

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 9, 2022

Christopher M. Wolpert
Clerk of Court

BENJAMIN COLE,

Petitioner - Appellant

v.

JIM FARRIS,

Respondent - Appellee

No. 22-5093
(D.C. No. 4:15-CV-00049-GKF-CDL)
(N.D. Okla.)

ORDER

Before **TYMKOVICH, MURPHY, and MORITZ**, Circuit Judges.

This matter is before the court *sua sponte* to convert our unpublished October 20, 2022 Order Denying Certificate of Appealability into a published order. The Clerk shall replace our October 20, 2022, Order Denying Certificate of Appealability with the attached published order effective *nunc pro tunc* to the date the Order Denying Certificate of Appealability was filed.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

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PUBLISH

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(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Thomas D. Hird and Katrina Conrad-Legler, Assistant Federal Public Defenders,
Oklahoma City, Oklahoma, for Petitioner-Appellant.

John M. O'Connor, Attorney General of Oklahoma, Tessa Henry, Assistant Attorney
General, Oklahoma City, Oklahoma, for Respondent-Appellee.

Before **TYMKOVICH**, **MURPHY**, and **MORITZ**, Circuit Judges.

PER CURIAM

Benjamin Cole, an Oklahoma state prisoner sentenced to death, seeks review of the district court's order denying his most recent habeas petition, in which he challenged his competency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). He also seeks a stay of his execution,

which is scheduled to take place on October 20, 2022. To appeal from the district court's order, he requires a certificate of appealability (COA). We deny a COA, dismiss the matter, and deny the requested stay as moot.

Mr. Cole was convicted and sentenced to death for first-degree child abuse murder of his infant daughter. After unsuccessfully invoking the state procedures for obtaining a determination of his competency to be executed, he filed, and later supplemented, a federal habeas proceeding under 28 U.S.C. § 2254.¹ The district court denied habeas relief, denied his request for a stay of execution as moot, and denied a COA.

A COA is a jurisdictional prerequisite to our review. *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant “must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Cole has failed to make such a showing.

He seeks a COA concerning the following issues:

I. Whether Mr. Cole made a substantial threshold showing of insanity sufficient to entitle him to a competency hearing that satisfied the *Ford* and *Panetti* due-process standard.

¹ The State concedes that Cole's Supplemental Petition, which was filed October 18, 2022, was timely. See State's Resp., *Cole v. Farris*, No. 4:15-cv-00049-GKF-CDL, CM doc. 66 at 4.

II. Whether the statutory procedure prescribed by Okla. Stat., tit. 22, § 1005 violates the Constitution by placing the warden—who is an executive officer and executioner—in the position of a gatekeeper who decides whether to seek a competency trial.

III. Whether Oklahoma’s execution protocol violates the Eighth Amendment by failing to provide safeguards for an inmate who may be incompetent, including failure to provide for member(s) of his legal team to witness executions.

BACKGROUND

The Eighth Amendment bars as cruel and unusual the execution of a defendant who is incompetent and who therefore lacks “a rational understanding of the reason for the execution.” *Panetti*, 551 U.S. at 958. The bar for competence to be executed is not a high one; even a person who would not be “considered normal, or even rational, in a layperson’s understanding of those terms” can possess the rational understanding required to satisfy the Eighth Amendment. *Id.* at 959 (internal quotation marks omitted). Our analysis focuses on “whether a mental disorder has had a particular *effect*: an inability to rationally understand why a State is seeking execution.” *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019). That said, “[a] prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” *Panetti*, 551 U.S. at 959. A prisoner who suffers from “gross delusions preventing him from comprehending the meaning and purpose of [his] punishment” may not satisfy the rationality requirement. *Id.* at 960.

Once a prisoner offers evidence sufficient to make a “substantial threshold showing of insanity,” this triggers the State’s duty to supply him with due process in the form of a competency hearing. *Panetti*, 551 U.S. at 949–50 (internal quotation marks omitted). The Supreme Court has not prescribed “the precise limits that due process imposes in this area,” but has instead mandated that states adopt procedures that meet the “basic requirements” of due process, including the ability to present evidence and argument concerning the competency issue. *Id.* (internal quotation marks omitted). “[A] constitutionally acceptable procedure may be far less formal than a trial.” *Id.* at 949 (internal quotation marks omitted).

Oklahoma’s competency statute, which applies to Mr. Cole’s scheduled execution, provides as follows:

If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

Okla. Stat., tit. 22, § 1005.

In 2015, Cole filed a 28 U.S.C. § 2254 habeas application in the Northern District of Oklahoma, claiming that he was incompetent to be executed and that his execution would violate the Eighth and Fourteenth Amendments, as interpreted in *Ford* and *Panetti*. *Cole v. Farris*, No. 4:15-cv-00049-GKF-CDL. While the § 2254 application was

pending, Cole litigated in state court the issue of his competency to be executed, based on the evidence of his mental condition. The OCCA ruled against him on this issue. *See Cole v. Trammell*, 358 P.3d 932, 938-41 (Okla. Crim. App. 2015).

Mr. Cole's execution was stayed from 2015 until earlier this year, when the Western District of Oklahoma entered judgment against him and other Oklahoma death-row inmates in a case challenging Oklahoma's method of execution. Given the stay, the district court had administratively closed his habeas proceeding. It later granted his motion to reopen the matter and to reinstate his original habeas application.

In June 2022, the district court approved an agreed proposal for a mental health evaluation. That evaluation was conducted in July 2022 by Dr. Scott Orth. Dr. Orth found Cole competent to be executed.

After his execution date was rescheduled for October 20, 2022, Mr. Cole continued to assert his incompetency to be executed. He invoked Oklahoma's statutory procedure, asking Warden Jim Farris to refer him for competency proceedings because there was "good reason" to believe that he had become incompetent to be executed. *Cole*, No. 15-cv-00049, CM doc. 62-10 at 4. The warden declined to make the referral, stating that although it was his "duty to inform the . . . District Attorney" if he had "good reason to believe that Mr. Cole has become insane after his delivery to this prison for execution," upon careful consideration of the materials Mr. Cole provided, it was "[his] determination that Mr. Cole has not become insane since his delivery to the Oklahoma State Penitentiary for execution." *Id.* at 10.

Mr. Cole sought mandamus relief from the Oklahoma courts to override the warden's decision and obtain a jury trial concerning his competency. After holding an evidentiary hearing, the state district court denied relief. The OCCA subsequently also denied mandamus relief, finding that the state district court did not abuse its discretion when it determined that Mr. Cole did not meet the required substantial threshold showing of insanity, and that the warden therefore did not abuse his discretion by refusing to make the notification prescribed by § 1005.

On October 18, 2022, Mr. Cole filed a supplemental petition for writ of habeas corpus, supplementing his habeas application in No. 15-cv-00049. He also requested a stay of execution in connection with the supplemental petition. The district court denied the habeas application, the supplemental petition, a COA, and his emergency motion for stay of execution. Mr. Cole appealed.

DISCUSSION

Federal habeas review of Mr. Cole's issues is prescribed by the AEDPA standards for § 2254 claims. To the extent his issues were presented to and adjudicated on the merits by the Oklahoma state courts, we may grant relief only if the state court's adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

1. Whether Mr. Cole Made the Required Substantial Threshold Showing

To prevail on his due process-based challenge to the failure to conduct incompetency proceedings under § 1005 in his case, Mr. Cole must demonstrate that he offered evidence sufficient to make a “substantial threshold showing of insanity” sufficient to trigger the State’s duty to offer him a competency hearing. *Panetti*, 551 U.S. at 949–50. After surveying the evidence, including Warden Farris’s testimony at the evidentiary hearing and the expert medical evidence, the OCCA concluded that it was “clear that [Mr. Cole], while exhibiting some peculiar behaviors, completely and rationally understood the nature of the proceedings against him, what he was tried for, and that his execution was imminent.” *Cole*, No. 15-cv-00049, CM doc. 62-2 at 18-19. Thus, the OCCA determined, Mr. Cole did not meet the required substantial threshold showing that would have entitled him to further competency proceedings, including the jury trial prescribed by Oklahoma statute.

Mr. Cole argues that reasonable jurists could debate whether the OCCA’s determination unreasonably applied relevant Supreme Court precedent or represented an unreasonable determination of the facts. From a procedural standpoint, he contends that Warden Farris improperly made his own determination of whether there was “good reason” to make a referral to the district attorney, rather than simply applying the “good reason” standard objectively—and thereby deprived him of due process. But two levels of the Oklahoma courts reviewed the warden’s decision, including holding an evidentiary hearing, and found that Mr. Cole did not meet the substantial threshold requirement for a

showing of insanity. In light of the process he received, Mr. Cole fails to raise a debatable issue about whether the warden's use of language suggesting he could decide for himself whether there was good reason for the referral deprived him of due process.

Substantively, Mr. Cole challenges the district court's conclusion that fair-minded jurists would not disagree with the OCCA's determination that he has not shown that he is presently incompetent to be executed. He argues that the large quantum of evidence he presented concerning his severe mental illness and incompetency for execution at least provided good reason to believe he was not competent to be executed. But he fails to show a debatable issue concerning whether the OCCA's determination was unreasonable. Although he argues that "[o]n the other side of the scale, the warden and courts also had before them a single expert report, from Dr. Scott Orth, Psy.D., finding Mr. Cole competent," *see* COA Appl. at 4, and suggests that this single report did not outweigh his contrary evidence, his argument fails to consider the quality of Dr. Orth's neutral expert report, as opposed to the quantity of the evidence he presented.

Dr. Orth, after reviewing the evidence in the case and conducting an extensive interview with Mr. Cole, concluded that Mr. Cole has a rational understanding of the reason he is being executed. He emphasized that although Mr. Cole's religious obsessions came through in his conversation, he did not express any unusual religious explanation for the reason he is being executed, which he rightly attributed to his punishment for his current offense. Nor did he reference any sort of supernatural explanation for the instant case or the punishment he will receive, or any understanding of any supernatural, otherworldly, mystical, divine, or prophetic results (other than his

hope for his continued spiritual existence after death) that would result from the execution.

Dr. Orth also concluded that Mr. Cole has a rational understanding that he will be executed and that his execution is imminent. Mr. Cole not only accurately described his own execution date but provided fairly accurate estimated dates for the two inmates whose executions preceded his on the OCCA's execution schedule. He also acknowledged his understanding about execution proceedings, including the fact that the State of Oklahoma will execute him by lethal injection. This rational awareness concerning the prisoner's execution and the reasons for it, and not some general "competency" or freedom from mental illness, is the standard the Supreme Court requires for a prisoner to be competent to be executed. *See Panetti*, 551 U.S. at 958; *Madison*, 139 S. Ct. at 728.

Although it is true that other witnesses disagreed with Dr. Orth or reached other conclusions, the OCCA discussed the evidence in the case and reasonably concluded that Mr. Cole did not satisfy the threshold showing for an incompetency claim. Mr. Cole fails to show the district court's decision upholding the OCCA's determination was debatable among reasonable jurists.

Finally, Mr. Cole cites the district court's determination that the OCCA made a statement concerning the evidence that "could be construed as a misstatement." *See Cole*, 15-cv-00049, CM doc. 71 at 20. The OCCA stated that Mr. Cole "has provided no new evidence regarding his competence, other than [Dr.] Orth's report which finds him competent to be executed." *Id.* (internal quotation marks omitted). This statement could

be viewed as a factual error, because Mr. Cole in fact presented reports from other doctors regarding their assessments or attempts to assess his competence between 2016 and 2022. But the district court determined that the OCCA’s statement was “apt” because this new evidence was much the same as the evidence presented to the OCCA in the 2015 mandamus action. The district court observed that the OCCA’s statement followed its thorough consideration of all the evidence, and it therefore concluded that any misstatement was not material. Mr. Cole fails to show this determination is debatable among reasonable jurists.

2. Facial Challenge to Constitutionality of Okla. Stat., tit. 22, § 1005

Mr. Cole argues that Okla. Stat. tit. 22, § 1005 violates the United States Constitution, as interpreted by *Ford*, by making the warden—who is an executive officer and his executioner—the gatekeeper who decides whether to seek a competency trial. *See Ford*, 477 U.S. at 416 (stating a State governor, who is “commander of the State’s corps of prosecutors[,] cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding” involving competency). The OCCA rejected this claim, citing our unpublished decisions that have upheld the constitutionality of § 1005 against similar challenges. *See Ochoa v. Trammell*, 504 F. App’x 705, 708 (10th Cir. 2012); *Allen v. Workman*, 500 F. App’x 708, 710-12 (10th Cir. 2012).

Although these unpublished decisions are not binding precedent, we find their reasoning persuasive. The concern the Court expressed in *Ford* about having an executive branch official serve as the sole gatekeeper for competency-to-be-executed claims is attenuated here because in Oklahoma the warden functions de facto as an *initial*

gatekeeper whose decision is subject to judicial review through mandamus proceedings. *See Ochoa*, 504 F. App'x at 708; *Allen*, 500 F. App'x at 710-12 (rejecting warden-as-gatekeeper claim, because in Oklahoma (1) “a jury is the ultimate arbiter of sanity”; (2) the state trial court and the OCCA can review the warden’s gatekeeping function; and (3) the gatekeeper role is consistent with *Ford*’s recognition of the need to control non-meritorious or repetitive competency-based claims).

Mr. Cole argues that because the Oklahoma legislature recently passed a new statute that removes the warden from the process, *see* Okla. Stat. tit. 22, § 1005.1 (eff. Nov. 1, 2022), and because that statute will become effective on November 1, 2022—eleven days after his execution—use of the old procedure in his case is impermissibly arbitrary. This argument does not make this issue debatable among jurists. If the existing statute already provides due process, an improvement on that statute does not make application of the existing statute *per se* impermissibly arbitrary. This is also true *a fortiori* under Mr. Cole’s particular circumstances, because applying the new statute would strip him of a jury trial on the competency issue and provide instead for an evidentiary hearing followed by determinations by the court—a form of process Mr. Cole has already received.

Mr. Cole also argues that *Ochoa* can be distinguished from his case because in contrast to his presentation concerning competency, the prisoner in that case failed to provide any expert opinion to support his claim and meet the threshold showing required by *Panetti*. Although this may be grounds to distinguish *Ochoa* on the merits of the competency issue (which is the issue on which we discussed the prisoner’s weak

presentation), it does not significantly undermine *Ochoa*'s reasoning concerning the requirements of due process.

3. Adequacy of Oklahoma's Execution Protocol

The district court rejected this claim because Mr. Cole failed to present it, in any form, to the OCCA. It thus denied the claim on the procedural ground of lack of exhaustion of state remedies. *See Grant v. Royal*, 886 F.3d 874, 890 (10th Cir. 2018) (a state prisoner must exhaust his claims by fairly presenting them to the state courts). When the district court denies a claim on procedural grounds, we may grant a COA only “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Cole's only argument concerning the district court's procedural rationale is that “[t]hough not presented earlier, the claim was nonetheless worthy of engagement, as Mr. Cole made clear that a defendant's competency is not a static concept, but can arise any time during a proceeding.” COA Appl. at 9 (internal quotation marks omitted). As a defense to lack of exhaustion, this merits-based argument is frivolous. The issue of Mr. Cole's competency had obviously arisen by the time of the state competency proceedings, and he fails to explain why he could not have presented this argument during those proceedings. Moreover, the argument does not raise any recognized ground for excusing his failure to exhaust this claim.

CONCLUSION

We deny a COA, dismiss this matter, and deny the requested stay as moot.