# THE COURT OF COMMON PLEAS
# CUYAHOGA COUNTY, OHIO

**STATE OF OHIO,**
**Plaintiff**

**vs**

**ABDUL HAMIN AWKAL**
**Defendant**

**CASE NO. CR-276801**

**MEMORANDUM OF OPINION AND ORDER**

**FRIEDMAN, J.:**

[¶1] The Court has before it the defendant's renewed Postconviction Petition Under Ohio R. C. §2953.21, et seq., etc., filed May30, 2012, and the state's brief in opposition. Mindful of the fact that the defendant is scheduled to be executed on Wednesday, June 20, 2012, the Court will be succinct in its consideration of the issues raised.

[¶2] There is no need at this juncture to recite the procedural history of the case in any detail. The Court will merely note that the defendant was charged, *inter alia*, with two counts of aggravated murder with "mass murder" specifications, stemming from the shooting death of his estranged wife and brother-in-law outside a hearing room in the Cuyahoga County Domestic Relations Court.

[¶3] The defendant initially was found to be not competent to stand trial and referred to the Dayton Forensic Center for restoration to competency. He subsequently was found competent and was tried to a jury. The jury found him guilty of the underlying charges and of the specifications; that same jury later recommended imposition of the death penalty. On December 14, 1992, the Court issued an opinion accepting the jury's recommendation and imposing the death penalty.

[¶4] Subsequent to that date there have been numerous appeals and other proceedings challenging the verdict and sentence, both in Ohio state courts and in the federal judicial system. In all cases both the verdict and the sentence have been affirmed.

[¶5] On April 9, 2012, counsel for the defendant filed a petition for post-conviction relief, seeking to vacate the death penalty on the basis that the defendant is not competent to be executed , and citing *Ford v. Wainwright*, 477 U.S. 399 (1986) and its progeny – in particular *Panetti v. Quarterman*, 551 U.S. 930 (2007). In response to that petition, the Court appointed the expert requested by counsel, Dr. Phillip Resnick (Director of the Court's Psychiatric Clinic) to examine the defendant. Collaborating with Dr. Resnick in the evaluation was his associate, Dr. Jennifer Piel. The prosecuting attorney retained Dr. Stephen Noffsinger, also of the Court Psychiatric Clinic to perform a second evaluation. At the date set for the hearing, the Court was advised that Drs. Resnick and Piel and Dr. Noffsinger all had concluded that – despite his documented history of severe and longstanding mental health issues – the defendant was indeed competent under the *Ford* standard, in that he understood that his impending execution was to take place as punishment for his murder of his wife and brother-in-law; accordingly, the Court denied the petition.

[¶6] Counsel for defendant filed a renewed petition for post-conviction relief on May 30, 2012, this time supported by the report of an evaluation performed upon the defendant by Dr. Pablo Stewart, who concluded, on the basis of his review of the history of the case and his examination of the defendant, that Mr. Awkal is *not* competent to be executed. The state responded the next day, alleging that the defendant was not entitled to a hearing, that he had failed to make a sufficient showing of his mental state to justify a *Ford* hearing; the state further asserted that this Court lacks the authority to order a stay of execution.

[¶7] On June 4, 2012 – two days before the scheduled execution of the defendant – the Court held a hearing, at which it determined that Dr. Stewart's report provided sufficient evidence as to the defendant's state of mind to justify a full evidentiary hearing on the petition for post-conviction relief. Upon being advised that Dr. Stewart was engaged in a murder trial in Arizona, and thus would not be available to testify prior to the June 6 scheduled execution date,the Court directed counsel to take any appropriate action to seek a stay of execution until a hearing could be held.

[¶8] On June 5, 2012, the Court was advised that the Ohio Supreme Court had denied the requested stay of execution; later that same day, however, Gov. John Kasich issued a fourteen-day reprieve, until 10:00 a.m. on June 20, 2012, in order to permit the *Ford* hearing to take place. Accordingly, on the morning of June 6 the Court called all counsel into chambers, in order to set a date for the hearing; upon learning that Dr. Stewart could appear as early as June 12, the hearing was duly set for that date. The Court was further informed that Dr. Resnick had noted certain statements by the defendant reported by Dr. Stewart that had not been made in his earlier evaluation and that accordingly he wanted to re-interview Mr. Awkal prior to his testimony. In response the Court ordered the defendant returned to Cuyahoga County in time for that interview to take place, as well as a second interview by Dr. Noffsinger.

[¶9] The Court first must note that a trial court's jurisdiction post-conviction is limited to those situations where it is specifically granted. Such situations include, for example, judicial release and postconviction relief. On its face Ohio's Postconviction Relief statute (R.C. §§2953.21, et seq.) does not appear to be intended to serve as a vehicle for challenging a defendant's competence to be executed. However, in the closely analogous situation of an *Atkins* determination (regarding a claim of mental retardation as a basis for asserting that the defendant is not competent to be executed[1]), the Ohio Supreme Court has held specifically that: "The procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing Lott's *Atkins* claim." *State v. Lott*, 97 Ohio St. 3d 303, 202-Ohio-6625, at ¶13. The Court continues, setting forth the procedural framework for such a hearing:

> In considering an *Atkins* claim, the trial court shall conduct its own de novo review of the evidence in determining whether the defendant is mentally retarded. The trial court should rely on professional evaluations of Lott's mental status and consider expert testimony, appointing experts if necessary, in deciding this matter. The trial court shall make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded. We believe that these matters should be decided by the court and do not represent a jury question. In this regard, a trial court's ruling on mental retardation should be con-

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

ducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury, decides the issue).
*Id.*, at ¶18.

[¶10] The state further asserts that the instant petition should be denied because Ohio Rev. Code §2953.23(A) provides that a court may not entertain a second or successive petition, unless "...either of the following applies:

> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief; [or[
> (b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

Under the unique facts of this case, the Court finds that subsection (a) applies here: the defendant—who is indigent—was not aware of Dr. Stewart's availability to perform an evaluation and report prior to the unanticipated involvement of other individuals in this case—specifically, David Singleton, his attorney in an unrelated civil action. Furthermore, and particularly in cases involving the death penalty, the Court deems it appropriate to permit the petitioner herein the benefit of any doubt—certainly, at least, as to any procedural matters. If Mr. Awkal is to be executed, that decision should be made on the merits, not due to any possible procedural shortcomings by counsel.

[¶11] Attached to the renewed petition is a report prepared by Dr. Pablo Stewart, M.D. Dr. Stewart's C.V. (also provided) establishes that he has expertise in the specific field of evaluating defendants as to competency for execution.

[¶12] The state, in its brief in opposition, attacks Dr. Stewart's credentials, noting—*inter alia*—that his credibility was questioned in one case, and that in another case the trial court "...chose to follow the findings of another psychiatrist over those of Dr. Stewart." The state further asserts that, from counsel's own research, "...it appears that Dr. Stewart only testifies for the defense and, quite often, in post-conviction capital litigation." The Court determined that these issues, both as to Dr. Stewart's credentials and

as to possible bias, should not be disposed of by this Court on the state's motion, but rather affected the weight to be given to his testimony: claims of bias of an expert witness may be relevant for impeachment purposes, but are not sufficient to deny a hearing on the findings of his report. In any event, the findings pronounced by Dr. Stewart appeared to be most significant and disturbing, particularly in light of the fact that—having considered much of the same evidence, and having interviewed the defendant mere weeks after Drs. Resnick, Piel, and Noffsinger, and applying the same legal standard to the evidence before him, Dr. Stewart drew a conclusion that is substantially in conflict with their earlier findings.

[¶13] The state further challenges Dr. Stewart's conclusions by asserting that another person was present during the interview of the defendant, whose participation might have affected the outcome of the evaluation. Again, this is a matter for cross-examination at an evidentiary hearing, and not grounds for the Court to ignore Dr. Stewart's report *in toto*.

[¶14] At hearing the parties stipulated to the qualifications of Drs. Resnick, Piel, and Noffsinger as expert witnesses. Following a lengthy testimony as to his credentials, the Court concluded that Dr. Stewart also qualified as an expert witness.[2]

[¶15] On the eve of the hearing defense counsel advised the Court and the state that they had secured yet another witness who had performed an evaluation of Mr. Awkal, and who was prepared to testify immediately after Dr. Stewart. This was Dr. Bob Stinson, a forensic psychologist. He also was stipulated as qualified to testify as an expert witness, and the Court permitted him to testify, although over the objection of the state due to the lateness of his involvement in the case.

THE STANDARD TO BE APPLIED

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2 Although Dr. Stewart is a clinical psychiatrist, and not a forensic psychiatrist, no objection was made to his testimony on this basis, and it appears that he in fact has testified as an expert witness in several other jurisdictions.

[¶16] Although *Ford v. Wainwright, supra*, has been cited as the leading case on the subject, a review of the plurality decision rendered by Justice Marshall (there was no majority opinion) nowhere establishes a firm standard for the court to determine whether a defendant is competent to be executed. Such standard may be gleaned, however, from Justice Kennedy's majority opinion in *Panetti v. Quarterman, supra*. As in the case *sub judice*, Panetti was sentenced to death because he had been found guilty of a brutal multiple murder; however, he suffered from the delusional belief that he was to be executed in order to stop him from preaching. *127 S. Ct. 2859*. Panetti met the first three criteria for competence to be executed: [F]irst, he is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question." *Id., at 2860*. In *Panetti*, though, the Court held that limiting the inquiry to these questions precluded the court from inquiring into the defendant's delusional state of mind and thus prevented a determination as to whether he had a rational understanding of the reason for his execution.

[¶17] It is incumbent that the Court to make it clear that this hearing is *not* about whether the defendant is guilty or innocent, or whether the jury properly recommended and the court properly imposed the death penalty, or about whether he received effective assistance of counsel at any previous stage of these proceedings. Those issues have been litigated repeatedly over the past twenty years. Despite these and other issues that have been raised, the verdict and sentence have been and remain affirmed. Similarly, any issues as to his mental competence to stand trial, sanity at the time of the act, competence to waive his right to further appeals (both in 2005 and 2007) are relevant only to the extent that they may be useful in assisting the Court in determining whether the claim of severe mental illness is longstanding—and thus presumably genuine—or of recent appearance—and thus indicative of malingering.

[¶18] Thus, the sole issue before this Court is a determination whether the defendant is competent to be executed under the standards set forth by the United States Supreme Court. No matter how heinous the crime, no matter how devastating its impact upon

the victims, their families, or society as a whole, to execute a man who—due to severe mental illness—cannot fully and rationally appreciate the connection between his actions and his execution constitutes cruel and unusual punishment, in violation of the Eighth Amendment.

[¶19] Thus, and as difficult as it is for all concerned (including, one may add, the Court itself) in these proceedings the Court may not consider any victim-impact information: such statements were relevant in proceedings before the Ohio Parole Board and the Governor, in considering the request for clemency.[3] Once again, the single issue for this Court to determine is a rather straightforward one: is the defendant presently competent to be executed? As the Supreme Court summarized the issue in *Ford v. Wainwright*, 477 U.S. 399 (1986): "For centuries, no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common law heritage in holding that it does."[4]

[¶20] That simple declaration of principle unfortunately leads us into a morass in attempting to define "insane". We can determine easily enough whether a bone is fractured; tests can determine whether a tumor is benign or malignant; we can even determine a person's ancestry by analysis of his DNA—but by their very nature *mental* health determinations remain more art than science, and even highly skilled practitioners may disagree as to the diagnosis.

[¶21] As the Supreme Court held in *Ford v. Wainwright*, supra, at 414:

> We recently had occasion to underscore the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), we recognized that, because

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3 The Court has been made aware of—but has not read—a Facebook page urging clemency for Mr. Awkal, and also of a blog that contains an impassioned plea by the victims' brother, Ali Abdul-Aziz, urging execution of the defendant. There also appear to be any number of items on the internet adopting various points of view.

4 While that language, taken literally, would appear to preclude the execution of anyone found to be insane, the Court is aware that subsequent case law has limited the holding.

> Psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms.
> The factfinder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party' when a defendant's sanity is at issue in a criminal trial. *Id. At 81.*

[¶22] This dilemma was best expressed by Mr. Justice Frankfurter, dissenting, in *Solesbee v. Balkcom*, 339 U. S. 9, 23 (1950):

> The vindication of this concern turns on the ascertainment of what is called a fact, but which, in the present state of the mental sciences, is, at best, a hazardous guess, however conscientious. If the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself. And the minimum assurance that the "life and death" guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.

(Cited in *Ford v. Wainwright, supra*, at 414.)

[¶23] All the experts who testified agree that Abdul Awkal suffers from a severe mental illness: schizoaffective disorder, depressive type--a form of psychosis. This diagnosis was supported by the defendant's repeated statements, made in various contexts and over more than a decade, claiming that he had provided information to the United States Central Intelligence Agency (CIA), the White House, and the presidential campaign of John Kerry and John Edwards, offering advice as to the conduct of the fight against Osama bin Laden and Al-Quaeda and the prosecution of the wars in Afghanistan and Iraq, and that he would receive coded replies via news articles in U.S.A. Today and other media sources. All the experts further noted a depressive component to that diagnosis. Dr. Stewart, Dr. Stinson. There was an issue raised as to possible post-traumatic stress disorder (PTSD); however, that was not confirmed by a preponderance of the evidence, and is not deemed significant in light of the more fundamental diagnosis.

[¶24] All the expert witnesses further concur that the defendant is aware that he was tried, convicted, and sentenced to death for the murder of his wife and brother-in-law.

[¶25] The discrepancy—and the nub of this case, as it happens—lies in the claim by Mr. Awkal that his death sentence would not be carried out but for the fact that "the CIA wants me dead." Mr. Awkal has stated on several occasions his belief either that his sentence had been commuted by President Bush or that his appeals would have been successful, but that the CIA wants him to die because he knows too much or because he went over the head of the Agency in discussing his plans with either President Bush or the Kerry/Edwards campaign.

[¶26] Dr. Stewart and Dr. Stinson find these statements to be evidence of the defendant's psychosis—a persistent belief that is at odds with the facts. Dr. Noffsinger, on the other hand, asserts that this is evidence not of his psychosis but of dissembling in an effort to save his life.

[¶27] Dr. Noffsinger was the most adamant in his belief that Abdul Awkal not only understands that he committed the crimes and that he was sentenced to death because of those crimes, but that he was malingering in his claim of a delusional belief that his impending execution was the result of interference by the CIA in his appeals and request for clemency. In support he noted that, although Awkal has made delusional and grandiose statements in the past as to his involvement in counterterrorism and the Afghan and Iraq wars, he never made claims that the CIA wished him dead until recently, as his date of execution became imminent and until he began his relationship with David Singleton—his civil lawyer and friend. Dr. Noffsinger noted that previously Awkal had expressed a willingness to die, but that he now has a desire to live, and that this coincides with his CIA statements. As Dr. Noffsinger noted, this provided Awkal with a strong incentive to dissemble: to save his life.

[¶28] Dr. Piel testified that, while recognizing the possibility of malingering, she believed there was perhaps an 80% likelihood that this was not the case, and that the defendant's statements were the result of his delusional state of mind, rather than intentional dissembling. On cross-examination she stated that, in both the initial and second

evaluations, there was no mention of the possibility of malingering, and was firm that this would have been noted had there been any concern that the defendant was prevaricating. She concluded, in the end, that she and Dr. Resnick were unable to form an opinion as to whether the defendant was able to form a rational understanding as to the reason for his execution.

[¶29] In his testimony Dr. Resnick concurred generally with Dr. Piel, although he declined to put a percentage figure as to the likelihood that Awkal was truthful, rather than malingering; however, he found that it was "more likely than not" that Awkal was telling the truth. He stated that, given the defendant's history and his lack of sophistication, any attempt at malingering would have been done "in a more direct way." Awkal, he concluded, simply lacks the capability to concoct a plan so sophisticated as to mislead the psychiatrists and psychologists who have examined him. In this respect he noted that he disagrees with Dr. Noffsinger's view that Awkal is not credible.

[¶30] Dr. Resnick concluded that the defendant understood that his *sentence of death* was the result of his murder of his wife and brother-in-law, but that he delusionally believed that his execution would not be taking place *but for the actions of the CIA* in interfering with his appeals. He explained that he was reluctant to assert to the appropriate standard ("to a reasonable degree of professional certainty") that this delusion made the defendant not competent to be executed under the *Ford* and *Panetti* principle; his reason was that he believed that to be a legal, rather than a psychiatric, determination, and his role was merely to make a professional evaluation as a psychiatrist. His position was that it is for the Court to make that ultimate decision.

[¶31] The Court notes in passing that the state attempted to impeach Dr. Stewart's testimony by asking each of the other expert witnesses whether it was appropriate to have anyone other than the interviewer and interviewee present. All testified that this is a practice they normally avoid, and one that poses some danger of coaching; however, they all declined to condemn the practice absolutely, noting that there may be instances in which it may be helpful, or at least not detrimental to the quality of the evaluation. The Court notes that the reasons for Mr. Singleton's presence were indeed satisfactory,

and that there was no evidence to suggest actual coaching of the defendant, either directly or indirectly.

SUMARY AND CONCLUSION

[¶32] The following facts are undisputed:

(1) On January 7, 1992, Abdul Awkal shot and killed his wife and brother-in-law. Caught moments later, he was tried, convicted, and on December 14, 1992, sentenced to death. Prior to trial he was found not competent for trial, but was pronounced restored to competency upon treatment at Ohio's Dayton Forensic Center.

(2) For many years Abdul Awkal has been diagnosed as having a severe mental disease, schizoaffective disorder, depressive type. One manifestation of the delusions associated with this disease has been his persistent claim of involvement with the CIA and other government offices, as well as the 2004 Kerry/Edwards presidential campaign, with respect to alleged assistance in the battle against terrorism and the Afghan and Iraqi conflicts.

(3) Although Mr. Awkal has been treated for his illness with antipsychotic drugs, since at least mid-April, 2012, he has been off those medications.

(4) Mr. Awkal's persistent mental health issues have been well documented, both by prison authorities and by Dr. Phillip Resnick of the Court Psychiatric Clinic (2005 and 2007 evaluations, as a result of which he twice was found not competent to withdraw his appeals).

(5) In response to the Petition for Post-conviction Relief filed in April, 2012, Mr. Awkal was referred once again to Dr. Resnick and to Dr. Noffsinger for evaluations as to his competence to be executed; at that time both reports concluded that he was in fact competent.

(6) As a result of a subsequent evaluation by Dr. Pablo Stewart, finding the defendant not competent to be executed, but Court ordered a new hearing, and Dr. Resnick (with Dr. Piel) and Dr. Noffsinger once again conducted evaluations of Mr. Awkal.

(7) At the hearing held June 12 to 14, 2012, the Court heard testimony by all the mental health professionals who has performed evaluations, and by David Singleton.

(8) All reports and testimony are consistent in the following respects: Mr. Awkal understands that he murdered his wife and brother-in-law, that he was convicted of those crimes, and that the death penalty was imposed as a result of the conviction for the murder of his wife and brother-in-law. Where the findings diverge is as to the ultimate decision before this Court: does Abdul Awkal presently have an understanding that his proposed execution is to take place because of his conviction and death sentence for the murder of his wife and brother-in-law?

[¶33] Upon review of all the testimony elicited at trial, this Court is forced to conclude that the defendant/petitioner, Abdul Awkal, was not malingering in claiming that, despite the death sentence imposed on December 14, 1992, his life would have been spared, either by a commutation by former President George Bush, or by successful appeals, and that this did not take place because of interference by the Central Intelligence Agency, resulting from his failure to assist the Agency further, his success in getting former Director George Tenet fired, and his co-operation with the presidential campaign of John Kerry.

[¶34] In his Affidavit Dr. Stewart quotes Awkal as claiming that he was to be executed on June 6, 2012, "Because the CIA wants me dead." Asked what would happen if the CIA did not want him dead, Awkal replied: "I would get clemency." (at ¶74) Further on, Awkal conceded that he was on death row because he murdered his wife and brother-in-law in 1992; however, the reason he was to be executed was not that death sentence but because the CIA wanted to kill him. As Dr. Stewart reported (¶83):

> He explained that while he understands he was sentenced to death for the 1992 killings, the CIA promised him several years ago that it would ensure that Ohio spared his life because of the valuable assistance he has provided the United States government. Thus, in his mind, the execution will go forward on June 6, because the CIA wants to rid the nation of a man 'who knows too much.' Mr Awkal believes that if he is not executed, it will be because the CIA directed Governor Kasich to grant clemency.

[¶35] Even though Awkal has only recently made this specific claim – linking his planned execution to efforts by the CIA, it nevertheless is fully consistent with his grandiose assertions over the past decade and more concerning his purported involvement with the CIA, his efforts to aid the US government, his claim that he was responsible for the firing of CIA Director George Tenet, and so forth.

[¶36] Based upon an exhaustive review of all the evidence before it, including the evaluations of five acknowledged expert mental-health professionals, the Court is forced to conclude that, as a result of severe and persistent mental disease (schizoaffective disorder, depressive type), Abdul Awkal presently lacks the capacity to form a rational understanding as to the reason the state intends to execute him on June 20, 2012. Accordingly, and under the standard set by the United States Supreme Court in *Ford, supra*, and *Panetti, supra*, Abdul Awkal may not be executed unless and until he has been restored to competency. The defendant shall be conveyed by the Ohio Department of Rehabilitation and Corrections to an appropriate institution for restoration to competency, in order that his execution may take place at a future date.

[¶37] The Court is aware of case law from several jurisdictions holding that a defendant may not be subjected to forced medication for the purpose of restoring him to competency to be executed; however, no decisions binding upon this Court have been presented, and that issue is not presently before the Court. Furthermore, the Court notes, and hereby advises all counsel, that this decision does not effect an automatic stay of execution. Per *State v. Steffen* (1994), 70 Ohio St. 3d 399, an execution date set by the Supreme Court of Ohio may not be stayed by any other state court.

IT IS SO ORDERED.



Stuart A. Friedman, Judge