).

Pursuant to the above framework, a prisoner is presumed to be competent for execution. *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").[2] Thus, a capital inmate must first make "a substantial threshold showing of insanity." *Panetti*, 551 U.S. at 949; *see also id*., 551 U.S. at 946-47 ("The 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."); *Ford*, 477 U.S. at 417 ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity."). This Court has described this burden as a "high" one. *Ford*, 477 U.S. at 417. If a capital inmate can overcome that presumption and make such a showing, *then* he or she is entitled to a fair impartial hearing. *Panetti*, 551 U.S. at 949. However, notably, "a constitutionally acceptable procedure may be far less formal than a trial." *Id*. (quoting *Ford*, 477 U.S. at 427 (Powell, J., Concurring)).

Oklahoma's statutory scheme is consistent with *Ford* and *Panetti*. A new statute which took effect on November 1, 2022, 22 O.S.2022, § 1005.1, sets forth a comprehensive procedure for competence to be executed claims.

First, the prisoner's counsel must file a motion in this Court—within seven days of the State's notice of the appropriateness of setting an execution date—asking

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[2] 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").

for a competency evaluation. 22 O.S.2022, § 1005.1(C)-(D) "The person shall attach affidavits, records, or other evidence supporting such allegations or shall state a reason for which such items are not attached." 22 O.S.2022, § 1005.1(E).

Second, this Court must remand the case "to the trial court where the person was originally tried and sentenced." 22 O.S.2022, § 1005.1(G).

Third, the trial court must hold an evidentiary hearing to determine whether the prisoner "has raised a substantial doubt as to the person's competency to be executed." 22 O.S.2022, § 1005.1(H). The standard to be applied is identical to the *Ford*/*Panetti* standard. 22 O.S. § 1005.1(A). If the court finds no substantial doubt as to the prisoner's competence, "the execution shall proceed." 22 O.S.2022, § 1005.1(H). If a substantial showing is made, the trial court shall order an evaluation by the Department of Mental Health and Substance Abuse Services. 22 O.S.2022, § 1005.1(H).

Fourth, the trial court shall hold an evidentiary hearing in which the prisoner must "overcome the presumption that he or she is competent to be executed by a preponderance of the evidence." 22 O.S.2022, § 1005.1(K). If the trial court finds the prisoner to be incompetent, a stay of execution must issue. If the trial court finds the prisoner competent, the execution must proceed.

Finally, and of most significance in this case,

> If any intervening change in the mental competency of the person to be executed occurs after the seven (7) day deadline to initiate proceedings required pursuant to subsection D of this section, the person may file a motion alleging he or she is mentally incompetent to be executed with the Court of Criminal Appeals. An intervening change

> shall be a condition that has not and could not have been presented in a timely motion because the factual basis for the claim was not ascertainable through the exercise of reasonable diligence. If the Court of Criminal Appeals determines that an intervening change has occurred, the procedures set forth in this section shall apply.

22 O.S.2022, § 1005.1(O).[3]

2. Petitioner's Case Presents a Poor Vehicle for his Question Presented as he has not Challenged § 1005.1 in State Court.

Petitioner's Motion in the OCCA argued that he is entitled to a competency determination, but did not in any way challenge the constitutionality of § 1005.1 or the appropriateness of applying it to his case. Pet. App'x B, Bates Nos. 5-12. This Court generally does not consider issues that were not pressed or passed upon below. *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Ramirez v. Collier*, 142 S. Ct. 1264, 1276 (2022) ("In any event, we need not definitely resolve the issue as respondents failed to raise it below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ('we are a court of review, not of first view').").

3. This Court does not Review Questions of State Law.

Petitioner argues he is automatically entitled to a competency hearing as a matter of Oklahoma law. Pet. at 5. The State disagrees, as Petitioner must show a change in his condition pursuant to § 1005.1(O). In any event, assuming the OCCA interprets the statute in a way with which Petitioner disagrees, such would not be

[3] Petitioner's suggestion that the OCCA might apply some sort of "time bar" to his claim, Pet. at 7-8, is unsupported. The State has not asked the OCCA to deny his motion for a competency determination as untimely. Petitioner was concededly competent when his execution date was set. The Legislature anticipated such possibilities when it enacted subsection (O).

subject to review by this Court so long as the OCCA does not contradict *Ford* or *Panetti*. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (this Court does not sit to review questions of state law). Since those cases require a substantial threshold showing of incompetence, the OCCA will not interpret the statute in an unconstitutional manner. Accordingly, Petitioner presents no question which is proper for this Court's review.

4. Petitioner Seeks Mere Error-Correction.

The OCCA will apply § 1005.1(O), which incorporates the *Ford*/*Panetti* standard. Thus, Petitioner asks this Court to second-guess the OCCA's application of a properly stated rule of law *See* Sup. Ct. R. 10. Petitioner fails to establish that his case presents a compelling question of federal law or involves a situation that is likely to affect any case other than his own. Petitioner presents no compelling question for review. *See Halbert*, 545 U.S. at 605 (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function").

5. Petitioner has not Made a Substantial Threshold Showing of Incompetence.

Finally, this Court should deny a stay because Petitioner has not made a substantial threshold showing of incompetence. *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").

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)).

In this case, Petitioner entirely failed to make a substantial showing of incompetence. Petitioner's counsel informed the Oklahoma Pardon and Parole Board that Petitioner could "no longer tell the difference between reality and delusions" and his

> mental illness presents itself in the following ways: Richie believes that his family is controlling the date of his execution; that he possesses thousands of acres of land and billions of dollars that his family will inherit when he dies; that his mother and sister are "Gemeni twins;" and that he is the "omen 347." Richie talks almost non-stop about the above subject matter and it is difficult to get him to answer questions.

Yet, Petitioner's counsel admit that Petitioner was competent at the time of his October 12, 2022, clemency hearing.[4] Pet. App'x B, Bates No. 9.

So what changed between October 12, 2022, and November 16, 2022? As it turns out, nothing changed. In their letter to Warden Farris, Petitioner's counsel claimed that, "[i]n recent conversations we have had with Mr. Fairchild he has explicitly expressed his belief that . . . the purpose of his punishment is at the direction of his family, rather than for the crime of which he stands convicted." However, the affidavits Petitioner has provided this Court do not say anything which informs the Court of his beliefs regarding "the purpose of his punishment".

In fact, the affidavits appended to the Petition say precisely what was contained within the clemency packet—at which time Petitioner now concedes he was competent. Petitioner apparently believes his brother is somehow responsible *for the date of his execution*. However, Petitioner has not alleged that he fails to rationally understand *why he is being executed*. In fact, Petitioner as much as admits that he does have the requisite rational understanding: "Although Richie believes he is in prison because of the death of Adam, he firmly believes that the reason he is being

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[4] Petitioner has repeatedly claimed to have brain damage, but aside from trial testimony that his lifelong substance abuse caused "an accute [sic] brain syndrome" (Tr. V 1226-27), he never properly presented evidence of such to any court. *See Fairchild v. State*, No. PCD-2009-895, slip op. (Dec. 1, 2009) (unpublished) (finding Petitioner had waived his claim of brain damage by not presenting it in a timely manner); *Fairchild v. State*, No. PCD-1998-31, slip op. (Oct. 25, 2000) (unpublished) ("none of Petitioner's Exhibits 6 through 14 support his suggestion that his drug use, head injuries, or boxing activities have had any lasting effect on his mental abilities").

executed *on 11/17/22*, is because his brother Max accelerated his execution date and has been trying to kill him for years." Motion, Att. 1, ¶ 10 (emphasis added). Petitioner cites no authority for the idea that someone who rationally understands that he is being executed for murder might nonetheless be incompetent because of an alleged delusion regarding the date of the execution. *Cf. Madison*, 139 S. Ct. at 726 ("a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution").

In fact, there is no legal or policy basis for such a rule. "The *Panetti* standard concerns, once again, not the diagnosis of [a mental] illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Madison*, 139 S. Ct. at 728. This is because

> "[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life .... Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."

Panetti, 551 U.S. at 957 (quoting *Ford*, 477 U.S. at 409-10) (alteration adopted). Petitioner has failed to show that he suffers from "[g]ross delusions stemming from a severe mental disorder [that has] put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id*. at 960. In fact, Petitioner is well aware he is being punished

for the murder of A.B. Pet. App'x B, Bates No. 15 at ¶ 10.

It is difficult to imagine a more parsimonious evidentiary presentation than the one in this case. Petitioner's fact-based arguments are unsupported by the record before this Court. The motion for a stay of execution should be denied.

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

Further, Petitioner 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, Petitioner's arguments are without merit.

Moreover, Petitioner fails to show that a balancing of the equities and harms weighs in his favor. 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, A.B., and those that survive him, have been waiting nearly three decades for justice. Thus, "[t]he people of [Oklahoma], the surviving victims of Mr. [Fairchild]'s crimes, and others like them deserve better," especially when Petitioner'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)).

The equities also strongly weigh against a stay in light of Petitioner's lack of diligence. "A stay of execution is an equitable remedy, and '[e]quity must take into

consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.'" *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (citation omitted). Petitioner's counsel admitted in their letter to the Warden to having had concerns about his competence for the last 90 days. Yet, it appears they have engaged in no preparation for legal proceedings.

The letter written by counsel to the Warden indicates Petitioner has expressed the alleged delusion regarding his execution "[i]n recent conversations." Counsel does not explain when those conversations occurred or why they did not prompt an earlier competency challenge.

Moreover, Petitioner wasted nearly an entire day by sending said letter to the Warden pursuant to a repealed statute. Petitioner fails to explain why he did not file in the OCCA under § 1005.1(O) after the first "recent conversation", or at the very least, on November 14. Worse still, the Warden responded to the letter at 8:57 a.m. on November 16, but Petitioner did not file his pleadings in the OCCA until approximately 2:00 p.m. CT. This is the very definition of dilatory.

Petitioner should never have relied upon a repealed statute in the first place. At the very least, Petitioner should have had pleadings ready to file considering his counsel have anticipated the possibility of pursuing a competency determination for the last several months. Immediately upon receipt of the letter to the Warden, counsel for the State began drafting two responses: one in case Petitioner filed a petition for writ of mandamus in Pittsburg County pursuant to § 1005, and one in case Petitioner

filed a motion in the OCCA pursuant to § 1005.1. There is no reason Petitioner could not have acted with the same diligence.

> Courts should police carefully against attempts to use such challenges [in that case it was to the method of execution] as tools to interpose unjustified delay. Last-minutes stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay.

Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019); *see also Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 502 U.S. 653, 654 (1992) (*per curiam*) ("There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.")).

C. Conclusion.

Ultimately, in light of the foregoing, Petitioner 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 Petitioner of his burden to show he is entitled to a stay.

As a final matter, Petitioner's argument that this Court can "preserve" its jurisdiction by issuing a stay of execution is without merit. Pet. at 7-9. To be sure,

> [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.[5] 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 Petitioner'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 Petitioner cannot meet his burden of demonstrating his entitlement to a stay

[5] *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.").

of execution pending the filing and disposition of a petition for certiorari, Petitioner's request for a stay of execution should be denied.

CONCLUSION

This Court should deny Petitioner's stay application.

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