

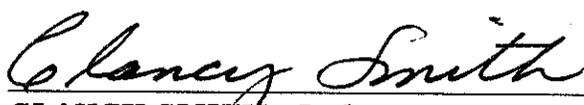
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day
of April, 2012.


ARLENE JOHNSON, Presiding Judge


DAVID B. LEWIS, Vice Presiding Judge


GARY L. LUMPKIN, Judge


CHARLES A. JOHNSON, Judge


CLANCY SMITH, Judge

ATTEST:


Clerk

APR 10 2012

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

GARRY THOMAS ALLEN,)	
)	
Petitioner,)	NOT FOR PUBLICATION
)	
v.)	No. MA-2012-307
)	
RANDALL G. WORKMAN,)	
Warden, Oklahoma State Penitentiary,)	
State of Oklahoma,)	
)	
Respondent.)	

**ORDER DENYING WRIT OF MANDAMUS AND
APPLICATION FOR STAY OF EXECUTION**

On April 5, 2012, Petitioner, Garry Thomas Allen, filed a Petition for Writ of Mandamus and Brief in Support. He also filed an Application for Stay of Execution. These requests relate to the execution of a death sentence arising from Oklahoma County District Court case number CRF-1986-6295. Allen is scheduled to be executed on April 12, 2012, pursuant to executive order 2012-04, dated March 13, 2012, by the Honorable Mary Fallin, Governor of the State of Oklahoma.

Allen now seeks extraordinary relief from Workman's denial of a request to follow the statutory mandate of 22 O.S.2001, § 1005, regarding Allen's sanity to be executed. Allen's stay of execution is requested so that the § 1005 proceedings can be completed. Petitioner sought extraordinary relief in the District Court of Pittsburg County, and was denied on April 2, 2012 in case

number CV-2012-32. The District Court found that Workman did not abuse his discretion in refusing to initiate proceedings pursuant to § 1005.¹ From the District Court's order, Allen filed a writ of mandamus with this Court.

In order for a writ of mandamus to issue, "Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief." Rule 10.6, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2012).

Allen asserts that Workman has good reason to believe that he (Allen) has become insane, thereby, Workman is required to follow the dictates of § 1005, and notify the District Attorney of Pittsburg County so that Allen's sanity can be inquired into. Allen asserts that Workman has refused to perform his legal duty in this respect. Allen alleges that Workman's knowledge of an evaluation by Clinical Neuropsychologist Michael M. Gelbort, Ph.D., is sufficient to give him good reason to believe that Allen has become insane.

Allen further argues that Workman, in refusing to perform his duty, is acting as the final arbiter of his sanity determination, which violates his constitutional rights to due process. This due process right in determining sanity to be executed is spelled out in *Ford v. Wainwright*, 477 U.S. 399, 416,

¹ An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

106 S.Ct. 2595, 2605, 91 L.Ed.2d 335 (1986). In *Ford*, the United States Supreme Court held that the sanity to be executed determination cannot be “entrusted to the unreviewable discretion of an administrative tribunal.” *Id.* We dispose of this argument by finding that, in this case, Workman’s actions were reviewed by the District Court during these mandamus proceedings for an abuse of discretion, and the District Court found no abuse of discretion. Our analysis below shows that Allen does not prevail here.

Allen has not shown this Court, with the record presented, that he has a clear legal right to the relief sought. After a jury trial held April 28, through May 1, 2008, Allen was found to be sane. *See Allen v. State*, 2011 OK CR 31, ¶ 2, 265 P.3d 754, 755. In doing so, the jury found that Allen has:

sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.

See Bingham v. State, 1946 OK CR 54, 82 Okl.Cr. 305, 169 P.2d 311, 314-15.

This jury verdict is granted great deference by this Court. *Pavatt v. State*, 2007 OK CR 19, ¶ 35, 159 P.3d 272, 284. Further, a prisoner facing execution bears the burden of showing that he is insane.

The Supreme Court in *Ford v. Wainwright*, recognized that some high threshold showing on behalf of the prisoner may be necessary to control the number of repetitive claims of insanity. *Id.* 477 U.S. at 417, 106 S.Ct. at 2605.

While we do not set a standard for a initial finding of sanity to be executed in cases heretofore at issue, we find that Allen, in this case, has not shown with the record presented to this Court that there is a reasonable probability that his condition has deteriorated to a level of insanity from the time the jury determined that he was sane under the *Bingham* standard.

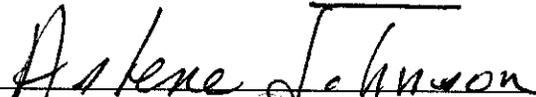
The report by Dr. Gelbort references earlier reports, where he concluded that Allen was insane under the *Bingham* Standard. Dr. Gelbort's present report states that Allen's condition is consistent with earlier evaluations, and further states his earlier diagnosis of Cognitive Disorder has now morphed into Dementia arising out of his brain injury and seizure disorder. Dr. Gelbort again concludes that Allen is insane.

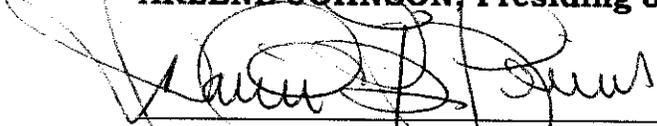
Although Allen's functioning may have declined, Dr. Gelbort's latest report, alone, is not enough to convince this Court that Allen has met the substantial threshold showing that his condition has substantially deteriorated from the time a jury found him sane until the present date. *See Panetti v. Quarterman*, 551 U.S. 930, 949, 127 S.Ct. 2482, 2856, 168 L.Ed.2d 662 (2002). Moreover, at the District Court hearing on this mandamus action, Dr. Gelbort's findings were contradicted by Workman's findings that Allen's mental state was sufficient to meet the *Bingham* standard, based on the daily interaction between prison employees and Allen. The entirety of the evidence, which was considered by Workman and reviewed by the District Court, is not sufficient to meet Allen's burden.

IT IS THEREFORE THE ORDER OF THIS COURT that Allen's application for a Writ of Mandamus shall be denied.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day of April, 2012.


ARLENE JOHNSON, Presiding Judge

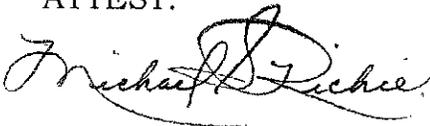

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