

No. _____

In the
Supreme Court of the United States

RANDALL MAYS,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

RANDALL MAYS IS SCHEDULED TO BE EXECUTED ON OCTOBER 16, 2019

OFFICE OF CAPITAL AND FORENSIC WRITS

Benjamin B. Wolff,* Director

Benjamin.Wolff@ocfw.texas.gov

Sarah Cathryn Brandon**

Sarah.Brandon@ocfw.texas.gov

Michelle E. Ward

Michelle.Ward@ocfw.texas.gov

1700 N. Congress Ave., Ste. 460

Austin, TX 78701

(512) 463-8600

**Member, Supreme Court Bar*

*** Counsel of Record, Member, Supreme
Court Bar*

QUESTION PRESENTED

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court held that a prisoner is incompetent to be executed if, despite his awareness of a causal link between his crime and punishment, he suffers from gross delusions that put his awareness in a context so far removed from reality that execution can serve no penological purpose.

In this case, all three court-appointed experts at a *Ford* hearing agreed that Mr. Mays is seriously mentally ill, suffers from gross delusions and paranoia, and is cognitively impaired. All three experts also agreed that, at a minimum, Mr. Mays has been able to articulate that he was convicted of a capital offense and was sentenced to death for that crime. However, two of the court-appointed experts opined that Mr. Mays believes that the State seeks to now execute him because of a conspiracy related in part to the State's desire to steal his green energy ideas. A third expert was unable to elicit the same information from Mr. Mays, but also did not elicit anything contradictory, while opining that he thought Mr. Mays was competent.

In considering the evidence of incompetence, the trial court relied on lay stereotypes of the mentally ill, while evaluating the expert testimony based on how closely the experts adhered to an unscientific, unvalidated, pre-*Panetti* checklist for forensic evaluation that did not include questions designed to illuminate a prisoner's rational understanding of why he is being executed. *Cf. Moore v. Texas*, 137 S. Ct. 1039 (2017). The trial court held that Mr. Mays was competent to be executed, ignoring virtually all evidence of incompetence. The Texas Court of Criminal Appeals affirmed, holding that the trial court did not abuse its discretion.

Thus, this case raises the following two questions:

1. May a state court rely on junk science and lay stereotypes of the severely mentally ill to adjudicate a *Ford* claim?
2. If an inmate acknowledges the presence of a causal link between the offense and his death sentence, but believes as a result of a grossly delusional belief system that the State seeks to execute him in order to steal his green energy ideas, protect Big Oil, and save money, may he be executed consistent with the Eighth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

All parties on the cover page in the caption of the case.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
I. PRIOR PROCEEDINGS.....	3
II. RELEVANT FACTUAL HISTORY	5
A. Mr. Mays's Mental Health History and Prior Evaluations	5
B. <i>Ford</i> Competency Proceedings.....	8
a. Expert Evaluations.....	9
b. State Court Findings	14
REASONS TO GRANT THE WRIT	15
I. CERTIORARI SHOULD BE GRANTED BECAUSE A STATE COURT'S DETERMINATION OF COMPETENCY TO BE EXECUTED BASED ON UNSCIENTIFIC STANDARDS AND LAY STEREOTYPES REGARDING MENTAL ILLNESS VIOLATES THE EIGHTH AMENDMENT	18
A. The Trial Court Relied Upon an Unscientific, Unvalidated Checklist in Discrediting Expert Opinions that Mr. Mays is Incompetent to be Executed	19
1. This Court incorporates advancements into medical, technological, and social science into its analysis of Eighth Amendment protections	20

2.	The trial court judged the reliability of the expert opinion about Mr. Mays's competency by how closely experts adhered to an unscientific, unvalidated, pre- <i>Panetti</i> competency checklist.....	21
3.	The unvalidated, pre- <i>Panetti</i> checklist tainted the trial court competency determination.....	23
B.	The Trial Court Relied on Lay Stereotypes of the Mentally Ill to Decide that Mr. Mays is Competent to be Executed.....	25
II.	CERTIORARI SHOULD BE GRANTED BECAUSE A PRISONER IS INCOMPETENT TO BE EXECUTED WHEN HE HOLDS A DELUSIONAL BELIEF THAT THE STATE'S PURPOSE IN EXECUTING HIM IS TO PERSECUTE HIM, IN SPITE OF HIS AWARENESS OF THE CAUSAL LINK BETWEEN THE OFFENSE AND HIS DEATH SENTENCE.....	27
A.	A Prisoner's Grossly Delusional Belief System That Prevents Him from Having a Rational Understanding of the Meaning and Purpose of the Punishment to Which He Has Been Sentenced Renders His Execution Cruel and Unusual	28
B.	The Texas Court of Criminal Appeals Failed to Take into Account Whether Mr. Mays's Mental Impairments Prevented Him from Having a Rational Understanding of the State's Purpose in Executing Him as Required by <i>Panetti</i>	29
C.	Mr. Mays is Incompetent to be Executed Because His Overwhelming Belief that the State Seeks to Execute Him to Prevent Him from Developing Windmill Technology Prevents Him from Sustaining a Rational Understanding of the Reason for His Execution	31
1.	Mr. Mays's mental illness and cognitive impairments cause him to incorporate real life events into his persecutory delusions	31
2.	Mr. Mays can articulate that he was convicted of capital murder and sentenced to death, but he has no rational understanding of why he is now being executed.....	33
D.	Executing Mr. Mays Serves No Penological Purpose	36
CONCLUSION.....		37
CERTIFICATE OF COMPLIANCE.....		1

INDEX TO APPENDICES

APPENDIX A Opinion, Randall Wayne Mays v. State of Texas, No. AP-77,055 (Tex. Crim. App. June 5, 2019) (unpublished)

APPENDIX B Order on TCCP Article 46.05 Hearing, The State of Texas v. Randall Mays, No. B-15,717 (392nd Dist. Ct., Henderson County, Tex. Oct. 2, 2017)

APPENDIX C: Order on Preliminary Article 46.05 Proceedings (P. Zapf, et al., *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist* 21 Behav. Sci. Law 103-120 (2003))

APPENDIX D: Report of Dr. Bhushan Agharkar, M.D.

APPENDIX E: Report of Dr. George Woods, M.D.

APPENDIX F: Report of Dr. Randall Price, Ph.D.

Each appendix is cited below as “App.A,” “App.B,” etc.

TABLE OF AUTHORITIES

FEDERAL

<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	19, 33
<i>Burton v. Stewart</i> , 549 U.S. 147 (2007)	17
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	passim
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	21
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	36
<i>Hall v. Florida</i> , 572 U.S. 701 (2014)	16
<i>Madison v. Alabama</i> , 139 S.Ct. 718 (2019).....	passim
<i>Mays v. Stephens</i> , 135 S. Ct. 951 (2015)	4
<i>Mays v. Stephens</i> , 757 F.3d 211 (5th Cir. 2014)	4
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	19, 21
<i>Moore v. Texas</i> , 137 S.Ct. 1039 (2017)	passim
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	passim
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	21

STATE

<i>Ex parte Mays</i> , No. WR-75,105-01, 2011 WL 1196799 (Tex. Crim. App. Mar. 16, 2011)	4
<i>Mays v. Director</i> , TDCJ-CID, No. 6:11-CV-135, 2013 WL 6677373 (E.D. Tex. Dec. 18, 2013)	4
<i>Mays v. State</i> , 318 S.W.3d 368, 372 (Tex. Crim. App. 2010).....	3
<i>Mays v. State</i> , 476 S.W.3d 454 (Tex. Crim. App. 2015).....	5
<i>Mays v. State</i> , No. AP-77,055, 2015 WL 1332834 (Tex. Crim. App. March 16, 2015)	4

STATUTES

28 U.S.C. § 1257.....	2
TEX. CODE. CRIM. PROC. art. 46.05	2

No. _____

In The
Supreme Court of the United States

RANDALL MAYS,
Petitioner,
v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

Randall Mays respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The unpublished opinion of the Texas Court of Criminal Appeals (TCCA) affirming the trial court's decision finding Mr. Mays competent to be executed and lifting a stay of execution is attached as Appendix A. The unpublished trial court decision finding Mr. Mays competent to be executed is attached as Appendix B.

JURISDICTION

This Court has jurisdiction to review these orders pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 46.05 of the Texas Code of Criminal Procedure provides, in relevant part, as follows:

Sec. (a) A person who is incompetent to be executed may not be executed.

[....]

Sec. (h) A defendant is incompetent to be executed if the defendant does not understand:

- (1) that he or she is to be executed and that the execution is imminent; and
- (2) the reason he or she is being executed.

Sec. (i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

[....]

Sec. (k) The trial court shall determine whether, on the basis of reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing, the defendant has established by a preponderance of the evidence that the defendant is incompetent to be executed. If the court makes a finding that the defendant is not incompetent to be executed, the court may set an execution date as otherwise provided by law.

TEX. CODE. CRIM. PROC. art. 46.05.

The Eighth Amendment to the U.S. Constitution provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides as follows: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS

On May 17, 2007, Randall Mays was charged for capital murder for the shooting deaths of two sheriff’s deputies and for attempted capital murder of a third. *Mays v. State*, 318 S.W.3d 368, 372 (Tex. Crim. App. 2010). Just shy of one year later, Mr. Mays was tried for the capital murder of one of the deputies. *Id.* at 372. Insanity was not an issue raised as a defense to the crime. *Mays*, 318 S.W.3d at 385. However, evidence that Mr. Mays suffers from paranoia was introduced at the culpability phase of his trial, and evidence of mental illness (a psychotic disorder and depression) was introduced at the punishment phase. *Id.* at 375-376. In May 2008, the jury found Mr. Mays guilty of capital murder and sentenced him to death. *Id.* at 372. On April 28, 2010, Mr. Mays’s conviction and death sentence were affirmed on direct appeal by the TCCA. *Id.* at 397.

Mr. Mays filed a state post-conviction application for a writ of habeas corpus, in which he raised claims that it is unconstitutional to execute the mentally ill and that his trial counsel were ineffective for failing to pursue a neuropsychological evaluation for organic brain damage, failing to request a hearing on whether he was competent to stand trial, and failing to raise an insanity defense. App.A4-5. On

March 16, 2011, the TCCA denied his application for state habeas relief. *Ex parte Mays*, No. WR-75,105-01, 2011 WL 1196799, at *1 (Tex. Crim. App. Mar. 16, 2011) (per curiam, not designated for publication). Mr. Mays raised the same claims in a petition for a writ of habeas corpus in federal court. The United States District Court for the Eastern District of Texas denied relief. *Mays v. Director, TDCJ-CID*, No. 6:11-CV-135, 2013 WL 6677373 (E.D. Tex. Dec. 18, 2013) (mem. op., not designated for publication). The Fifth Circuit denied Mr. Mays's request for a certificate of appealability. *Mays v. Stephens*, 757 F.3d 211 (5th Cir. 2014). This Court then denied Mr. Mays's petition for writ of certiorari. *Mays v. Stephens*, 135 S. Ct. 951 (2015).

The trial court signed a warrant for Mr. Mays to be executed on March 18, 2015. Concerned about Mr. Mays's competency to be executed, on February 24, 2015, the Office of Capital and Forensic Writs filed a motion for a *Ford* hearing, pursuant to Texas Code of Criminal Procedure article 46.05. *Id.* After a hearing on the motion, the trial court found that Mr. Mays had raised "some doubt" as to his competency but had not made a substantial showing that he was incompetent to be executed. *Id.* Mr. Mays appealed to the TCCA, and on March 16, 2015, his execution was stayed pending further review. *Mays v. State*, No. AP-77,055, 2015 WL 1332834 (Tex. Crim. App. March 16, 2015) (not designated for publication). Eight months later, the TCCA held that Mr. Mays made a threshold showing that he was

incompetent for execution and remanded the matter to the trial court for a competency determination, including the appointment of at least two mental health experts. *Mays v. State*, 476 S.W.3d 454, 462 (Tex. Crim. App. 2015).

The trial court appointed three experts to conduct evaluations—one from a list proposed by Mr. Mays, one proposed by the State, and one that was jointly proposed by the first two selected experts. App.A9. All three experts agreed that Mr. Mays suffers from a mental illness; all three experts agreed that Mr. Mays is cognitively impaired; two of the three concluded that Mr. Mays was incompetent to be executed. *See generally* App.D, App.E, App.F. On August 9-12, 2017, a hearing was held. App.B1. On October 2, 2017, the trial court held that Mr. Mays had not established his incompetence for execution by a preponderance of the evidence. App.B2-3. Counsel for Mr. Mays appealed this decision to the TCCA. App.A7. On June 5, 2019, the TCCA affirmed the trial court's decision, holding that the trial court did not abuse its discretion in finding Mr. Mays competent to be executed. The TCCA also lifted the stay of execution, which had been in place since 2015. App.A43. Days later, the trial court re-scheduled Mr. Mays's execution for October 16, 2019.

II. RELEVANT FACTUAL HISTORY

A. Mr. Mays's Mental Health History and Prior Evaluations

Mr. Randall Mays has a documented history of delusions, paranoid thoughts, and odd behaviors that spans more than 36 years. *See* 7EHRR230.¹ Mr. Mays also

¹ Citations to "EHRR" refer to the Reporter's Record for Mr. Mays's *Ford* competency evidentiary hearing.

has an IQ of 63 and related cognitive impairments.² 7EHRR220. Mr. Mays has twice been involuntary committed to a state-sponsored psychiatric hospital. During one stay, he was “delusional, hallucinating, combative,” and claimed that “the Devil had possession of him.” *Id.* at 230-31, 237. Mr. Mays was diagnosed with “hallucinosis.” *Id.* at 230-31, 239. During the second stay, he experienced visual and auditory hallucinations. *Id.* at 277-78, 291.

In 1991, Mr. Mays, who had turned to drugs after his brother was shot and bled-out in his arms, stopped using drugs. 31RR135³; 2EHRR151; 7EHRR289. However, his odd behaviors, paranoia, and delusional thinking persisted. 31RR135; 7EHRR289; 17EHRR131-255. Mr. Mays frequently called 911 about suspicious traffic around his home, suspected break-ins, gas odors, generally suspicious activity, and his inability to sleep. 17EHRR145-46. He lived on a property at the edge of town, surrounded by a tall, metal, parameter fence covered with “Keep Out” signs, security cameras, and motion-activated lights. 33RR141; 17EHRR120-204.

Mr. Mays also displayed delusions about being poisoned. 31RR133. He believed the local water supplier was attempting to poison him through his sister’s water, *id.* at 132-33, and called 911 to report that fumes from burns were choking him. *Id.* at 133; 17EHRR145-46. Mr. Mays also developed an elaborate conspiracy

² Although Mr. Mays has a qualifying IQ-score and is likely intellectually disabled, the issue of Mr. Mays’s categorial ineligibility for the death penalty, under *Atkins*, has yet to be fully litigated and adjudicated by any court.

³ Citations to “RR” refer to the Reporter’s Record for Mr. Mays’s trial.

theory that he was being intentionally poisoned by a chicken and fish restaurant when he became sick after eating there. 31RR133.

On the day of the offense, Mr. Mays sustained a gunshot wound to his arm and was transported to East Texas Medical Center. 8EHRR41. There, nurses reported that he was “talking to someone who was not there.” *Id.* at 13. Mr. Mays lay in bed, screaming for help. *Id.* at 9. He told hospital staff that people were trying to poison him, and stated, “I’ve wrote help on my tray, please try to get someone from outside in here to talk to me. I think they killed my wife.” *Id.*

At Mr. Mays’s trial, Dr. Vail, the jail psychiatrist, testified that Mr. Mays had auditory hallucinations both on the day of the capital incident and at the time she treated him. 31RR44-45. He experienced paranoid thoughts of being poisoned and believed that prisoners and guards were plotting to harm him, that he was allergic to ozone, and that gases in the air were making it hard for him to breathe. App.A8. She concluded that his delusions, including his fear of being poisoned and “plotted against,” were consistent with his psychotic disorder. 31RR22-23. She diagnosed Mr. Mays with a psychotic disorder not-otherwise-specified and depression. *Id.* at 19-20, 27; 17EHRR180-82.

Medical records from the jail also note that Mr. Mays had “organic brain syndrome,” an archaic term for dementia. App.A8-9; 3EHRR151-52. Mr. Mays was prescribed an antipsychotic medication and an antidepressant to treat his symptoms. App.A8-9; 31RR24-5. At trial, the defense presented the testimony of two mental

health experts. Dr. Kessner testified that Mr. Mays suffered from a thought disorder with paranoid ideation. 29RR15. Dr. Self testified that Mr. Mays has a chronic and severe psychiatric illness that causes delusional thinking and irrational behavior. 31RR129.

Since his sentence and transfer to the custody of the Texas Department of Criminal Justice (TDCJ), prison records reveal that Mr. Mays frequently makes complaints about physical ailments that have irrational origins or cannot be confirmed. 2EHRR171. Mr. Mays reported that his liver hurt because of sugar, salt, and vanilla, and complained that ozone in confined areas made him start panting and smelling acid in the air. *Id.* at 170-71. In May 2008, Mr. Mays was given a mental health screening that revealed he had at least below-average intelligence and below-average executive functioning. 11EHRR56-68. In 2009, at the request of his state post-conviction attorneys, Dr. Joan Mayfield performed a neuropsychological evaluation of Mr. Mays. 7EHRR218-26. Dr. Mayfield diagnosed Mr. Mays with Dementia not-otherwise-specified, secondary to chronic amphetamine and related sympathomimetic abuse, and determined that he was significantly cognitively impaired. *Id.* at 220-22.

B. *Ford* Competency Proceedings

Mr. Mays's execution date was initially scheduled for March 18, 2015. App.A6. In February 2015, Mr. Mays's counsel filed a motion in the trial court challenging his competency to be executed. App.A1. In support of his motion, Mr. Mays relied on medical records showing his past and present delusional and paranoid

behavior, the trial testimony of Drs. Vail, Kessner and Self, and the 2009 neuropsychological evaluation by Dr. Joan Mayfield. *Id.* at 8. Pursuant to the TCCA remand order for the trial court to conduct further competency proceedings, the trial court appointed three mental health experts, Drs. Agharkar, Woods, and Price, to evaluate Mr. Mays for execution-competency. Each expert evaluated Mr. Mays, prepared reports, and testified at a four-day August 2017 evidentiary hearing. *Id.* at 7, 9.

The trial court's appointment order instructed the experts to determine whether Mr. Mays suffers from a mental illness or mental impairment and, if so, whether his mental illness or impairment deprives him of a rational understanding of the connection between his crime and punishment. App.A9-10; App.C3. Attached to the Order were professional guidelines and a competency evaluation checklist. App.C7-24. This checklist was published in 2003, before this Court decided *Panetti v. Quarterman*, 551 U.S. 930 (2007), and has never been scientifically validated. 2EHRR71, 132; 3EHRR101. It also included topics that were irrelevant to the competency-to-be-executed determination, such as those related to competency to stand trial. App.C. Nevertheless, the trial court ordered the experts to use the checklist as a basis for framing their conclusions and to assist them in conducting their evaluations. App.A10; App.C2.

a. Expert Evaluations

All three experts agreed that there was no evidence that Mr. Mays was malingering or feigning symptoms; all three agreed that Mr. Mays is mentally ill or mentally impaired. Mr. Mays's extensive history of paranoia, delusional thoughts,

and odd behaviors is consistent with the symptoms observed in the experts' clinical interviews. *See* 2EHRR39-40, 171-72. Of the three experts, Dr. Price hewed closely to the checklist, asking questions that tracked each checklist item. He not only covered the portions of the Court's checklist that were ordered, but also covered other areas that were included in the checklist. 2EHRR186-87. Dr. Agharkar covered all the topics required from the checklist in his interviews, but because, as he testified, rapport-building is important for a person being evaluated to be able to open up and talk about his beliefs, he asked more open-ended questions. 2EHRR46. Dr. Woods, out of a concern that using the checklist would introduce "psychobabble" and because it contained questions not relevant to the competency inquiry, focused on the referral questions rather than the checklist. 3EHRR104, 116.

Dr. Agharkar found that Mr. Mays is mentally ill and mentally impaired, and that his cognitive impairment, combined with his mental illness, has a worsening effect. 2EHRR64-65. Mr. Mays's thoughts do not track linearly or logically. *Id.* at 52-3. He has paranoid thoughts and persecutory delusions about being poisoned from multiple sources. *See, e.g.* 31RR132-33; 2EHRR39-40, 171; 17EHRR145-46. He told Dr. Agharkar that he believes the prison guards are poisoning his food in prison, that pepper gas is being pumped through the vents in his cell, and that the ozone in the atmosphere is making it impossible for him to think straight or breathe and is causing fatigue. 2EHRR55. Dr. Agharkar noted the consistency in Mr. Mays's complaints about being poisoned over the years. *Id.* at 40.

Mr. Mays also has specific, recurring patterns of paranoia and delusional thoughts that he is being poisoned and has a delusional belief system that he has developed an alternative green energy source. *Id.* at 52. Mr. Mays told Dr. Agharkar that he has a patent for his sustainable energy plan that would put big gas or big electric companies out of business and “revolutionize the energy sector.” *Id.* at 60, 66. His plan includes windmills and a direct energy-to-consumer system. *Id.* at 60; 3EHRR154. Mr. Mays explained to Dr. Agharkar that the gas or electric companies that will be hurt by the implementation of his green energy plans are “actively involved in trying to silence him and kill him.” 2EHRR60, 66-67.

Dr. Agharkar concluded that the consistency of complaints shows that Mr. Mays likely suffers a primary psychotic condition like schizophrenia. *Id.* at 40. Dr. Agharkar further concluded that, although Mr. Mays has a factual understanding that the State of Texas is attempting to execute him, he lacks a rational understanding of the reasons why. *Id.* at 66. Mr. Mays understands that he has been convicted of a crime, sentenced to death, and that the State intends to execute him. *Id.* However, he believes that the reasons they seek to execute him are to save on medical expenses and to prevent him from being able to build his device that would lose big companies “billions of dollars.” *Id.* at 62-3, 66. Because of Mr. Mays’s delusional belief system that the State of Texas seeks to execute him for reasons unrelated to his offense, Dr. Agharkar opined that Mr. Mays is not competent to be executed. *Id.* at 67.

Dr. Price also evaluated Mr. Mays for his competency to be executed. At the beginning of the interview, Mr. Mays was made aware of Dr. Price's relationship with the State when Dr. Price disclosed that he believed he was appointed at the State's suggestion. *Id.* at 140. Dr. Price made Mr. Mays uncomfortable by bringing up the capital offense "often" during his clinical interview. *Id.* at 180-81. Dr. Price admitted that, by making Mr. Mays uncomfortable, it was hard to build rapport with Mr. Mays. *Id.* at 181. After two hours and fifteen minutes, Mr. Mays asked if the interview could be terminated. *Id.* at 169, 181.

Dr. Price diagnosed Mr. Mays with mild cognitive impairment, although Mr. Mays declined to participate in several testing measures. *Id.* at 167-69, 174, 194, 204. Dr. Price also diagnosed Mr. Mays with Paranoid Personality Disorder and depression. *Id.* at 149. Dr. Price attributed Mr. Mays's frequent complaints of physical ailments as symptomatic of somatoform disorder, meaning Mr. Mays experiences physical symptoms that cannot be fully explained by any underlying medical or neurologic condition. *Id.* at 170-72. He also opined that Mr. Mays's frequent refusal of treatment showed a mistrust for the medical professionals or staff at the prison—and of Dr. Price—consistent with his paranoid personality. *Id.* Dr. Price found Mr. Mays to be delusional about the ozone and the air in the prison, however, he found that Mr. Mays's thoughts on green energy were rational. *Id.* at 148. Dr. Price opined that he believed Mays was impaired, but not profoundly impaired. *Id.* at 149.

When Dr. Price attempted to discuss the pending execution and Mr. Mays's understanding of the connection between his conviction and punishment, he was unsuccessful. *Id.* at 209. Mr. Mays cried, became anxious, and diverted the conversation. App.F8; 2EHRR174, 204, 215. Nevertheless, because of Mr. Mays's reaction, Dr. Price concluded that he has a rational understanding of his punishment and declared Mr. Mays competent to be executed. App.F17.

When Dr. Woods evaluated Mr. Mays, he found that Mr. Mays's thought processes were "paranoid, delusional, suspicious, [and] grandiose." App.E19. Dr. Woods agreed that Mr. Mays's delusions about poisoning are rooted in his mental illness. 3EHRR123. Dr. Woods declined to diagnose Mr. Mays with schizophrenia but concluded that it could not be ruled out. App.E25-6; 3EHRR133. Instead, Dr. Woods diagnosed him with a psychotic disorder not otherwise specified. App.E27; 3EHRR165.

Mr. Mays also discussed his clean energy product with Dr. Woods. App.E18-19; 3EHRR158. Mr. Mays stated that he still had a "50-50" chance of walking off death row, implementing his plan, and selling it. *Id.* He thought he could sell his invention for two thousand dollars. *Id.* When asked if he would trade the secret of his invention for his life, he said he would not, and reiterated that the State of Texas's goal was to "to put him out of business or to kill him so that this would not be a threat to the—to the oil business here in Texas." *Id.*

Dr. Woods concluded that Mr. Mays did not rationally comprehend the connection between the capital offense and punishment. 3EHRR165. In Mr. Mays's

mind, he is being killed because of his invention—not because of his conviction and sentence. *Id.* at 158. While he has some awareness of the State’s plans to execute him, his understanding of the motivation is grossly delusional. *Id.* at 166. He believes the State wants to execute him because of his clean energy plans. *Id.* Therefore, Dr. Woods concluded that Mr. Mays is not competent for execution. *Id.* at 166.

b. State Court Findings

On October 2, 2017, the trial court issued an Order finding that Mr. Mays failed to prove his incompetence for execution by a preponderance of the evidence. App.B. The court credited, as evidence weighing in favor of competency, Dr. Price’s report that he does not have an obsession with clean energy, TDCJ employee Carolyn Cooper’s testimony that Mr. Mays never mentioned clean energy ideas, poison in food, or air pollution to her, and the trial court’s own review of letters Mr. Mays’s wrote from prison that the trial court believed showed a rational concern for helping his family save on energy bills and not an obsession with wind energy. *Id.* at 2.

In support for its finding that Mr. Mays is competent, the trial court also concluded that Mr. Mays has not received mental health treatment for any illness relating to the competency inquiry. *Id.* Additionally, the trial court cited Mr. Mays’s “steady stream of notes,” his appearance of participating with his attorneys in the hearing, his politeness to a TDCJ employee, and his use of the prison library and periodical-reading as evidence of his competency for execution. *Id.*

The trial court noted that Dr. Price was the only expert to include the trial court’s checklist in his report and found Dr. Price’s opinions credible. *Id.* The court

largely ignored Dr. Agharkar's findings. The trial court also discredited Dr. Woods's opinion, citing doubts as to Dr. Woods's credibility and impartiality as a witness because Dr. Woods was observed passing notes with Mr. Mays's counsel. *Id.* Neither the notes nor their contents are included in the record, and there is no indication that trial court inquired about the content of the notes.

Upon the trial court's denial, Mr. Mays appealed to the TCCA. On June 5, 2019, the TCCA affirmed the trial court's decision, holding that the trial court did not abuse its discretion because there was evidence in the records supporting a conclusion that Mr. Mays "comprehends that there is a 'causal link' between the capital offense and his imminent execution beyond merely identifying the State articulated rationale for the execution." *Id.* at 42-3. The TCCA concluded that Mr. Mays was competent to be executed and lifted the stay of execution. *Id.* at 43. Mr. Mays is now scheduled to be executed on October 16, 2019.

REASONS TO GRANT THE WRIT

This Court has made clear that state courts must incorporate and rely upon current medical standards and practices in answering questions regarding a prisoner's eligibility to be executed. *Moore v. Texas*, 137 S.Ct. 1039, 1053 (2017) (holding that courts should look to "the medical community's current standards" rather than "nonclinical factors" in deciding whether a person is intellectually disabled and thus ineligible for the death penalty). While *Moore* addressed the issue of courts rendering opinions based on nonclinical guidelines and lay stereotypes of the intellectually disabled by focusing on a person's strengths instead of his deficits, this Court has

yet to address the equally critical question regarding that same handling of individuals who suffer from mental illness or cognitive impairments whose competency to be executed is in question.

In Mr. Mays's case, the trial court ordered the appointed experts to utilize a checklist during their evaluation of whether Mr. Mays is competent to be executed. All three experts appointed in this case agreed it had limited application. The checklist was also created before this Court decided *Panetti* and failed to incorporate questions regarding whether the prisoner has a rational understanding of why he is being executed, consistent with the requirements of the Eighth Amendment. Despite that, the trial court credited the one expert opinion who deemed Mr. Mays competent to be executed, noting that he was the only expert who relied upon the checklist. In doing so, the trial court failed to heed the experts' caveats regarding the checklist. *Cf. Hall v. Florida*, 572 U.S. 701, 710 (2014) (holding that “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”). The trial court also erroneously deemed Mr. Mays competent to be executed by relying on stereotypes of what he believes Mr. Mays’s capabilities are instead of his cognitive deficits. By doing so, the trial court “failed adequately to inform itself of the ‘medical community’s diagnostic framework’”). *Moore*, 137 S.Ct. at 1053 (citing *Hall*, 572 U.S. at 703.)

This case also presents the question whether a person who has an awareness that he was sentenced to death for a capital murder is competent to be executed when his mental illness and cognitive impairments prevent him from sustaining a

rational reason for his now-scheduled execution. *Panetti* requires that the prisoner have a rational understanding of the meaning and purpose of the execution. 477 U.S. at 961 (“Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”).

Here, Mr. Mays is able to recite that he was convicted of capital murder and that he was sentenced to death for that crime. In that regard, he is factually aware of the link between his conviction and sentence. However, Mr. Mays holds a grossly delusional belief that the State seeks to execute him to prevent his renewable wind-mill energy plan from being developed because it would threaten Texas’s oil and gas interests. Mr. Mays’s delusionary beliefs regarding his execution are so far removed from reality that he lacks a rational understanding of the State’s meaning and purpose in seeking his execution. As a result, his execution does not comport with the evolving standards of decency required by this Court’s Eighth Amendment jurisprudence.

Questions regarding the application of the Eighth Amendment’s protection regarding competency to be executed generally become ripe once a prisoner has a date of execution set. *Burton v. Stewart*, 549 U.S. 147, 154-55 (2007) (competency-to-be-executed claim “necessarily unripe until the State issued a warrant for his execution.”). Mr. Mays’s date of execution is scheduled for October 19, 2019. This Court should decide these two important questions regarding: the trial court relying on unvalidated, repudiated science and layperson stereotypes about mental health

to decide a prisoner’s competency to be executed; and whether a person’s awareness of the causal link between his conviction and death sentence render him competent to be executed, despite his irrational understanding as to why the State seeks to execute him.

I. CERTIORARI SHOULD BE GRANTED BECAUSE A STATE COURT’S DETERMINATION OF COMPETENCY TO BE EXECUTED BASED ON UNSCIENTIFIC STANDARDS AND LAY STEREOTYPES REGARDING MENTAL ILLNESS VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment forbids the execution of individuals who lack rational understanding of the rationale for their execution. Despite having “impressive historical credentials,” *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (citing the common law prohibition), the Eighth Amendment’s substantive restriction on the State’s power to execute is of recent vintage. Prior to *Ford*, all relevant opinions of this Court concerned only procedural questions presented under the Fourteenth Amendment. 477 U.S. at 405. In *Ford*, this Court announced that the inquiry into competency to be executed should answer the question of whether the prisoner has the ability to comprehend the reasons for his execution. *Ford*, however, offered no guidance on what evidence—test results, delusions, paranoia, behavior—was required to meet the standard for incompetence. *See Panetti*, 551 U.S. at 957 (observing that the majority in *Ford* “did not set forth a precise standard for competency”).

Ford acknowledges that a court’s decision regarding a person’s competency to be executed “depends substantially on expert analysis in a discipline that is fraught with ‘subtleties and nuances.’” *Ford*, 477 U.S. at 426 (J. Powell, concurring)

(citing *Addington v. Texas*, 441 U.S. 418, 430 (1979). To that, this Court has disavowed “strict tests for competency” that do not factor in aspects of mental illness that may prohibit that person from rationally understanding the reason for their execution. *Panetti*, 551 U.S. at 960. Advancements in understanding of modern medicine and social sciences inform this Court’s understanding of Eighth Amendment protections. *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (“Our decisions rested not only on common sense . . . but on science and social science as well.”). Here, the trial court relied on an expert’s use of a strict question-and-answer checklist that has not been scientifically validated, and has been repudiated by one of its authors, in deciding that Mr. Mays is competent to be executed. The court also relied on layperson stereotypes about mental illness in reaching his conclusion. This Court should address whether a court’s reliance on unscientific, unvalidated tools and misperceptions of mental illness and cognitive impairment constitute “fact finding procedures which . . . were ‘not adequate for reaching reasonably correct results.’” *Panetti*, 551 U.S. at 954 (citing *Ford*, 477 U.S. at 423-424)).

A. The Trial Court Relied Upon an Unscientific, Unvalidated Checklist in Discrediting Expert Opinions that Mr. Mays is Incompetent to be Executed

In *Panetti*, this Court made clear that “gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.” *Id* at 961. Because of this, this Court determined that a court must consider whether such delusions exist in deciding whether that person is competent to be executed. *Id.* at 960. More recently, this Court declared that the Eighth

Amendment prohibited the execution of an inmate even though he suffers from dementia or another disorder, rather than psychotic delusions, so long as the inmate lacks rational understanding of the reason why the state seeks to execute him. *Madison v. Alabama*, 139 S.Ct. 718, 727 (2019). *See also id.* at 728 (noting that the *Panetti* standard “has no interest in establishing any precise *cause*: psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension”). There is no precise test for courts to utilize in assessing whether a person is competent to be executed due to mental illness or cognitive impairments. However, the checklist the trial court relied upon below was ill-designed to ferret out the information that is critical to understanding whether Mr. Mays has a rational understanding of the causal link between his crime and punishment.

1. This Court incorporates advancements into medical, technological, and social science into its analysis of Eighth Amendment protections

In part, this Court’s reluctance to precisely demarcate the world of afflictions that could give rise to incompetence is emblematic of its recognition that medical, technological, and social science advancements inform Eighth Amendment categorical protections. *See, e.g., Moore*, 137 S. Ct. at 1052-53 (“The medical community’s current standards supply one constraint on States’ leeway [to determine intellectual disability]. Reflecting improved understanding over time, [the DSM-V and American Association on Intellectual and Developmental Disabilities Manual] offer ‘the

best available description of how mental disorders are expressed and can be recognized by trained clinicians.” (citations omitted)); *Miller*, 567 U.S. at 471 (“Our decisions rested not only on common sense . . . but on science and social science as well.”); *id.* at 472 n.5 (“[T]he science and social science supporting *Roper* [v. *Simmons*, 543 U.S. 551 (2005)]’s and *Graham* [v. *Florida*, 560 U.S. 48 (2010)]’s conclusions have become even stronger.”).

This recognition is apparent in *Panetti*, where this Court eschewed a “strict test” for competency and admonished the Fifth Circuit for restricting and disregarding “evidence of psychological dysfunction,” emphasizing the need for the “conclusions of physicians, psychiatrists, and other experts in the field” to inform analysis under the rational understanding standard. 551 U.S. at 960, 962.

2. The trial court judged the reliability of the expert opinion about Mr. Mays’s competency by how closely experts adhered to an unscientific, unvalidated, pre-*Panetti* competency checklist

Just as in other Eighth Amendment exclusionary contexts, reliable science must govern any competency-to-be executed determination—and here it did not. The trial court ordered the three court-appointed experts to use a checklist found in a 2003 article “to assist in conducting their evaluations and as the basis for framing the conclusions” regarding competency to be executed. App.C2. The checklist was contained in *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, published in the *Behavioral Sciences and the Law* journal. App.C7. Developed before this Court announced the “rational understanding” test

in *Panetti*, the checklist contained over 100 different areas of inquiry in competency to be executed determinations.

The authors developed this Pre-*Panetti* checklist by polling seven different psychologists to ask them what they thought should be included in the checklist. App.C14. The seven psychologists were selected because they had previously opined on competency to be executed questions. Two of the professionals last conducted a competency-to-be-executed evaluation in 1989; three last conducted a competency-to-be-executed evaluation in the 1990's. App.C14. There was no qualitative assessment of the survey participants before their opinions were solicited to develop the checklist. 3EHRR103. There has never been any research done on the validity or reliability of the checklist. 3EHRR75; 3EHRR88.

The seven survey participants did not agree what the medical-legal standard was for competency-to-be-executed. Most of the evaluators thought that the criteria were “very minimal standards” and “a very low threshold for incompetence.” App.C17. Many thought that this “very low threshold” consisted just of “factual understanding,” rather than the *rational understanding* required by this Court since *Panetti. Id.*

All three experts appointed or retained in Mr. Mays's case were familiar with the checklist and acknowledged that it was limited. *See, e.g.*, 3EHRR104 (referring to the checklist as “psychobabble”). All three experts acknowledged that the checklist did not include questions consistent with the *Panetti* standard. 2EHRR33-34 (Agharkar); 2EHRR132 (Price); 3EHRR100-104 (Woods). Two experts, Dr. Woods

and Dr. Agharkar, declined to mechanistically follow the checklist because they believed that to do so was inconsistent with best, forensic psychiatric practice. *See, e.g.*, 2EHRR114; 3EHRR100-104. Only Dr. Price used the checklist, notwithstanding the limitations, which he acknowledged. *See, e.g.*, 2EHRR132 (acknowledging that the checklist author expressed skepticism about using the checklist following *Panetti*); 3EHRR75 (acknowledging that the checklist reliability has been called into question by subsequent post-*Panetti* research); 3EHRR88 (acknowledging that the checklist does not contemplate the *Panetti* standard).

The focus of the checklist is on factual understanding of the crime, and irrelevant philosophical belief systems about death, rather than *rational understanding*. App.C21. As this Court recently observed, the *Panetti* decision “asks about understanding, not memory—more specifically, about a person’s understanding of why the State seeks capital punishment for a crime, not his memory of the crime itself.” *Madison*, 139 S. Ct. at 727. It is undisputed that no study was ever done on the validity and reliability of the guidelines, and subsequent to *Panetti*, one author of the checklist disavowed its use. 3EHRR75; 3EHRR88; 3EHRR101. Unsurprisingly, the sole expert to use the pre-*Panetti* checklist found Mr. Mays competent to be executed. The other two experts, Drs. Woods and Agharkar, who declined to use the unscientific checklist, did not.

3. The invalidated, pre-*Panetti* checklist tainted the trial court competency determination

The pre-*Panetti* checklist tainted the lower court competency determination in two significant ways. First, the court used adherence to the pre-*Panetti* checklist

to evaluate expert testimony. The trial court credited the opinion of Dr. Price because he followed the checklist and discredited the opinions of Drs. Woods and Agharkar because they did not. App.B. Dr. Price was the only expert who found Mr. Mays competent to be executed.

Second, the unscientific approach of the pre-*Panetti* checklist was replicated in the trial court's reasoning. In its opinion, the trial court spent more time discussing the fact that Mr. Mays could describe the crime scene, remembered details about the shootings, and had a factual understanding that he was scheduled for execution than it did discussing the expert opinions of Drs. Agharkar and Woods. *But see Madison*, 139 S. Ct. at 727 (observing that *Panetti* requires that the analysis focus on a person's understanding of why the State seeks to execute, not whether or not a person has a memory of the crime itself).

The trial court also noted that Mr. Mays had not been "diagnosed, treated, or received prescribed medications for any mental illness or obsession that has any bearing on this inquiry." App.B2. The trial court failed to consider that:

- Mr. Mays presented unchallenged testimony that he has an IQ of 63. 7EHRR220.
- All three court-appointed experts believed him to be cognitively impaired. App.D6, App.E5, App.F11.
- All three court-appointed experts believed Mr. Mays to suffer from a serious mental illness, only differing in how to label it. App.D5-6, App.E25-26, App.F17.

- All three court-appointed experts agreed that Mr. Mays has a delusional belief system. App.D3, App.E26, App.F10.
- Mr. Mays was diagnosed with dementia (called “organic brain syndrome” at the time) by a treating psychiatrist as far back as June 2007. App.A8-9; 3EHRR151-52.
- Mr. Mays was civilly committed in 1981 and 1983 and treated at Terrell State hospital for ten days in 1983. 7EHRR227-232.
- Mr. Mays was noted by mental health professionals to suffer from hallucinations before trial. 31RR44-45.

But as *Madison* cautions, in evaluating competency, a judge must look beyond any particular diagnosis to its downstream consequences. *Madison*, 139 S. Ct. at 728 (“psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.”). Here, there was uncontradicted, unimpeached testimony that Mr. Mays is delusional, has experienced symptomatology consistent with severe mental illness for many years, and suffers from a major neurocognitive disorder, highlighted by the fact that his IQ is 63. The trial court did not acknowledge or incorporate any of these psychological and psychiatric facets into its decision that Mr. Mays is competent to be executed.

B. The Trial Court Relied on Lay Stereotypes of the Mentally Ill to Decide that Mr. Mays is Competent to be Executed

Compounding the error, the trial court relied on lay stereotypes of the mentally ill as the basis for its reasoning. Without any basis in science or expert opinion

evidence, the trial court reasoned that Mr. Mays was not incompetent to be executed because, *inter alia*: he appeared to interact with his counsel during the hearing; Mr. Mays exchanged notes with counsel; he appeared to be “fully participating;” he “frequently read periodicals” and other books from the prison library. App.B.

There was no evidence presented, reliable or otherwise, that a person cannot interact with his lawyers, write notes, appear engaged, or read periodicals and still be incompetent to be executed. To the contrary, there was uncontested evidence that the focus of any competency determination must necessarily focus on limitations rather than strengths. As Dr. Agharkar testified,

[with] mental illnesses as well as brain impairment, you look at deficits. Deficits are what define the disease. It's not the strengths because everybody has strengths, and everybody has weaknesses. But in mental illness, the way we think about people, it's the stuff that they can't do. That's what impairs them. That's what leads to his incompetency in this area.

2EHRR126. The trial court, however, utterly failed to address Dr. Agharkar's testimony as to this point, or his opinion that Mr. Mays was incompetent to be executed, other than to note that he had not followed the pre-*Panetti* checklist. App.B.

The TCCA upheld the trial court's unscientific reasoning, holding that it was within the trial court's discretion to embrace these unfounded stereotypes of the mentally ill and impaired. App.A. But this is the very same type of unscientific reasoning this Court has rejected in the Eighth Amendment context. *See, e.g., Moore*, 137 S.Ct. 1039. In *Moore*, this Court held that Texas could not overemphasize Bobby Moore's adaptive strengths in an intellectual disability determination by favorably citing Mr. Moore's history of living on the streets, mowing lawns, and playing pool

for money. *Id.* at 1050. Just as it was error for Texas to rely on stereotypes about pool playing and lawn mowing in an intellectual disability determination, so too was it error for Texas to rely on note passing, appearance of engagement, and magazine reading to determine competence to be executed.

II. CERTIORARI SHOULD BE GRANTED BECAUSE A PRISONER IS INCOMPETENT TO BE EXECUTED WHEN HE HOLDS A DELUSIONAL BELIEF THAT THE STATE'S PURPOSE IN EXECUTING HIM IS TO PERSECUTE HIM, IN SPITE OF HIS AWARENESS OF THE CAUSAL LINK BETWEEN THE OFFENSE AND HIS DEATH SENTENCE.

The reason the State of Texas seeks to execute Mr. Mays, in his mind, is to prevent him from developing and implementing his design for a renewable energy plan. Mr. Mays is convinced that his design would cost big gas and electric companies “billions” of dollars. App.E20. Mr. Mays believes that the “big companies” are actively influencing Texas’s decision to execute him and does not believe he is being executed for his capital offense. Although Mr. Mays acknowledges details of this offense, that he was sentenced to death, and that the State of Texas seeks to execute him, he has overriding delusional beliefs that cause his understanding of the meaning and purpose of his execution to be so far removed from reality that his execution would serve no penological purpose.

This presents the important question of whether the Eighth Amendment prohibits the execution of a prisoner who acknowledges that he has been convicted of a capital offense and that the State wants to execute him, but whose dementing brain and psychosis force him into the delusional belief that the State wants to kill him for reasons that do not exist. *See Madison*, 139 S.Ct at 729 (Dementia “can cause

such disorientation and cognitive decline as to prevent a person from *sustaining* a rational understanding of why the State wants to execute him.”) (emphasis added).

This Court should address this ripe and important question today.

A. A Prisoner’s Grossly Delusional Belief System That Prevents Him from Having a Rational Understanding of the Meaning and Purpose of the Punishment to Which He Has Been Sentenced Renders His Execution Cruel and Unusual

The practice of executing those who are insane has long offended the notions of human decency. *Ford*, 477 U.S. at 406 (“The bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded ‘savage and inhuman.’”) (citing 4 W. Blackstone, *Commentaries* 24–25). This deeply-held tradition is rooted in the English common law—that it can be no example to others “when a mad man is executed, but should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty.” *Id.* at 407. (citing 3 E. Coke, *Institutes* 6 (6th ed. 1680)). So basic is this belief that at the time this Court decided *Ford* in 1986, it acknowledged that “no State in the Union permits the execution of the insane.” *Id.* at 408. And, consistent with that principle, this Court determined that “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.” *Id.* at 410.

“[T]he natural abhorrence that civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity,” that this Court acknowledged was “vivid” over 30 years ago, remains vivid today. *Id.* at 409. However, modern understandings of medicine and science must inform this Court’s de-

cision regarding the Eighth Amendment constitutionality of a punishment. *See Miller*, 567 U.S. at 471 (“Our decisions rested not only on common sense . . . but on science and social science as well.”). The ways in which our society understands mental illness today must be incorporated into that still-true statement.

Where a documented mental illness is the source of a person’s gross delusions and prevents him from comprehending the meaning and purpose of the punishment to which he has been sentenced, this Court accepted that it should be considered when determining whether that person has a rational understanding of the State’s desire to execute him. *Panetti*, 551 U.S. at 960; *see also id.* at 958 (acknowledging that a person’s delusions could “so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution.”).

B. The Texas Court of Criminal Appeals Failed to Take into Account Whether Mr. Mays’s Mental Impairments Prevented Him from Having a Rational Understanding of the State’s Purpose in Executing Him as Required by *Panetti*

Panetti was the first case in which this Court delineated a more focused standard for lower courts to determine how to better determine when a person is incompetent to be executed due to mental illness. *Panetti*, 551 U.S. at 960 (a person’s “severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced” should be considered). In *Panetti*, the Fifth Circuit found Mr. Panetti to be competent to be executed on the basis that he was aware of the State’s reason for executing him. *Id.* at 958. This Court overturned the Fifth Circuit’s decision, holding that the Fifth Circuit failed to take into account how Mr.

Panetti's mental illness may have prevented him from having a rational understanding of the meaning and purpose of the execution. *Id.* at 959 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."). This Court explained that an individual's delusions may rise to the level of making them unable to rationally understand the State's meaning and purpose in executing him. *Panetti*, 551 U.S. at 960. This is true even though that same individual may understand that there is a causal link between the crime for which he was committed and the death sentence. *Id.* at 959.

Here, the trial court failed to make a proper *Panetti* inquiry into whether Mr. Mays's impairments allow him to sustain a rational understanding of why the State wants to execute him. Instead, the trial court relied on lay stereotypes and extra-record evidence to conclude that Mr. Mays's beliefs were not delusional. And in determining whether the trial court abused its discretion, the TCCA asked whether, "despite any delusional beliefs or other mental illness he may have, and despite the fact that he may deny having committed the capital offense, [Mr. Mays] comprehends that there is a 'causal link' between his capital offense and his imminent execution, beyond merely identifying the State's articulated rationale for the execution." App.A42.

Mr. Mays acknowledges aspects of the crime he was convicted of and that he was sentenced to death for that crime. Although that acknowledgement is necessary for a person to be competent for execution, it is insufficient on its own. *Panetti*, 551 U.S. at 959. Here, Texas's inquiry does not account for the fact that a prisoner's

ability to articulate that he was convicted of a capital offense and sentenced to death for that offense is insufficient in determining whether he is competent to be executed when he also has an irrational belief that the State is executing him for a reason other than for the capital offense. *See id.* (“State’s rationale for an execution is not the same as a rational understanding of it.”).

C. Mr. Mays is Incompetent to be Executed Because His Overwhelming Belief that the State Seeks to Execute Him to Prevent Him from Developing Windmill Technology Prevents Him from Sustaining a Rational Understanding of the Reason for His Execution

Mr. Mays has a delusion that he has invented a wind energy system and that he has a patent for that design. Mr. Mays also has a delusion that the State of Texas, in order to protect its vested interest in Big Oil, seeks to silence him by executing him so that his machine is never developed or marketed. 3EHRR122. Mr. Mays’s belief that the State of Texas seeks to execute him is validated by his persistent and long-held belief that prison guards are poisoning his food and that he is being poisoned by the ozone. *Id.* at 122. Mr. Mays is preoccupied by his delusions regarding his windmill design and that the State does not want him to develop it, evidenced by his persistent discussing of the design to attorneys, family members, his wife, friends, and experts.

1. Mr. Mays’s mental illness and cognitive impairments cause him to incorporate real life events into his persecutory delusions

Neuropsychological testing conducted in October 2009 revealed that Mr. Mays’s executive functioning, intellectual abilities, and memory are significantly impaired. Mr. Mays has an IQ score of 63. He suffers from cognitive deficits in the

frontal and temporal lobes of his brain, which regulate memory and mood regulation, impulse inhibition, the ability to deliberate, and the ability to appreciate long-term consequences of behavior. App.F6.

Mr. Mays also suffers from dementia, which is a degenerative brain disease. The damage caused to Mr. Mays's brain is permanent. 2EHRR42. ("once [brain] cells die, they die"). Both his dementia and underlying mental illnesses prevent rational, linear, and logical thought processes. 2EHRR52. Mr. Mays is unable to provide thoughtful responses to questions without eventually trailing off, forgetting what he was saying, or changing topics completely. 2EHRR52-53.

Due to his impairments, Mr. Mays exhibits paranoid delusions, and pursuant to those delusions, believes that the State's purpose in executing him is to prevent him from pursuing his renewable energy plan. A paranoid delusion is a "fixed, false belief that breaks with reality." 3EHRR121. As Dr. Woods described, a "delusion is the basket in which people that have mental illness hold many of their false beliefs, and it really helps them organize those false beliefs in some type of meaningful way for them . . ." *Id.*

Mentally ill individuals often take real life experiences and incorporate them into their delusional belief system, called Perceptual Disorder. 3EHRR163. Once Mr. Mays realized that the prison read his letters in which he discussed the technology, (a real-life experience), Mr. Mays believed that the State became aware of his design by reading the mail (a real-life experience). Mr. Mays then incorporated

those real-life experiences into his delusional belief system regarding the wind technology, so that he now believes the State is seeking to execute him so he can never develop his patented design (a delusion).

2. Mr. Mays can articulate that he was convicted of capital murder and sentenced to death, but he has no rational understanding of why he is now being executed

Determining whether a person is competent to be executed under existing principles is a delicate question, and “depends substantially on expert analysis in a discipline that is fraught with ‘subtleties and nuances.’” *Ford*, 477 U.S. at 426 (citing *Addington v. Texas*, 441 U.S. 418, 430 (1979)). Mr. Mays knows that he has been convicted of murder. However, he believes that he is going to be executed, not because of that murder, but because the State wants to steal his green energy ideas to prevent them from being developed. Dr. Price contended that Mr. Mays “reported he was charged with ‘capital murder for what happened that day.’” App.F12. Mr. Mays could also articulate to Dr. Price that he was “convicted of capital murder on 5/16/08 in Athens, Texas.” App.F13. Mr. Mays appeared to acknowledge aspects of the crime, such as the fact police had come on to his property with guns. App.F3. Mr. Mays at one point acknowledged this aspect of his offense in a letter to his wife he wrote several years ago. App.A30.

However, following his arrest for the capital offense, Mr. Mays was treated for a gunshot wound, and, according to the nurses who treated him during his hospital stay, Mr. Mays “was lying in bed screaming for help and stating that he thought people were trying to kill him and that he thought they had killed his wife.” App.G7. Mr. Mays’s paranoia was so severe, he was prescribed a “powerful anti-

psychotic.” *Id.* Mr. Mays has been evaluated by many experts since his arrest, each one confirming the presence of severe paranoia. One psychiatrist noted “that Mr. Mays has a chronic and severe psychiatric illness, and I think that illness has caused him to experience delusional thinking and to act irrationally on the basis of that thinking[,]” and thought that the “distorted thinking and behavior driven by that was very centrally involved in the causality of this offense.” *Id.* at 12.

Accordingly, Mr. Mays therefore has persecutory delusions surrounding the offense itself, despite any acknowledgment to Dr. Price that he has been convicted of killing two officers or an ability to recall details of the night the murders happened in a letter written to his wife years ago. Since Mr. Mays has been incarcerated for this offense, his delusion has continued to “build and develop over time while he’s been in jail.” *Id.* Accordingly, the fact Mr. Mays can articulate aspects of his offense and believe that the State seeks to execute him for irrational reasons “can exist side by side,” but, most importantly, Mr. Mays “overriding belief at this point is that . . . the State is trying to kill him because they don’t want his machine to actually come to light.” *Id.*

The TCCA reasoned that the fact Mr. Mays wrote a letter to his sister informing her of where the family burial plots were located was an indicator that he understood his execution to be imminent. App.A30. Yet, pursuant to his delusional belief system that he has developed a windmill technology, Mr. Mays also believes that he will be capable of starting up and running his business and that the State seeks to execute him to prevent his green renewable energy from coming to fruition.

Accordingly, the circumstances of his paranoia prevent Mr. Mays from actually appreciating, in any rational way, that his execution is imminent. Further, delusions about green energy do not render a person incapable of planning for his own funeral.

Despite any acknowledgment of his offense and the fact the State seeks to execute him, Mr. Mays believes, to date, that he has invented a green, renewable energy idea that is based on windmill technology, and that he has received a patent for this design. App.D2. Mr. Mays also firmly believes that the warden at his prison unit is being pressured by power and oil companies to kill him because, otherwise, those companies stand to lose billions of dollars once his invention hits the market. *Id.* Mr. Mays does not understand that neither the warden nor the prison are the entities responsible for setting his execution date. Instead, he has an “overwhelming belief [] that the Texas state government is trying to kill him to keep him from promoting this wind machine that he believes he has developed” constitutes his understanding as to why the State wants to now execute him. 3EHRR165.

Mr. Mays’s dementia is a chronic condition that will not necessarily lessen in severity over time, and one in which the damage already done is irreversible. His cognition will continue to deteriorate and his ability to reason and make logical decisions will become even more difficult than they already are. Further, no expert expects Mr. Mays’s paranoia and mental illness to become less severe. Mr. Mays’s persecutory delusions will therefore likely remain his reality. Accordingly, Mr.

Mays has a mental condition that “cause[s] such disorientation and cognitive decline as to prevent [him] from *sustaining* a rational understanding of why the State wants to execute him.” *Madison*, 139 S.Ct. at 729.

D. Executing Mr. Mays Serves No Penological Purpose

Exacting the punishment of death upon a person “is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.” *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Retribution in the context of the death penalty exists as “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Id.* While the deterrent effect the death penalty has on future capital offenses is difficult to establish, this Court has assumed that “the death penalty undoubtedly is a significant deterrent” to at least some members of society. *Id.* at 185. However, when the prisoner cannot appreciate the reasons for his punishment, “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Ford*, 477 U.S. at 422.

Here, executing a person who believes he is being killed to silence him in order to save big gas companies does not serve either retributive or deterrent purposes. A prisoner’s “execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence.” *Madison*, 139 S.Ct. at 728. This is true whether the person suffers from “psychotic delusions or dementia.” *Id.* at 729. The execution of a person who believes that he is being executed because he has invented wind technology does not serve society’s interest in

seeing that execution through. In that case, the person is incapable of understanding the actual reasons society has deemed him worthy of a death sentence. Further, executing Mr. Mays will not serve as a deterrent to others. With the understanding that he believes he is being executed for irrational reasons not actually held by the State, the carrying out of his sentence does not exist as an “example to others and thus has no deterrence value.” *Panetti*, 477 U.S. at 958; *see also id.* at 960 (“Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”).

Because Mr. Mays’s punishment serves no penological interest, this Court should decide the important question of whether the Eighth Amendment prohibits the execution of a prisoner who acknowledges that he has been convicted of a capital offense, sentenced to death for that offense, and that the State wants to execute him, but whose dementing brain and delusional psychosis force him into the delusional belief that the State wants to kill him for reasons not actually held by the State. *See Madison*, 139 S.Ct. at 729 (“That mental condition can cause such disorientation and cognitive decline as to prevent a person from *sustaining* a rational understanding of why the State wants to execute him.”) (emphasis added).

CONCLUSION

The trial court determined that Mr. Mays is competent to be executed by relying on a checklist that predates this Court’s precedent in *Panetti* and does not incorporate the medical community’s modern understanding of mental illness, and

by relying on layperson stereotypes of mental illness. The trial court rendered those findings despite the fact Mr. Mays has persistent and fixed persecutory delusions which cause him to believe that the State's purpose in executing him on October 16, 2019 is to prevent him from implementing his renewable energy plan.

This Court should grant certiorari to address whether a trial court's reliance on unvalidated science and stereotypes violates the Eighth Amendment's prohibition against executing those who are incompetent, and to clarify that a mere awareness of the causal link between the offense and the death sentence are not sufficient to render a prisoner competent to be executed.

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

September 3, 2019

Sarah Cathryn Brandon

Benjamin B. Wolff, Director
Sarah Cathryn Brandon
Michelle E. Ward
1700 North Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600

*Counsel for Petitioner,
Randall Mays*

No. _____

In the
Supreme Court of the United States

RANDALL MAYS,

Petitioner,
v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari does not exceed 40 pages, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 3, 2019.

Sarah Cathryn Brandon
Sarah Cathryn Brandon
Counsel of Record for Petitioner
