THIS IS A CAPITAL CASE
EXECUTION SCHEDULED: APRIL 17, 2017, at an Undisclosed Time

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS

BRUCE E. WARD, Plaintiff; v. WILLIAM ASA HUTCHINSON, Governor of the State of Arkansas; WENDY KELLEY, Director, Arkansas Department of Correction; RANDY WATSON, Warden, Varner Supermax Unit; and BENNY MAGNESS, Chairperson, Arkansas Board of Corrections; in their respective official capacities only, Defendants.	*	Civil Action No. _____ **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTION

Bruce Ward is a diagnosed schizophrenic with no rational understanding of his death sentence and impending execution. The State has been aware of Mr. Ward's severe mental illness since the time of his first trial, nearly thirty years ago. Yet defendants have made no meaningful attempts to evaluate or treat Mr. Ward. To the contrary, the prison has exacerbated Mr. Ward's mental illness by imposing psychologically disastrous conditions. For over 26 years, Bruce Ward has lived on Arkansas's death row in a cell that is less than 90 square feet. He has spent the majority of that time in solitary confinement, having, due to florid psychotic delusions, not gone outside in over a decade. His execution, scheduled for April 17, 2017, would violate the state and federal constitutions because his mental illness has rendered him incapable of rationally understanding why he is to be executed. Yet, Arkansas's statutory scheme prescribes the authority for addressing this grave constitutional violation only with the Director of the

Department of Correction—the state official responsible for carrying out Mr. Ward's execution upon the governor's order. The length of time that Mr. Ward has languished in solitary confinement, as well as the prison's steadfast refusal to provide adequate mental health treatment, constitute cruel and unusual punishment rendering the execution of Mr. Ward's death sentence doubly unconstitutional. As discussed below, this Court should enter a declaratory judgment and injunction, prohibiting the prison from executing Mr. Ward.

NATURE OF THE ACTION

1. Plaintiff Bruce E. Ward, by and through undersigned counsel, brings this action under 42 U.S.C. §1983 and ARK. CODE ANN. §16-123-101 and §16-123-105 for injunctive and declaratory relief. The State of Arkansas is scheduled to execute Mr. Ward on April 17, 2017.

2. Mr. Ward also seeks injunctive relief under ARK. CODE ANN. § 16-113-101 *et. seq*. to enjoin his execution by the Defendant while he remains incompetent as defined by the Eighth Amendment and ARK. CODE ANN. § 16-90-506(d)(1)(A). In the event this pleading its evidentiary support, in this initial instance, merely satisfy the "substantial threshold showing" to require an evidentiary hearing, Mr. Ward also seeks injunctive relief under ARK. CODE ANN. § 16-113-101 *et. seq*., as contemplated under the Eighth and Fourteenth Amendments and until he has been provided the process due those amendments in determining whether he is competent to be executed.

3. The Defendants, acting under the color of Arkansas law in their respective official capacities, have deprived Mr. Ward of his right to be free from "cruel and unusual punishment." Plaintiff seeks (a) to immediately enjoin his execution by the State of Arkansas scheduled for April 17, 2017, pursuant to ARK. CODE ANN. § 16-113-102 *et. seq*.; (b) to enjoin permanently the State of Arkansas from executing him pursuant to ARK. CODE ANN. § 16-113-101 *et. seq*.; and

(c) an order declaring, pursuant to ARK. CODE ANN. § 16-111-103 *et. seq*., that the Defendants (also, collectively, "Arkansas" or the "State"), acting in their respective official capacities, have violated the prohibition against "cruel and unusual punishments" under the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 9 of the Arkansas Constitution.

4. In this action Mr. Ward seeks a determination that he is presently incompetent to be executed, that he has been denied the due process of law when the Director of the Arkansas Department of Correction determined Mr. Ward's competency, and that ARK. CODE ANN. 16-90-506(d)(1) violates Art. IV of the Arkansas Constitution (which requires a strict separation of powers) by impermissibly vesting judicial power in an executive officer. Finally, his execution, after spending decades in isolation with no mental health treatment, is cruel and unusual and would violate the state and federal constitution.

5. The Defendants seek to execute Mr. Ward more than a quarter-century after his first capital jury sentenced him, on October 18, 1990, to die. Over the span of his sentencing proceedings, Mr. Ward's defense attorneys had witnessed his psychological decompensation as his case repeatedly careened toward a death sentence. His first trial and appellate counsel noted the "marked and rapid deterioration" of his mental health.[1]

6. Three weeks before his third and final re-sentencing in 1997, defense counsel moved to stay proceedings because Mr. Ward's condition had "deteriorated to the point that he cannot or will not cooperate with present counsel and is unable or unwilling to proceed to trial with present counsel." (*Infra* at 8)

[1] Further, the first trial court was generally noticed of this as it denied defense counsel's motion under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), for authorization of an independent mental health evaluation.

7. Mr. Ward's condition only worsened precipitously in the ensuing years of his confinement. First imprisoned in solitary isolation on Arkansas's death row at the Tucker Maximum Security Prison, Arkansas relocated him in 2003 to the Varner Supermax Unit. Mr. Ward has been confined there for more than the past 13 years.

8. By 2006, Mr. Ward's post-conviction counsel obtained a psychiatric evaluation wherein Plaintiff was determined to suffer from Schizophrenia, Paranoid Type. Observations by counsel over the past decade, confirmed by expert analysis, clearly establish that Mr. Ward's mental health is acutely deteriorating.

9. During Arkansas's prolongation of his sentence, the State has subjected Mr. Ward to unremitting isolation under its regime at the Varner Supermax Unit, where the Department of Correction has housed its death row inmates in solitary confinement since 2003, and the Tucker Maximum Security Unit, where death row had been kept under isolation in the years leading up to 2003. Year after year, Plaintiff has been penned in the Supermax in a 90 sq. ft. cell closed by a solid steel door. Mr. Ward must sleep, eat, defecate, and shower within those 90 sq. ft. For the sake of context, this is less than 53% of the minimum size of a parking space—9 ft. x 19 ft., or 171 sq. ft.—under a standard municipal zoning ordinance.[2] Arkansas has kept Mr. Ward in his box 23 hours a day, permitting no more than a single hour on a given day for access to "recreation"—*viz.*, a covered dog run that continues to pen the inmate not unlike an animal for slaughter.

10. Given Plaintiff's extensively manifested mental health problems even before he arrived in their custody (*supra*), the State's treatment has ensured that Mr. Ward, as a psychiatric

[2]Ch. 11-21: Off-Street Parking Spaces, Rule No. 2115.1, *Size of Parking Spaces*, District of Columbia Architectural Barriers Act of 1980, effective July 1, 1980 (D.C. Law 3-76; 12 DCMR art. 15).

matter, is essentially incapable of leaving his cell for even his dog run—for years, he has only left his 90 sq. ft. cell two or three times annually for some attorney visits or a visit with his brother, the single family member able to sustain a semblance of contact with Plaintiff despite his very severe decompensation and impairments.

11. The ADC has maintained a "no involvement" policy designed to prevent any actual health screening in its attempt to prevent the emergence of evidence that could be used by Mr. Ward or any other "death row inmate playing crazy to avoid execution." (*Infra* at 21 *et seq*.).

12. Counsel have consistently provided Defendants notice of Mr. Ward's psychiatric condition and generally dire mental health. Yet, despite the unmistakable indications of his mental distress and illness predating his first sentencing proceeding in 1990, the Arkansas Department of Correction ("ADC") has abjectly failed to address his problems while confining him ever since.

13. Plaintiff's Complaint simultaneously relies on 42 U.S.C. §1983 and ARK. CODE ANN. §16-123-105. Its claims require no separate legal analysis of federal and Arkansas law. *See Lewis* v. *Jackson*, 486 F.3d 1025, 1030 (8th Cir. 2007), construing *Grayson* v. *Ross*, 369 Ark. 241 (2007); *see generally* ARK. CODE ANN. §16-123-105(c).[3]

14. In summary, Mr. Ward's causes of action are as follows:

a. Bruce Ward is "unaware of the punishment [he is] about to suffer and why [he is] to suffer it." *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Mr. Ward "is not competent, due to mental illness, to understand the nature and reasons" for his execution. ARK. CODE ANN. § 16-90-506(d)(1). He has no rational

[3] ARK. CODE ANN. §16-123-105(c) states: "When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C. §1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only."

understanding of the punishment he is about to suffer and why he is going to suffer it. Therefore, he is incompetent to be executed under the Eighth and Fourteenth Amendments to the United States Constitution.

b. The Defendants have subjected and continue to subject Plaintiff to the severely excessive punishment of solitary confinement and thereby have imposed a sentence beyond that which is accepted under the Eighth and Fourteenth Amendments of the United States Constitution and Arkansas's Constitution.

c. Defendants' actions have exacerbated Plaintiff's severe mental illness, not only because of decades of isolation and tortuous confinement, but because of cruel and indifferent medical and mental health care, amounting to torture. Defendant Kelley, pursuant to Ark. Code Ann. § 16-90-506(d)(1), has found that Mr. Ward is competent to be executed without providing to him a fundamentally fair evidentiary determination of his competency in that (i) Defendant Kelley did not provide any notice of the information she relied on before making and announcing her final decision that Mr. Ward is competent and that she would not refer him for an evaluation, (ii) Defendant Kelley provided no opportunity for Mr. Ward to examine and question the evidence and witnesses on which Defendant Kelley relied in making her determination, (iii) Defendant Kelley is not a neutral decisionmaker because she is the Director of the Department of Corrections, because she is the named respondent in post-conviction and habeas actions in which Mr. Ward has attacked his conviction and sentence, and because she supervises and hires (and her department bears potential liability for the failings of) the correctional staff and purported social workers whose observations she relied upon in finding Mr. Ward to be competent and who have failed to treat Mr. Ward for any mental illness despite his diagnosis with schizophrenia since 2006, and (iv) the Defendant, though she had knowledge that Mr. Ward has been diagnosed

with Schizophrenia and has a long history of mental health problems, made her determination that Mr. Ward is competent without any contemporaneous mental health evaluation. The process afforded to Mr. Ward therefore violates due process of law as guaranteed by the Eighth and Fourteenth Amendments. *Ford*, 477 U.S. 399; *Panetti*, 551 U.S. 930. Moreover, ARK. CODE ANN. § 16-90-506(d)(1) does not comport with the basic requirements of due process and is in violation of the Arkansas and United States Constitution, because it does not guarantee to Mr. Ward the basic requisites of procedural fairness.

d. Because it rests the final determination of Mr. Ward's competency with an administrative official instead of a court, ARK. CODE ANN. § 16-90-506(d)(1) offends due process and subjects Mr. Ward to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

e. The Defendant Kelley's determination that Mr. Ward is competent to be executed violates Art. IV of the Arkansas Constitution, which provides that "[n]o person or collection of persons" who is part of the executive department "shall exercise any power belonging" to the judicial department. Determining whether a prisoner is incompetent to be executed under the U.S. Constitution is a judicial function. Thus, Defendant Kelley's determination and the statute that purported to authorize it (§ 16-90-506(d)(1)) is in violation of the Arkansas Constitution.

JURISDICTION & VENUE

15. Ark. Const. Amend. 80 § 6(A) establishes this Circuit Court's jurisdiction as a court of general jurisdiction. The Arkansas Supreme Court has specifically held that circuit courts have jurisdiction over complaints for declaratory judgment based upon federal constitutional rights. *See Villines* v. *Harris*, 362 Ark. 393, 399-400 (2005) (deciding civil rights

case in circuit court brought pursuant to 42 U.S.C. §1983), citing *Brown* v. *Arkansas State (HVACR) Licensing Bd.*, 336 Ark. 34 (1999).

16. Venue is proper in Jefferson County for this civil action under Ark. Code Ann.§ 16-106-l0l(d) because this suit is against a state officer in her official capacity and it has been brought where the officer resides. Defendant Kelley is the Director of the Arkansas Department of Correction (ADC). The Defendant's residence is in Pine Bluff, Jefferson County, Arkansas.

PARTIES

A. PLAINTIFF

17. Plaintiff Bruce E. Ward is currently a prisoner in the custody of the Arkansas Department of Corrections (ADC), Inmate Number SK 915. Mr. Ward is under a sentence of death and the State has scheduled to execute him on April 17, 2017. After three sentencing proceedings, the Pulaski County Circuit Court imposed the death sentence *sub judice* in 1997. Mr. Ward is currently housed in the ADC's Varner Supermax Unit in Grady, Arkansas. As Mr. Ward's execution date approaches, undersigned counsel understands that he will be transferred, pursuant to ADC policy, to the Cummins Unit (also located in Grady) for use of its death chamber—a chamber in disuse since 2005.

B. DEFENDANTS

18. All Defendants are sued in their official capacities.

19. Defendant William Asa Hutchinson is the Governor of the State of Arkansas. Governor Hutchinson ordered Mr. Ward's execution for April 17, 2017.

20. Defendant Wendy Kelley is the Director of the Arkansas Department of Correction. Director Kelley is responsible for the supervision and operation of all Arkansas prisons including the Varner Supermax Unit, where Mr. Ward has been confined since 2003, and the Cummins Unit, where Arkansas is scheduled to execute him on April 17, 2017. Director

Kelley is charged by statute with carrying out Plaintiff's execution and determining whether Mr. Ward is not competent to be executed due to mental illness. ARK. CODE ANN. § 16-90-506(d)(1)(A).

21. Defendant Randy Watson is the Warden of the Varner Supermax Unit, where Mr. Ward has been confined since 2003.

22. Defendant Benny Magness is the Chairperson of the Arkansas Board of Corrections, the state board responsible for supervision of the Department of Correction.

PROCEDURAL HISTORY

23. A Pulaski County jury first convicted Mr. Ward of capital murder for the 1989 death of Rebecca Doss at the Jackpot Convenience Store in Little Rock. Prior to this trial, the court sent Mr. Ward to the state hospital for a competency evaluation. Tr. I 129-74. Though Mr. Ward refused to speak with the evaluators, the court declined to appoint an independent examiner, and instead found Mr. Ward competent to proceed. *Id*., *see also*, Ex. 9. Following Mr. Ward's first trial, the Arkansas Supreme Court affirmed the conviction of capital murder but reversed the death sentence due to a serious evidentiary error. *Ward v. State*, 827 S.W.2d 110 (Ark. 1992), cert. denied, 506 U.S. 841 (1992). Justice Dudley dissented on the ground that the trial judge was not impartial, as evidenced by how he had treated Mr. Ward's trial counsel differently from the prosecution. He concurred in reversing Mr. Ward's sentence of death but maintained that the conviction should have been reversed as well. *Ward v. State*, 831 S.W.2d 100 (Ark. 1992) (dissent of Dudley, J., as to affirmance of conviction).

24. The court held another penalty hearing 1995. This second jury again sentenced Mr. Ward to death. But no record of his sentencing was available because of the court reporter's negligence. The Arkansas Supreme Court was thus unable to conduct its required review of a

sentence of death, and again reversed the sentence. *Ward v. State*, 906 S.W.2d 685 (Ark. 1995).

25. Prior to a third sentencing hearing, Mr. Ward was again sent to the Arkansas State Hospital after his attorneys reported bizarre behaviors and delusions interfering with their ability to represent their client. *See,* Tr. III 133, Ex. 10, 11. Mr. Ward refused to speak with the same examiners who had met with him before the first trial. Ex 1. at 36. The examiners terminated their interview, finding only that Mr. Ward's refusal to cooperate did not appear to stem from an Axis I mental disorder. *Id. See also, infra* at 23-24. The court again declined to appoint an independent doctor. Thus, Mr. Ward was subjected to a third sentencing proceeding in 1997, after which he was again sentenced to death. The Arkansas Supreme Court affirmed the sentence on direct appeal, *Ward v. State,* 1 S.W. 3d 1 (Ark. 1999), and also the denial of his state post-conviction relief, *Ward v. State*, 84 S.W.3d 863 (Ark. 2002).

26. Mr. Ward then sought habeas corpus relief in the United States District Court for the Eastern District of Arkansas in 2002. Again, Mr. Ward's delusions led to a total breakdown in his relationship with counsel, as counsel themselves became the focal point of his paranoid delusions of grandiose conspiracies. *See* Ex. 12-15. The Eighth Circuit Court of Appeals affirmed the federal district court's denial of relief. *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009). The United States Supreme Court denied the resulting petition for a writ of certiorari. *Ward v. Norris*, 559 U.S. 1051 (2010).

27. Subsequent to the completion of federal habeas corpus proceedings, counsel alleged that Mr. Ward was mentally incompetent to stand trial and also that the circuit court violated due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985), by failing to appoint an independent mental health expert to assess Mr. Ward's criminal responsibility, his competency to stand trial, and his mental illness for purposes of establishing mitigating evidence for sentencing.

The Arkansas Supreme Court nevertheless denied Mr. Ward's coram nobis remedies in 2010 and more recently denied Mr. Ward's motions to recall the mandate on the Court's previous opinions. *See Ward v. State*, 455 S.W.3d 303 (Ark. 2015); *Ward v. State*, 455 S.W.3d 818 (Ark. 2015), cert. denied, 136 S.Ct. 356 (2015); *Ward v. State*, 455 S.W.3d 830 (Ark. 2015), 136 S.Ct. 485 (2015).

STATEMENT OF THE CASE

PART I

I. DECADES OF SCHIZOPHRENIC DELUSIONS HAVE RENDERED MR. WARD SEVERELY IMPAIRED AND INCAPABLE OF A RATIONAL UNDERSTANDING OF HIS DEATH SENTENCE AND SCHEDULED EXECUTION.

28. Mr. Ward suffers from Schizophrenia. As a result he is incompetent to be executed under the governing constitutional standard. Schizophrenia is a severe psychotic disorder, characterized by delusions, hallucinations, disorganized thoughts, speech and behavior, and negative symptoms such as flattened affect.

A. DR. WILLIAM LOGAN FOUND THAT MR. WARD IS NOT COMPETENT TO BE EXECUTED PURSUANT TO THE STANDARD UNDER *FORD V. WAINWRIGHT* AND *PANETTI V. QUARTERMAN*.

29. William Logan, M.D., a forensic psychiatrist recognized as an expert in the diagnosis and treatment of Schizophrenia and other psychotic disorders, has repeatedly evaluated Mr. Ward's illness and diagnosed him paranoid schizophrenia. *See* Exs. 1-3. (Psychological Reports of William Logan, M.D). In a report on September 29, 2016, Dr. Logan last concluded that Mr. Ward was incompetent to be executed, Ex. 3, which reaffirmed his earlier findings in June 2011 (Ex. 2), and April 2010 (Ex. 1).[4]

[4] After extensive effort, Mr. Ward has agreed to allow Dr. Logan to visit with him again and is scheduled to evaluate him on Saturday, April 1, 2017. Counsel for Mr. Ward anticipate immediately amending this complaint with the benefit of that evaluation.

30. Over the course of many years, Dr. Logan has reviewed many affidavits and records confirming, from multiple vantages, Mr. Ward's delusional beliefs. These records also show that Mr. Ward has not been treated for any mental illness by the Arkansas Department of Correction. Dr. Logan also performed a three-hour clinical interview of Mr. Ward on October 21, 2008. [5] Because the typical course of untreated Schizophrenia is chronic and unremitting Mr. Ward simply would not improve without treatment.

31. Dr. Logan's notes in 2010 reflects Mr. Ward's bizarre and delusional beliefs vividly demonstrating mental illness:

> Mr. Ward expressed a series of persecutory and grandiose delusions. He seems to believe he was the target of a conspiracy between officials in Pennsylvania, someone he knew in Canton, Texas and various Arkansas government entities including the governor's office and the State and Federal Public Defenders, who only encouraged him to take a life sentence to cover up a conspiracy to convict him and gave him a death sentence so he would not be able to reveal this conspiracy and the corruption in the Arkansas Department of Corrections and the Arkansas government in general. He cited divine revelation, which caused him to believe he will never receive the death penalty but will walk out of prison to great riches and public acclaim, including the Hollywood movie about the information he reveals. He made reference to hearing voices that confirmed his beliefs and the reality and validity of his views. He receives revelations from God directly (voices), and through scripture.
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> Report of William Logan, M.D., Ex. 1 at 13.

32. In 2011, again Dr. Logan found that Mr. Ward suffered from Schizophrenia. Dr.

[5] As discussed, *infra*, Mr. Ward's central delusions focus, and have for decades, on a vast interstate conspiracy, powered by evil, supernatural forced designed to kidnap and incapacitate him, in order to stifle his own super powers and predestined greatness. Throughout Mr. Ward's three decade long case, these delusions have interfered with his ability to communicate with counsel and with counsel's ability to represent their client. Currently, Scott Braden, the Chief of the Capital Habeas Unit, and Mr. Ward's lead counsel, is the focal point of Mr. Ward's delusions. Thus, Mr. Ward has refused to meet with any experts who he believes to be working with Mr. Braden. Given Mr. Ward's delusions, in combination with the mass execution schedule ordered by Defendant Hutchinson, counsel have not been able to obtain and updated evaluation of their client. Counsel intend to submit to the court an updated expert report as soon as possible.

Logan explained that this disease produces thought disorganization as well as grandiose and persecutory delusions. Report of William Logan, M.D., Ex. 2 at 6. In making his diagnosis, Dr. Logan pointed out examples of how Mr. Ward's Schizophrenia affects his perception of his sentence.

> These delusions cause a complete distortion of the meaning of his execution. Mr. Ward, through special powers, signs and messages from God, believes he has been selected by God for a special mission. His incarceration is a conspiracy by Satanic forces that God allows to test and mold him. He perceives the execution date as the product of the conspiracy to harass him so he will accept a life sentence so demonic sources can continue to feed on his soul. He does not believe God will allow the execution to occur. In his current untreated state he has no rational understanding of his legal situation, or need for a defense. He is impervious to the advice of his attorneys.
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> *Id.* at 6-7.

33. Mr. Ward remains unable to rationally understand whether or why he is about to be put to death. He has no understanding of the nature and reason for his execution. In 2015, Mr. Ward was scheduled to be executed and filed a challenge based upon his incompetence. At that time, Dr. Logan observed that Mr. Ward "does not believe he will be executed," and that he "views his incarceration and the proposed sentence as harassment by evil or demonic forces which God has temporarily allowed [in order] to prepare him for a special mission as an evangelist." Ex. 3 at 3. Mr. Ward perceives his execution as "a farce by evil actors to teach him patience, test his faith, and prepare him for God's eventual purpose for his life." *Id.* Mr. Ward's delusional beliefs have not changed appreciably since Dr. Logan examined him in person. *Id.* at 2. As a result of his schizophrenia, Mr. Ward "has no rational understanding of his punishment or the reason for it." *Id.* He is, therefore, not competent to be executed. *Id.* at 3.

34. Dr. Logan also examined the evidence considered by Defendant Kelley in her 2015 determination that Mr. Ward is competent and in refusing to refer him for an evaluation. *Id.*

at 2. Those reports detail the fact that Mr. Ward has not complained of mental health-related symptoms when dealing with correctional staff and mental health workers. Dr. Logan points out that Mr. Ward, like most persons who suffer from schizophrenia, "does not recognize that he suffers from a mental illness." Moreover, the prison's mental health workers provide "extremely limited" evaluations, which involve spending a few minutes in the cell block and speaking briefly to Mr. Ward through a steel door. "This type of cursory evaluation is not adequate to assess for any mental illness," Dr. Logan explains. *Id.* "Because Mr. Ward lacks the insight to know he is mentally ill he cannot diagnose his own mental illness." *Id.*

35. Dr. Logan also reviewed the evaluations of the Arkansas State Hospital and observed that neither state-conducted evaluation was sufficient to assess emerging or full-blown Schizophrenia. The state examiners "did not focus on Mr. Ward's reasoning or mental process, only his concrete understanding of his legal situation." Ex. 1 at 40. The same evidence that the state examiner relied on to diagnose Mr. Ward with anti-social personality disorder is consistent with Schizophrenia, Dr. Logan explained. *Id.* at 37-39. For example, prior documents from Pennsylvania showed poor performance in school and other achievement-related activities; an express reference from a 1977 report suggesting the possibility of "paranoid personality disorders"; another 1977 evaluation stating that Mr. Ward's responses and questions "had a paranoid flavor about them"; Mr. Ward's long-documented status as a socially isolated "loner"; a history of fainting spells and blackouts; the possibility of organic brain damage; and a "noted inflation of the self-concept" that accords with petitioner's grandiose delusions in which "people in powerful positions" are specifically targeting him. *Id.* at 37-38. The previous evaluations, then, "cannot exclude paranoid schizophrenia" even on the evidence known at the time of trial (let alone twenty-six years later, at the time of Mr. Ward's scheduled execution). *Id.* at 38.

B. MR. WARD HAS EXHIBITED A LONG AND DOCUMENTED HISTORY OF DELUSIONAL THINKING.

1. Observations of current counsel.

36. Because of his extreme isolation over the years, Mr. Ward has meaningfully interacted with virtually no one other than certain of his attorneys. Thus the majority of those able to observe Mr. Ward have been his counsel—but only those whom Mr. Ward has not incorporated into his delusions as conspiring against him.

37. In 2006, Joseph Luby was appointed to represent Mr. Ward and Jennifer Merrigan was appointed in 2007. Soon after appointment, counsel observed their client's comprehensively bizarre and delusional thinking. *See* Ex. 4-6 (Affidavits of Joseph Luby and Jennifer Merrigan). After consulting with ethical and legal experts, counsel began to document their client's cognition and symptomology with contemporaneous memoranda, which counsel shared with Dr. Logan. Because Mr. Ward is under 23-hour lock-down supervision, and, by virtue of his own mental illness, he has little other contact with people. Thus, counsel's observations are critical evidence of his mental state and delusional thinking.[6]

38. During the more than 100 months since they have represented him, Mr. Ward has never wavered in his belief that he will walk out of prison a free man and will receive money

[6] Counsel fully understand that petitioner's communications are otherwise privileged. Nevertheless, Mr. Ward's mental illness and social isolation inevitably make counsel the primary witness of his incompetence. The ABA Guidelines both envision and endorse the dual role occupied by present counsel under these awkward circumstances. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, §* 10.15.1 ("Duties of Post-Conviction Counsel"), comm. (2003) ("Counsel's ongoing monitoring of the client's status ... also has a strictly legal purpose. . . .[A] worsening in the client's mental condition may directly affect the legal posture of the case[,] and the lawyer needs to be aware of developments. For example, the case establishing the proposition that insane persons cannot be executed was heavily based on notes on the client's mental status that counsel had kept over a period of months."); *Ford,* 477 U.S. at 402 (relying on counsel's notes and observations); *Panetti,* 551 U.S. at 936 (noting stand-by counsel's observations of Panetti "both in private and in front of the jury")

from the state of Arkansas for their wrongful execution of him. *See, e.g.,* Ex. 5, Ex. C at 2.

39. Mr. Ward has repeatedly maintained that he was "set up" and "framed" for murder by a conspiracy of state actors from both Pennsylvania and Arkansas, although some of the details of the conspiracy have changed over the years. Ex. 4 at 1. Mr. Ward insists that the state of Arkansas does not intend to execute him, that state actors have been trying to "force" him to take a life sentence, and that he will walk out of prison after the charges against him are dropped. *Id.* at 2. He believes that God is calling him to be a preacher after he leaves prison, where he remains only because God wants him to learn from his suffering. *Id.* A sampling of Mr. Ward's delusional observations are set forth below.

40. On August 19, 2015, Mr. Ward said that "mean people" or "nasty people" have set him up, and they told him "You're going to the south, but you can't escape us," even before he moved in the 1980s from Pennsylvania to Texas (after which he came to Arkansas). He described news coverage concerning the Arkansas governor's intent to set execution dates and knew "I'm at the top of the list," but, nevertheless, he believes that God will save him from being executed, and that the state is trying to force him into a life sentence instead of executing him. A life sentence is simply "there for the taking," said Mr. Ward, but he will not accept one. Ex. 4,[7] Ex. A at 1 (memorandum from 8-19-2015).

41. On September 2, 2015, Mr. Ward repeated his certainty that he would not be executed: "All I know is I'm gonna walk into your office … and I'm gonna shake your hand." *Id.* Ex. C at 1 (Memorandum from 9-2-2015). He again mentioned that "they" told him in Pennsylvania that, "You go down south, you're not gonna get away from us down there," and

[7] This exhibit, along with Exhibit 5, are themselves affidavits attaching exhibits. For example, Exhibit 4 includes Exhibits A through G. The citations herein thus indicate the alphabetical *sub*-exhibits.

Mr. Ward said "they" told him that even before he knew that he was moving south. *Id.* at 2.

42. On September 3, 2015, Mr. Ward explained that he had been summoned to the warden's office at Varner, where they told him about the then upcoming execution date. *Id.* Ex. D at 1 (memorandum from 9-3-2015). He reportedly told the warden and others, "My charges are being dropped, and I'm walking out of here. I'm going free, and I'm not interested in anything you have to say." *Id.* at 2. He said there was a "power" or a "something" in that room, that angels were involved, and that the Spirit of God was present. *Id.* "The Lord opened my mouth and I spoke," he said. *Id.* He again said that God is calling him to the ministry and he will walk out of prison: "My charges are being dropped." *Id.* "God has a mission for me, and I'm learning and will teach others how to walk in a Christian lifestyle." *Id.* at 3.

43. On September 8, 2015, Mr. Ward made similar predictions about his imminent and certain release: "There's this whole group of bad people who've done bad things to me from the very beginning … Everything was against me, but now all this bad stuff is being taken off. But this is the end of it, and from now on I'll have a productive and happy life." *Id.* Ex. E at 2 (Memorandum from 9-8-2015).

44. On September 10, 2015, Mr. Ward called the day after his execution date had been set. Counsel apologized about the execution date, but Mr. Ward laughed and said "Why worry about it?" *Id.* Ex. F at 1 (Memorandum from 9-10-2015). He offered to frame the cover-letter that came with the execution warrant and to send it to counsel's office so that "I'll come and see it and you after I go home." *Id.* He reported seeing a demon in the warden's office when the eight condemned men were told about their death warrants, but he said that the demon "saw Christ within me." *Id.* He remains convinced that the state is "trying to shove a life sentence at me, but I ain't taking it." *Id.* at 1-2. During this conversation and others, Mr. Ward insisted that

he is not insane, and he hesitated to share details that he fears others may judge or perceive as insane. *Id.*, *e.g.* (instructs counsel not to mention his prophecies in court filings "because I'm not insane, and I know what I saw" at 1; "Don't ask me questions like that. You know I can't answer." at 3; and referring to "some stuff" concerning "revelation", *id.*).

45. On Sept. 14, 2015, Mr. Ward explained that state officials "know damn well there's going to be a stay," and that the "mean nasty people" had put him in jail but "I'm walking out of here a free man." *Id.* Ex. G at 2 (Memorandum from 9-14-2015). He described the purpose of his death sentence and execution date as follows: "They know I'm innocent. They knew it in Pennsylvania. They keep coming after me because I won't take a life sentence." *Id.*

46. On September 23, 2015, Mr. Ward said that he will not be executed, that the charges will be dropped, and that there is "zero evidence" of his guilt. Ex. 5 (Supplemental Luby Affidavit), Ex. A at 2 (Memorandum from 9-23-2015).

47. On September 25, 2015, Mr. Ward said again that he will be released instead of executed, and that the state is trying to foist a life sentence upon him. *Id.* Ex. B at 4 (Memorandum from 9-25-2015). "If they can't get me to take a life sentence, they're gonna have to let me go." *Id.* "Don't ask me to explain it." *Id.*

48. On Sept. 29, 2015, Mr. Ward expressed his longstanding confidence that he will receive a large financial award after his release: "I don't see how I'm gonna get out of here without them giving me money, then I'll go to Pennsylvania and they'll pay me too." *Id.* Ex. C at 2 (memorandum from 9-29-2015).

49. Mr. Ward exhibited a similar lack of understanding of his death sentence when attorney Jennifer Merrigan visited him at Varner Supermax on September 29, 2015. Ex. 6 (Affidavit of Jennifer Merrigan). At the outset of the visit, Mr. Ward handed Ms. Merrigan his

execution warrant, which he had ripped into 4 pieces. He told her to "be careful and not to ruffle the edges of them," because—as he would repeat to her many times over in the future—"I'm going to tape them together and then frame them and hang it upside down above my desk in my office." *Id.* at 1. He said he had been framed for murder as part of God's plan, that "God is molding him," that he has been instructed by the Holy Spirit to write two books and that he will get out of prison but does not know when. *Id.* Mr. Ward also told Ms. Merrigan that his deceased father had come to visit him in prison and told Mr. Ward that he would see him in Heaven in 30-40 years. Bruce explained that:

> His voice was different because he was in that stage right after puberty. Where you're too old to be playing with toys anymore, but you're too young to work. I didn't recognize his voice but I just knew it was him. When something happens with the Holy Spirit you just know it and you can't explain it but you just know it. Mom went to heaven too, she died last February. Dad knew everything that was going on. When you're in heaven you know everything that is happening. Dad said to me, 'I'll see you in about 30 or 40 years.' He had his dog Ginger with him. Ginger was a little toy poodle that he used to have. That dog was always at his feet. In prison, there are little resurrected dogs. Animals all go to heaven, because they don't have souls. But they can still be saved, because they have life.

Id. at 5. For the remainder of the visit Mr. Ward jumped from one bizarre topic to another, without transition and without evident distress about his scheduled execution. *Id.* at 1-5.

50. Mr. Ward has shared his delusions with Ms. Merrigan over the many years of her representation. As with other counsel, Mr. Ward states that he was framed and kidnapped by people in both Arkansas and Pennsylvania, that he sees and hears demons and other supernatural forces that have caused him and his family to suffer, and that he has grandiose or magical powers to foresee and address dangerous situations. *Id.* at 7-9. Mr. Ward has also shared details of abuse he experienced as a child, including sadistic punishments from his mother. *Id.* at 8, *supra* at 30-31.

51. On September 29, 2015, Mr. Ward spoke on the telephone with attorney Josh Lee

of the Arkansas Federal Public Defender's Office. Mr. Ward said that his arrest, conviction, and sentence were the product of a "conspiracy" and "cover up" by a group of "mean and nasty people … who know who each other are." Ex. 7 (Affidavit of Josh Lee) at 1. He described for Mr. Lee, as he has for other counsel, an interstate conspiracy of actors who have framed him. *Id.* at 1-2. Among other things, he explained that someone told him "You can't get away from us by moving down south," even before he left Pennsylvania. *Id.* at 2. He said that state authorities are trying to force him to take a life sentence, and he expressed certainty (based on divine revelation) that he will walk out of prison and carry out a Christian ministry. *Id.* at 2-3.

52. Mr. Ward called Mr. Lee again on October 1, 2015. Ex. 8 at 1 (Affidavit of Josh Lee). Mr. Ward never mentioned his execution date, even though it was only three weeks away, in contrast to other clients of Mr. Lee who have faced execution dates. *Id*. As in his discussions with attorney Luby, Mr. Ward is "obsessed" with the "secret" book he has called *Police in America*. *Id.* at 1-2; *see also* Ex. 4, Ex. A at 3; Ex.5, Ex. B at 5, Ex. C at 1-2, Ex. D at 2). Additionally, he believes that he would go free if his attorneys would simply argue in federal court that the prosecution showed no evidence of his guilt. Ex. 8 at 3.

53. Since learning that Defendant Hutchinson had scheduled his execution for April 17, 2017, Mr. Ward has remained steadfast in his belief that he will walk out of prison. Julie Vandiver met with Mr. Ward on March 24, 2017, and noted that he was "lighthearted and chatty." Ex. 27 at 1. He told her that he knew that he was going to walk out of prison. *Id*. He reported to Ms. Merrigan that God had again told him that he would not be executed. After he was returned from Jefferson Regional Medical Center, where he was taken by ambulance for gastrointestinal bleeding, Mr. Ward told Ms. Merrigan that "God had even intimated to him that he might not be sick when he was released from prison, that his illnesses would be cured." Ex.

26 at 4-5.

54. His delusions have destroyed his working relationship with Scott Braden, Chief of the Capital Habeas Unit of the Federal Defender, who Mr. Ward believes to be working in concert with the prison and against him. Ex. 26 at 2-3, Ex. 27 at 1. Mr. Ward has refused to meet with mental health experts hired by Mr. Braden, or to sign any documents which he believes have come from their office. *Id.* Mr. Ward is actively working against his own interests because of his schizophrenic delusions.

55. Dr. Craig Haney (discussed *infra,* 40-46) was scheduled to visit Mr. Ward on April 27, 2016. Ex. 26 at 2. However, after a visit with Scott Braden on April 13, Mr. Ward became convinced that Mr. Braden and Dr. Haney were working in concert with the prison and against Mr. Ward. *Id.* Mr. Ward informed counsel that he believed that Dr. Haney was the same doctor who worked for the ADC and had attempted to see him in 2015, when he was under execution warrant. *Id.* He believed that Mr. Braden was secretly working with the prison behind Mr. Ward's back. He told counsel that this was the same conspiracy that Craig Lambert had alluded to when he represented Mr. Ward a decade prior. Ex 27 at 1.

56. Recently Mr. Ward was taken via ambulance to the Jefferson Regional Medical Center and hospitalized due to gastrointestinal bleeding. His records reflect that he is suffering from hypertension and diabetes. Ex. 25 at 47-48. While in the hospital, the doctors observed that Mr. Ward "is not a good historian and he rambled the entire time that l was seeing him." *Id*. at 51. At the prison, the doctor noted that Mr. Ward was "Alert but speaking somewhat oddly and oblivious in his responses to our concerns." *Id.* at 50; *see also, id.*, "Seems somewhat 'odd' when speaking to him."

57. Because of his hospitalization, Mr. Ward agreed to meet with a medical doctor.

On March 24, 2017, Dr. Zivot and attorney Julie Vandiver. During that visit Mr. Ward reported that he had "extraordinary strength" and had once lifted the front of a car in a snow storm. *Id*. at 2. He also expressed delusional reasoning for his diabetes symptoms:

> Mr. Ward told us that he was in Tucker Maximum Security prison he was put in a hot room that the sun was beating in the window and the only way that he could keep cool was by walking and so he walked for 12 hours per day for multiple days in a row. He said after walking so long he injured his feet, causing numbness, and has suffered the effects of the injuries ever since. When Dr. Zivot suggested that the numbness could be from diabetes he was insistent that it was not at all and that it was from this instance when he had to walk so much at Tucker Max.

Ex. 27 at 1-2. These reports are further manifestations in Mr. Ward's consistent, sustained history of delusional and disorganized thinking.

2. Mr. Ward's mental illness and delusions have been documented in his case for over 25 years.

58. Attorney Didi Sallings represented petitioner at his 1990 trial and on his first direct appeal. Tr. I 345; Ex. 9 (Affidavit of Ms. Sallings) at l; *Ward v. State,* 308 Ark. 415, 827 S.W.2d 110 (1992). Ms. Sallings observed a "marked and rapid deterioration" in her client's mental health over the course of the representation. Ex. 9, at 1. Mr. Ward became "increasingly and noticeably paranoid," and lent almost no assistance to the defense. *Id.* Mr. Ward was evaluated by a state-employed psychologist and psychiatrist, who concluded he was legally sane and competent to stand trial, and he was diagnosed with anti-social personality disorder. Tr. I 129-74. The examiners' report acknowledged that Mr. Ward refused to provide contact information for his relatives, and that the evaluators could not assemble a complete and reliable social history. Tr. I 205-06.

59. At the competency hearing, counsel requested an independent psychiatric evaluation, which the court denied based on its view that there was insufficient evidence to warrant it. Tr. I 5, 171-72. Counsel also formally moved for funding for an independent

mental health evaluation under *Ake v. Oklahoma,* 470 U.S. 68 (1985), primarily for purpose of preparing a penalty phase defense. Tr. I 38-43. Counsel observed that Mr. Ward had been examined only by state experts and that even those experts did not conduct adequate psychological testing, speak with any relatives of Mr. Ward, or examine any mitigating diagnoses beyond the issues of sanity and competence. Tr. I 201-08; *see also id.* 140-44, 157, 171. Counsel explained that the scant records available from Mr. Ward's history in Pennsylvania suggest personality disorders, a possible history of an extended fever from measles, and possible neurological damage as a result. Tr. I 202-04. The trial court denied the motion, describing the relevance of mental health issues as a "figment of your imagination." *Id.* 208.[8]

60. Mr. Ward's mental state would again become a focal point at his final resentencing. Three weeks before his October 1997 re-sentencing, attorney Tammy Harris moved to stay Mr. Ward's proceedings. Trial Tr. III at 127- 29; Ex. 10 (Affidavit of Ms. Harris) at 1-2. Counsel had just visited with Mr. Ward and wrote that his condition had "deteriorated to the point that he can not or will not cooperate with present counsel and is unable or unwilling to proceed to trial with present counsel." *Id.* at 1; Trial Tr. III at 127. The motion recounted a number of "demands" that Mr. Ward wished to make of the trial court. These included a "full blanket presidential pardon," a new vehicle to replace the motorcycle seized by police at the crime scene, and a cash award of $1,000,000 for each year of his incarceration. Ex. 10 at 1; Trial III 128. The motion referenced additional, but privileged, evidence of Mr. Ward's mental state, which Ms. Harris later revealed. Specifically,

[8] The Court also remarked that "You all have got a $650,000 budget. How you spend it is up to you." (*Id.* 206-07); "the Court's not going to get into hiring assistant lawyers . . . If we ain't got lawyers that can get prepared, we need to get some." (*Id.* 207). Although trial counsel protested that no one in her office had the necessary psychological training, the court rebuffed her: "[l]f you feel that you should before you try these cases, Didi, you ought not be trying them." *Id*

Mr. Ward said that people "at the highest levels of government" were trying to kill him, and that there was a "hit" out on Ms. Harris and her family from which Mr. Ward was trying to protect her. Ex. 10, at 2. Counsel believed that "Mr. Ward was having a pronounced break with reality," and she was "sincerely concerned that he was not competent to proceed." *Id*.

61. Ms. Harris's co-counsel, Julie Jackson, gathered "elaborate" details from Mr. Ward concerning his belief that the mafia in Pennsylvania "were out to get him and had been after him a long time." Exhibit 11 (Affidavit of Ms. Jackson), at 1. Ms. Jackson found Mr. Ward's beliefs to be sincere but delusional, and came to understand her client's penchant for delusions after spending a great deal of time with him. *Id.* Mr. Ward's delusions "would not have been obvious from a brief or casual conversation." *Id.*

62. As with Mr. Ward's first trial, counsels' efforts to investigate Mr. Ward's mental illness were unsuccessful. First, counsel had filed yet another motion for an independent mental health evaluation under *Ake,* 470 U.S. 68, which the court again denied. Tr. III 89-94, 126. Second, the court denied the motion to stay the trial date, but again ordered Mr. Ward to be evaluated by the state psychologist and psychiatrist who had seen him in 1989 and found him sane and competent. *Id.* at 130-31. Mr. Ward, in turn, refused to cooperate with the state examiners, declined to answer any questions, and made clear that the triggering motion was his counsels' rather than his own. *Id.* at 133. The examiners did not expressly find Mr. Ward competent or sane, but wrote that their "brief interview" with him did not indicate that his uncooperativeness was itself due to a mental disorder. *Id.; cf. Rees v. Peyton,* 384 U.S. 312, 313 (1966) ("Psychiatrists selected by the State who sought to examine Rees at the state prison found themselves thwarted by his lack of cooperation, but expressed doubts that he was insane.")

63. Mr. Ward's federal habeas counsel observed the same signs and symptoms. Mr. Ward lacked habeas counsel until, on or about the petition's due date under the statute of limitation, attorney Craig Lambert was notified of the case. Ex. 12 (Motion for Leave to Withdraw) at 2. Mr. Lambert "started and completed and filed" the petition on the very date that it was due, over the course of seven or eight hours. *Id.* at 3.

64. As with his predecessors, attorney Lambert tried unsuccessfully to develop the issue of Mr. Ward's mental health. Proceeding *ex parte,* Lambert sought, and obtained, funding for investigative and mitigation assistance. Ex. 13 (Motion for Funding) at 1-3. Counsel observed that Mr. Ward was delusional, difficult to communicate with and "may well be . . . actively psychotic." *Id.*at 2. Counsel therefore sought to lay the groundwork for an as-yet "premature" mental health evaluation, by first conducting a "thorough social history." *Id.* The attorney-client relationship quickly deteriorated after the court granted Mr. Lambert's motion. Mr. Ward was incensed by counsel's alleged attempt to develop "mitigating" evidence, refused to speak with the court-approved investigator, refused to exit his cell on all seven occasions in which Mr. Lambert traveled to the prison, and refused all of Mr. Lambert's telephone calls. Ex. 12, at 2-3, 6-11. Despite his view that the petition he filed was a "placeholder" intended simply to fall within the statute of limitation, Mr. Lambert did not file an amended habeas petition or any other document between the time that the court approved the funding motion and the court's later denial of habeas relief on November 7, 2005.

65. Attorney Lambert initially remained on the case for the appeal to the Eighth Circuit, along with fellow Little Rock attorney Sam T. Heuer, who had acted as co-counsel in the district court. Both attorneys moved to withdraw, citing breakdowns in the attorney-client relationship. Ex. 12, at 1-11; Ex. 14 (Motion to be Relieved as Counsel) at 1-7. Mr. Ward had

threatened to sue Mr. Heuer "for malpractice and conspiracy to hide proof of innocence." Ex. 14, at 6. He ordered counsel not to ignore the State's "total lack of any evidence" and wrote there was "no chance of executing me." *Id.* 6-7. The day before Mr. Ward's letter and threat, he asked counsel to "drop" the Eighth Circuit appeal and insisted that Arkansas would not execute him because he is innocent. Ex. 15 (Affidavit of Mr. Heuer), at 2. It was apparent to Mr. Heuer that petitioner "wasn't dealing with a full deck of cards." *Id.*

66. On January 30, 2006, the Eighth Circuit appointed replacement counsel to represent Mr. Ward. Over the course of their representation, through many hours of telephone conversations, a one-week investigative trip to Arkansas from counsels' office in Kansas City, and an in-person meeting with Mr. Ward, counsel came to believe that Mr. Ward is mentally ill and does not rationally understand his case, his conviction, his punishment, or the underlying facts.

67. Counsel consulted forensic psychiatrist, Dr. Logan, who concluded Mr. Ward suffers from either paranoid schizophrenia or delusional disorder. Ex. 16, at 1-9 (Affidavit of Dr. Logan, May 26, 2006). Based on counsel's reports and other documents from Mr. Ward's personal, medical, and correctional history, Dr. Logan concluded to a reasonable degree of medical certainty that petitioner "does not rationally understand the nature of his previous or present habeas proceedings or how to assist counsel in litigating them." *Id.* at 8. Dr. Logan also found that Mr. Ward's delusional beliefs of past and ongoing persecution preclude a rational understanding of his death sentence and why it was imposed. *Id.* He observed numerous shortcomings in the competency proceedings completed before petitioner's first and third trials. These include the limited scope of records and clinical history that the evaluators sought and considered, including the fact that the evaluators did not speak with any relatives of Mr. Ward

(whose identities he refused to disclose), and did not speak with trial counsel or otherwise investigate the reasons for Mr. Ward's refusal to cooperate. *Id.* at 5-7.

68. Counsel returned to the federal district court and filed a motion for relief from judgment, pursuant to Fed. R. Civ. P. 60(b), arguing that Mr. Ward was entitled to proceed on his petition only when competent, that the denial of relief should be vacated because the proceedings lacked Mr. Ward's competent input, and that further proceedings should be stayed until his competence could be restored. *See Rohan ex rel. Gates v. Woodford,* 334 F.3d 803 (9th Cir. 2003); *Holmes v. Buss,* 506 F.3d 576 (7th Cir. 2007) (both recognizing right of death-sentenced capital habeas petitioner to be competent when proceeding). The district court denied the motion—construing it as a forbidden "second or successive" petition for habeas corpus—and a divided panel of the Eighth Circuit affirmed that ruling. *Ward v. Norris,* 577 F.3d 925 (8th Cir. 2009). In 2010, the United States Supreme Court denied certiorari.

69. After the denial of certiorari, counsel continued to litigate their client's competence. In 2010, counsel petitioned the Arkansas Supreme Court to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis, asserting that Mr. Ward was incompetent to proceed at his first trial in 1990, at which he was convicted of capital murder and sentenced to death, as well as the penalty phase retrial in 1997, after which the circuit court re-imposed the death penalty. *Ward v. State*, 91CR0036, Petition To Reinvest Jurisdiction In The Circuit Court To Consider A Petition For Writ Of Error Coram Nobis. Counsel argued, once again, that they had never been granted the resources to properly investigate and litigate their client's incompetence. The Arkansas Supreme Court denied Mr. Ward's Petition to Reinvest Jurisdiction. *Ward v. State*, 91CR0036, September 30, 2010 Order.

70. Following the denial of coram nobis relief, counsel for Mr. Ward moved to recall

the mandate on the Arkansas Supreme Court's affirmances of Mr. Ward's conviction, final death sentence, and denial of Rule 37 relief. Counsel argued, among other things, that the circuit court violated due process and the Eighth Amendment by refusing to appoint an independent defense expert to assess Mr. Ward's competency to stand trial and otherwise to assess Mr. Ward's mental health for the purpose of developing and presenting mitigating evidence at sentencing. *See Ake,* 470 U.S. 68. The Arkansas Supreme Court took the motions as a new case, held oral argument, and denied relief, finding no "defect or breakdown in the appellate process" that would allow recall of the mandate, and reasoning that a trial court satisfies *Ake* by sending a defendant to the state mental hospital. *See Ward v. State*, 455 S.W.3d 303 (Ark. 2015); *Ward v. State*, 455 S.W.3d 818 (Ark. 2015); *Ward v. State*, 455 S.W.3d 830 (Ark. 2015).

3. Mr. Ward has exhibited a long history of delusional thinking, pre-dating his trials.

71. The information known to trial counsel supports the much broader showing of Mr. Ward's difficulties that present counsel make now. Records which trial counsel obtained reveal a troubling childhood marked by visits to several psychologists and therapists. In 1962 and 1964, when Mr. Ward was in the first and third grades, he was administered psychological evaluations by the school psychologist. Ex. 17 (Pennsylvania School Records) at 1-3. His teacher from 1965 and 1966 wrote a letter to Mr. Ward's trial counsel, explaining that those evaluations were administered because of Mr. Ward's behavioral problems. The teacher, Thomas Ritter, wrote that Mr. Ward "was one of the most unusual children that I have ever taught." *Id.* at 1. Although Mr. Ritter had been a teacher for 28 years, Mr. Ward was "the only child that I ever spanked as a teacher." *Id.* He recalled that Mr. Ward "would stare out in space, when one would call on him, his mind was never in the classroom." *Id.* Additionally, Mr. Ritter recalled a specific

incident involving Mr. Ward which, even after 25 years, the "teachers still talk about. That case was when they caught Bruce eating flies." *Id.* Mr. Ritter acknowledged that the school failed Mr. Ward: "I look back now and realize that we were not trained to teach the Bruce's of the world. Today he would have been identified early and placed in a social emotional class." *Id.*

72. Trial counsel also knew of evidence that Mr. Ward had the measles during the 1962-63 school year, and suffered a lengthy fever. Tr. I 202-03; Ex. 1, at 19. Counsel explained to the trial judge that a high fever over a long period of time can lead to neurological damage. *Id.* The court nevertheless denied counsel's request for funding of an independent mental health evaluation. *Id.* 206-08; *see also id.* at 5, 171-72.

73. There are indications from the available evidence that Mr. Ward's mother, Delores Ward, was also mentally ill. In 1977, Mrs. Ward reported that she had a mental breakdown after her mother died, when Mr. Ward was four years old. Ex. 1, at 14. She reported that, until the mid-1970s, she could not sleep at night until the entire family was in bed, and only after drinking wine. *Id.* In addition, Mr. Ward has informed counsel about other family members who he believed shared his mother's mental illness: his maternal grandfather, his maternal Aunt Elsie, and his maternal Uncle Walter.

74. Consistent with the accounts of Mrs. Ward's mental illness, undersigned counsel have learned of the "strict" punishments she imposed on her son. Mr. Ward states that he "learned very young not be alone with her." Mrs. Ward would beat her son with a belt, leaving welts across his body. Mr. Ward has told counsel about an incident when Mr. Ward was five or six years old; the roof was leaking and his mother made him strip and lay down on the bed so that the water dripped on him. On another occasion, when Mr. Ward was seven or eight years old, he got into trouble for eating two maraschino cherries, when he was not supposed to. As

punishment, his mother made him eat everything in the refrigerator. Ex. 1, at 5. On another occasion, Mrs. Ward put tar on her son and then placed him in ice-cold water. *Id.* at 30. These punishments are consistent with the only information about his past that Mr. Ward provided to his first counsel, and even then, not until during the jury's penalty phase deliberations at the 1990 trial. Ex. 9 at 1. At that time, petitioner told Ms. Sallings that his mother used to punish him by making him kneel on a heating grate "for hours at a time." *Id.*

II. MR. WARD IS INCOMPETENT AND HIS "SUBSTANTIAL THRESHOLD SHOWING" NECESSITATES A STAY OF EXECUTION FOR THE COURT TO CONDUCT A HEARING TO DETERMINE COMPETENCY

A. ARKANSAS'S UNFAIR PROCEDURES AND NONJUDICIAL DECISION MAKING DENY MR. WARD DUE PROCESS UNDER LONG-ESTABLISHED U.S. SUPREME COURT LAW

75. Defendant Kelley has determined with finality, and with no meaningful input from Mr. Ward or his counsel, that Mr. Ward is competent and can understand the nature and reason for his execution. *See* Ex. 19b. Mr. Ward and his counsel have made a significant preliminary showing of his mental illness to Defendant Kelley (*supra*), but have never had the opportunity to rebut, by cross examination or the presentation of rebuttal witnesses, any evidence that Defendant Kelley considered in finding Mr. Ward to not be mentally ill.

76. The present claim in this Complaint thus presents this Circuit Court with Mr. Ward's incompetence and, by satisfying the "substantial threshold showing" contemplated in the U.S. Supreme Court jurisprudence, hereby necessitates a stay of execution in order to be afforded the requisite hearing under that same jurisprudence.

77. On its face, the Arkansas statutory scheme concerning determinations of incompetency to be executed violates the foregoing procedural rights set forth in *Ford*. The fundamental structural flaw in this scheme is that under ARK. CODE ANN. § 16-90-506(d)(1) (the "Director's Statute"), only the Director of the Department of Correction is vested with any

capacity to initiate process relating to a determination of the sanity, for purposes of execution, of a death-sentenced prisoner. Moreover, the statute deprives prisoners of due process in that it delegates, wholesale, the competence inquiry to the state's health and human services bureaucracy, with no parameters or direction from the legislature, and effectively strips the prisoner any rights to examine or rebut the evidence against him. Plainly, the statute flouts "the minimum procedures a State must provide to a prisoner raising a Ford-based competency claim" that Justice Powell enunciated in *Ford*. *See Panetti*, 551 U.S. at 949. Arkansas legislation and rules of court are devoid of any provision, rule or statutory mechanism providing a death-sentenced prisoner with the express capacity to seek adjudication of his competency by moving or petitioning a hearing court, as *Ford*, 477 U.S. at 426, explicitly calls for. The Arkansas statute in relevant part, states:

> When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment, the Director of the Department of Correction shall notify the Deputy Director of Behavioral Health of the Department of Health and Human Services. The Director of the Department of Correction shall also notify the Governor of this action. The Division of Behavioral Health of the Department of Health and Human Services shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification. The attorney of record of the individual shall also be notified of this action, and reasonable allowance will be made for an independent mental health evaluation to be made. A copy of the report of the evaluation by the Division of Behavioral Health of the Department of Health and Human Services shall be furnished to the Department of Correction Mental Health Services, along with any recommendations for treatment of the individual. All responsibility for implementation of treatment remains with the Department of Correction Mental Health Services.
>
> ARK. CODE ANN. § 16-90-506(d)(1).

78. Thus Arkansas places with the Director of the ADC—the party responsible for carrying out its executions—the power to initiate any semblance of process relating to incompetency. *Id*. It is the mere semblance of process though, not actual due process, that the

statute provides. It situates with the party responsible for the State's executions the decision as to the existence of "reasonable cause to believe" the prisoner may be incompetent for execution by the State. *Id*. This extra-judicial, bureaucratic determination by the most adverse party conceivable—one's own executioner—patently violates the above-outlined *Ford* procedural rights accorded to every death-sentenced prisoner to seek and, if able to satisfy the "substantial threshold showing" for the hearing court, to receive "a 'fair hearing' in accord with fundamental fairness" regarding his incompetency. *Panetti*, 551 U.S. at 949, quoting *Ford*, 477 U.S. at 426.

79. Moreover, the procedures in place do not afford prisoners the requisite procedural safeguards as guaranteed by the Constitution. Once the Director believes that there is "reasonable cause" the statute directs him to delegate the competence determination to yet another administrative agency, the Division of Behavioral Health of the Department of Health and Human Services, who "shall cause an inquiry to be made into the mental condition of the individual." ARK. CODE ANN. § 16-90-506(d)(1)(A). The statute does not specify even the most basic qualifications or credentials for the person charged with making this "inquiry," for example he is not even required to be a doctor.[9] Nor does the statute prescribe the scope or nature of the "inquiry." Importantly, counsel for the prisoner is not privy to any of this information. In fact the statute is quite vague as to when counsel for the prisoner is even notified. *Id*. Though counsel is apparently permitted to submit an independent evaluation, the statute does not allow counsel access to the state's evaluation or the opportunity to rebut its contents or to cross-examine the author. In fact the statute allows for no adversarial hearing, no resources or funds for appointment of an independent expert, and no transparency whatsoever. Finally, the statute fails

[9] The credentials of the person making the "inquiry" is a well-founded concern, given what we know about the credentials of ADC's mental health staff. *See* Ex. 20 (Ms. Bonner, Varner Unit Mental Health Counselor, was a high school graduate with one year of college, no professional licenses in mental health, and no formal mental health training.)

to designate a decision maker within the Department of Health, apparently leaving it entirely to the discretion of the state.

80. Arkansas's Director's Statute—both as written and as carried out by the Defendants to date—violates the clear mandate articulated by the Court in *Ford* and *Panetti*. *Compare* TEX. CODE CRIM. PROC. ANN., Art. 46.05. Competency to be Executed ("(b) The trial court retains jurisdiction over motions filed by or for a defendant under this article.") *Compare also Panetti*, 551 U.S. at 939 (discussing Texas petitioner's 10 motions filed in the motion court during Art. 46.05 proceedings); *Eldridge v. Thaler*, 2009 WL 3856672, at *2 (Nov. 17, 2009 S.D. Tex.) (discussing hearing court's appointment of expert for petitioner in order to provide his preliminary incompetency evaluation in Art. 46.05 proceedings).

B. THE ARKANSAS "DIRECTOR'S STATUTE" WALLS OFF THE COURTS FROM THEIR CONSTITUTIONAL ROLE OF DETERMINING COMPETENCY TO BE EXECUTED

81. Under Arkansas's Director's Statute, when the Director of the Department of Correction "is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment, the Director of the Department of Correction shall notify the Deputy Director of the Division of Behavioral Health of the Department of Health and Human Services." The Division of Behavioral Health is then required to "cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification." Under the statute, counsel for the individual shall also be notified of the action of the Director.

82. On September 2, 2015 undersigned counsel sent a detailed letter to the Director pointing out Mr. Ward's mental illness and how that mental illness prevents him from rationally understanding the nature and reasoning for his approaching execution. Ex. 18, 19a. (Letter to

Defendant Kelley). Accompanying this letter were the 2010 and 2011 reports of Dr. William Logan, which set out his diagnosis of Schizophrenia. Ex. 1, 2.

83. This letter requested that counsel for Mr. Ward be allowed to present witnesses to Defendant Kelley to show the existence of Mr. Ward's mental illness and the opportunity to cross examine any person or expert she relied on in making her statutory determination that Mr. Ward is competent to proceed. Ex. 18a.

84. In response to counsel's letter notifying the Director of Mr. Ward's ongoing history of mental illness and irrational understanding of his conviction and sentence, Defendant Kelley issued a letter on September 22, 2015. Ex. 19b. Defendant Kelley found "no reasonable grounds" for believing that Mr. Ward is not competent to understand the nature of his punishment or to "reach a rational understanding of the reason for his execution." *Id.* Defendant Kelley therefore refused to refer Mr. Ward for an evaluation. In making her final determination, Defendant Kelley announced, for the first time, that she had considered not only the information provided to her by counsel for Mr. Ward, but also the entirety of Mr. Ward's "mental health file as maintained by the Department." *Id.* The Director invited counsel to access that information by contacting one of her employees, Bob Parker. *Id.*

85. Counsel for Mr. Ward have since obtained the mental health file, which consists of numerous reports from social workers who make "mental health" rounds of the cell block, speaking only momentarily to Mr. Ward or not at all. Each such report notes that Mr. Ward makes no affirmative complaint of mental health symptoms. Nevertheless, as Dr. Logan has made clear, the majority of people who suffer from schizophrenia do not believe that they are mentally ill. Ex. 3 at 2. The "evaluations" from correctional health workers are "extremely limited" and are not a reliable means of detecting mental illness. *Id.*; *accord* Ex. 11 at 1 (noting

that Mr. Ward's delusions "would not have been obvious from a brief or casual conversation").

86. As discussed below, in Section II of Part II, the prison's mental health policies and practices further underscore the unreliability of its mental health assessments. ADC hires individuals who are unqualified to be "mental health counselors" and then provides them with no training. *See* infra at 46-50. The mental health counselor's duties include being "on call, writing treatment notes during the Mental Health Clinics, making rounds on my assigned cell blocks, managing caseloads, conducting psycho-educational groups,[10] assessing the mental health needs of inmates on my assigned cell block and following up with the Mental Health Supervisors on behalf of the inmates." Ex. 20 (Declaration of Sandra Bonner) at 3; *See also* Ex. 21 (Deposition of Natasha Martin at 7).[11]

87. Critically, the staff acknowledged that Varner Unit has a "'no involvement' policy . . . regarding death row inmates and mental health services." Ex. 20 at 8.

88. Despite Mr. Ward making a significant preliminary showing that he is mentally ill and not competent to be executed (including medical observations from a forensic psychiatrist who has evaluated Mr. Ward in person, as well as counsel's contemporaneous observations of Mr. Ward's bizarre thought processes), Defendant Kelley denied Mr. Ward due process of law in numerous ways:

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[10] Death row prisoners were not permitted to attend the educational groups. According to Ms. Bonner, "If a death row inmate wanted information covered on any of the group topics, I would give him pamphlets or reading material each week, for eight weeks for him to read in his cell. They could receive the pamphlets but they could not receive a certificate of completion for these groups as the other inmates could." Ex. 20 at 6.

[11] Mr. Ward has attached a declaration and two depositions obtained in connection with the case of another death row prisoner, Jack Greene. See Ex. 20, Declaration of Sandra Bonner, Ex. 21, Deposition of Natasha Martin, and Ex. 22, Deposition of Julia Partain. At a hearing and with the subpoena and discovery power of this Court, Mr. Ward will seek to question additional mental health counselors and staff about their qualifications and practices with regard to Mr. Ward.

a. Defendant Kelley failed to timely provide Mr. Ward notice of the evidence she considered in determining that he is competent to be executed;

b. Defendant Kelley failed to allow Mr. Ward the opportunity to cross examine any and all of the witnesses she consulted in determining that Mr. Ward is competent to be executed;

c. Defendant Kelley failed to allow Mr. Ward the opportunity to rebut any and all evidence she considered in determining that he is competent to be executed;

d. Defendant Kelley failed to give Mr. Ward notice of the reasons why she believes he is competent;

e. Defendant Kelley failed to rely on scientifically valid and reliable evidence in determining whether Mr. Ward is competent to be executed;

f. Defendant Kelley refused even to refer Mr. Ward for a competency evaluation by a qualified mental health professional, even though the only such evaluation to be conducted of Mr. Ward resulted in a finding of incompetence for execution in 2011, and even though Mr. Ward has not received treatment for his condition since that time;

g. Defendant Kelley, rather than a court, has herself made the final decision and determination of the ultimate constitutional question of whether Mr. Ward is competent to be executed.

h. Defendant Kelley, aside from being an administrative official instead of a court, is institutionally and personally biased against Mr. Ward's showing of incompetence. The Director is the named defendant in the considerable majority of Mr. Ward's legal actions attacking the validity of his conviction and sentence. The Director hires and supervises the mental health workers whose reports she relied upon to make her final determination that Mr. Ward is competent. The Director and her employees have been on notice since 2006 that Mr. Ward has

been diagnosed with schizophrenia, and yet they have provided no treatment and instead have relied on the cursory and professionally unreasonable "examinations" from social workers and others—all circumstances that cast an unfavorable light on the mental health services provided by the Department, and which subject the Department and its employees to potential liability. The Director of the Department of Correction, then, has a tangible institutional stake in denying the fact that Mr. Ward suffers from schizophrenia.

C. ARKANSAS'S DIRECTOR'S STATUTE VIOLATES THE SEPARATION OF POWERS UNDER THE ARKANSAS CONSTITUTION

89. Nor does the Director's Statue comport with the Arkansas Constitution. In *Davis v. Britt*, 243 Ark. 556 (Ark. 1967), the Arkansas Supreme Court held that a statute which gave a State Hospital examiner the power to finally determine whether a person charged with capital murder was sane or insane violated the separation of powers doctrine. The same reasoning applies to ARK. CODE ANN. § 16-90-506(d)(1), which purports to give the Director of the Department of Corrections the authority to determine whether a prisoner is competent for execution.

PART II

I. ARKANSAS'S SOLITARY CONFINEMENT OF WARD INFLICTED TWENTY-SIX YEARS OF TORTURE, EXACERBATING MR. WARD'S MENTAL ILLNESS

A. MR. WARD HAS BEEN SUBJECTED TO EXTREME CONFINEMENT CONDITIONS ON ARKANSAS'S DEATH ROW

90. On October 18, 1990, Mr. Ward arrived at the Arkansas Department of Correction's Tucker Maximum Security Prison. The Tucker Maximum Security Unit was a lock down facility, where prisoners wee maintained in 23-hour segregation. The conditions of the Maximum Security Unit were similar to Mr. Ward's current conditions of

confinement, however cells at Tucker had bars instead of the solid steel doors used at Varner (*infra*). Between 1990-1999, when Mr. Ward's sentenced was affirmed, he was transferred out of the prison to court a handful of times, and was usually returned on the same day. The majority of the time, he remained alone, isolated in his cell on 23-hour lockdown.

91. In 2003, Arkansas death row prisoners were transferred to the state's first "Supermax" facility.[12] On August 22, 2003, Mr. Ward was transferred to the new Supermax Unit where he has remained in isolation ever since.

92. The Varner Supermax Unit is a lock-down facility in which each prisoner is housed in a single-man cell. Ex. 23 at 1 (Declaration of Julie Brain). The cells for death-sentenced prisoners at Varner Unit are approximately 12 feet deep, 7.5 feet wide, and 9 feet high. *Id*. The door to the cell is made of solid, thick steel. *Id*. at 1, Ex. A, F. Above the slot in the door through which the prisoner receives his meals, mail and other items is a viewing portal that is approximately 12 inches tall and 6 inches wide and made of thick safety glass that allows facility staff to observe the prisoner. *Id*. at 1, Ex. A; *See also* Ex. 21 at 24. The toilet and shower are at one end of the cell. Ex. 23 at 1, Ex. D. At the other end is a metal bench for the prisoner to sleep on and a flat surface that he can use as a desk or for storage. *Id*, Ex. C. In the back wall of the cell, above the sleeping surface, is a long, narrow window made of thick safety glass. The safety glass is thick enough that the prisoner cannot see outside of the window. *Id*. The cell is lighted by a fluorescent light fixture built into the ceiling and controlled by facility staff. *Id*.

93. A death row prisoner is permitted to spend up to five hours outside of his cell

[12] Arkansas began construction on the facility in 1999. http://adc.arkansas.gov/about/Pages/PrisonHistoryPage2.aspx.

per week for recreation; he must remain in his cell for the remainder of the time. *Id.* at 41. A prisoner remains in his cell when he uses the shower or toilet. He eats all of his meals in his cell, from a tray that is brought to his door and passed to him through a metal slot. When he is permitted to make a telephone call a portable telephone is brought to him and passed through the same slot. Any mail he receives is delivered to him through the slot in the door also. Death-sentenced prisoners are not permitted to engage in any kind of employment in the facility. *Id*.

94. Prisoners remain in isolation during their allowed weekly five hours of recreation. Ex. 23 at 2. The prisoner spends his recreation time in an outdoor recreation cage. These cages are roughly the same size as the cells. The ceiling of the cage is wire and the floor is concrete. The cages are empty and contain no recreation or fitness equipment.

95. Prisoners are not permitted to attend recreation with other inmates; instead they are in the recreation cage alone. The prisoner is cuffed behind his back through his door and uncuffed once they are in the outdoor cage. The prisoner is then strip-searched upon returning from his recreation period, a procedure that many find so humiliating and distressing that they decline to leave their cells for recreation. While in the recreation cage the prisoner is exposed to the heat of the summer and the cold in the winter and has no access to a bathroom. Because prisoners must sometimes wait for long periods before they are escorted back to their cells, these circumstances, for many, add to the reasons to decline recreation.

96. Mr. Ward has spent the last 12 years in almost constant isolation. He has only rarely gone out to recreation and has left his cell two to three times per year for visits. Ex. 4, Ex G (memorandum from 9-14-2015); Ex. 5. Prior to appointment of current counsel, there

were entire years where he did not leave his cell.

B. SOLITARY CONFINEMENT IS KNOWN TO PRODUCES SEVERE, LASTING ADVERSE PSYCHOLOGICAL EFFECTS

1. Dr. Haney is a Preeminent Scholar and Expert Regarding the Psychological Effects of Isolation

97. Dr. Craig Haney is an expert in the psychological effects of living and working in institutional environments. Ex. 24 at 1. He is the Distinguished Professor of Psychology, Director of the Legal Studies Program, and director of the UC Presidential Chair, 2015-2018, at the University of California at Santa Cruz. *Id*. He has written extensively on the subject, including over 100 scholarly articles and a book on the psychological consequences of imprisonment, *Reforming Punishment: Psychological Limits to the Pains of Imprisonment*, published by the American Psychological Association. Washington, DC: APA Books (2006).

98. Dr. Haney has toured and inspected and analyzed conditions of confinement at numerous state and federal prisons as well as prisons in different countries. Ex. 24 at 2.[13] He has lectured at numerous universities, professional psychology organizations, legal agencies, including the Palo Alto Police Department, and the United States Department of Justice. Dr. Haney was invited to speak at a White House Forum in 2000 and a conference jointly sponsored by the United States Department of Health and Human Services (DHHS). *Id*. In 2012, Dr. Haney testified before the United States Judiciary Sub-Committee on the psychological effects of isolated confinement. *Id*. at 3.

[13] Dr. Haney toured Arkansas Varner Supermax Unit in connection with another capital case. His report and the information he obtained for that case is the subject of a protective order by the United States District Court for the Eastern District of Arkansas. In the current pleading and attached Report from Dr. Haney, Dr. Haney has relied solely upon documentation and information supplied by counsel for Mr. Ward. He has not relied upon any of the information he obtained in connection with the *Dansby* case or his tour of the prison.

99. Most recently, Dr. Haney has focused on the assessment of the psychological effects of confinement in so-called "lockup," punitive segregation, or so-called "supermax" confinement (in what are variously known as management control, security housing, high security, or close management units). His research, writing, and testimony on these various prison-related issues have been cited by state courts, including the California Supreme Court, and by Federal District Courts, Circuit Courts of Appeal, and the United States Supreme Court. *Id*. at 6. He is a respected and renowned expert on the psychological effects of isolation.

2. Solitary Confinement Imposes Grave Psychological Harm That Amounts to a Categorically More Severe Degree of Punishment Than Ordinary Confinement

100. It is Dr. Haney's expert opinion "that being housed in solitary or isolated confinement—especially over a long period of time—can and often does produce a number of negative psychological effects. It places prisoners at grave risk of psychological harm." *Id*. at 7. In his Preliminary Report, attached as Exhibit 24, Dr. Haney discusses scientific literature and numerous empirical studies documenting "the pain and suffering that isolated prisoners endure and the risk of psychological harm to which they are exposed." *Id*. These findings, he explains, are "theoretically sound." *Id*. We know that "exclusion and isolation from others is known to produce adverse psychological effects in contexts other than prison" he explains; thus "it makes perfect theoretical sense that this experience produces similar negative outcomes in correctional settings, where the isolation is so rigidly enforced, the social opprobrium that attaches to isolated prisoners can be extreme, and the other associated deprivations are so severe." *Id*. at 8.

101. As Dr. Haney discusses in his report, there is a "reasonably large and growing literature on the significant risk that solitary or so-called "supermax" confinement poses for the mental health of prisoners." *Id*. at 10. The report continues:

> The long-term absence of meaningful human contact and social interaction, the enforced idleness and inactivity, and the oppressive security and surveillance procedures, and the accompanying hardware and other paraphernalia that are brought or built into these units combine to create harsh, dehumanizing, and deprived conditions of confinement.
>
> *Id*.

102. Numerous studies, conducted over four decades and across several continents and professions, "clearly document the distinctive psychological harm that can and do occur when persons are placed in solitary confinement." *Id*. at 10-11. These studies document "emotional disturbances," "isolation panic," "appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations." *Id*. at 11.

> Moreover, direct studies of prison isolation have documented an extremely broad range of harmful psychological reactions. These effects include increases in the following potentially damaging symptoms and problematic behaviors: anxiety, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.
>
> *Id*. at 12.

103. The harm inherent in solitary confinement "is underscored by the fact that it is commonly used in so-called 'brainwashing' and certain forms of torture." *Id*. at 13-14.

104. Social deprivation and isolation causes a number of other harmful psychological changes. Social psychologists have written at length about these harmful effects, which include "dehumanization," "cognitive deconstructive states" ("in which there is emotional numbing, reduced empathy, cognitive inflexibility, lethargy, and an absence of

meaningful thought), and "social pathology" ("necessary adaptations that prisoners must make to live in an environment that is devoid of normal social contact.") *Id*. at 15-16.

105. Social exclusion poses a "serious threat" to psychological well being, including "'increased salivary cortisol levels… and blood flow to brain regions associated with physical pain,' 'sweeping changes' in attention, memory, thinking, and self-regulation, as well as changes in aggression and prosocial behavior." *Id.* at 16.

106. The pain caused by the isolation does not decrease once the prisoners have "adjusted." Dr. Haney reports that, "[s]ome prisoners have told me that the absence of meaningful contact and the loss of closeness with others are akin to a dull ache or pain that never goes away. Others remain acutely aware of the relationships that have ended and the feelings that can never be rekindled." *Id*. Paradoxically, the isolation is so painful, that some prisoners

> socially withdraw further from the world around them, receding even more deeply into themselves than the sheer physical isolation of solitary confinement and its attendant procedures require. Others move from initially being starved for social contact to eventually being disoriented and even frightened by it. As they become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence.
>
> *Id*. at 17.

107. The pathological adaptations become internalized and persistent, morphing from conscious survival strategies to "deeply engrained ways of being." *Id*. "In extreme cases, these ways of being are not only dysfunctional but have been internalized so deeply that they become disabling, interfering with the capacity to live a remotely normal or fulfilling social life." *Id*.

108. In addition to the psychological pain of social deprivation, solitary confinement and supermax units have other negative psychological effects, including "high levels of repressive control, enforced idleness, reduced environmental stimulation, and physical or material deprivations that also produce psychological distress and can exacerbate the negative consequences of social deprivation." *Id*.

109. Human beings need movement and exercise to remain healthy. *Id.* at 18. Prisoners in supermax units such as the Varner Supermax, are deprived of physical activity, mental stimulation, and human touch. *Id*. The psychological literature underscores the importance of meaningful contact and interaction. . . Over the long-term, they may be as essential to a person's psychological or mental health as adequate food, clothing, and shelter are to his or her physical well-being." *Id*. at 20. As Dr. Haney points out,

> in response to the scientific evidence that I have summarized above, and out of the recognition that meaningful social contact and interaction is central to psychological health and well-being, virtually every major human rights and mental health organization in the United States as well as internationally have taken public stands in favor of significantly limiting solitary or isolated confinement use (if not abandoning it altogether). These organizations include major legal, medical, and health organizations, as well as faith communities and international monitoring bodies.
>
> *Id.*

110. Organizations such as the American Bar Association and the bipartisan Commission on Safety and Abuse in America's Prisons have cautioned against housing prisoners in solitary confinement, concluding that supermax prisons are "expensive and soul destroying." *Id*. at 21-22.

3. Solitary Confinement Imposes Severer Harms On Prisoners With Pre-existing Psychological Vulnerability or Mental Illness

111. The psychological harms of supermax prison units are worse for prisoners with mental illness. The "adverse psychological effects vary as a function not only of the

specific nature and duration of the isolation (such that more deprived conditions experienced for longer amounts of time are likely to have more detrimental consequences) but also a function of the characteristics of the prisoners subjected to it." *Id*. at 23. Among the prisoners who are "especially vulnerable to the psychological pain and pressure of solitary confinement" are prisoners who suffer from mental illness. *Id*. "Mentally ill prisoners are particularly at risk in these isolated environments and have been precluded from such environments by legal and human rights mandates precisely because of this." *Id*.

112. Mentally ill prisoners are more "reactive to psychological stressors and emotional pain and, thus, "are more likely to deteriorate and decompensate when they are subjected to the harshness and stress of prison isolation." *Id*. at 23-24. One reason for this is that isolation and social deprivation may worsen the pre-existing symptomology experienced by prisoners with mentally illness:

> For example, many studies have documented the degree to which isolated confinement contributes to feelings of lethargy, hopelessness, and depression. Thus, for already clinically depressed prisoners, these acute situational effects are likely to exacerbate their pre-existing chronic condition and lead to a worsening of their depressed state. Similarly, the mood swings that some prisoners report experiencing in isolation would be expected to amplify the pre-existing emotional instability that prisoners diagnosed with conditions such as bi-polar disorder suffer. Prisoners who suffer from disorders of impulse control would likely find their pre-existing condition made worse by the high levels of frustration, irritability, and anger that many isolated prisoners report experiencing. And prisoners prone to psychotic breaks may suffer more in isolated confinement due to conditions that deny them the potentially stabilizing influence of social feedback that might ground their sense of reality in a stable and meaningful social world.
>
> *Id.*

113. For these reasons numerous corrections officials, professional mental health associations, including the American Psychological Association, and human rights organizations to advocate to prohibit or severely limit the placement of the mentally ill in

solitary confinement. *Id*. Such positions by state and national organizations "reflect the accepted fact that mentally ill prisoners are especially vulnerable to isolation- and stress-related regression, and decompensation that worsen their psychiatric conditions and intensify their mental health related symptoms and maladies (including depression, psychosis, self-harm)." *Id*. at 26. At the very least, this recognition mandates for strict mental health screening and review of prisoners before they are to be placed in isolation. *Id*.

II. THE SUPERMAX UNIT'S UNQUALIFIED, STUDIOUSLY UNTRAINED "MENTAL HEALTH COUNSELORS" *SERVE TO PREVENT THE TREATMENT OF PRISONERS* IN ORDER TO FRUSTRATE THE CONSTITUTIONAL PROHIBITION AGAINST EXECUTING THE INCOMPETENT

A. ADC POLICY IS CONSCIOUSLY DESIGNED TO PREVENT ENGAGEMENT IN THE MENTAL HEALTH CONCERNS OF VARNER SUPERMAX PRISONERS

114. The prison's deliberate indifference to the mental illness of its death row is evidenced by the lack of mental health training and specialized knowledge in the "counselors" that staff the Varner Supermax Unit. The mental health staff of Varner are, simply, unqualified and untrained and have been as a matter of hiring and staffing practices for many years.

115. Three of the mental health counselors responsible for seeing and assessing death row prisoners while Mr. Ward has been in the Varner Unit are Sandra Bonner, Natasha Martin, and Julia Partain. Ms. Bonner, who was a Mental Health Counselor for death row prisoners from approximately 2007-2010, is a high school graduate with no formal mental health training or any certification.[14] Ex. 20 at 1. Though a degree was nominally required for her position, the prison makes an exception for anyone who had worked at the prison for

[14] Wendy Kelley was supervising psychiatrist at the time that Ms. Bonner was hired by mental health services. Ex. 19 at 3.

five years. Thus, Ms. Bonner, a correctional officer of ten years, was considered qualified to be a mental health counselor. Ms. Martin joined ADC as a mental health counselor in approximately 2008. Ex. 21 at 6. Ms. Martin graduated from college with a bachelor's degree in criminal justice and a master's in business administration. *Id*. at 7. She also had no mental health licensing and no formal mental health education. Her position at Varner Unit was her first position in mental health and in corrections.

116. The prison does not provide adequate training to its mental health staff. The only mental health training required by ADC is a yearly suicide-training program. *Id.* at 47. The practices employed by the Supermax Unit's mental health staff are cursory and uninformed.

117. Three days per week, mental health counselors conduct "rounds." The rounds are brief, lasting anywhere from just a few minutes to an hour, to check and assess approximately 70 prisoners on the death row. *See Id.* at 7, 18 (Ms. Martin's rounds last from between "15 minutes to an hour or so" to see approximately 70 people.); *See* Ex. 20 at 5-6 (Ms. Bonner's "Rounds would take anywhere from 35 to 40 minutes but could last just a few minutes if no inmate needed anything from me."); *See* Ex. 22 at 32 (Ms. Partain spends about 45 minutes to an hour seeing 76 prisoners on the death row unit during her rounds). When making rounds, mental health counselors can stand at a prisoner's steel door and assess them through a window that is approximately 6 inches wide and about two feet tall. Ex. 21 at 24. The doors do not have holes to speak or listen through, instead "you can kind of hear" "through the cracks of the door and the cracks of the food trap." *Id*. at 25.

118. Ms. Bonner's practice was to "go on the tiers and call out 'mental health' and those that needed to speak with me, would stand at their cell door." Ex. 20 at 5. Ms. Partain's

practice was to say, "This is mental health, at least move and let me know you're alive in there." Ex. 22 at 34. Ms. Partain was loath to get too close to a door; for fear that the locks might pop automatically. *Id*. at 55 ("I'm not going to step in front of a train.").

119. Prisoners who did not respond or said they did not want to talk were marked as "uninterested." Ex. 21 at 26. This is so despite the admission by the mental health counselors that prisoners may be reluctant to talk about their own mental health. According to Ms. Partain, mental health services is responsible for the mental health care for 1700 inmates, "but fortunately most of them would rather be shot at dawn than admit they had a mental health problem anyway. There's still some stigma attached to mental health, so they don't want to talk to us." Ex. 22 at 34-35.

120. Mental health counselors conduct mental health "reviews" every 90 and 180 days, using a mental health checklist from the prison. Ex. 21 at 50. The checklist contains a list of potential mental health symptomology. However, because they are not trained, the mental health counselors fail to understand the basic mental health concepts and even the basic terminology contained in the forms.

121. For example, Ms. Martin appeared unable to distinguish between "mood" and "affect." *Id*. at 27. When assessing either, Ms. Martin would look to see if they seemed "sad," "super excited or really giddy" or "really frustrated or irritated or mad at the world." *Id*. She plainly was not familiar with many terms on the prison's mental health checklist. *Id.* When asked whether someone could have a depressed affect, she responded, "I don't know." *Id*. She defined euthymic (a mood that is neither elevated nor depressed) as "sad, "dysthymic" (characterizing mild depression) as "really happy," "psychomotor retardation" (slowing of thoughts or reduction of movement) as a "physical disability", and "poverty of

speech" (lack of unprompted speech) as speaking "slowly." *Id*. at 32, 34, 37-38. She could think of no examples of the criteria "dysphoric," "expansive," "digressive speech," circumstantial speech" and admitted that she did not know what either a "labile affect" or a "blunted affect" meant. Ex. 21 at 33-35, 39. Unsurprisingly, Ms. Martin never checked the boxes for any of these mental health symptoms and instead perennially classified inmates' moods and affects as "normal." *Id*. at 34

122. Ms. Martin could think of no examples of for the criteria "dysphoric," "expansive," "digressive speech," or "circumstantial speech." *Id*. at 33, 34, 35. Unsurprisingly, Ms. Martin never checked the boxes for any of these mental health symptoms and instead classified inmates' moods and affects as "normal." *Id*. at 34-35, 38.

B. SWORN TESTIMONY OF ADC "MENTAL HEALTH COUNSELORS" EXPOSES ITS "NO INVOLVEMENT" POLICY COMMITTED TO PREVENTING EVIDENCE OF "THE DEATH ROW INMATE PLAYING CRAZY TO AVOID EXECUTION", MAINTAINED AT THE EXPENSE OF ACTUAL HEALTH SCREENING

123. The Varner Supermax Unit has a "'no involvement' policy . . . regarding death row inmates and mental health services." Ex. 20 at 8. According to a former mental health counselor this

> implied policy that came from the mental health administrators and supervisors was that the agency doesn't provide psychiatric treatment to death row inmates because of legal concerns. Specifically, **these legal concerns the administrators were concerned about involved the death row inmate playing crazy to avoid execution. The mental health services unit did not want to be involved in any way with an inmate 's efforts to stop their execution by claiming mental illness**.
>
> *Id*. at 8-9 (emphasis added).

124. The noninvolvement policy is borne out by other ADC policies and practices toward the Supermax Unit population. For example, the prison also employs a policy that death row prisoners may not be removed from their cells and taken to mental health. Ex. 22

at 41. Indeed, Ms. Bonner and Ms. Partain recalled only one death row inmate ever making a request for mental health services. Ex. 20 at 8; Ex. 22 at 42. That prisoner was receiving services because he had "demanded" medication. Ex. 22 at 42. Neither Ms. Bonner nor Ms. Partain was able to name a prisoner for whom the prison had initiated services.

1. Mental Health Personnel Uniformly Ignore Mr. Ward's Numerous, Obvious Needs and, Through This Neglect, Have Worsened the Harsh Consequences of the ADC's Form of Confinement

125. A review of ADC records of Mr. Ward, which chiefly consist of repetitive brief entries from the "mental health rounds" (described above), carried out by comprehensively unequipped ADC personnel, manifest the absurdity, ingrained cynicism, and institutional disregard for the lives of the men in the ADC's charge at the Supermax Unit. By institutional design, the reporting does *not* reflect Mr. Ward's very severe mental illness (outlined above).

126. One of the earliest entries in the ADC's available records of Mr. Ward, dated June 1, 1999, reflects that even the ostensibly qualified mental health staff acquiesced to the prisoner's resistance to engagement: "Inmate Ward refused to come to the office for his semi-annual mental health interview. Staff report no problems with him." John Mangiaracina, Ph.D. Mental Health Services, *Progress Note*, Jun. 1, 1999. Ex. 25 at 36. In fact, the large majority of mental health reviews for Mr. Ward indicate that the staff put a checkmark next to "normal" and noted that he had "refused" to speak with them. *See e.g., Id*. at 5-23. These entries are not reflective of Mr. Ward's mental health, but instead are indicative of the prison's callous disregard for the mental health of these prisoners.

127. The available ADC records consistently reflect that the inmate's "wishes"—that is, his psychiatric problems, psychological impairments, and other limitations—

perpetuate the institutional neglect of his health. The so-called mental health staff are very aware of this dynamic, as related above. The supermax's gross understaffing is possible, as an administrative matter, because, "fortunately," as it was characterized, most inmates "would rather be shot at dawn than admit they had a mental health problem anyway. There's still some stigma attached to mental health, so they don't want to talk to us." Ex. 21 at 34-35 (*supra*).

128. On January 27, 2010, the note from the day's rounds provides that Mr. Ward "was hostile/angry. Inmate told social worker to go away and stated he would sue for harassment if social worker continued to knock on his door." Ex. 25 at 40

129. In response, the staff apparently did just as Mr. Ward asked: she went away. The next entry (Feb. 1, 2010) reflects no follow-up, escalation, or other sensible handling of Mr. Ward's hostility. Rather, the entry provides that he was "seen during mental health round and voiced no mental health concerns." *Id.*

130. Mr. Ward's saturation in denial and the stigma attached to mental illness punctuates his otherwise banal records consisting mainly of perfunctory notes checking off that he was "uninterested" or "voiced no mental health concerns:"

> I/M refused request to be seen in Varner Supermax MH office. Psychologist did walk to cell block to see I/M. When psychologist identified herself, I/M said, "I don't want to talk to you." I/M then walked away and came back and asked, "Did you get a request from me?" When psychologist explained that MH administrator had requested consult, I/M said, "No, No, No. You're not running insanity on me." I/M then added, "If you try to talk to me again, I'll sue you." I/M then walked away."
>
> ADC Mental Health Services, *Segregation Review Form*, Jun. 30, 2011. Ex. 25 at 24.

131. Despite this episode's obvious signal for follow-up by at least a qualified health screener, the notes from the next day's rounds held no connection to the prior

encounter, opting instead for the usual "uninterested" catechism: "Inmate seen during mental health round and voiced no mental health concerns." ADC Mental Health Services, *Segregation Review Form*, Jul. 1, 2011. *Id*.

132. Similarly, another day, Julia Partain marked that Mr. Ward's mood was "inappropriate" and "incongruous" and that he was "irritable," "blunted," and "intense." Nevertheless, for "Mental Health Needs" she checked "None."

133. To the extent the ADC records reflect even superficial consideration that Mr. Ward has persistently presented any issue, they also uniformly reflect that personnel have never taken any meaningful step to intervene in his circumstances:

> Ward has vehemently refused to talk with social worker. He has been observed in his cell, involved in positive activities: watching TV, reading and writing. In an encounter with Dr. Rector, Staff Psychologist on 6/30/2011, Ward expressed some concerns about "insanity." Social worker recalls him expressing similar concerns at the time she began making rounds in Cell Block 4.
>
> ADC Mental Health Services, *Segregation Review Form*, Sep. 14, 2011. Ex. 25 at 38.

134. Overall, the ADC records voice what amounts to misgivings with Mr. Ward's difficult behavior:

> Ward has refused to interact with social worker since she began doing rounds in Cell Block 4. He is observed during rounds and his activities noted. Occasionally, however, he will make a profane remark when social worker looks into his cell as she passes.
>
> ADC Mental Health Services, *Segregation Review Form*, Dec. 10, 2013. Ex. 25 at 3.[15]

[15] Compare this more recent but nearly carbon copy note entry: "Ward is Class 1C and on death row. Ward has refused to interact with social worker as long as she has conducted rounds in Cell Block 4, approximately 5 years. He is observed during rounds and his activities noted. He will occasionally, however, make a profane remark when social worker looks into his cell as she passes." ADC Mental Health Services, *Segregation Review Form*, Dec. 4, 2014. Ex. 25 at 22-3.

135. However these records actually contain very obvious red flags that would alert any reasonably qualified mental health personnel—and really any lay-person with common sense—that a proper evaluation is needed.

136. Recently disclosed mental health records manifest the continuity of systemic and individual disregard over the years of Mr. Ward's confinement in Varner. ADC's nominal mental health personnel have always accepted whatever manner of dismissal Mr. Ward provided, never conducting any further manner of inquiry to begin to engage him meaningfully about his obvious mental health issues.

137. When asked, and Mr. Ward was in one mood, he would self-report no mental health concerns and thereby eliminate any further inquiry. ADC Mental Health Services, *Segregation Review Form*, Feb. 19, 2016. Ex. 25 at 45. But when asked while in a different mood, Mr. Ward routinely reacted with hostility that should have, but never did, engage ADC mental health personnel to at least begin to probe his status.

138. On October 14, 2016, "When the Advisor was walking away from inmate cell she heard inmate stating 'Get the fuck away'." ADC Mental Health Services, *Segregation Review Form*, Oct. 14, 2016. Ex. 25 at 44. Records reflect no action by ADC personnel. The following month, Mr. Ward again responded to the routine query about mental health with "Get the fuck away from my door." ADC Mental Health Services, *Segregation Review Form*, Nov. 23, 2016. Ex. 25 at 43. A few months after that encounter, records reflect Mr. Ward responding to personnel with: "Don't knock on my door anymore. Don't stop by my door. I will sue you." ADC Mental Health Services, *Segregation Review Form*, Feb. 1, 2017. Ex. 25 at 41-42. Two days later, Mr. Ward reiterated: "Please get away from my door. I have the Constitutional Right to refuse health and mental health services. If you come by my cell door

again I am going to sue you. . . . Get away from my cell door." ADC Mental Health Services, *Segregation Review Form*, Feb. 3, 2017. Ex. 25 at 41.

139. The very cursory, at best, nature of these ADC mental health encounters with Mr. Ward are highlighted by reference to contemporaneous records concerning other prisoners. During the February 3, 2017 visit recounted in the immediately preceding paragraph, the identified ADC personnel responsible for Mr. Ward's "screening," Ms. Phalia Carter (who apparently refers to herself as "Advisor" in the brief Notes provided in these records), reported conducting two other prisoner consultations, each of which was of the duration of "minutes" at the exact same time (8:45 AM) as she reportedly saw Mr. Ward. Similarly, records on other dates reflect the same practice of bulk-reporting multiple screening interactions with various prisoners at the identical time. *See, e.g.*, entries for February 27, 2017 at 10:05 AM and for March 1, 2017 at 9:11 AM.

140. The foregoing rehearsal of representative records entered by ADC personnel over the years are devoid of any evidence of institutional capacity, let alone intention, to mitigate the incalculable cost Mr. Ward and men situated like him have carried from the Department of Correction's intractable policy of solitary confinement and neglect.

2. Untreated Migraine Headaches Earn Mr. Ward "Punitive Isolation" Rather Than Medical Attention

141. Apart from the sustained disregard for Mr. Ward's general mental well-being, the ADC repeatedly ignored treatment of Mr. Ward's symptoms of possible neurological problems. Instead of inquiring more deeply about Mr. Ward's periodic migraine headaches, he was periodically cited for rule violations—and punished with even greater isolation.

142. ADC records reflect a violation on June 14, 2008 in which Mr. Ward was charged for using "paper covering his cell lights and windows making it too dark keeping any one from seeing him in his cell." Ex. 25 at 33. Mr. Ward explained in his statement that he "was only trying to keep my cell cool and I did not want to over heat. I did have them up in the window."

143. Records reflect a similar violation on May 27, 2010 for, in part, having "papers covering the light which is in violation of cell compliance." *Id.* at 30-32. As Mr. Ward has had to explain repeatedly, he endures migraine headaches that entail extreme sensitivity to light. Thus, he sought to dim the lighting that is otherwise constant in his cell and beyond his control.

144. The Orwellian "Punitive Isolation" treatment—as though his standard, otherwise near-total, isolation is *not* punitive—provided the only substantial departures from his routine in his cell. For example, on August 3, 2012, he was written-up for a failure to "Keep Person/Quarters W Regulat" and "Failure To Obey Order of Staff". On that occasion, he was released from Punitive Isolation on September 6, 2012.

145. Later, on February 26, 2014, Mr. Ward obtained another Punitive Isolation violation for attempting to relieve the discomfort form an "extreme migraine headache." As he put it,

> I'm being forced to choose to live with pain or without my hobbycraft. That is unconstitutional! Prison rules and regulations will not be used to force me to live in extreme pain and also will not be implimented [sic] to force me to use medication in order to comply with any regulations. Remove all disciplinary actions or sign your name here into record approving illegal practices of torture!
>
> Ex. 25 at 35.

146. Later in 2014, this migraine situation repeated itself, again with no indication of any assessment of his health problem and, instead, just punishment for violating rules:

> Mr. Bowen did not fill out the write-ups and forced to sign the write ups by Warden Meinzer. Warden Meinzer wrote the disciplinary and force the officer to sign the disciplinary. I did have my light covered because I have extreme migraine headaches. I have to plea guilty to one of the lesser evils, or die taking medication that will kill me. I don't want Officer Bowen to loss his job."
>
> ADC Mental Health Services, *Segregation Review Form*, Dec. 4, 2014. Ex. 25 at 28-29.

VI. Statement of Claims

Claim I - Mr. Ward suffers from severe mental illness and is incompetent to be executed as a result. His execution would violate his right to freedom from cruel and unusual punishment, as protected by the Eighth and Fourteenth Amendments to the United States Constitution, Mr. Ward's mental illness renders him unable to comprehend rationally the punishment he is about to receive and the reasons for which it will be imposed. "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). In addition, Mr. Ward is entitled to an order enjoining his execution because he has made a sufficient "threshold" showing of incompetence, and the Court must conduct a hearing to determine the ultimate question of whether Mr. Ward is competent to be executed. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007), *Ford*, 477 U.S. at 426. Mr. Ward's execution also violates Arkansas statute because he is not able to understand the nature and reason he is about to be executed under ARK. CODE ANN. § 16-90-506.

Claim II – Defendants have violated and continue to violate the prohibition against "cruel and unusual punishments" under the Eighth and Fourteenth Amendments of the United States Constitution and Article 2, Section 9 of the Arkansas Constitution. Defendants

have subjected and continue to subject Plaintiff to the severely excessive punishment of solitary confinement and thereby have imposed a sentence beyond that which is accepted under the foregoing constitutional provisions. Further, the prolongation of Plaintiff's death sentence, in itself, has vitiated any penological justification for death and results in the gratuitous infliction of suffering in violation of the constitutions.

Claim III – ARK. CODE ANN. § 16-90-506(d)(1) does not comport with due process requirements of the Arkansas and United States Constitutions and is unconstitutional on its face and as applied. Mr. Ward has been denied the due process of law under the Eighth and Fourteenth Amendments and requires a meaningful hearing and process to show that he is and remains mentally ill, and therefore incompetent to be executed. Mr. Ward has made a substantial threshold showing of mental illnesswas and thereby must be permitted a fair hearing, in accordance with fundamental fairness, on the issue of his incompetence. *Panetti*, 551 U.S. 930.

Claim IV – By statutorily assigning the competency-for-execution determination to an administrative official (including one who is not neutral with respect to the employees on whom she relied in finding Mr. Ward to be competent), and making no provision for that determination to be made by a court, ARK. CODE ANN. § 16-90-506(d)(1), violates the Eighth and Fourteenth Amendments as set forth in *Ford*, 477 U.S. 399, and *Panetti*, 551 U.S. 930 (*supra*).

Claim V – By having decided for herself the question of whether Mr. Ward is legally competent to be executed, the Defendant-Director carried out a judicial function as a member of the executive branch. Her actions violate the state constitutional guarantee of the separation of powers as described in *Davis v. Britt*, 243 Ark. 556 (1967). The statute authorizing the Director determine Mr. Ward's competence, *i.e.*, ARK. CODE ANN. § 16-90-506(d)(1), violates the state

Constitutional by purporting to confer such authority on the Director of the Department of Corrections.

VII. Prayer for Relief

Wherefore, Plaintiff prays as follows:

A. That this Honorable Court issue a judgment declaring that Mr. Ward is incompetent to be executed and that executing him in his present condition violates his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and under ARK. CODE ANN. § 16-90-506.

B. That this Honorable Court determine that Mr. Ward was denied due process of law when Defendant Kelley determined Mr. Ward was competent to be executed without allowing him any proceeding, let alone a fair one, to show otherwise, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

C. That this Honorable Court determine that Mr. Ward is not able to understand the nature and reason for his execution which would violate ARK. CODE ANN. § 16-90-506 and also the Eighth and Fourteenth Amendments to the United States Constitution.

D. That this Honorable Court determines that by these pleadings Mr. Ward has made a "substantial threshold showing" of incompetence to be executed under *Panetti v. Quarterman* , 551 U.S. 930, 949 (2007), quoting *Ford v. Wainwright*, 477 U.S. 399, 426 (1976).

E. That this Honorable Court enter a stay of execution thereby enjoining the State of Arkansas from executing Mr. Ward on April 17, 2017 so that the Court, in due course, may conduct a full and fair evidentiary hearing to determine whether Mr. Ward is competent to be executed under the Eighth Amendment to the United States Constitution as well as under the standard set forth in ARK. CODE ANN. § 16-90-506.

F. That, in due course, this Honorable Court conduct such a full and fair evidentiary hearing to determine whether Mr. Ward is competent to be executed under the Eighth Amendment to the United States Constitution as well as under the standard set forth in ARK. CODE ANN. § 16-90-506.

G. That this Honorable Court order Arkansas to provide Plaintiff with discovery, including access for his expert to tour the Varner Supermax Unit;

H. That this Honorable Court determine that, on its face, ARK. CODE ANN. § 16-90-506 violates the Eighth and Fourteenth Amendments to the United States Constitution for providing for the Arkansas Department of Correction, rather than a court of competent jurisdiction, to make a final determination of a prisoner's competency to be executed.

I. That this Honorable Court determine that ARK. CODE ANN. § 16-90-506 violates the Arkansas constitutional requirement of separation of powers by allowing the Director of the Department of Correction to determine whether a condemned prisoner is competent for execution, and that the Director herself violated the separation of powers by making that determination.

J. That this Honorable Court determine that Arkansas has violated the Federal and State prohibition on "cruel and unusual punishments" in the manner by which it has confined Plaintiff and subjected him to grossly excessive delay during and after his subjection to constitutionally defective death penalty procedures before his sentencing *sub judice*;

K. That this Honorable Court preliminarily and permanently enjoin Arkansas from confining Mr. Ward under Supermaximum, solitary, or other isolation conditions;

L. That this Honorable Court appoint from the nomination of Mr. Ward's counsel a Special Master with recognized expertise in the mental health effects of severe confinement

conditions such as Supermaximum and solitary confinement to establish, in consultation with the Department of Correction, suitable confinement conditions for Mr. Ward and monitor the conditions periodically for the remainder of Mr. Ward's confinement;

M. That this Honorable Court order the Department of Correction to provide Mr. Ward perennial, sustained mental health treatment, to be specified in consultation with the Special Master, to assist in Mr. Ward's recovery from the harms resulting from the foregoing violation of his constitutional rights;

N. That this Honorable Court both preliminarily and permanently enjoin the Defendants and any and all of their agents from executing Mr. Ward on April 17, 2017 or on any other day while he remains incompetent as defined by the Eighth and Fourteenth Amendments to the United States Constitution.

O. That this Honorable Court retain jurisdiction of this matter until the unconstitutional and other unlawful conduct, conditions, and practices set forth herein and otherwise adduced in this litigation no longer exist and the Court, upon recommendation of the Special Master, is satisfied that they will not recur with respect to Mr. Ward; and

P. Any other relief as may be just and equitable.

Respectfully Submitted,
JENNIFFER HORAN
FEDERAL DEFENDER

By: _____

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Counsel for Plaintiff

DATED: March 29, 2017

CERTIFICATE OF SERVICE

I, Scott W. Braden, hereby certify that I have hand delivered a copy of the foregoing Complaint and accompanying Exhibits to Leslie Rutledge, Attorney General, Office of the Attorney General, 200 Catlett-Prien Tower Bldg., 323 Center Street, Little Rock, Arkansas 72201-2610 on this 29th day of March, 2017.

_____

Scott W. Braden