No. 20A9

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

WESLEY IRA PURKEY

(CAPITAL CASE)

REPLY IN SUPPORT OF APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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All agree that respondent could have brought his current claims as part of the application for habeas corpus relief he filed in the Southern District of Indiana soon after his execution date was first scheduled last year. Respondent made a different choice. After seeing the district court in the Southern District of Indiana deny his application for habeas relief on other claims, and seeing the district court in the District of Columbia grant a stay of his execution date in unrelated litigation concerning a challenge to the federal execution protocols, respondent chose to instead file this case in the District of Columbia, asserting a never-before-recognized cause of action that he asked the district court to infer directly from the Constitution itself.

At 5:00 a.m. this morning, the district court rewarded respondent for that choice. It held that he is likely to succeed in showing that the Constitution contains an unwritten and previously uninvoked cause of action that supplants the application for a writ of habeas corpus in 28 U.S.C. 2241 for prisoners asserting claims under Ford v. Wainwright, 477 U.S. 399 (1986), allowing them to bring suit in a forum of their choosing far from the district of their confinement. And the court went on, in just a few short sentences, to conclude that respondent is likely to prevail on that cause of action -- even though respondent's own expert, in a declaration attached to his own complaint, acknowledged that respondent "accept[s] that he is going to be executed for the murder of Jennifer Long." D. Ct. Doc. 1-1, at 12 (Nov. 26, 2019).

As the government explained in its application, this Court should not allow that decision to stand. Respondent never addresses this Court's admonitions that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," it would be inappropriate "to supplement that scheme with one created by the judiciary." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996). Because respondent does not dispute that he could have brought his Ford claim in habeas, that principle is dispositive here. And even if courts were free to devise unwritten constitutional causes of action for

the pursuit of non-"core" habeas claims, as the district court's decision implicitly assumed, respondent has not shown that the claims here would qualify. Respondent argues under Ford that he is incompetent to be executed and thus the government is barred from executing him under current law; his claim is therefore properly treated as a postconviction habeas claim.

Even if respondent had brought his claim in the appropriate manner and forum, though, it would have had no substantial likelihood of success. Respondent's curated submissions, like the district court's cursory "analysis" of them, do not establish a threshold showing that respondent is incompetent to be executed under Ford, supra. That is because, for all of their focus on generalized issues involving respondent's allegedly deteriorating mental state, those submissions cannot change the specific fact relevant under Ford: respondent understands that he has been sentenced to die because he kidnapped, raped, and murdered a 16-year-old girl.

Finally, respondent seeks to distract from the numerous flaws in his own case by attacking the government's conduct in this litigation. Those attacks are unfounded. Because respondent chose not to use the scheme for relief that Congress provided in Section 2241, he was not entitled to any of the discovery that he complains at length about not receiving. Nevertheless, the government did voluntarily accommodate many of respondent's requests for evidence

relevant to his current mental condition. Respondent now tries to turn the government's most recent voluntary accommodation into an affirmative reason to further delay the execution, suggesting that the government concealed evidence favorable to his claims, while failing to include that supposed evidence in his lengthy appendix. His suggestion that the government concealed evidence favorable to him is wrong, as the reports themselves -- which respondent's appendix does not include, but which the government will provide to the Court upon request -- demonstrate.

For all of those reasons, and others addressed in the government's application, this Court should allow the execution to proceed as scheduled.

A. Respondent's Claims Are Unlikely To Succeed Because He Chose To Circumvent The Habeas System That Congress Has Created To Hear Claims Like This One

As the government's application explained (Stay Appl. 14-15), where Congress has provided a "remedial scheme for the enforcement of a particular right," it would be inappropriate for courts to "supplement that scheme" by inferring new, unwritten causes of action. Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 74 (1996); see Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'") (citation omitted). Here, respondent does not dispute that Congress has provided a remedial scheme by which to

pursue his Ford claim -- an application for a writ of habeas corpus filed under 28 U.S.C. 2241 in the district of confinement. Accordingly, against the backdrop of a half-century's worth of this Court's cases refusing to infer unwritten causes of action in such circumstances, respondent has no substantial likelihood of showing that a new cause of action should be inferred directly from the Constitution to allow him to bring his claims in his preferred forum rather than the district of his confinement. Respondent has no answer to this dispositive point.

Ignoring the difficulty of asking a Court to create a new cause of action, respondent focuses instead on whether Congress has foreclosed a new cause of action. But respondent simply repeats the district court's flawed reasoning that because an incompetent prisoner's competency could be restored at some point in the future, a Ford claim does not necessarily bar his execution for all time and thus does not qualify as a "core habeas" claim. Opp. 26-29. But he does not meaningfully engage with the government's showing that Ford claims are manifestly unlike the single-manner-of-execution claims to which he analogizes them. See Stay Appl. 15-16. Nor does he address the implications of his argument -- which would suggest that any federal prisoner's Ford claim may be brought in any court in the Nation -- or this Court's own repeated consideration of Ford claims by state prisoners in the context of habeas petitions. See id. at 16.

B. Respondent's Claims Are Unlikely To Succeed Because He Has Not Made A Threshold Showing That He Is Incompetent To Be Executed

In any event, respondent's claims are meritless. Respondent has not made a substantial threshold showing of incompetency, and thus he would be unlikely to succeed on either the merits of his Ford claim or his derivative due process claim even had he brought them in the correct jurisdiction.

1. Most of respondent's merits argument rests on general assertions about purported mental infirmities. See Opp. 9-14. But such general assertions have no bearing on whether a prisoner is incompetent to be executed. Ford is concerned with one very specific type of mental infirmity: only if a prisoner is unable to "reach a rational understanding of the reason for his execution" does the prisoner lack competency to be executed. Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (brackets and quotation marks omitted). And a prisoner is entitled to a hearing on whether he is competent to be executed only if he makes "a substantial threshold showing" of incompetency. Panetti v. Quarterman, 551 U.S. 930, 949 (2007).

Respondent's brief in this Court does not change the fact that the only direct support respondent has offered for his incompetency claim is the report of Dr. Bhushan Agharkar, a psychiatrist who interviewed respondent in November 2019. D. Ct. Doc. 1-1, at 3 (Nov. 26, 2019). Although Dr. Agharkar opined that respondent is incompetent to be executed, his report is

fundamentally flawed on its face because it conflates respondent's understanding of the reason for his execution (which could prevent him from being executed under Ford), with his understanding of the reason for scheduling his execution date (which has no bearing on his competency under Ford). See id. at 2-14; see also Stay Appl. 24-26. Respondent's own pro se filings in the Southern District of Indiana show that it is the "selection of his execution date" that he claims was retaliation for his "jailhouse lawyering," and that any delusions he has are not about why he has been condemned to die but rather why his execution will be carried out before "other inmates who ha[d] fully exhausted their appellate remedies prior to me." 19-cv-517 D. Ct. Doc. 1, at 1, 3 (S.D. Ind. Oct. 28). Indeed, Dr. Agharkar noted that respondent "stated that he knew what an execution was and said that he accepted that he was going to be executed for the murder of Jennifer Long," D. Ct. Doc. 1-1, at 12 (emphasis added), which plainly indicates that respondent "rationally understand the reasons for his death sentence," Madison, 139 S. Ct. at 728.

While it is true that at one point Dr. Agharkar stated that respondent "has a fixed belief that he is going to be executed for his legal work," D. Ct. Doc. 1-1, at 12, it is clear from the entirety of their discussion that respondent's concern is "that he was given a date for execution unfairly and for reverse discrimination," id. at 11 -- not that his legal work and

discrimination against it were the reason for his death sentence in the first place. See also Stay Appl. 24-26. Respondent's pro se filings confirm this.

The facts of Panetti v. Quarterman, supra, where it was uncontested that the prisoner had made a substantial showing of incompetency, do not help respondent. The prisoner in Panetti believed that his execution was "part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light" and an expert opined that he thought "that the stated reason [for his execution] is a sham and the State in truth wants to execute him to stop him from preaching." Panetti, 551 U.S. at 954-955 (internal quotation marks omitted). By contrast, respondent has accepted that he is going to be executed for Long's murder; his purported confusion as to why he has been selected for an execution date differs from the prisoner's inability to understand the reason for his execution in Panetti.

None of respondent's other allegations indicates that he lacks competency under Ford, and indeed many of the documents he relies on strongly support the conclusion that he understands the reasons for his execution. See Stay Appl. 27-29 (explaining in detail why respondent's purported mental infirmities and diseases do not prevent him from understanding the reasons for his execution). And as the government explained in its stay

application, id. at 15-16, the district court's conclusory findings in a single paragraph fall far short of the required showing under Ford.

2. Without the required threshold showing, Ford and Panetti v. Quarterman, supra, make clear that no process -- including information-sharing or discovery -- is required. See Panetti, 551 U.S. at 950 ("Petitioner was entitled to these protections once he had made a substantial threshold showing of insanity.") (emphasis added; internal quotation marks omitted). Respondent's due process claim thus is certain to fail along with his Ford claim. Respondent argues that he could somehow have succeeded if the government had not, in his view, sought "a litigation advantage by depriving counsel of information about their client." Opp. 33. He asserts that there has been "significant interference [by the government] with his attempts to gather critical evidence" of his medical condition and offers a number of factual accusations (undeveloped in the record) about the government's alleged conduct. Opp. 32.

For numerous reasons, the Court should give these allegations no weight. As an initial matter, although respondent pressed many of these allegations below, the district court's order did not credit them in balancing the relative equities. This Court should not either. The government disputes many of respondent's factual assertions and his suggestion that the government has not acted in

good faith. Indeed, the government has been accommodating of respondent's requests, permitting testing at counsel's request despite the lack of any formal discovery requests or orders authorizing medical testing. See D. Ct. Doc. 27, at 1-2 (June 29, 2020). BOP officials have tried to accommodate counsel's testing requests and provided counsel with information to schedule in-person visits. Id. at 8 n.1; D. Ct. Doc. 27-1 (Siereveld Decl.)(June 29, 2020).

3. Finally, respondent asserts that "five minutes before this filing, [respondent]'s counsel learned that the Government appears to have had scientific confirmation in their possession of significant structural abnormalities in [respondent]'s brain that are consistent with cognitive impairment such as vascular dementia or other conditions." Opp. 33. The government assumes that counsel is referring to the results of the recent testing and disagrees with his characterization. The government does not believe that review of the district court's preliminary injunction would appropriately include review of contested non-record materials. In any event, to the extent that respondent suggests that recent test results (which he does not include in his appendix) support leaving the preliminary injunction in place, that suggestion is unsound.

Respondent relies on a new expert report in his appendix (Resp. App. 296a-299a) that purports to find significant new data

in the recent tests performed on respondent -- again, tests that the government facilitated despite the absence of any legal obligation to do so. But that report again relies on general assertions of mental condition and does not suggest evidence of the particular type of incompetence that Ford requires. It is also highly selective in its reading of the test results, which the government is willing to provide to the Court upon request, but which specifically state that certain evidence that would be indicative of Alzheimer's disease and dementia was not found.

4. In sum, having failed to make the threshold showing necessary for discovery in the district court, respondent now tries to make that showing in this Court, characterizing the government's voluntary accommodation of certain medical requests as evidence of significant misconduct. That characterization is inaccurate and unfair, but the critical point is that respondent still cannot make the required threshold showing. For a Ford claim to proceed, the claimant must make a threshold showing of a specific kind of mental infirmity. Here, respondent's evidence not only fails to make that showing -- it refutes it.

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For the foregoing reasons and those stated in the government's application for a stay or vacatur, this Court should immediately stay or summarily vacate the district court's preliminary injunction.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

JULY 2020