IN THE SUPREME COURT OF ARKANSAS

BRUCE E. WARD **APPELLANT/PETITIONER**

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

WILLIAM ASA HUTCHINSON,
Governor of the State of Arkansas,
WENDY KELLEY,
Director, Arkansas Department of Correction,
MARK CASHION,
Warden, Varner Supermax Unit, and
BENNY MAGNESS, Chairman,
Arkansas Board of Corrections, **APPELLEES/RESPONDENTS**

RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION AND REQEUST FOR AN EXPEDITED BRIEFING SCHEDULE

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

1. After waiting for a month after the Governor set an execution date of April 17, 2017, Ward filed a petition in the circuit court below seeking to stay his execution on the grounds that he is incompetent to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). His petition took aim at a statute whereby the Director of the Arkansas Department of Correction has the responsibility to

evaluate whether or not an inmate has made a threshold showing of incompetency, *see* Ark. Code Ann. § 16-90-506(d)(1)(A). However, although his experienced counsel has used the statute successfully on behalf of other inmates,[1] Ward did not seek a determination by the Director in this case before filing the lawsuit below.

The circuit court below ultimately dismissed the action on the grounds that "[a] Circuit Court lacks jurisdiction to stay an execution." Order Denying Motion for Preliminary Injunction and Dismissing Complaint, Jefferson County Circuit Court No. 35CV-17-206-5 (order of April 13, 2017). *See also Singleton v. Norris*, 332 Ark. 196, 200, 964 S.W.2d 366, 367 (per curiam) ("[A] circuit court does not have jurisdiction to stay an execution.") (quoting *Rector v. Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992) (per curiam)). Ward then filed the instant Emergency Petition for a Stay of Execution in this Court.

2. A stay of execution is an equitable remedy that must take into account whether the petitioner's delay in seeking a stay, and also whether he or she has

[1] In 2015, the Director discharged her responsibility under the statute and found that Terrick Nooner, another death-row inmate, had made a substantial showing of incompetency. She then asked the Governor to cancel Nooner's execution date, which was done. Nooner's counsel, who also represents Ward here, did not question the legitimacy of the statute he had invoked, but embraced the Director's determination.

demonstrated a strong likelihood of success on the merits. *See Hill v. McDonough*, 547 U.S. 573 (2006). Here, Ward's request for a stay of execution should be denied because (a) Ward's delay in bringing the action below between the Governor's setting of his execution and the date it was to be carried out, which is much larger than any delay that could conceivably be laid at the circuit court's feet, and (b) Ward's failure to demonstrate a strong likelihood that he could succeed in his chosen forum, the circuit court, on the merits of his claim, because he fails to convincingly address the basis upon which the circuit court actually dismissed his case, lack of jurisdiction.

3. Although this Court has never expressly defined a standard for issuing a stay of execution, federal courts use the standard in *Hill*, 547 U.S. 573 (2006). In *Hill*, the United States Supreme Court held that a pending lawsuit does not entitle a condemned murderer to a stay of execution as a matter of course, and that the State and crime victims have a profound interest in the timely implementation of a valid death sentence. *Id.* at 583-84. The courts "must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Applicants seeking a stay must meet all the elements of a stay, including showing a significant possibility of success on the merits. *Id.* at 584.

4. Ward paints a picture of foot-dragging on the part of everyone else in this case except him, but the full context regarding (a) his knowledge of his *Ford* claim prior to the setting of an execution date and (b) the litigation choices he has made in filing the suit below and since, reveal a different picture. To begin with, Ward knew the following indisputable facts regarding his Ford claim before an execution date was ever set in this case:

First, Ward and his counsel have known for many years that he is part of a small group of persons who have exhausted the ordinary course of review of their capital sentences in state and federal court, and are liable to have execution dates set imminently.

Second, Ward knew that he would be making a *Ford* claim whenever the Governor set an execution date. Ward avers that he has suffered from a mental illness that for decades has rendered him incompetent to be executed. He filed a *Ford* claim in 2015, when a previous execution dates was set, only to voluntarily nonsuit it when this Court entered a stay.

Third, Ward knew that his position would be that his *Ford* claim would become ripe as soon the Governor set an execution date.

Fourth, Ward knew that he would have a limited amount of time to litigate a *Ford* claim prior to the date set for his execution, particularly because his execution date was the first among the ones the Governor set.

Finally, and importantly, Ward knew that he would be the *plaintiff* in such an action, and, like any plaintiff, that *his* litigation decisions about where to file, and what actions *he* took once the case was filed, would drive the litigation.

5. Despite having full knowledge of the necessity to act quickly after the setting of an execution date, Ward simply did not do so. On February 27, 2017, the Governor an execution date of April 17, 2017. There are 49 days between February 27, 2017, and April 17, 2017. Ward filed the lawsuit in the circuit court below on March 29, 2017. This means that Ward waited 30 days, or 61% of the time he had prior to his execution date, to seek a stay below based on a *Ford* claim of incompetence to be executed that he has known about for *years*. Any delay that is not Ward's, accordingly, must fall within the 15 days between March 29, 2017, when he filed his lawsuit, and April 13, 2017, when the circuit court issued its order dismissing for lack of jurisdiction.[2]

[2] Ward cites his obligations to other clients and other lawsuits as complicating his obligations in this case, but if those concerns factor in the equitable calculus here, they cut in favor of acting sooner, not later, in the circuit court. This is particularly true given that his petition was based on his expert's 2015 evaluation, information he already had prior to filing the suit. The federal cases he points to, *Lee v. Hutchinson et al.*, No. 4:17-194 (E.D. Ark.), and *McGehee v. Hutchinson,* et al., No. 4:17-cv-179 (E.D. Ark.), were initiated on

6. A close examination of the facts surrounding those 15 days does not show interminable delay or unreasonableness on the part of the circuit court or the Respondents, but simply litigation driven by Ward.

7. In his petition, Ward announced that his expert would be evaluating him on Saturday, April 1, 2017. The circuit court ruled, following a motion and argument on March 31, 2017, that the evaluation could be recorded. Counsel for Ward and the Respondents worked diligently to comply with the order, but Ward ultimately made the decision that he would rather not do the evaluation under the terms set by the circuit court. Contrary to Ward's view, the Respondents did not obstruct his legal team from developing anything. And Respondents never asked to cancel or prohibit the evaluation—that was Ward's decision alone. The several days between the filing of the complaint and Ward's cancelling the evaluation was not delay on the part of the circuit court or the Respondents.

8. After Ward filed an amended complaint, the Respondents filed another motion to dismiss—which Ward never responded to. Instead, he asked for a status conference and a competency hearing. The Court subsequently communicated that it could accommodate a hearing on April 11, 2017, but Ward's counsel did not

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March 28 and 29, 2017, respectively. The discovery in those cases was produced after they were filed, of course, and do not help Ward explain the delay of 30 days prior to the filing of the instant case below.

make himself available during the time the Court had available. *See* Email Correspondence, attached as Exhibit A. The circuit court, of course, is entitled to manage its docket. Offering a hearing only to have Ward's counsel decline to attend is not delay on the part of the circuit court.

9. That leaves April 12, 2017, when Ward complains that the circuit court did not return his efforts at communication. Ward assigns a sinister motive to the circuit court's silence, which the Respondents frankly doubt—more likely the circuit court was both (a) taking care of its other judicial business and (b) affording Ward the right to file a response to the Respondent's motion to dismiss. He never filed such a response and he never indicated to the court (or the Respondents) that he waived his response. The circuit court's actions on April 12, 2017, do not amount to unreasonable delay on the court's part.

10. Neither the circuit court nor the Respondents are responsible for any difficulties Ward had in obtaining a certified record from the circuit clerk; even indigent parties are expected to abide by the rules.

11. Finally, yesterday. The Attorney General's Office does not believe it contributed to unreasonable delay by recognizing that the proposition of representing the circuit court in the mandamus proceeding while at the same time litigating a stay proceeding in a capital case before the same court presented a conflict of interest. Indeed, the Respondents have little doubt that Ward would

have sought to remove the Attorney General's Office from the case or recuse the circuit court had the conflict not been avoided. In any event, the Attorney General acted with dispatch in obtaining outside counsel and the order was entered promptly after private counsel got to work. Yesterday's events do not reflect unreasonable delay by the circuit court. Nor do they believe the circuit court was trying to hide the ball from him – more likely that the court was awaiting a response to the Respondent's second motion to dismiss.

12. In sum, the time since the filing of Ward's petition is the product of litigation, not unreasonable delay on the part of the circuit court or the Respondents. And any delay in the past few days pales in comparison to the *month* Ward waited before filing the suit below in the first place. The equities weigh against a stay of execution on this equitable factor.

13. As to the likelihood of success on the merits, Ward's stay request does not present any convincing argument on the circuit court's determinative ruling that it lacked jurisdiction to rule on Ward's petition. It could not address the merits of Ward's petition in an absence of jurisdiction, which is a threshold issue. *E.g.*, *Nance v. State*, 2014 Ark. 201, at 13, 433 S.W.3d 872, 879-80. Because Ward offers no convincing argument on jurisdiction—*Singleton* and *Rector* are still good law—he consequently makes no showing of a substantial likelihood of success on the merits on the threshold issue, jurisdiction. Even if a declaratory judgment

action would lie, Respondents doubt that Ward would have standing to maintain it, given that he has not presently invoked the statute he seeks to invalidate—even though that statute has proven to be effective for other death-row inmates, namely Terrick Nooner. That equitable factor, too, weighs against entry of a stay.

14. Finally, this Court should consider that the Respondents have weighty equitable interests on their side of the scale—interests that Ward does not even address in his stay petition. *See Hill*, 547 U.S. at 584 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."). Ward left Rebecca Doss on the restroom floor of the Jackpot gas station 28 years ago. His request for a briefing schedule in the normal course would have the effect of pushing any execution date beyond the Respondent's present ability to carry it out—which is a goal of this lawsuit and of the avalanche of last-minute federal and state litigation that Ward and the other condemned inmates have initiated.

15. The request for a stay should be denied. If the Court wishes briefing, Respondents believes that the issues are capable of being briefed quickly, and requests an expedited briefing schedule of simultaneous briefs due at 1:00 p.m., Friday, April 14, 2017.

WHEREFORE, Appellees request that this Court deny Ward's Motion for a Stay of Execution and an expedited briefing schedule.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Christian Harris, certify that on the 14th day of April, 2017, I electronically filed the foregoing document with the Clerk of the Court using the eFlex system which shall send notification of such filing, which is deemed service, to:

Mr. Scott W. Braden
Assistant Federal Defender

Ms. April Golden
Assistant Federal Defender

1401 West Capitol Avenue
Suite 490
Little Rock, AR 72201

/s/ CHRISTIAN HARRIS
CHRISTIAN HARRIS

Brad Newman

From: Scott Braden <Scott_Braden@fd.org>
Sent: Tuesday, April 11, 2017 11:35 AM
To: Kim Taylor
Cc: Brad Newman; Kent Holt; Charles Lyford; Darnisa Johnson
Subject: Re: Bruce Ward

Thank you. I am in court this afternoon. Scott

Sent from my iPad

On Apr 11, 2017, at 11:33 AM, Kim Taylor <kim.taylor@jeffersoncountyarcourts.gov> wrote:

> Judge Dennis is in Lincoln County this morning. She has a hearing here in Jefferson County at 1:30 p.m. I will definitely let her know and hopefully schedule something for after the 1:30 hearing.
>
> **From:** Scott Braden [mailto:Scott_Braden@fd.org]
> **Sent:** Tuesday, April 11, 2017 9:27 AM
> **To:** Brad Newman <Brad.Newman@arkansasag.gov>
> **Cc:** Kim Taylor <kim.taylor@jeffersoncountyarcourts.gov>; Kent Holt <Kent.Holt@arkansasag.gov>; Charles Lyford <charles.lyford@arkansasag.gov>; Darnisa Johnson <Darnisa.Johnson@arkansasag.gov>
> **Subject:** Re: Bruce Ward
>
> Thanks Brad if she contacts me I will pass that on
>
> Sent from my iPad
>
> On Apr 11, 2017, at 9:26 AM, Brad Newman <Brad.Newman@arkansasag.gov> wrote:
>
> > Ms. Taylor,
> >
> > In response to the motion for a telephone status hearing filed by Mr. Braden, please let Judge Dennis know that we will be available for such a hearing at any time.
> >
> > Thanks.
> >
> > **Brad Newman**
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