CAPITAL CASE-EXECUTION SET FOR
December 18, 2024 (from 12:01 am until Sunrise)

No. 24A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

TAHINA CORCORAN, next friend for JOSEPH E. CORCORAN, Petitioner,

v.

RON NEAL,
Warden, Indiana State Prison, Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

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EMERGENCY APPLICATION FOR STAY OF EXECUTION

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To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

The State of Indiana has scheduled the execution of Joseph E. Corcoran for **December 18, 2024**, **from 12:01 am until Sunrise, central time**. Petitioner respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari, concurrently filed with this Court.

INTRODUCTORY STATEMENT

Mr. Corcoran suffers from untreated mental illness. For years, he heard and saw things that nobody else could hear or see, but to him these delusions were all very real. In a tragic and unspeakable turn, Mr. Corcoran reacted to one of these delusions—disparaging comments that were never actually made but that echoed in his mind so resoundingly that his psychosis told him to react. He was convicted and sentenced to death in the Circuit Court of Allen County in for the murders of Mr. Jim Corcoran (his brother), Mr. Doug Stillwell, Mr. Scott Turner (his sister's fiancé), and Mr. Timothy Bricker. This tragedy unfolded because of his untreated mental illness.

At trial, the State was satisfied with a life sentence and offered a plea. Mr. Corcoran conditioned acceptance of the life-sentence plea on something incredible and indicative that he was in the throes of mental illness—the severing of his vocal cords so that he would no longer blurt out his innermost thoughts to his embarrassment,

which was another delusion.[1] Of course, the State could not accept this delusional condition and withdrew the offer.

Two evaluating experts at the mitigation hearing diagnosed Mr. Corcoran with paranoid schizophrenia. Dr. Philip Coons, M.D., testified during the sentencing phase that Mr. Corcoran's denial that he was mentally ill was actually a symptom of his paranoid schizophrenia. He testified that "the person with paranoid schizophrenia generally minimizes their symptoms and doesn't bring attention to them . . . unless you know what doors to open, what question to ask, you may well miss it because they keep it to themselves. And that was true of Mr. Corcoran. Had I not known about some kind of sleep problem, I don't think I would have uncovered this delusional system." T. 2706. Another expert, Dr. Eric Engum, a neuropsychologist, also testified during the penalty phase that Mr. Corcoran was "trying to mask it. He's trying to hide it. He's very secretive, again consistent with paranoia and suspiciousness." *Id.* at 2318. Both experts agreed that Mr. Corcoran's mental illness rendered him incompetent.

In particular, the experts agreed Mr. Corcoran's mental illness rendered him incapable of assisting counsel in his own defense. Dr. Coons explained that Corcoran's "refusal to accept either a plea bargain or a bench trial without the death penalty was a product of his mental illness." SR 78 (Def.'s Pre-Sent. Memo, Ex. C p. 11. Dr. Larry Davis agreed. SR 99-100 (Def.'s Pre-Sent. Memo, Ex. D p. 6-7) ("I believe his

[1] One of Mr. Corcoran's long-held delusions is that he suffers from a sleep and speech disorder which causes him to unconsciously vocalize his private thoughts, for which people ostracize him or retaliate against him.

underlying psychosis and associated illogic rendered him incompetent, specifically to work effectively with his own defense attorney in his defense.").

Trial counsel have recently signed affidavits asserting that had they fully understood the extent of Corcoran's mental illness, and had they realized how his mental illness prevented them from "consulting with Corcoran in a rational or logical manner," they would have requested a competency hearing before trial. Dt. Ct. Doc. 1-1 Attachment I (Affidavit of Mark Thoma); Attachment J (Affidavit of John Nimmo). But they did not have this understanding, and the trial proceeded, even though Mr. Corcoran was so mentally ill that he could not assist in his own case to save his life.

The trial court disputed the mental illness suggestion.[2] Rather than give it the weight it should have been given, the trial court castigated Mr. Corcoran: "It's shameful that you would come into this court, Mr. Corcoran and try to characterize your illness as a mental illness to the disrespect of all people in this country that are in fact mentally ill." T. 2909.

On direct appeal, Mr. Corcoran waived guilt phase issues and the state appellate court addressed only sentencing issues. After the Indiana Supreme Court

[2] The Indiana Supreme Court would reverse the trial court for a sentencing error. *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000). The Seventh Circuit also reversed the trial court for improperly considering non-statutory aggravation. *Corcoran v. Levenhagen*, 593 F.3d 547 (7th Cir. 2010). This Court reversed, not because the trial court did not violate Indiana law, but on the basis the violation of the state law did not present a federal question. *Wilson v. Corcoran*, 562 U.S. 1 (2010) (per curiam). Thus, Mr. Corcoran's death sentences are enfeebled by an unremedied state law violation for which there is no remedy.

reversed and remanded, the trial court corrected its error, but still affirmed Mr. Corcoran's death sentences. *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002). An Indiana Supreme Court Justice dissented on the basis that executing the seriously mentally ill violated both state and federal constitutional principles. *Id.* at 502 (Rucker, J., dissenting) (Ind. 2002) ("I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a mental illness.").

In 2003, a competency hearing occurred before the same trial court that previously castigated Mr. Corcoran for faking his mental illness. All three testifying experts affirmed that his decision to waive was based on multiple irrationalities. These experts, Dr. George Parker (a board-certified forensic psychiatrist), Dr. Robert Kaplan (a clinical psychologist), and Dr. Edmund Haskins (a neuropsychologist), all diagnosed Mr. Corcoran with paranoid schizophrenia (PC Comp. T. at 11, 13, 48, 59, 66), and agreed that Mr. Corcoran was not engaging in rational decision-making, but rather, had decided to not pursue state post-conviction review on the basis of his delusion that the prison was torturing him with an ultrasound machine. *Id.* at 14, 53, 66-67.

All three experts discussed the great lengths Mr. Corcoran would go to mask his delusions and hallucinations and hide his illness. As one expert, Dr. George Parker, M.D., indicated, "[Joseph Corcoran] would rather be executed than admit that schizophrenia might be contributing to his desire to die." PC Comp. Tr. 56-57. The State did not dispute this evidence and offered no competing expert testimony.

The trial court engaged in a colloquy with Mr. Corcoran and placed great weight on Mr. Corcoran's own assessment of his competency in finding him competent over the testimony of the three testifying experts who opined that Mr. Corcoran was irrational. In sum, the trial court relied on the words of an individual so tormented and contorted by his ever-present psychotic symptoms that he had begged the State to sever his vocal cords, and whose thought process was so erratic that he could not help his attorneys in the defense to save his own life.

After Mr. Corcoran's case made its way through habeas proceedings and through the Indiana Supreme Court, the Northern District of Indiana, the Seventh Circuit Court of Appeals, and this Court on a variety of issues, Mr. Corcoran's death sentences remained in place. *See Corcoran v. Neal*, 783 F.3d 676 (7th Cir. 2015). The State of Indiana, however, was unable to acquire the drugs to carry out the execution, and for eight years, Mr. Corcoran remained on death row, spending every day in agony from the excruciating torment of the ultrasound machine.

Eight years later, approximately 3,000 days, on June 26, 2024, the State filed a motion to set Mr. Corcoran's execution date. The Indiana Supreme Court on September 11, 2024, set December 18, 2024, as Mr. Corcoran's execution date. *Corcoran v. State*, 240 N.E.3d 701 (Ind. 2024) (Mem.). However, the Court noted that Mr. Corcoran could "raise constitutional claims through a successive petition for post-conviction relief." *Id.*

On November 15, 2024, Mr. Corcoran presented his competency to be executed claim with supporting exhibits to the Indiana Supreme Court. Dt. Ct. Doc. 1-1

(Attachment A). On that same day, he also moved for a stay of execution. *Id.* (Attachment B). On November 19, 2024, the Indiana Supreme Court set a briefing schedule. (Attachment C).

On November 26, 2024, the State filed its response with supporting exhibits. *Id.* (Attachment D). On December 3, 2024, Mr. Corcoran filed his reply in support. *Id.* (Attachment E).

The Indiana Supreme Court denied the *Ford* claim in a December 6, 2024 decision and December 10, 2024 opinion, saying it was procedurally defaulted because Mr. Corcoran had not signed the petition (even though his mental illness was what prevented him from signing) and because, despite the evidence of his detachment from reality, he had not met the substantial threshold showing of incompetence. *Corcoran v. State*, Case No. 24S-SD-222, 2024 WL 5052384 (Ind. Dec. 10, 2024).

Petitioner filed a first habeas petition containing the *Ford* claim in the Northern District of Indiana on December 11, 2024, (Dt. Ct. Doc. 1) with an accompanying motion for stay of execution. Dt. Ct. Doc. 3. The district court denied the petition and stay motion as moot on December 13, 2024. Dt. Ct. Doc. 20. Petitioner filed a Notice of Appeal to the Seventh Circuit Court of Appeals almost immediately, and filed a merits brief and a motion for stay of execution less than 24 hours on December 14, 2024. The State filed its brief, and Petitioner filed a reply.

The Seventh Circuit panel denied Petitioner's appeal and stay motion on the evening of December 16, 2024. Apx. at 72a (Slip Op. at 5). Judge John Lee, however,

dissented. Apx. at 75a (Slip Op. at 7). He highlighted that the Indiana Supreme Court had applied the incorrect standard in finding Mr. Corcoran competent; because the it improperly relied on a stale 2005 competency determination, which was made using the competency standards of *Dusky* and *Ress*, to now find Mr. Corcoran competent under the Ford/Panetti standard. *Id.* Judge Lee correctly found the state court thus improperly substituted the competency standard to waive appeal under Dusky and Rees, for the competency to be executed standard under *Ford*, *Panetti* and *Madison*, standards which are "markedly different." *Id.* at 75a-76a.

Additionally, Judge Lee took issue with the "relevance" of that stale competency finding, labeling it "at best questionable." *Id.* at 76a. He noted that the *Dusky*/*Rees* valuation was twenty years ago, and although the Indiana Supreme Court found that nothing in Mr. Corcoran's mental condition had changed in that time, Mr. Corcoran had offered new evidence that "Corcoran's severe paranoid schizophrenic delusions not only continue but also cause him to hide his condition from the world and feign sanity." *Id.* This new evidence, including Mr. Corcoran's recently published book, *Electronic Harassment: A Whistle-blower Report* (Apx. at 79a-108a), supports the need for a contemporaneous consideration of competency under the Ford/Panetti standard.

No less important, the dissenting judge concluded that the Indiana Supreme Court failed to comply due process afforded under *Ford* and *Panetti*, when it considered Mr. Corcoran's recently written affidavit, filed after briefs were submitted, because it failed to give defense counsel an opportunity to respond to it. Apx. at 77a

(Slip Op. at 9). As the dissent correctly, the "Indiana Supreme Court's reliance on Corcoran's untested affidavit is particularly troubling given that defense counsel's entire theory is premised on Corcoran's inability to rationally comprehend the reasons behind his execution and his efforts to hid his true motivations for seeking the death penalty." *Id.*

Mr. Corcoran respectfully requests that this Court stay his execution, currently scheduled for December 18, 2024, at 12:01 AM CST, so that this Court may consider these important questions regarding the correct application of competency standards, proper due process under *Panetti*, and evidence weighing under 28 U.S.C. § 2254(d).

REASONS FOR GRANTING THE STAY

I. Petitioner's *Ford* claim is meritorious and non-frivolous, as evidenced by the multiple dissenting judges and justice and the district court's grant of a COA, and a stay should issue to prevent it from becoming moot.

This Court should stay Mr. Corcoran's execution while it resolves the merits of his petition for writ of certiorari. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (a stay is justified when a petitioner presents "substantial grounds on which relief may be granted."). A stay is warranted now to prevent mootness upon Mr. Corcoran's execution. *Id.* at 893-94 (once a COA is granted, a court, "where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal. . . ."); *see also Smith v. Armontrout*, 865 F.2d 1515, 1516 (8th Cir. 1989) (granting a certificate of probable cause and a stay of execution "pending determination by this Court of the appeal on its merits.").

In *Barefoot*, the Supreme Court made clear that federal courts "need not, and should not, . . . fail to give non-frivolous claims of constitutional error the careful attention that they deserve" and when the court is "unable to resolve the merits . . . before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits." 463 U.S. at 888-89. Petitioner's claim is non-frivolous in light of Mr. Corcoran's well-established mental illness and documented delusions and hallucinations. An appeal on the merits of the first habeas petition raising a competency to be executed claim[3] cannot properly be considered before the scheduled execution on December 18, 2024. *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996).

Because Petitioner's habeas petition containing the *Ford* claim is considered a first petition, it is subject to the *Lonchar*/*Barefoot* standard. Whether a claim is a "first petition" or a "successor provision" is a term of art, which carries with it legal effect. Although Congress did not define the phrase 'second or successive,' as used to modify 'habeas corpus application under section 2254,' §§ 2244(b)(1)-(2), it is well settled that the phrase does not simply refe[r] to all § 2254 applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (internal citations omitted). Mr. Corcoran has already fully litigated one federal habeas

[3] Incompetency to be executed claims are not ripe until an execution date is set. The claim regarding Mr. Corcoran's incompetency to be executed only ripened on September 11, 2024, when the Indiana Supreme Court set his execution date. *Panetti*, 551 U.S. at 942; *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-46 (1998); *Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir. 2016); *see also Fulks v. Watson*, 4 F.4th 685, 594 (7th Cir. 2021).

petition under § 2254, but that does not make this petition automatically successive and subject to the stay standard offered by the State.

Rather, the Supreme Court has rejected the contention that a habeas petition filed second in time raising a *Ford* claim must be treated as successive. *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) ("The State argued that because the prisoner 'already had one fully-litigated habeas petition, the plain meaning of § 2244(b) … requires his new petition to be treated as successive.' We rejected this contention."). The statutory phrase "second or successive" is a term of art in the habeas context, and *Ford* petitions are not successive, but first petitions, and should be treated as such. *See also*; *Holmes*, 816 F.3d at 954; *Fulks*, 4 F.4th at 694.

Within *Barefoot*, the Supreme Court discussed the distinctions between standards to employ given the procedural circumstances. Indeed, *Barefoot* itself addressed the distinction between successive petitions and first-in-time petitions when the Court noted, "**Second and successive federal habeas corpus petitions present a different issue**." 463 U.S. at 895 (emphasis added). In those successive circumstances, the abuse of writ and more onerous standards are to be employed. But in circumstances involving first habeas petitions, the *Barefoot* Court made clear that a stay of execution is warranted to allow the merits to be addressed. *Id.* at 888-89. Critically, *Barefoot's* distinction regarding successors continues to be endorsed the Supreme Court in *Magwood*, *Panetti*, and *Martinez-Villareal*. This Court should give effect to that precedent and apply the *Lonchar/Barefoot* standard.

The "critical question" is whether the claims are "palpably incredible" and "patently frivolous or false." *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). Undoubtedly and as recognized by the district court's grant of the COA, Petitioner's claim that Mr. Corcoran's paranoid schizophrenia and debilitating delusions render him incompetent to be executed is not "patently frivolous." Not only have multiple experts from multiple disciplines consistently found and testified that Mr. Corcoran's mental illness prevents him from being able to think rationally and assist his legal counsel in the case for his life, but the credibility of the claim is underscored by the dissent in the Indiana Supreme Court, made up of 40% of the court. The dissent stated:

> The evidence submitted by Corcoran's attorney's reveals a documented history of severe mental illness, an inability to cooperate with counsel, and a desire to be executed to escape prison – all of which raise substantial questions about his current mental capacity. As a result, we should stay Corcoran's execution to allow his attorneys to seek successive post-conviction relief to litigate his competency. But at a minimum, we should stay Corcoran's execution and order a psychiatric examination.

Doc. 1-1 at 241 (*Corcoran,* 2024 WL 5052384, *15 (Goff, J., dissenting, Rush, J., concurring in dissent)). The dissenting judges emphasized that "to ignore these findings now and proceed with an execution without a current competency evaluation amounts to enabling [Mr. Corcoran's] delusions – a state sanctioned escape from suffering rather a measured act of justice." *Id.* The dissent was so concerned by the evidence of Mr. Corcoran's detachment from reality and so troubled by the possibility of executing a severely mentally person who cannot and does not rationally understand why he is being executed that in their seven-page dissenting opinion, the

two justices called for a competency evaluation, because "even if it seems that Corcoran may understand why the State is seeking execution, the point is that we simply do not know." *Id.* at 245 (*Corcoran*, 2024 WL at *17).

This dissent is presumed reasonable, as noted by Chief Justice Roberts just last year: "Reasonable minds may disagree with our analysis—in fact, at least three do." *Biden v. Nebraska*, 600 U.S. 477, 507 (2023). Because reasonable Indiana Supreme Court jurists disagreed with the Court majority's decision that Mr. Corcoran is competent to be executed and because the district court granted a COA, that claim cannot be patently frivolous, and a stay must issue.

II. Even under the more strenuous stay standard, Mr. Corcoran is still entitled to a stay of execution.

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot*, 463 U.S. at 895. To decide whether a stay of execution is warranted, the federal courts consider the petitioner's 1) likelihood of success on the merits, 2) the relative harm to the parties, and the 3) extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 US. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Mr. Corcoran also meets the relevant standards for this Court to grant a stay of execution.

A. Petitioner is likely to succeed on the merits.

The petition for writ of certiorari has a substantial likelihood of success. There is "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and there

is "a significant possibility of reversal of the lower court's decision." *Barefoot*, 463 U.S. at 895. Mr. Corcoran's certiorari petition raises an "important question of federal law that has not, but should be, settled by this Court," Sup. Ct. R. 10(c).

1. Petitioner's evidence of incompetence to be executed meets the threshold showing under *Ford* and *Panetti*.

Mr. Corcoran does not have the ability to rationally understand the world around him—his paranoid schizophrenia and the delusions it causes create a totally different reality for him. While the reason for his execution is that a jury found him guilty of four counts of murder, he truly views his execution as an assisted suicide—with the State providing the assistance—and not as punishment, because his execution will allow him to escape prison and the torture he delusionally believes he suffers there.

And although Mr. Corcoran can parrot that the reason the State seeks to execute him is because he was found guilty of murder, he has not internalized this reason nor does he believe this reason to be true, as evidenced by recent prison staff notes and his book describing how he is tormented on a regular basis. *See Panetti*, 551 U.S. at 959. In short, like the petitioners in Panetti and Madison, the evidence of Mr. Corcoran's schizophrenic delusions meets the substantial threshold showing of his incompetence for execution and is likely to succeed on the merits of his claim.

It is significant that the very state procedure that precluded the Allen Superior Court from hearing evidence on Mr. Corcoran's Ford claim is a procedure wholly inconsistent with federal law (and the law of every other state that actively

carries out executions). It is well-settled that a habeas petition raising a Ford claim is not a second or successive habeas petition requiring a higher court's permission to file, but rather a first habeas petition because the Ford issue is not ripe until an execution date is set. *Panetti*, 551 U.S. at 942. Yet, contrary to Supreme Court precedent, under Indiana law, a Ford claim is considered a successive habeas petition and before it can be filed in superior court, the Indiana Supreme Court must grant permission. See Indiana Post-Conviction Rule 1; *Baird*, 833 N.E.2d 28, 30 (Ind. 2005); *Timberlake v. State*, 858 N.E.2d 625, 627 (Ind. 2006).

The decision to deny Mr. Corcoran further review in the state court was a divisively close case with a razor-thin majority margin. Again, two of the Indiana Supreme Court justices—40% of the court, who are unquestionably reasonable jurists—found the evidence supporting the Ford claim to satisfy the substantial threshold showing so as to require an evaluation and further proceedings. That two reasonable jurists disagreed with and dissented from the majority's legally and factually unreasonable opinion demonstrates that this claim has substantial merit.

The district court also found the Indiana Supreme Court's opinion to not be unreasonable under 28 U.S.C. §§ 2254(d)(1) and (2) and to not run afoul § 2254(e)(1). This too was an improper and inaccurate finding. The core issue of this litigation is Mr. Corcoran's mental condition and incompetency to be executed presently at the time of his execution—the issue is not whether he was competent to waive post-conviction review two decades ago (which, according to three expert opinions from that time, he was not). But unreasonably and contrary to federal law, the Indiana Supreme Court majority relied on a competency determination

from over twenty years ago, and made its own unilateral determination based on the new evidence presented that Mr. Corcoran's mental condition had not changed since then. In doing so, the majority unreasonably failed to comply with its own past practices and order a contemporaneous expert evaluation, which the dissenting justices warned was necessary. The majority also failed to account for the well-established and well-supported fact that competency is variable and is certainly so over the span of twenty years. Even if Mr. Corcoran was competent twenty years ago, his competency has been fluid since then.

The majority also heavily and unreasonably relied on Mr. Corcoran's November 2024 affidavit, while discounting the other evidence, including the new evidence such as Mr. Corcoran's book and notes from prison staff. The majority found the affidavit credible on its face without affording Petitioner due process or a meaningful opportunity to respond to the affidavit and explain its full context. Despite seemingly agreeing that Mr. Corcoran is seriously mentally ill, the majority unreasonably relied on his own statements, which were a product of his mental illness, to find that he is competent. It is unreasonable to find a documented mentally ill person competent on the virtually sole basis that he insisted he is not mentally ill. *See Corcoran v. Buss*, 551 F.3d 703, 717 (7th Cir. 2008) (Williams, J., dissenting) ("Rather, the person whom the court credited was a person diagnosed with a severe mental illness that causes delusions, who told a doctor and his sister he wanted to die to escape those delusions. . . . In fact, Dr. Parker stated that Corcoran 'would rather be executed than admit that schizophrenia might be contributing to his desire to die.'"). The majority's finding that this single piece of

evidence established Mr. Corcoran's competency was unreasonable because the rest of the evidence, including Mr. Corcoran's delusional writings about the inner workings of the ultrasound machine, the notes of prison staff of his recurrent delusions, and the testimony and reports of experts that he is incapable of rational thought or engagement with reality, meets the required substantial threshold showing that Mr. Corcoran does not rationally understand the reasons for his execution. Yet, the district court found that the majority's finding was not unreasonable, speculating that Mr. Corcoran's ability to parrot the reason for his execution, his "cogent" writing, and his interest in "electricity-related concepts" supported the majority's finding that he is rational. Doc. 20 at 34-35. The majority's and the district court's fact-finding and credibility determinations should have been reserved for an evidentiary hearing, which federal due process requires under *Panetti*. 551 U.S. at 949 (fundamental fairness requires an evidentiary hearing (citing *Ford*, 477 U.S. at 424, 426)). These determinations were improper.

The evidence of Mr. Corcoran's paranoid schizophrenia and his debilitating delusions and hallucinations shows that he cannot engage in rational thinking and does not rationally understand the reason for his impending execution. Instead of rationally understanding the execution is punishment for the offenses of which he has been convicted, Mr. Corcoran believes the execution is a State-assisted suicide that will allow him to escape prison torture that does not exist. His desire to escape prison is the very reason he wants to be executed and the reason he intentionally masks his symptoms of mental illness. Petitioner is substantially likely to succeed on the claim that Mr. Corcoran is incompetent to be executed.

2. The state court improperly deprived Mr. Corcoran of the due process required by *Ford* and *Panetti*.

As in *Panetti*, "the factfinding procedures upon which the [Indiana Supreme Court] relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Panetti*, 551 U.S. at 954. Reliance on an affidavit that Petitioner did not have the opportunity to respond is seriously inadequate for the ascertainment of the truth and violates due process. *Id.* Had Petitioner been given the opportunity to address and respond to Mr. Corcoran's affidavit, they could have provided the testimony of an expert like board-certified forensic psychiatrist Dr. Angeline Stanislaus, who could have contextualized and rebutted his statements. *Cf. id.* at 960 ("Expert evidence which may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent."). Consequently, an error occurred because there was no opportunity to challenge the affidavit, which, as noted by the State (and accepted by the Panel), is "the *most* contemporaneous evidence of his understanding [that] was a substantial part of the basis of the state court's opinion (Ex. 15 at 24–25)." State's Brief p. 33-34 (emphasis in original) (referring to Mr. Corcoran's 2024 affidavit).

Thus, the Indiana Supreme Court's refusal to allow a chance to respond and address evidence the court relied on was a violation of due process as provided in *Panetti*. *See* Apx. at 77a (Slip Op. p. 9 (Lee, J., dissenting) (this denial of opportunity to respond to, or in any way address the affidavit "is precisely the lack of due process

the Supreme Court condemned in *Ford* and *Panetti*.") (citing *Ford*, 477 U.S. at 415, and *Panetti*, 551 U.S. at 948)).

3. The Seventh Circuit Panel improperly relied on 28 U.S.C. § 2254(d)(1) to access the state court's weight of evidence determination, a reliance inconsistent with its own precedent and this Court's precedent that such weight0of-the-evidence determinations are properly made under § 2254(d)(2).

This Court in *Brumfield v. Cain*, 576 U.S. 305, 314 (2015), has determined that arguments as to the weight a state court gives certain evidence are properly made under 28 U.S.C. § 2254(d)(2). In *Brumfield*, in which the Court only interpreted and applied § 2254(d)(2), the court's "examination of the record before the state court compels [the Court] to conclude that both of [the state court's] critical factual determinations were unreasonable." *Id.* at 314. In fact, one of the unreasonable factual determinations in *Brumfield* was very similar to the unreasonable factual determination the court made here regarding criteria related to intellectual disability. *Id.*

The Panel however, improperly indicated:

> The next friend argues about the weight they believe the state court should have given certain evidence, whether it is Corcoran's November 2024 affidavit or a new expert report by Dr. Angeline Stanislaus. But arguments as to weight are properly made under 28 U.S.C. § 2254(d)(1), not (d)(2). *See Lopez v. Smith*, 574 U.S. 1, 8 (2014).

Apx. at 72a (Slip Op. p. 4). This runs counter to multiple Seventh Circuit rulings, in addition to *Brumfield*, including a previous ruling from the court in Mr. Corcoran's case.

B. The Equities Favor a Stay of Mr. Corcoran's Execution

As to the issue of relative harm, execution is, by its very nature, irreparable harm. *See, e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (recognizing that irreparable harm "is necessarily present in capital cases"). Mr. Corcoran faces the irreparable harm of being put to death, and the irreparable harm of being put to death in violation of his right to be free of cruel and unusual punishment under the Eighth Amendment and his right to due process under the Fourteenth Amendment. *See Back v. Bayh*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) ("When violations of constitutional rights are alleged, further showing of irreparable injury may not be required if what is at stake is not monetary damages. This rule is based on the belief that equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm."); *Bevis v. City of Naperville*, 85 F.4th 1175, 1219 (7th Cir. 2023) ("[A]n alleged constitutional violation often constitutes irreparable harm."); *see also* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 2022) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary."); *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has been repeatedly recognized by federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.").

Likewise, the State will suffer no harm. There is no legitimate interest in carrying out an execution that circumvents federal law. There is no justice in carrying out an execution of a mentally ill man who lacks a rational understanding

of his execution, and for whom the execution is neither a deterrent nor retribution. Adherence to the United States Constitution and representing the people of Indiana is a fundamental duty of the Indiana Attorney General.

As the Supreme Court has made clear, once a petitioner makes a substantial threshold showing of incompetence, the Constitution entitles him to "a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 (citing *Ford*, 477 U.S. at 424, 426). Carrying out Mr. Corcoran's execution without affording him a fundamentally fair opportunity to prove his incompetency would violate *Ford* and *Panetti* and the Due Process Clause of the Fourteenth Amendment. *See id.* Furthermore, because Mr. Corcoran does not have a rational understanding of the basis for this execution, the State's plan to execute him subjects him to cruel and unusual punishment and an unreliable sentence in violation of the Eighth Amendment. *Madison*, 586 U.S. at 283; *Panetti*, 551 U.S. at 959-60; *Ford*, 477 U.S. at 409-10, 417. This Court must accord Mr. Corcoran an opportunity to be heard and stay his execution to provide a "fair hearing" in accord with fundamental fairness. *Panetti*, 551 U.S. at 949.

The State's insistence on enforcing Mr. Corcoran's death sentence in the absence of a full and fair hearing unquestionably violates his constitutional right to due process, and because Mr. Corcoran in fact does not have a rational understanding of the basis for this execution, his execution despite his incompetency will subject him to cruel and unusual punishment in violation of the Eighth Amendment. Without this Court's intervention, Mr. Corcoran will be executed even though he is incompetent

and before this incompetency claim can be fully litigated, contrary to the tenets and principles of the Constitution and the mandates of the Supreme Court.

The State will incur no injury for not getting to execute Mr. Corcoran, an incompetent severely mentally ill man, during the Advent season, a mere week before the celebration of Christmas. Instead, the State should only have an interest in carrying out constitutionally sanctioned executions—and here there is a colorable, non-frivolous claim that Mr. Corcoran is incompetent to be executed.

More importantly, there is no harm to the family of the victims. Ms. Kelly Ernst, who lost her brother and fiancé in the crime, has stated she is against the crime because it "won't solve or change anything." Rick Callahan, *After a 15-year pause in executions, Indiana prepares to put to death a man who killed 4*, (Dec. 14, 2024),https://apnews.com/article/indiana-execution-joseph-corcoran-aaf0dea682859a61bec8080aeb517la.

C. There has been no delay in bringing this claim.

The State does have a "significant interest in enforcing its criminal judgment." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). But it is now operating in a way that would undermine the judicial process. It failed to schedule Mr. Corcoran's execution for eight years, which "undermines any urgency surrounding" its need to do so. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018). And yet now it moves with a frenzied pace.

Petitioner timely filed this claim. This *Ford* claim became ripe only after the Indiana Supreme Court set the execution date on September 11, 2024. *See, e.g.,*

Martinez-Villareal, 523 U.S. at 644-45. Mr. Corcoran filed the request to file his successive petition for post-conviction relief regarding this claim in the Indiana Supreme Court thereafter.

Although, the Indiana Supreme Court denied permission to file for post-conviction relief by order on December 5, 2024, it did not issue its opinion until five days later on December 10, 2024. This five-day delay prevented Petitioner from filing his federal habeas petition sooner because he needed to address the Indiana Supreme Court's findings in his federal petition. Once the opinion issued, Petitioner promptly filed the federal habeas petition containing the *Ford* claim less than 24 hours later, on December 11, 2024. The district court denied the petition and accompanying motion for stay of execution on December 13, 2024. Petitioner filed a Notice of Appeal almost immediately after the district court's denial, and filed the appellate brief and accompanying motion for stay of execution within 24 hours on December 14, 2024. The State filed its response brief the evening of December 14. Petitioner filed their reply brief on December 15, 2024.

The Panel of the Seventh Circuit denied the habeas petition and motion for stay of execution on the evening of December 16, 2024, over a dissent from Judge John Lee. Petitioner then filed a petition for rehearing en banc in the early hours of December 17, 2024. It was denied later that morning.

The proposed successive petition for post-conviction relief and habeas petition filed in the Indiana Supreme Court included extensive evidence of incompetence, including evidence gathered after the Indiana Supreme Court scheduled his

execution. Additionally, even after Mr. Corcoran's legal team requested *all* prison records for 10 months beginning in February 2024, and diligently and repeatedly followed-up on that request on a near-weekly basis, the Department of Correction failed to turn over years' worth of Mr. Corcoran's records until December 2, 2024, when counsel received the complete set of records from 2013. Nevertheless, despite waiting on several years' worth of records, Mr. Corcoran's counsel filed its petition in the Indiana Supreme Court in the name of expediency.

Mr. Corcoran has been diligent and there has been no delay in bringing this claim.

III. This Court should enter a stay to consider Mr. Corcoran's petition.

This Court can exercise its discretion to enter a stay to preserve its jurisdiction to address a habeas petition. *See, e.g., Gutierrez v. Saenz*, 144 S.Ct. 2718 (2024); S. Ct. R. 23. Indeed, this Court did the same in another *Ford* case. *Madison v. Alabama*, 583 U.S. 1108 (2018). This Court should enter a stay to allow this Court a full and meaningful opportunity to consider Petitioner's Petition for Writ of Certiorari of be considered in manner. 28 U.S.C. § 2101(f).

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that the Court stay his execution to allow full and fair litigation of his meritorious writ of certiorari.

Respectfully submitted,

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