

# CV-17-291

\*\*\*THIS IS A CAPITAL CASE\*\*\*

\*\*\*EXECUTION DATE SCHEDULED FOR APRIL 17, 2017\*\*\*

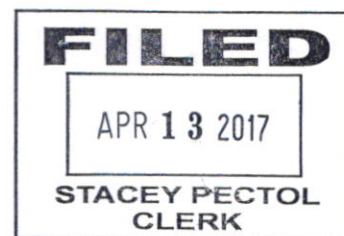
BRUCE WARD,

PETITIONER

v.

WILLIAM ASA HUTCHINSON,  
Governor of the State of Arkansas;  
WENDY KELLEY, Director, Arkansas  
Department of Correction;  
MARK CASHION, Warden, Varner  
Supermax Unit;  
and BENNY MAGNESS, Chairperson,  
Arkansas Board of Corrections;

RESPONDENTS.



## EMERGENCY PETITION FOR STAY OF EXECUTION

The State of Arkansas intends to execute Petitioner Bruce E. Ward on April 17, 2017, at an undisclosed time. Mr. Ward, a diagnosed schizophrenic, has spent over 25 years in solitary confinement without any treatment for his mental illness. On March 29, 2017, Mr. Ward filed a Complaint in Arkansas's Jefferson County Circuit Court, alleging that he is incompetent to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Though Petitioner made multiple requests for a hearing or conference, it was only today, after he initiated in this Court a mandamus action, that the lower court finally entered a ruling on his Complaint, adopting Respondents' arguments and dismissing for lack of jurisdiction.

Mr. Ward seeks an emergency stay from this Court pursuant to ARK. CODE ANN. §§ 16-90-506(a)-(c) and ARK. CONST. amend. 80, §§ 1, 2(E), & 3, in order to avoid his unconstitutional execution on April 17, 2017, and to permit him time for full briefing and consideration of these important issues in this Court.

### **Procedural History**

On February 27, 2017, Arkansas Governor Asa Hutchinson ordered the execution of eight prisoners to take place between April 17 and April 27, 2017. The governor therein ordered Mr. Ward's execution on April 17.

Amidst the various legal challenges for the foregoing eight men,<sup>1</sup> Petitioner's Arkansas-barred, state court counsel filed a state court action on March 29,

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<sup>1</sup> In state court, Mr. Ward has been represented by Scott Braden, the Capital Habeas Unit chief in the Office of the Federal Public Defender for the District of Arkansas. He has been counsel of record for Mr. Ward, and local counsel, since 2007. He is also counsel for three other prisoners sentenced to die over the next two weeks. He has acted to advance their respective interests while carrying out his responsibilities in pending federal district court litigation affecting their rights along with the other men for whom the governor signed execution warrants this month. He has been responsible for preparing their clemency applications and hearings, as well as federal court litigation. *See Lee v. Hutchinson*, 4:17-cv-00194 and *McGehee v. Hutchinson*, 4:17-cv-00179. Both suits have been the subject of

2017, substantiating Mr. Ward's incompetency to be executed under the constitutional authorities of *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). In support, he submitted over 600 pages of supporting evidence, including psychological reports, affidavits from current and prior counsel who had represented Mr. Ward for over 27 years, and Arkansas Department of Corrections medical records.

Two days later, on March 31, 2017, at approximately 11:00 a.m., the State filed a motion asking the court to allow its own expert to observe an evaluation by Mr. Ward's expert, scheduled for the following day. Within hours, the court had convened a teleconference on the matter and took argument. By the late afternoon

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multi-day hearings in the district court. *Lee v. Hutchinson*, 4:17-cv-00194 (hearing from April 4-6); *McGehee v. Hutchinson*, 4:17-cv-00179 (hearing commenced on April 11, 2017 and continuing as of this filing). The latter suit has generated over 1,000 pages of discovery pertaining to the scheduled executions, most of which had never been accessed by Plaintiffs or their counsel. Both challenges also assert that sentencing multiple clients to death within days of one another result in conflicts of interest, stripping counsel of their ability to competently represent their clients. *McGehee v. Hutchinson*, 4:17-cv-00179, E.D. Ark. Doc. 31



that same day, she had entered an order allowing the State to videotape the evaluation by Mr. Ward's expert.

Mr. Ward immediately filed objections along with a notice that the evaluation would be postponed because his expert did not believe that he could ethically conduct the interview, given his obligation to inform Mr. Ward of its conditions and Mr. Ward's profound state of delusion and paranoia. Undersigned counsel also asserted that they would need to observe the prison's plant and procedures for videotaping the evaluation. The following day, counsel met with her client (without the expert) and then met with an assistant attorney general and assistant warden to assess the videotaping equipment and room.

On April 4, undersigned counsel moved the state court to reconsider its order allowing the State to videotape his expert evaluation. The order had effectively precluded him from obtaining an expert evaluation. He provided a sworn statement from his expert, in which the doctor asserted that conducting the videotaped examination would violate his code of ethics because of the harm it would do to the client. Counsel attached to their motion a copy of a motion previously filed by the State in federal court, in which the State's own mental health expert made the same assertion: namely, that the doctor was precluded from conducting an evaluation that would be monitored by a third-party (either physically or electrically) and that to conduct an evaluation under such conditions would violate his code of ethics.

Thus, in Mr. Ward's case, the State had knowingly sought to obstruct his legal team's ability to develop evidence of his incompetence.

On April 5, the defendants in the state litigation filed a Motion to Dismiss and Brief in Support, arguing, inter alia, that the court lacked jurisdiction by virtue of *Singleton v. Endell*, 316 Ark. 133 (1994), and that the state court had no power to grant a stay of execution pursuant to *Singleton v. Norris*, 964 S.W.2d 366, 367 (1998) (per curiam).

On April 7, Mr. Ward filed his response. That same day he amended his complaint to properly identify the defendants in their individual and official capacity, and to correctly name the present warden of the Varner Supermax Unit, where Mr. Ward has been incarcerated in solitary confinement since 2003. (Prior to that, since his initial sentence in 1990, Mr. Ward was incarcerated in the Tucker Maximum Security prison.)

On April 11, Mr. Ward moved the court to hold a status conference and renewed his request for a hearing. Mr. Ward cited to his impending execution date as well as his Arkansas-barred counsel's limited availability, due to the mass executions scheduled for later this month.

Also on April 11, defendants filed a Motion to Dismiss the Amended Complaint and Brief in Support, which was largely the same as its prior motion to dismiss.

On April 12, 2017, counsel for Mr. Ward again attempted to contact the court in order to schedule a conference or hearing. He sent an email to the court and counsel for the State in the early morning, but did not receive a response. He finally reached the court's clerk by telephone and was informed that the judge is out of the office and that chambers will be closed on Good Friday, April 14, 2017.

On April 12, counsel also attempted to file a petition for a writ of mandamus in the Arkansas Supreme Court, asking that court to direct its lower court to enter an order in his case. However, the circuit court refused to issue him a certified record because the court inexplicably found that Mr. Ward (a death row prisoner for over twenty-seven years, who is not permitted to work and has been appointed counsel repeatedly) was not indigent and, thus, was unable to initiate the paper filing in the Arkansas Supreme Court prior to the close of business.

On April 13, Mr. Ward was finally able to tender the Writ of Mandamus to this Court. At 9:40 a.m. this Court ordered the Attorney General to respond to Mr. Ward's petitions to proceed in forma pauperis and to complete record by 11:00 a.m. At 11:12 a.m., the Attorney General's office informed this Court via letter that it had a conflict of interest and had retained a private attorney to represent Judge Dennis in the mandamus action. At 12:35 p.m. the Attorney General's office notified this Court that it would not respond.



At 1:41 p.m., the Jefferson County Circuit court entered a one-page order dismissing the claim.

As discussed below, this case presents serious constitutional issues. This Court should grant him a stay and set a full briefing schedule in order to give meaningful consideration to these important issues.

### **Argument**

#### **I. The Court has the authority to stay Mr. Ward's execution.**

The Court has authority to stay the execution of a death sentence in light of “any competent judicial proceeding” under ARK. CODE ANN. § 16-90-506(a)(1), as well as the Court’s “inherent judicial power.” *Singleton v. Norris*, 332 Ark. 196, 200-02, 964 S.W.2d 366, 367-69 (1998). For the reasons explained below, Mr. Ward’s underlying complaint presents issues that are “bona fide and not frivolous,” and therefore, the Jefferson County proceedings are “competent.” *Singleton*, 332 Ark. at 207, 964 S.W.2d at 372 (opinion on denial of rehearing).

#### **II. Mr. Ward brings meritorious constitutional claims warranting full briefing and meaningful consideration of this Court.**

Only after Mr. Ward’s mandamus petition to this Court did the circuit court rule on the substantial pleadings initiated in her court on March 29, 2017. In apparent haste, the circuit court ruled in a one-page order denying injunctive relief and dismissing the action. The court stated: “The defendants’ arguments in support of their motion to dismiss are well founded. The defendants have sovereign and statu-

tory immunity, plaintiff has failed to exhaust his administrative remedies, and plaintiff has failed to state a claim for which the Court can grant relief.”

This Delphic pronouncement on a case of this gravity is deeply troubling and made all the more so by the circumstances under which it was entered. The case languished inexplicably and an order was jarred loose only after engaging Supreme Court process. The circuit court’s reasoning, in as much as one can surmise the rationale, sidesteps the central question presented in Mr. Ward’s complaint. The State argued in the circuit court that “[a]s a matter of law, Ward was not denied due process when he was not given a hearing” on his competency to be executed and that “this Court is fundamentally without jurisdiction to grant the injunction Ward seeks.” (April 11, 2017 Brief in Support of Motion to Dismiss at 12). Appellees maintained that Arkansas’s scheme for determining a prisoner’s competency for execution, *viz.*, the Director’s Statute (Ark. Code Ann. § 16-90-506(d)(1)), explicitly denies Mr. Ward any access to the circuit court (or any other motion court) for a judicial determination that, by the evidence and bases set forth in his Complaint, he has made “a substantial threshold showing of insanity.” *Ford*, 477 U.S. 399, 426 (1986) (Powell, J., concurring).

The State has relied on *Singleton v. Endell*, 316 Ark. 133 (1994), a case decided eight years after *Ford*, for its categorical view that the executive branch dictates competency determinations. Appellees have insisted that the Director’s Stat-



ute *can* arrogate the jurisdiction of the Arkansas judiciary to entertain counsel's claim of Mr. Ward's incompetence and simply shut him out of the courts entirely. But in his dissent in *Ford*, then Justice Rehnquist noted that the Court had "creat[ed] a constitutional right to a *judicial* determination of sanity before [the death] sentence may be carried out," and that this signaled a marked departure from the Court's precedent. *Id.* at 435 (emphasis added, discussing *Solesbee v. Balkcom*, 339 U.S. 89 (1950)). In any case, prior to this appeal, this Court has not had cause to revisit *Singleton* in the ensuing 23 years from the *Ford* decision. However, the Supreme Court *has, in fact, revisited Ford* since *Singleton*.

In 2007, the United States Supreme Court decided *Panetti v. Quarterman*, 551 U.S. 930, clarifying the plurality opinion in *Ford* to unequivocally require a judicial determination of the gateway question of whether a prisoner's motion for a hearing sets forth the requisite "substantial threshold showing." *Panetti*, 551 U.S. at 949. Further, *Panetti* enunciated that the "protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Id.*, quoting *Ford*, 477 U.S. at 426. *Singleton* simply does not square with the federal constitutional jurisprudence and Mr. Ward's appeal presents this Court with the occasion to tackle the matter.

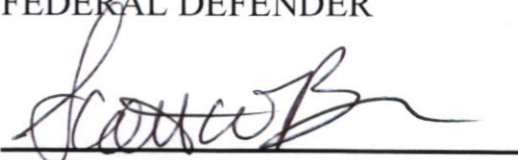
The appeal thus presents this Court with an issue of great importance and warrants further process and a reasonable briefing schedule to fully present the

complexities at bar. As a result of the delays suffered in the circuit court, at this juncture heading into Good Friday before Mr. Ward's execution date on Monday, April 17, a stay of execution is warranted from this Court so that it may be able to properly consider this grave issue.

Respectfully Submitted,

JENNIFFER HORAN  
FEDERAL DEFENDER

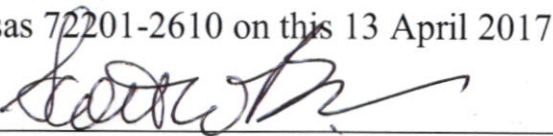
By:



Scott W. Braden  
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### **CERTIFICATE OF SERVICE**

I, Scott W. Braden, hereby certify that I have hand delivered a copy of the foregoing Motion to Office of the Attorney General, 200 Catlett-Prien Tower Bldg., 323 Center Street, Little Rock, Arkansas 72201-2610 on this 13 April 2017.



Scott W. Braden