IN THE SUPREME COURT OF ARKANSAS

BRUCE E. WARD **APPELLANT/PETITIONER**

VS. **CASE NO. CV-17-291**

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, Chairman,
Arkansas Board of Corrections, **APPELLEES/RESPONDENTS**

EMERGENCY MOTION FOR RECONSIDERATION OF ORDER GRANTING WARD'S MOTION FOR A STAY OF EXECUTION

COMES NOW Appellees/Respondents ("Respondents"), William Asa Hutchinson, Governor of the State of Arkansas, Wendy Kelley, Director, Arkansas Department of Correction, by and through counsel, Leslie Rutledge, Attorney General, and Brad Newman, Kent G. Holt, Christian Harris, and Charles Lyford, Assistant Attorneys General, and for their Emergency Motion for Reconsideration of Order Granting Ward's Motion for a Stay of Execution, state:

1. Pursuant to Ark. Sup. Ct. R. Rule 2-1(g) (2016), the Respondents respectfully ask the Court to reconsider its summary order of April 14, 2017, granting Ward's request for a stay of execution. This motion is timely, meritorious, and not presented for purposes of delay.

2. The Court's summary order did not indicate whether it based its stay on a determination that Ward's month-long delay in bringing his petition was significant in the equitable calculus for a stay, or whether the Court believes that Ward made a strong showing of a likelihood of success on the merits on his constitutional argument, or for some other reason.

3. A stay based on the first reason, delay, should be reconsidered and vacated because Ward's decision to delay *a month* to initiate this case, leaving the circuit court and this Court on appeal only 15 days to act, weighs in favor of the Respondents.

4. A stay based on an assessment that Ward made a strong showing of a likelihood of success on the merits of his constitutional claim, should likewise be reconsidered and vacated because Ward's constitutional claim, which is based on *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986), is wholly without merit.

5. Ward's constitutional argument is that the United States Supreme Court's holding in *Panetti* rendered this Court's holdings in *Singleton v. Endell*, 316 Ark. 133, 870 S.W.2d 742 (1994) (per curiam) (*Singleton I*), and *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992) (per curiam), unconstitutional.

6. *Singleton* and *Rector*, along with *Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 336 (1998) (*Singleton II*), upheld the constitutionality of Ark. Code Ann.

16-90-506, which vests the Director of the Arkansas Department of Correction with the exclusive responsibility, under state law, to determine whether or not the inmate has made a threshold determination of insanity. *Singleton II*, 332 Ark. at 200, 964 S.W.2d at 367; *Singleton I*, 316 Ark. at 137, 870 S.W.2d at 745; *Rector*, 308 Ark. at 108, 823 S.W.2d at 831. For this reason, "a circuit court does not have jurisdiction to stay an execution." *Singleton II*, 332 Ark. at 200, 964 S.W.2d at 367.

7. Ward's stay motion did not establish a strong likelihood of success on the merits as to the question of whether *Panetti* establishes a due-process right to a judicial determination of whether a condemned inmate has made a "substantial threshold showing" of incompetence, for the following reasons.

8. *Panetti* does not speak to the question of what, if any, state-law procedure is required *before* the substantial threshold showing is made, because the parties and the Supreme Court assumed that the substantial thresholding showing *had already been made*. To be clear, a stay of execution is warranted only *after* the threshold showing has been made and the final showing of incompetency has been established. *Panetti* governs what happens *after* the showing is made, not *before*.

9. The Eighth Amendment's prohibition against cruel and unusual punishment prevents a state "from inflicting the penalty of death upon a prisoner

who is insane." *Ford*, 477 U.S. at 410. Additionally, a state may not execute a prisoner "whose mental illness prevents him from comprehending the reasons for the penalty or its implications" or who is "unaware of the punishment they are about to suffer and why they are to suffer it." *Panetti*, 551 U.S. at 957 (quotations omitted).

10. Moreover, the United States Supreme Court held in *Panetti* that a prisoner is not competent to be executed where the prisoner's "mental illness . . . is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960. The Supreme Court emphasized that the delusions must "impair the prisoner's concept of reality [so] that he cannot reach a rational understanding of the reason for the execution." *Id*. at 958.

11. While "[p]rior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition[,]" *id*. at 934, the state may presume that a prisoner who has been judged competent to stand trial remains sane at the time the sentence is to be carried out. *Ford*, 477 U.S. at 426. Accordingly, consistently with due process, a state can "require a substantial threshold showing of insanity" to trigger further proceedings. Although the Supreme Court has not clarified the meaning of a "substantial threshold showing of insanity[,]" the Court should follow the *Panetti* holding given

the absence of an Arkansas statutory procedure for judicially adjudicating claims of incompetency to be executed.

12. Importantly, in *Panetti*, the prisoner had a well-documented history of mental illness ***at the time of his crimes*** that included delusions and hallucinations. *Panetti*, 551 U.S. at 948 ("*[i]t is uncontested that petitioner made a substantial showing of incompetency*.") (emphasis supplied). In articulating the due-process protections required by *Ford*, the Supreme Court stated:

> 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. This protection means a prisoner must be accorded an "opportunity to be heard," though "a constitutionally acceptable procedure may be far less formal than a trial." As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made solely on the basis of the examinations performed by state-appointed psychiatrists." "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations."

Id. at 949 (internal citations omitted) (quoting and citing *Ford*, 477 U.S. at 424, 427).

13. Neither *Ford* nor *Panetti* mandate that a prisoner is entitled to a full judicial evidentiary hearing to determine whether he or she has made a threshold showing of incompetency to be executed. Rather, *Ford* and *Panetti* hold that due process requires that only when a prisoner first makes a substantial showing of

incompetency must he be provided an opportunity to be heard, which includes submission of "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own expert psychiatric examination." *Ford*, 477 U.S. at 424, 427; *see also Panetti*, 551 U.S. at 949–50.

14. As Justice Powell noted in *Ford*:

> Finally, the sanity issue in this type of case does not resemble the basic issues at trial or sentencing. Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. *See Addington v. Texas*, 441 U.S. 418, 429-430, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1979); *cf. Barefoot v. Estelle*, 463 U.S. 880, 898-901, 103 S.Ct. 3383, 3397-3399, 77 L.Ed.2d 1090 (1983). And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with "subtleties and nuances." *Addington*, *supra*, 441 U.S., at 430, 99 S.Ct., at 1811. This combination of factors means that ordinary adversarial procedures-complete with live testimony, cross-examination, and oral argument by counsel-are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity. *Cf. Parham v. J.R.*, 442 U.S. 584, 609, 99 S.Ct. 2493, 2507-2508, 61 L.Ed.2d 101 (1979) ("Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real").
>
> *We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial.* The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to

> determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of § 2254(d) on federal habeas corpus.

Ford, 477 U.S. 399, 426–27 (emphasis supplied) (Powell, J., concurring).[1] Therefore, because *Panetti* does not mandate any procedure—judicial or otherwise—regarding the determination of the pre-threshold showing of incompetence under *Ford*, Ward made no substantial showing in his motion for a stay of execution of a strong likelihood of success on the merits of that claim. This Court should reconsider its ruling and vacate the stay of execution.

15. Ward did not point to the rulings that the circuit court made in the alternative after finding that it lacked jurisdiction—namely, that "[t]he [Respondents] have sovereign and statutory immunity, [Ward] has failed to exhaust his administrative remedies, and [Ward] has failed to state a claim for which the Court can grant relief"—as supporting a stay. To the extent the Court looked beyond the parties' pleadings on the motion for a stay, and considered the

[1] "When there is no majority opinion, the narrower holding controls. Under this rule Justice Powell's opinion [in *Ford*] . . . sets the minimum procedure a State must provide to a prisoner raising a *Ford*-based competency claim." *Panetti*, 551 U.S at 949.

circuit court's alternative rulings, this Court should reconsider its ruling and vacate the stay.

16. The trial court correctly ruled that it had no jurisdiction to entertain Ward's civil-rights based allegations, which he styled as claims under 42 U.S.C. § 1983 and the Arkansas Civil Rights Act ("ACRA"). These claims are meritless.

17. First, it is undisputed that Ward did not comply with the administrative-exhaustion requirements of Arkansas and federal statute. 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); *Jones v. Block*, 549 U.S. 199, 212 (2007) ("[E]xhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be brought in court."); Ark. Code Ann. § 16-106-202 (Repl. 2016) ("A civil action or claim initiated against the state . . . by an inmate in a penal institution . . . may be . . . [d]ismissed without prejudice by the court on its own motion or on a motion of the defendant, if all administrative remedies available to the inmate have not been exhausted."). Second, the Respondents are all actors immune from suit in both their official and individual capacities. See, e.g., *Fegans v. Norris*, 351 Ark. 200, 206, 89 S.W.3d 919, 924 (2002) (holding that an inmate's suit against ADC officials "in their capacities as employees of the State" was correctly dismissed for

lack of jurisdiction, given that the inmate demanded declaratory and injunctive relief that "if granted, would control the action of the ADC."). Ward is also outside the three-year statute of limitations applicable to claims filed in Arkansas under § 1983 or ACRA. His civil-rights allegations are also, in essence, improper collateral challenges to the lawfulness of his death sentence. *See*, *e.g.*, *Heck v. Humphrey*, 512 U.S. 477 (1994). And his deliberate-indifference allegations fail to state a claim for relief. See, e.g., *Keeper v. King*, 130 F.3d 1309 (8th Cir. 1997); *Logan v. Clarke*, 119 F.3d 647, 649 (8th Cir. 1997); *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995).

WHEREFORE, Appellees/Respondents request that this Court grant their motion for reconsideration of its order granting Ward's motion for a stay of execution, and vacate the stay of execution.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: /s/ Brad Newman
BRAD NEWMAN
Arkansas Bar No. 85119
Assistant Attorney General
brad.newman@arkansasag.gov

KENT G. HOLT
Arkansas Bar No. 86090
Assistant Attorney General
kent.holt@arkansasag.gov

CHRISTIAN HARRIS
Arkansas Bar No. 2002207
Assistant Attorney General
christian.harris@arkansasag.gov

CHARLES LYFORD
Arkansas Bar No. 2010-200
Assistant Attorney General
charles.lyford@arkansasag.gov

323 Center Street, Suite 200
Little Rock, Arkansas 72201
501-682-3650 [Phone]
501-682-8203 [Fax]

ATTORNEYS FOR APPELLEES/
RESPONDENTS

CERTIFICATE OF SERVICE

I, Christian Harris, certify that on the 15th day of April, 2017, I electronically filed the foregoing document with the Clerk of the Court using the eFlex system which shall send notification of such filing, which is deemed service, to:

Mr. Scott W. Braden
Assistant Federal Defender

Ms. April Golden
Assistant Federal Defender

1401 West Capitol Avenue
Suite 490
Little Rock, AR 72201

/s/ CHRISTIAN HARRIS
CHRISTIAN HARRIS