

Case No. 23-7612

IN THE SUPREME COURT OF THE UNITED STATES

WADE GREELY LAY,
Petitioner,

v.

CHRISTE QUICK, Warden
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Wade Greely Lay, is an Oklahoma death row inmate appearing *pro se* in this action, seeking this Court’s review of an Order entered by the United States Court of Appeals for the Tenth Circuit on December 28, 2023, dismissing Petitioner’s appeal from a non-final civil rights action prosecuted in the United States District Court for the Eastern District of Oklahoma. As context, the Tenth Circuit had previously directed Petitioner, on November 28, 2023, to show cause on or before December 19, 2023, why his appeal should not be dismissed, given the apparently non-final nature of Petitioner’s lower court proceedings, as well as Petitioner’s failure to either pay the requisite filing and docketing fees or explain why he should be excused from payment of the same. After Petitioner disobeyed the Tenth Circuit’s directive to show cause by that date, his appeal was dismissed. Petitioner now seeks certiorari review of this procedural dismissal. Bearing that background in mind, the question presented is:

Whether this Court should agree to review a federal circuit court’s order dismissing a *pro se* state inmate’s appeal from a non-final federal civil rights proceeding when that prisoner disobeyed a show-cause order directing him to cure his procedural defects or risk dismissal?

¹ Although this case was docketed as a “Capital Case,” Petitioner seeks review of a federal circuit court’s procedural dismissal of a civil rights action filed by Petitioner *pro se*. To be sure, Petitioner is an Oklahoma death row inmate (whose execution has been stayed indefinitely due to a finding of incompetence); but the case at hand is not a “Capital Case” in the sense that Petitioner does not substantively challenge his underpinning capital Judgment and Sentence. Nonetheless, Respondent offers the instant Brief in Opposition as an aid to this Court in determining whether certiorari should be granted in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	7
I. Certiorari should be denied because Petitioner’s case is a poor vehicle for the question presented, and the question presented is not a compelling issue.....	8
II. The Tenth Circuit correctly dismissed Petitioner’s non-final appeal as it lacked jurisdiction to entertain Petitioner’s claims	10
III. Since Petitioner’s competency-to-be-executed trial was stricken from the docket, and since Petitioner was found presently incompetent to be executed, Petitioner’s request for relief is now moot	12
CONCLUSION	13

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Aikens v. California</i> , 406 U.S. 813 (1972)	13
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	9
<i>Catlin v. United States</i> , 324 U.S. 229 (1945)	11
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	11
<i>Cunningham v. Hamilton Cty., Ohio</i> , 527 U.S. 198 (1999)	11
<i>Golden v. Zwickler</i> , 394 U.S. 103 (1969)	12
<i>Haines v. Kerner</i> , 404 U.S. 519 (1972)	10
<i>Hall v. Bellmon</i> , 935 F.2d 1106 (10th Cir. 1991)	10
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	12
<i>Lay v. Trammell</i> , No. 08-CV-617-TCK-PJC, 2015 WL 5838853 (N.D. Okla. Oct. 7, 2015)	3
<i>Massachusetts v. Sheppard</i> , 468 U.S. 981 (1984)	10
<i>McClung v. Silliman</i> , 19 U.S. 598 (1821)	11
<i>Microsoft Corp. v. Baker</i> , 582 U.S. 23 (2017)	11
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	9

<i>St. Pierre v. United States</i> , 319 U.S. 41 (1943)	12
<i>The Monrosa v. Carbon Black Exp., Inc.</i> , 359 U.S. 180 (1959)	11
<i>United Public Workers of America (C.I.O.) v. Mitchell</i> , 330 U.S. 75 (1947)	12
<i>United States v. Alaska S.S. Co.</i> , 253 U.S. 113 (1920)	12

STATE CASES

<i>Lay v. State</i> , 179 P.3d 615 (Okla. Crim. App. 2008)	3
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FEDERAL STATUTES

28 U.S.C. § 1291	10
42 U.S.C. § 1983	4, 5, 8

STATE STATUTES

OKLA. STAT. tit. 21, § 701.12 (2001)	3
OKLA. STAT. tit. 22, § 1005 (2011)	4
OKLA. STAT. tit. 22, § 1005.1 (2022)	7

RULES

10th Cir. R. 3.3	1, 2
10th Cir. R. 27.3	6
10th Cir. R. 42.1	1, 2

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Respondent respectfully urges this Court to deny Petitioner Wade Greely Lay’s Petition for Writ of Certiorari to review an Order issued by the United State Court of Appeals for the Tenth Circuit, entered on December 28, 2023, dismissing Petitioner’s appeal for lack of prosecution pursuant to Tenth Circuit Rules 3.3(B) and 42.1. *See Lay v. Quick*, No. 23-7085 (10th Cir. Dec. 28, 2023). Resp. App’x, at 120.¹

INTRODUCTION

As background, Petitioner filed a *pro se* civil rights action that, after a venue transfer, was docketed in the United States District Court for the Eastern District of Oklahoma, where Petitioner is currently confined. Resp. App’x, at 001–042, 043–044, 045–110. But Petitioner failed to utilize the correct district court form for his civil rights complaint; nor did he pay the requisite filing fee or else move to file *in forma pauperis*. The district court directed Petitioner to cure these deficiencies, but rather than doing so, and while proceedings were still ongoing, Petitioner took an appeal to

¹ Along with the filing of his Petition for Writ of Certiorari, Petitioner has offered Petitioner’s Appendix, purportedly in support of his request for relief. Unfortunately, none of the materials within Petitioner’s Appendix are paginated or in sequential order, and many of the documents, authored by Petitioner himself (with the addition of highlights, interlineations, and annotations), appear to be randomly assembled in stream-of-consciousness fashion, offered without any discernible context. For the sake of clarity, then, contemporaneously with the filing of this Brief in Opposition, Respondent respectfully offers Respondent’s Appendix, which includes materials relevant for this Court’s consideration in deciding Petitioner’s case. Citations to Respondent’s Appendix will be referred to as “Resp. App’x, at ___.” Although not explicitly contemplated by this Court’s Rules, Respondent’s Appendix is offered because Petitioner’s Appendix includes very few documents that are relevant or helpful to the disposition of this case, and Respondent believes additional context is necessary for this Court’s review. *See* SUP. CT. R. 14.1(i)(vi) (permitting inclusion, in a petitioner’s appendix, of “any other material . . . essential to understand the petition”).

the United States Court of Appeals for the Tenth Circuit. Resp. App'x, at 111, 112–115. Upon docketing the matter, the Tenth Circuit observed that Petitioner had already filed three or more civil actions or appeals, which had previously been dismissed as frivolous, malicious, or for failing to state a claim upon which relief could be granted. Resp. App'x, at 118. Further, the Tenth Circuit expressed concern that the district court proceedings which Petitioner sought to challenge appeared to be ongoing, which, if true, would run afoul of the finality requirement for appellate jurisdiction. Resp. App'x, at 116–17. As such, the Tenth Circuit directed Petitioner to show cause, on or before December 19, 2023, whether there was “any basis in law or fact for this court to exercise appellate jurisdiction over this appeal given the apparent lack of finality,” and to pay the appellate filing and docketing fees or show cause why he should be excused from said requirement. Resp. App'x, at 118–19. Petitioner was warned that failure to comply may result in his appeal being dismissed without further notice. Resp. App'x, at 119.

Petitioner did not show cause as directed. Accordingly, on December 28, 2023, the Tenth Circuit entered an Order dismissing Petitioner's appeal pursuant to Tenth Circuit Rules 3.3(B) and 42.1. Resp. App'x, at 120–21. That Order served as the mandate for the Court. Petitioner now seeks certiorari review of the Tenth Circuit's dismissal of his appeal.

STATEMENT OF THE CASE

Petitioner was convicted of First-Degree Murder and sentenced to death for the slaying of bank security guard Kenneth Anderson at the MidFirst Bank in Tulsa,

Oklahoma, during a botched bank robbery perpetrated in concert with Petitioner's son, Chris Lay, on May 24, 2004. *Lay v. State*, 179 P.3d 615, 619 (Okla. Crim. App. 2008).² Petitioner was motivated by a desire to avenge the United States Government's involvement in the Ruby Ridge and Branch Davidian affairs, and was based on Petitioner's perception that his actions were driven by a need for the greater good of our nation. *Id.* The Oklahoma Court of Criminal Appeals ("OCCA") upheld Petitioner's convictions and sentences on direct appeal. *Id.* at 625.³

Petitioner's initial application for post-conviction relief was rejected. *Lay v. State*, No. PCD-2006-1013 (Okla. Crim. App. Sept. 26, 2008) (unpublished). And Petitioner's successive post-conviction application was likewise rejected. *Lay v. State*, No. PCD-2010-407 (Okla. Crim. App. Oct. 13, 2010).

Petitioner unsuccessfully sought federal habeas corpus relief in the United States District Court for the Northern District of Oklahoma. *Lay v. Trammell*, No. 08-CV-617-TCK-PJC, 2015 WL 5838853, at *57 (N.D. Okla. Oct. 7, 2015) (unpublished). The Tenth Circuit rejected the claims for which Petitioner received a Certificate of Appealability ("COA") and affirmed the federal district court's denial of

² Petitioner was also convicted of Attempted Robbery with a Firearm, for which he received twenty-five (25) years imprisonment. *Id.* at 618.

³ As to his murder conviction, the jury found the existence of three (3) aggravating circumstances: (1) that Petitioner knowingly created a great risk of death to more than one person; (2) that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) that a probability existed that Petitioner constituted a continuing threat to society. *Id.* at 618, 624–25. *See also* OKLA. STAT. tit. 21, § 701.12 (2001) (statutory aggravating circumstances in Oklahoma). The jury was presented with six (6) mitigating circumstances. *Lay*, 179 P.3d at 625. The OCCA upheld all three (3) aggravating circumstances on direct appeal. *Id.*

habeas corpus relief. *Lay v. Royal*, 860 F.3d 1307, 1318 (10th Cir. 2017). On April 16, 2018, this Court denied certiorari review of the Tenth Circuit’s decision. *Lay v. Royal*, 584 U.S. 936 (2018). As of that day, therefore, Petitioner had exhausted all appellate avenues for relief. However, for reasons unrelated to this matter, the State of Oklahoma determined that it was not yet appropriate to set an execution date for Petitioner.⁴

On October 26, 2021, Petitioner, through counsel, filed a state-court petition for writ of mandamus in District Court of Pittsburg County Case No. CV-2021-224, alleging that Petitioner was not competent to be executed and seeking an order requiring then-Warden of the Oklahoma State Penitentiary to initiate competency proceedings pursuant to a since-repealed state statute governing competency-to-be-executed matters, *see* OKLA. STAT. tit. 22, § 1005 (2011).

As those competency proceedings were ongoing, on September 25, 2023, Petitioner filed a *pro se* civil rights complaint in the United States District Court for the Western District of Oklahoma, in the case styled *Lay v. Quick*, Case No. CIV-23-858-J. Resp. App’x, at 001–042. Briefly stated, Petitioner sought the federal court’s intervention to prevent Petitioner’s (unwarranted) fear of exclusion from his then-upcoming competency-to-be-executed trial in state court. The Western District of Oklahoma construed Petitioner’s action as arising under 42 U.S.C. § 1983, and

⁴ The State subsequently determined that an execution date for Petitioner had, by that time, become appropriate, and in September of 2021, the OCCA set an execution date for Petitioner. For reasons not central to the matter at hand, Petitioner’s execution date was set and re-set multiple times in the years to follow. Petitioner’s most recent execution date would have taken place on June 6, 2024, but for an intervening stay of execution entered by the OCCA on May 24, 2024, discussed *infra*.

transferred the matter to the United States District Court for the Eastern District of Oklahoma, the proper venue. Resp. App’x, at 043–044 (“On review, the Court liberally construes Plaintiff’s arguments as alleging that officials are denying him access to the courts, a claim that arises under 42 U.S.C. § 1983, and TRANSFERS this action to the United States District Court for the Eastern District of Oklahoma.”).

After the matter was transferred, Petitioner filed a motion for evidentiary hearing and motion for stay of proceedings, requesting an “immediate order for protection” from prison officials at the Oklahoma State Penitentiary. Resp. App’x, at 045–110. On October 21, 2023, the Eastern District of Oklahoma entered an Opinion and Order directing Petitioner to file, within twenty days, a proper civil rights complaint pursuant to 42 U.S.C. § 1983, utilizing the correct form, along with a motion for leave to proceed *in forma pauperis*, or else pay the requisite filing fee. Resp. App’x, at 111. Petitioner was cautioned that failure to comply with that Order would result in dismissal of the action without further notice. Resp. App’x, at 111.

On November 27, 2023, the district court entered a minute order, again directing Petitioner to pay the filing fee or move to file *in forma pauperis*, within twenty days, *i.e.*, on or before December 18, 2023, or else risk dismissal. Resp. App’x, at 122 (docket sheet). Petitioner was provided with an instruction sheet and a copy of the *in forma pauperis* form. Resp. App’x, at 122.

Rather than complying with the district court’s directive to cure his deficiencies, Petitioner filed a notice of appeal in the Tenth Circuit, and the matter was opened under Tenth Circuit Case No. 23-7085. Resp. App’x, at 112–15. One day

later, on November 28, 2023, the Tenth Circuit entered an Order *sua sponte*. Resp. App’x, at 116–19. First, the Tenth Circuit observed that the district court’s order, which Petitioner sought to challenge, did not appear to be a final decision, and thus the Tenth Circuit considered summarily disposing of the appeal. *See* 10th Cir. R. 27.3(B). Resp. App’x, at 116–17. Second, Petitioner failed to either prepay the entire appellate docketing and filing fees, or else explain why he should be excused from doing so. Resp. App’x, at 117–18. Thus, Petitioner was directed, on or before December 19, 2023, to: (1) respond in writing setting forth any basis in law or fact for the Tenth Circuit to exercise appellate jurisdiction over the appeal, in light of the apparent lack of finality; and (2) pay the entire appellate filing and docketing fee, or else explain why the fees should be excused. Resp. App’x, at 118–19. Petitioner was cautioned that failure to show cause as directed “may result in the court dismissing this appeal without any additional notice.” Resp. App’x, at 119.

Petitioner failed to comply with the Tenth Circuit’s Order. On December 28, 2023, the Tenth Circuit terminated Petitioner’s action for lack of prosecution, and the mandate was issued that same day. Resp. App’x, at 120, 121. Furthermore, in a minute order subsequently entered by the district court on January 4, 2024, Petitioner’s district court action was likewise dismissed for failure to file a proper civil rights complaint and pay the filing fee (or else move to file *in forma pauperis*). Resp. App’x, at 123.⁵

⁵ Meanwhile, with respect to the matter of Petitioner’s competence-to-be-executed, the state district court ordered the Oklahoma Department of Mental Health and Substance Abuse Services to evaluate Petitioner’s current competence to be executed, and on February 22, 2024, the State’s neutral forensic examiner found Petitioner presently incompetent to be

On March 26, 2024, Petitioner filed a Petition for Writ of Certiorari in this Court, purportedly challenging the Tenth Circuit’s procedural dismissal of his appeal. For the reasons given below, this Court should deny Petitioner’s Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Although not an exhaustive list, Supreme Court Rule 10 outlines certain circumstances where the grant of a petition for writ of certiorari may be necessary or warranted, as a matter of judicial discretion and “only for compelling reasons.” SUP. CT. R. 10. These circumstances include a conflict among United States courts of appeals on the same matter of importance, a conflict between a United States court of appeals and a state court of last resort on an important federal question, an instance where a United States court of appeals “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power,” or when a state court or a United States court of appeals “has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this

executed. In light of that finding, on May 9, 2024, the parties stipulated to Petitioner’s present incompetence to be executed, and on that same day, the state district court entered an order finding, based on the stipulation of the parties, that Petitioner is presently incompetent to be executed. Resp. App’x, at 153–62. Petitioner’s competency trial was also stricken from the docket. Resp. App’x, at 152. On May 24, 2024, the OCCA entered a Stay of Execution pending Petitioner’s treatment for restoration of competency. Resp. App’x at 163–71. As such, Petitioner’s most recent execution date—which had been slated for June 6, 2024—was stayed until Petitioner regains competency to be executed. *See* OKLA. STAT. tit. 22, § 1005.1(L) (2022). At the time of this Brief’s filing, the State is currently exploring said competency-restoration treatment, and no new execution date has yet been set.

Court,” *inter alia*. SUP CT. R. 10(a)–(c). In that sense, then, this Court has issued the following caution: “A petition for 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.

For the reasons given below, this Court should deny Petitioner’s Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

I. Certiorari should be denied because Petitioner’s case is a poor vehicle for the question presented, and the question presented is not a compelling issue.

For starters, because Petitioner’s case is a poor vehicle for the resolution of the question at stake, certiorari review is unwarranted. *See* SUP. CT. R. 10. In his Petition, Petitioner claims that his then-upcoming competency trial functioned as an “impediment” to the filing of a petition for writ of habeas corpus, and that he was allegedly deprived of the right to a public hearing on the issue of his competency. *See, e.g.,* Petition, at 20–22; Supplemental Brief, at 2–6.⁶ More specifically, though, Petitioner asserts that “federal judges in this state and the Tenth Circuit imposed their will upon those bureaucratic actors,” presumably meaning, the prison officials administrating the facility in which he is housed, and thus, “this is why the Tenth Circuit refuses to recognize the habeas petition, throwing Petitioner into the realm of 42 U.S.C. § 1983, because those same judges have created a false paradigm of restriction under the prison litigation and reform act (PLRA) – the three (3) strike rule.” Supplemental Brief, at 2–3 (capitalization modified). Although not a model of

⁶ Petitioner has filed both a Petition and a “Supplemental Brief” attached to his Petition, which Respondent will cite accordingly.

clarity, Petitioner appears to take issue with the Tenth Circuit's refusal to entertain his appeal, especially since the Tenth Circuit noted that Petitioner had previously been cited for filing frivolous or malicious actions on at least three prior occasions. Resp. App'x, at 117–18.

Since Petitioner's case was taken as an improper appeal to the Tenth Circuit stemming from a non-final dispute over whether Petitioner should have filed his *pro se* civil rights complaint on the proper form and satisfied the filing-fee requirement, and since Petitioner directly disobeyed an order to show cause, both at the Tenth Circuit and at the federal district court below, there is no valid reason for this Court to take up Petitioner's case. *See* SUP. CT. R. 10. Given the factual posture of this case, including Petitioner's refusal to comply with the Tenth Circuit's show-cause order despite being given an opportunity to do so, Petitioner's case is a poor vehicle for resolution of his claim. Accordingly, this Court's judicial resources are better allocated elsewhere. *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions . . . that will 'have no effect on the outcome of the case.'" (quoting *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009))).

Nor does Petitioner's case present a compelling issue for this Court's review. On that point, Petitioner suggests that the Tenth Circuit has, in this case, "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supplemental Brief, at 2 (capitalization modified). Aside from essentially parroting this Court's language in Rule 10, Petitioner's claim, even liberally

construed, fails to show how. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (general rule that *pro se* pleadings are held “to less stringent standards than formal pleadings drafted by lawyers”); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (although a *pro se* petitioner’s complaint should be read broadly, liberal construction “does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based”). Not only does Petitioner fail to explain how the Tenth Circuit’s decision in this case allegedly conflicts with relevant decisions of this Court or presents an important federal question, the matter at stake is also intensely fact-bound and unlikely to be a recurring issue. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (issue not reached by the Court was “a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity”). As such, because certiorari is reserved only for “compelling reasons,” and because this is not such a case, certiorari review is not warranted. SUP. CT. R. 10.

II. The Tenth Circuit correctly dismissed Petitioner’s non-final appeal as it lacked jurisdiction to entertain Petitioner’s claims.

Setting aside the reason for Petitioner’s procedural dismissal at the Tenth Circuit—Petitioner’s decision to disobey the Tenth Circuit’s Order to show cause why the appeal should not be dismissed—the Tenth Circuit correctly identified that Petitioner sought to challenge non-final proceedings in the district court. Resp. App’x, at 116–17. *See also* 28 U.S.C. § 1291 (“[T]he courts of appeals . . . shall have jurisdiction from all *final* decisions of the district courts of the United States” (emphasis added)). “Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that ‘ends the litigation on the merits and leaves

nothing for the court to do but execute the judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)), *superseded by rule as stated in Microsoft Corp. v. Baker*, 582 U.S. 23, 30 (2017). *See also Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 204 (1999).

As explained above, the Tenth Circuit correctly observed that Petitioner’s appeal was taken from ongoing district court proceedings, and that appellate jurisdiction, at the time of Petitioner’s appeal, was therefore lacking. Resp. App’x, at 116–17. Petitioner then, despite having an opportunity to show how the district court’s proceedings were, in fact, final, disregarded the Tenth Circuit’s Order and failed to show cause. Therefore, the Tenth Circuit’s dismissal of Petitioner’s appeal on procedural grounds was a correct judgment, one which does not warrant certiorari review. Resp. App’x, at 120. *See McClung v. Silliman*, 19 U.S. 598, 603 (1821) (“The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed.” (emphasis in original)); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (reaffirming that this Court only decides “questions of public importance” in the “context of meaningful litigation,” and that when the challenged issue may not affect the ultimate judgment of the court below, the issue “can await a day when the issue is posed less abstractly”). Accordingly, Petitioner’s case does not fall under any of the limited categories in which certiorari review is necessary or imperative. *See* SUP. CT. R. 10.

III. Since Petitioner’s competency-to-be-executed trial was stricken from the docket, and since Petitioner was found presently incompetent to be executed, Petitioner’s request for relief is now moot.

Finally, Petitioner’s request for relief has been rendered moot by the state district court’s subsequent finding of Petitioner’s present incompetence to be executed. Resp. App’x, at 153–62. “A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.” *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). *See also United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). To put it differently, since Petitioner’s request for relief centered on his then-upcoming competency-to-be-executed trial, and because Petitioner has since been found presently incompetent, Resp. App’x, at 153–62—with his trial on that matter stricken from the docket, Resp. App’x, at 152—there is “no longer a subject matter on which the judgment of this Court could operate.” *St. Pierre*, 319 U.S. at 42.

Moreover, any ruling on the issue would function as merely an advisory opinion, which this Court has been historically reluctant to provide. *See* 3 Correspondence and Public Papers of John Jay 488–49 (Henry P. Johnston ed., 1891) (declining to issue a response on behalf of the Court to a question posed by President Washington). *See also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (reaffirming that this Court does not issue advisory opinions, but rather decides “concrete legal issues, presented in actual cases, not abstractions” (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947))); *cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (“[This Court is] not permitted to render an advisory opinion . . .”).

To be sure, the State is exploring avenues to restore Petitioner’s competency, as directed by the state district court in its Order issued on May 9, 2024. Resp. App’x, at 159. For the sake of this present action, however, Petitioner’s request for relief stemming from his since-stricken competency-to-be-executed trial is now no longer at issue, and thus has been rendered moot. *See Aikens v. California*, 406 U.S. 813, 814 (1972) (per curiam) (dismissing writ of certiorari upon party’s motion, observing: “Petitioner thus no longer faces a realistic threat of execution, and the issues on which certiorari was granted . . . is now moot in his case”). For this reason, in addition to the ones stated above, this case does not merit certiorari review. *See* SUP. CT. R. 10.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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