Appendix 1

AP-77,055
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. AP-77,055

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/11/2018
DEANA WILLIAMSON, CLERK

RANDALL WAYNE MAYS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE 392ND DISTRICT COURT OF HENDERSON COUNTY DENYING RELIEF UNDER ARTICLE 46.05 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

APPELLANT'S OPENING BRIEF

OFFICE OF CAPITAL AND FORENSIC WRITS
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Oral Argument Requested

PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.1, subdivision (a), the parties to the district court's order and to this proceeding, and their counsel, are listed below.

(1) **Randall Wayne Mays**, No. 999535, Polunsky Unit, 3872 FM 350 South, Livingston, Texas 77351, is the Appellant in this Court and was the Defendant/Movant in the district court. Mays is represented by the Office of Capital and Forensic Writs, 1700 N. Congress Avenue, Suite 460, Austin, Texas 78701, Benjamin Wolff (director) and Gretchen Sween (Counsel of Record). Sween also represented Mays in the 46.05 proceedings below.

(2) **The State of Texas**, by the Henderson County District Attorney's Office, 109 West Corsicana, Suite 103, Athens, Texas 75751, is the Appellee and opposed Mays's motion under Article 46.05 in the district court. The State was represented below by District Attorney Mark Hall and his predecessor, District Attorney Scott McKee, who is now the elected judge of the 392nd District Court. Mays anticipates Hall will appear for the State in this appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. *See* TEX. R. APP. PROC. 68.4(c). The issue of incompetency-to-be-executed is rarely litigated, and the facts in this case bear little resemblance to those underlying *Battaglia v. State*, this Court's last adjudication in an Article 46.05 proceeding. Two of three court-appointed experts found Mays incompetent to be executed; the third, who found Mays competent, was laboring under an undisclosed conflict of interest and a demonstrably flawed methodology. No expert found that Mays was malingering. The trial court's sparse order rests on several material misrepresentations of the factual record and demonstrates an alarming disregard for the relevant legal standard. Moreover, this case raises significant issues applicable beyond the incompetency-to-be-executed context when a trial court's conclusion is at odds with the opinions of mental health experts whose appointment is mandated by state statute and federal constitutional law. The complexity of the factual record and importance of the issues suggest that argument will assist the Court in the decisional process.

STATEMENT OF THE CASE

Randall Mays is currently confined under a sentence of death pursuant to the judgment of the 392nd District Court, Henderson County, Texas, cause B-15,717. Judge Carter Tarrance presided over the trial. 32 RR 76.[1] After a date was set for Mays's execution, his incompetency-to-be-executed was raised under Article 46.05 of the Texas Code of Criminal Procedure. On his behalf, Mays's counsel now asks this Court to review the trial court's order finding him competent. *See* **APPENDIX A** [Order]. The Order was entered by Senior Judge Joe Clayton, sitting by assignment. Judge Clayton was assigned to preside over the proceeding midstream because the elected judge in the 392nd district court of Henderson County, the Honorable Scott McKee, had been the elected district attorney who initially litigated against the Article 46.05 motion. Judge McKee took the bench when the original district court judge, who had presided over Mays's trial and much of the 46.05 proceeding, the Honorable Carter Tarrance, retired.

JURISDICTION

This Court has jurisdiction to review the trial court's order denying Mays's motion regarding his competency to be executed. *See Druery v. State*, 412 S.W.3d 523, 532-33 (Tex. Crim. App. 2013); TEX. CODE CRIM. PROC. art. 46.05.

[1] Citations to "RR" are to the Reporter's Record at trial. For instance, "32 RR 76" refers to volume 32, page 76 of the Reporter's Record. Citations to "EHRR" are to the Reporter's Record for the 46.05 evidentiary hearing.

ISSUES PRESENTED

Three court-appointed mental health experts opined that Mays is mentally ill, a conclusion supported by decades of mental health history, including two stays in psychiatric hospitals in the 1980s and diagnoses of paranoia, schizophrenia, psychosis, dementia, and neurocognitive disorder. Two experts concluded that Mays is currently incompetent to be executed because he lacks a rational understanding of the connection between his crime and punishment. A third expert found that Mays was competent to be executed. That expert was, however, laboring under a concerning conflict of interest that was not disclosed to the court at the time of his appointment and who used an unreliable methodology. ***No expert found that Mays was malingering.*** After a four-day evidentiary hearing and the introduction of voluminous materials into evidence, the trial court issued a two-page order announcing its conclusion that Randall Mays is competent to be executed. APPENDIX A at 2. The Order is devoid of legal analysis. The specific issues presented in this appeal are:

I. Did the trial court abuse its discretion by misapprehending the factual record, ignoring the reliable experts' assessments, and failing to apply the relevant standard dictated by *Panetti v. Quarterman*, in concluding that Mays is competent to be executed?

II. Are the dispositive facts and rationale underlying this Court's decision in *Battaglia v. State* readily distinguishable from this case?

PROCEDURAL HISTORY

Randall Mays was convicted on May 17, 2007, of capital murder arising from the shooting deaths of two police officers. 25 RR 143, 157. He was sentenced to death less than a year later. 32 RR 76.

On July 10, 2014, the trial court signed a warrant for Mays to be executed on March 18, 2015.

On February 10, 2015, the Office of Capital and Forensic Writs (OCFW) took over Mays's representation. Thereafter, a Motion Re Competency to Be Executed Pursuant to Code of Criminal Procedure Article 46.05 was filed, arguing that substantial evidence demonstrated that Mays was currently incompetent to be executed. CR[2] 7-32. On February 25, 2015, the State filed an opposition. CR 33-47.

At a hearing two days later, the trial court concluded that Mays had made a showing that "some doubt is raised in the mind of a reasonable man" about Mays's competency to be executed but found that the motion did not raise a "substantial doubt." Hearing on Motion Re Competency To Be Executed, 2-27-15.

The matter was then appealed to this Court, which first stayed Mays's execution and then, on December 16, 2015, reversed the trial court, holding that Mays had made a "substantial showing" of his current incompetency-to-be-executed. This Court also mandated further proceedings under Article 46.05. The

[2] "CR" refers to the Clerk's Record in the Article 46.05 proceeding.

Court's opinion was published as *Mays v. State*, 476 S.W.3d 454 (Tex. Crim. App. 2015).

Following the remand, the trial court set a status hearing. In advance of that hearing, Mays filed a Motion to Compel Expedited Discovery to Facilitate Article 46.05 Proceedings and a Motion Outlining Proposal for Article 46.05 Proceedings. CR 54-77, 79-87. The latter included a proposal for the court appointment of experts to evaluate Mays as Article 46.05(f) requires. The proposal cited several articles, including P.A. Zapf, *et. al*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 BEHAV. SCI. LAW 106 (2003) ("the 2003 Guidelines").

At the January 22, 2016, hearing, Judge Tarrance recognized that the court was statutorily required to appoint "at least two mental health experts" to conduct an evaluation in advance of any hearing regarding the merits of Mays's claim. *See* TEX. CODE CRIM. PROC. art. 46.05(f). To comply with this mandate, Judge Tarrance directed each party to submit a list of at least three experts they deemed qualified to conduct the requisite mental health evaluation. *See* **APPENDIX B** [1-22-16 Status Hrg Trans.].

On or around February 12, 2016, Mays's counsel submitted a list of three names and the State submitted a list of three names. CR 88-112; CR 145-167; DX46; DX47.[3]

On February 18, 2016, Judge Tarrance signed an Agreed Order on Preliminary Article 46.05 Proceedings, to which a copy of the 2003 Guidelines was attached as an exhibit at the suggestion of Mays's counsel. CR 122-144; **APPENDIX C** [Agreed Order with 2003 Guidelines]. The experts were directed to use the 2003 Guidelines, including sections one-three, excluding section four, of the checklist in the appendix, to assist in conducting their evaluations. Judge Tarrance recognized that section four, questions about the underlying offense and about counsel, are relevant to incompetency-to-stand-trial inquiry but not to incompetency-to-be-executed. *See* APPENDIX B at 19.

The Agreed Order also contained the following referral questions:

> 1. Does Mays suffer from a mental illness or mental impairment?
>
> 2. If so, does Mays's mental illness or mental impairment deprive him of a rational understanding of the connection between his crime and his punishment, *i.e.*, "if [Mays's] mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole?" *Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007).

[3] "DX" refers to exhibits Mays introduced into evidence at the 46.05 hearing.

In answering these referral questions, each expert was directed to "consider whether Mays's mental illness or mental impairment deprives him of: (1) a rational understanding that he is to be executed and that the execution is imminent or (2) a rational understanding of the reason he is to be executed." *Id.*

The Agreed Order also included various directives regarding logistics. For instance, each expert was to work independently and then convey his report directly to the court, which would convey the reports to counsel for Mays and for the State when they were all complete. *Id.*

In a letter dated February 18, 2016, the trial court notified the parties that it had selected one name from Mays's list of proposed experts (Bhushan S. Agharkar, M.D.) and one name from the State's list (Randall Price, Ph.D.). Those two experts, per the Agreed Order, were then directed to designate a third expert. Dr. Agharkar and Dr. Price together proposed George Woods, M.D. Each of these three experts was then appointed by the court and directed to provide an objective assessment of Mays's competency to be executed.

On October 28, 2016, Dr. Woods provided notice to the court that, due to family medical issues, he was forced to withdraw from the case. Subsequently, Dr. Agharkar and Dr. Price conferred, agreed that J. R. Merikangas, M.D. could replace Dr. Woods, and Dr. Merikangas was eventually appointed.

At the end of 2016, Judge Carter Tarrance retired from the bench. Meanwhile, counsel for the State, the elected District Attorney for Henderson County, Scott McKee, had been elected to district court judge of the 392nd District Court, and took office on January 1, 2017. Judge McKee thereafter recused himself from this proceeding, and Senior Judge Joe D. Clayton was appointed to preside. CR 167.

Subsequently, Dr. Merikangas had to withdraw before examining Mays. On March 8, 2017, the court reappointed Dr. Woods and directed him to submit his evaluation to the court on or before May 1, 2017.

After reviewing relevant materials produced jointly by the parties, and after clinical interviews with Mays at the Polunsky Unit, each of the three experts prepared a report. *See* **APPENDIX D** [Dr. Agharkar's Report]; **APPENDIX E** [Dr. Woods's Report]; **APPENDIX F** [Dr. Price's Report]. These reports were not produced to the parties until all three reports were first submitted to the court. On May 5, 2017, Judge Clayton conveyed copies of the three experts' reports to counsel for both parties. He also set a hearing for June 14, 2017.

The experts' reports demonstrated that all three had found that Mays suffered from a mental illness; two of the three (Dr. Agharkar and Dr. Woods) had concluded that Mays was incompetent to be executed; and a third expert (Dr. Price) had concluded that Mays was competent to be executed. *See* APPENDIX D; APPENDIX E; APPENDIX F.

The trial court thereafter ordered that an adversarial hearing would commence on August 9, 2017, in which both sides could present evidence and examine witnesses. The court received documentary evidence and listened to testimony on August 9-11, 2017. Closing arguments were held on August 12, 2017. *See* 1-19 EHRR. Thereafter, counsel for Mays submitted Proposed Findings of Fact and Conclusions of Law, which were filed on September 20, 2017. CR 203-58. Counsel for the State submitted a "Memorandum on CCP Article 46.05 Hearing" directly to the court, which was served on Mays's counsel but not filed with the clerk of court. *See* **APPENDIX H**.[4] On October 2, 2017, the trial court entered an "Order on TCCP Article 46.05 Hearing." APPENDIX A. This appeal followed.

LEGAL STANDARD

As a matter of state and federal law, "[a] person who is incompetent to be executed may not be executed." TEX. CODE CRIM. PROC. art. 46.05(a); *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Article 46.05 defines "incompetent to be executed" as a defendant who "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." TEX. CODE CRIM. PROC. art 46.05(h).

[4] The State's six-page memorandum contains no citations to the trial record or to the record developed during the 46.05 evidentiary hearing.

The proper understanding of "incompetent to be executed" has developed through case law. After the Supreme Court decided *Ford*, the Fifth Circuit interpreted the governing standard as being that a death-sentenced individual need only be aware "that he [is] going to be executed and why he [is] going to be executed." *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006) (citing *Barnard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994)); *see also Green v. State*, 374 S.W.3d 434, 442 (Tex. Crim. App. 2012) (noting that federal district court in *Panetti* found that "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution") (internal citations omitted). But that test was soon rejected.

As the Supreme Court subsequently clarified:

> [T]he *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware[ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Panetti v. Quarterman, 551 U.S. 930, 958 (2007).

Together *Ford* and *Panetti* make clear that, when a prisoner alleges incompetency-to-be-executed due to a mental illness or impairment, examinations must inquire into: (1) whether the prisoner suffers from a mental illness or impairment; and (2) whether that mental illness so distorts the prisoner's mental state that "his awareness of the crime and punishment has little or no relation to the

understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 959. In short, there must be an inquiry into whether a prisoner lacks a "rational understanding" of the connection between his crime and his punishment. "It is not enough for the prisoner to merely recite the proffered reason for his execution." *Battaglia v. State*, 537 S.W.3d 57, 65 (Tex. Crim. App. 2017).

In reviewing decisions under Article 46.05, this Court has previously found that the abuse of discretion standard applies. *Green*, 374 S.W.3d at 441. A trial court abuses its discretion by acting "without reference to any guiding rules and principles" or where "the act was arbitrary or unreasonable." *Downer v. Aquamarine Operations, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *see also Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op'n on rehearing) (finding an abuse of discretion and warning against trial court mistaking "common experience" for what "is really no more than the operation of a common prejudice").

STATEMENT OF THE FACTS

I. Mays Has a Long History of Mental Illness.

Records introduced into evidence during the adversarial hearing show that Mays has a long history of serious mental illness—including multiple commitments to a state psychiatric hospital decades before he was charged with a capital offense. More recent evidence shows deteriorating mental functioning.

In July 1983, Mays was involuntarily committed to the Terrell State Hospital, a state-sponsored psychiatric inpatient unit. Examining physicians found him "delusional, hallucinating, combative, and a danger to self and others" and diagnosed him with "hallucinosis." *Id.* at RM186-87, He was also described as pacing, talking to himself, refusing to communicate with others, and claiming "that the Devil had possession of him." *Id.* at RM193. Ten days after his commitment, Mays was discharged and instructed to return to the psychiatric hospital if he experienced psychosis in the future. *Id.* at RM195.

Two years later, Mays was involuntarily admitted to the Terrell State Hospital due to "see[ing] things," auditory hallucinations, and behaving wildly. *Id.* at RM233-34, 247. He was accompanied by officers who described him as "spaced out on crystal." *Id.* at RM245. He was diagnosed as having a drug addiction, but soon left the hospital before he was released. *Id.* at RM245.

By 1991, Mays, who had turned to drugs after his brother was shot and bled-out in Mays's arms, quit using drugs altogether. 2 EHRR 150-52; 31 RR 90, 113-19. Even so, his odd behavior persisted over subsequent decades. Specific examples of Mays's irrational behavior offered at trial include his:

- trying to attack a man on television after seeing him slap a woman;
- continuously walking around with an Icy-Hot patch on his head to help with "headaches";

- making random, incoherent digressions in the middle of conversations and then walking away;

- getting "a weird look in his eyes" like "he wasn't there;" and

- walking up to the bride and groom in the middle of his daughter's wedding ceremony to congratulate them then standing, transfixed, in the middle of the aisle.

31 RR 59, 69-70, 92, 119, 167-68, 174. Those who knew Mays in and around the small community of Athens, Texas described him as acting "strange," "peculiar," and "crazy" well before the underlying offense occurred. *See, e.g.*, 31 RR at 56, 91-92, 119. He did not, however, receive mental health treatment during those years.[5]

Mays's odd behavior, paranoia, and delusional thinking was known to law enforcement in his community. DX21-DX26. For instance, neighbors repeatedly reported Mays for shooting his shotgun toward vehicles or into the air. DX21 at RM2818, 2819, 2826; DX22 at RM2856-57. Police also knew Mays as a frequent 911-caller: about suspicious traffic passing his house out in the country, about fumes from burns that were choking him, about suspected break-ins, gas odors, generally suspicious activity, and his inability to sleep. *Id.* at RM2831-52. On December 25, 2001, a neighbor called the police to report that Mays "just came to [the neighbor's]

[5] During the 46.05 evidentiary hearing, Dr. Woods opined regarding social conditions that make this a common phenomenon, including a shortage of psychiatrists and psychologists, particularly in rural communities for lower-income people. 3 EHRR 136, 221-23, 227. Dr. Price also acknowledged that it was not unknown for someone to go for years with mental health problems and yet not seek or receive treatment. 3 EHRR 54.

residence and gave him a 1400 lb steer and a bull calf" and said Mays "has been acting strange the last few days." *Id.* at RM2822.

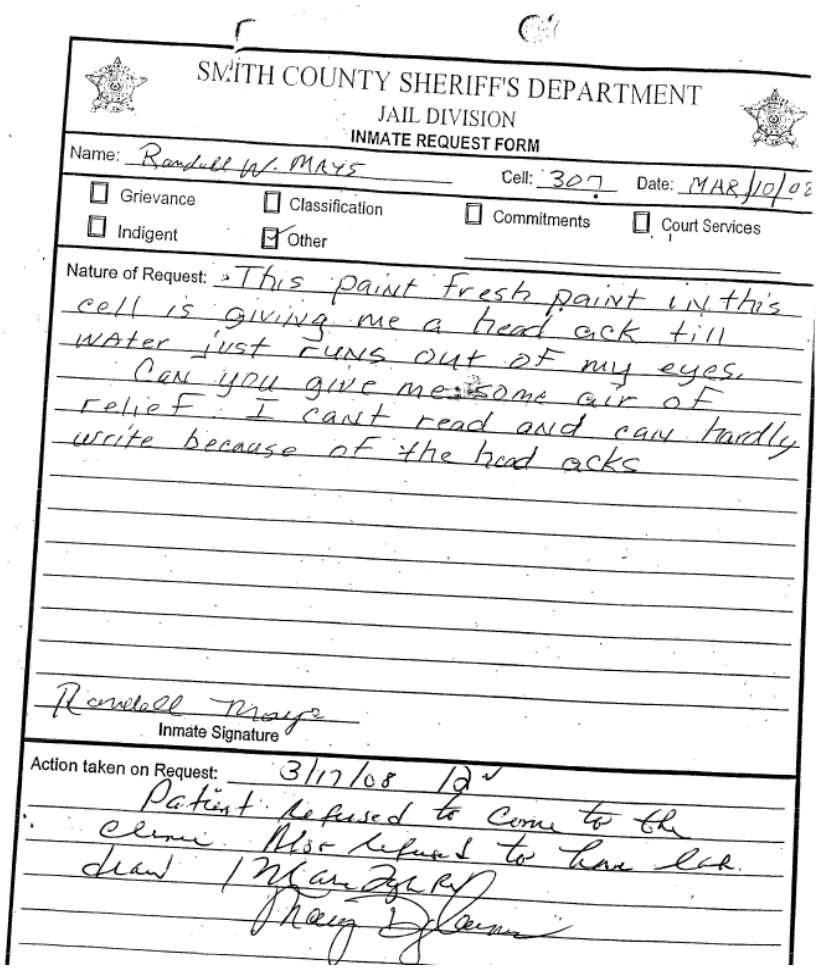
At the time of the offense, Mays lived on the edge of town on property surrounded by a tall, metal parameter fence covered with "Keep Out" signs, security cameras, and motion-activated lights. 33 RR 141; DX20-DX22. On May 17, 2007, after a neighbor complained yet again that Mays had been shooting into the dirt, police came on to his property. When they attempted to arrest him, chaos ensued. DX23.

The tragic outcome of this mental health crisis was the deaths of two police officers and injury to another as well as to Mays. *Id.*; 4 EHRR 22. Afterwards, Mays was transported to East Texas Medical Center. While hospitalized, a nurse observed him "talking to someone who was not there." DX4 at RM260. Hospital staff also noted: "[Patient] lying in bed, screaming for help. [The patient] [s]tates 'I think people are trying to poison me. 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 RM256. Soon thereafter, Mays was discharged to the Smith County Jail. *See id.* at RM249.

While awaiting trial, Mays was prescribed Zoloft, an anti-depressant, and Risperdal, an anti-psychotic. Two months later, the dosage of his anti-depressant had to be increased. DX8. He was also diagnosed with "Organic Brain Syndrome," an archaic term for "dementia." 3 EHRR 151-52. Dr. Vail, the treating psychiatrist,

concluded that Mays had a severe mental illness and diagnosed him with depression and psychotic disorder NOS (not otherwise specified). DX4 at RM136-38.

Mays's appointed trial counsel, Bobby Mims, noticed that Mays was mentally ill during the representation. 4 EHRR 7. Mims saw that Mays could not understand basic directives, like avoiding talking about his case in public. *Id.* at 8; *see also* DX33 (DVD of NBC footage). Mims also observed Mays's paranoia, reflected in his reluctance to sign releases but also when it came to accepting treatment after he had asked for help. *Id.* at 17. *See, e.g.*, DX8 at RM 621:



SMITH COUNTY SHERIFF'S DEPARTMENT
JAIL DIVISION
INMATE REQUEST FORM

Name: Randall W. MAYS Cell: 307 Date: MAR 10 08

☐ Grievance ☐ Classification ☐ Commitments ☐ Court Services
☐ Indigent ☑ Other

Nature of Request: This paint fresh paint in this cell is giving me a head ack till water just runs out of my eyes. Can you give me some air of relief. I cant read and can hardly write because of the hed acks

Randall Mays
Inmate Signature

Action taken on Request: 3/17/08 12[illegible]
Patient refused to come to the clinic. Mar refused to have lab. drawn [illegible]
Mary Dlamm

Shortly before trial, the defense team realized that they had likely missed something in the medical records: the reference to "Organic Brain Syndrome." *Id.* at 9-10; *see also* DX4 at RM294. But when they tried to obtain Mays's consent to undergo testing, Mays's paranoia was triggered again; he, who was ordinarily very meek and polite, became uncooperative and would not sign releases. 4 EHRR 11-12.

At the time, Mims did not recognize that he should have had his client tested for incompetency-to-stand-trial and otherwise have him evaluated by a mental health professional. 4 EHRR 12-16.

At trial, Dr. Vail, a treating psychiatrist retained by the jail, testified to Mays's delusions and auditory hallucinations, as well as his fear that he was being poisoned and "plotted against." 31 RR 21-23. She also testified about efforts to treat him with anti-psychotic medication. 31 RR 25.

Other mental health experts testified at trial about Mays's history of mental illness; but these experts had not actually met with Mays to evaluate him. Defense counsel's decision to retain mental health experts but deprive of access to the client arose from counsel's fear of the implications of the *Lagrone* case,[6] a decision Mays's trial counsel came to regret because it was based on a misunderstanding of that case. 29 RR 8-26; 31 RR 123-37; 4 EHRR 14-16.

[6] *See Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

During trial proceedings, Mays's team had issues with him arising from his mental health problems: "All of a sudden, Randall just changed. And I have never seen anything like it. It's almost like – he's a very meek man, very humble, very courteous, very polite, very responsive, at least to counsel at that time. . . . All of the sudden he just changed." 4 EHRR 21. At trial, his sister testified about a history of similar behavior:

> Q. Describe that for the jury. What happens to him when he suddenly changes?
>
> A. I'm not sure, but he gets a look on his face, and it's -- and you can be talking to him and discussing, you know, what he did that day or what I did that day, and then all of a sudden, he just stares at you in this weird -- and he goes to saying stuff, and you don't know what he's talking about. And then he may just turn around and walk off.
>
> Q. Have you ever tried to get him into mental health?
>
> A. No. . . . If he talks and says crazy stuff, I told him, "I don't want to hear that. You know, that's crazy" or -- and I may hang up on him if we're on the phone, you know.
>
> Q. Be fair to say he's a pretty peculiar fellow?
>
> A. He is, but he's very loving, and, you know, he has a good heart. I don't understand how all this stuff like this can happen.

31 RR 91-92. Mays's reaction to hearing this testimony was to blurt out "I love you" in court. *Id.* Several times during the trial, Mays was unable to control his emotions. *See, e.g.*, 32 RR 85 (removing Mays from the courtroom for sobbing and calling out "I'm sorry for your loss" during victim-impact statements); 4 EHRR 20.

II. Mays's Persistent Delusions and Mental Impairments Are Captured in TDCJ and Other Records.

After Mays was sentenced to death and confined to the custody of the Texas Department of Criminal Justice (TDCJ), he was given a mental health screening instrument by TDCJ's agent, the University of Texas Medical Branch (UTMB). DX9. The results show that Mays had at least below-average intelligence and below-average executive functioning. *Id.* at RM1152. UTMB recommended that he be evaluated further, but no records suggest that this recommendation was followed. *Id.*

In 2009, a neuropsychologist retained by his post-conviction counsel, Dr. Joan Mayfield, gave Mays a full battery of neuropsychological tests. Her test results demonstrated that Mays had major neurocognitive impairments as indicated by objective testing, and she diagnosed Mays with Dementia NOS secondary to chronic amphetamine and related sympathomimetic abuse, as well as Depressive Disorder NOS. *Id.* at RM176-78. Dr. Mayfield also noted that Mays was "hesitant to answer any personal questions or engage in conversation." DX4 at RM175. During state writ proceedings, Dr. Mayfield testified that Mays was "withdrawn . . . and sometimes hesitant to talk about his history" but "very polite." DX6 at RM529. She also described him as having a "loss of cognitive functioning" exacerbated by "novel, complex, difficult, [and] stressful situations." *Id.* at RM548, 550.

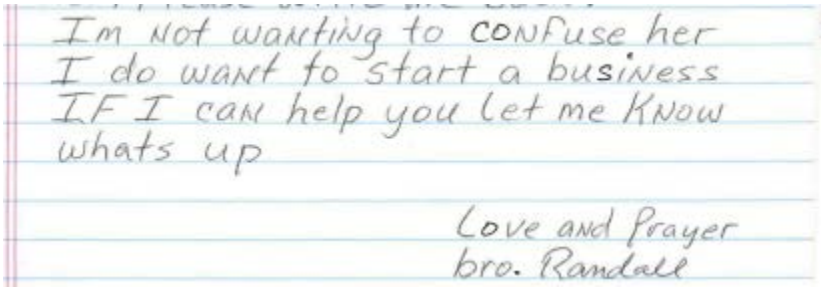
Since then, Mays has continued to exhibit signs of severe mental illness and delusional thinking. For instance, in November 2011, Mays sought treatment from

TDCJ/UTMB for trouble breathing due to being "allergic to ozone." DX4 at RM298. Likewise, in June 2012, TDCJ recorded that he complained: "I am having problems breathing my head hurts and my chest hurts I am getting dizzy I believe the air vented in is the problem and I want to be moved." DX17 at RM2258; *see also* DX4 at RM304. According to medical staff, Mays did not exhibit any signs of respiratory issues, however. DX4 at RM304. UTMB personnel described Mays's affect as "peculiar" and diagnosed him with an unspecified "mental illness." DX7 at RM607-9. But there was no follow-up.

Another recurrent theme in the prison records is Mays's concern about "someone intentionally put[ting] something in his food to make him sick." DX4 at RM307. Medical staff noted, "[Mays] does believe someone intentionally put something in his food to make him sick. When asked who he thought did such a thing, he said 'the offenders, and maybe some officers.' When asked if he felt he had been singled out or if it was a general problem with the food he said 'maybe they singled me out because I won't participate in their games.'" *Id.*

Mays continued to experience specific persecutory delusions, and in the summer of 2014, UTMB staff recommended that he be "evaluated by mental health" due to his preoccupation with "gases in the air." DX4 at RM308. But there is no record of Mays receiving these services.

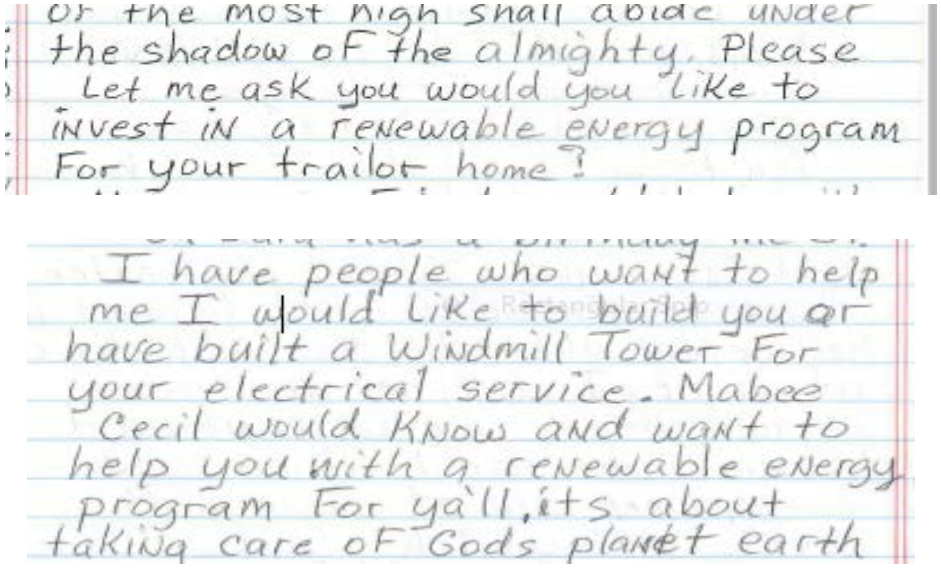
Mays's delusions are also evident in letters to family members sent from death row. In a December 2, 2014, letter to his sister, he states


Im not wanting to confuse her
I do want to start a business
IF I can help you let me Know
whats up

Love and Prayer
bro. Randall

DX4 at RM169. This letter, detailing Mays's desire to start a business in the future, was written shortly before his scheduled execution date (which had, by then, been set for March 2015).

Mays again wrote to his sister on December 29, 2014:


of the most high shall abide under
the shadow of the almighty. Please
Let me ask you would you like to
invest in a renewable energy program
For your trailor home?

I have people who want to help
me I would like to build you or
have built a Windmill Tower For
your electrical service. Mabee
Cecil would Know and want to
help you with a renewable energy
program For ya'll, its about
taking care of Gods planet earth

Id. at RM170-71. That is, two and a half months before his scheduled execution date, Mays was under the impression that he would still have the opportunity to (1) start a business and (2) physically build a windmill for his sister.

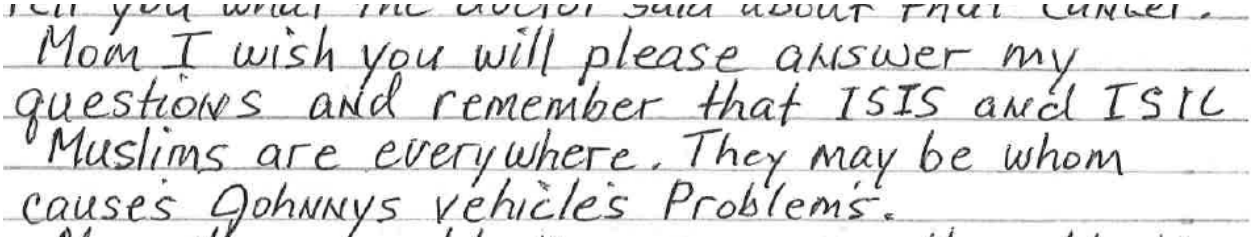
On January 25, 2015, Mays again wrote to his sister about his proposed business venture. *Id.* at RM172. At that time, his renewable energy obsession appears repeatedly in letters to family and friends. *See, e.g.*, DX4 at RM169-71; DX12 at RM2069, RM2085, RM2086, RM2097, RM2115, RM2133.

Shortly before his scheduled execution, on February 5, 2015, an attorney named Katherine Black met with Mays at the Polunsky Unit for approximately two hours. Throughout the meeting, Mays had difficulty speaking. During frequent pauses, Mays would "grab his head and wrinkle his face with his eyes closed." DX4 at RM133. Mays admitted that he heard voices that he connected to "evil spirits." *Id.* To quell the voices, he would "stuff his ears with paper, put socks over his head, lie with his head next to the fan, flush the toilet, or make noise." *Id.*

Mays also complained to Black that ozone in the air filled his prison cell with carbon monoxide and caused him pain—a complaint consistent with previous complaints to TDCJ and UTMB personnel that had prompted the latter to recommend a mental health evaluation in 2014, which was never undertaken, and consistent with delusions about noxious air predating his incarceration. *Id.* at RM134; *see also* DX22 at RM2831-52. Additionally, Mays brought up his plans for a renewable energy business. Mays's answers to Black's questions were "vague and muddled" and suggested disorientation with respect to time. For example, he stated that he was sixteen years old when his brother Noble died in 1995, when in fact

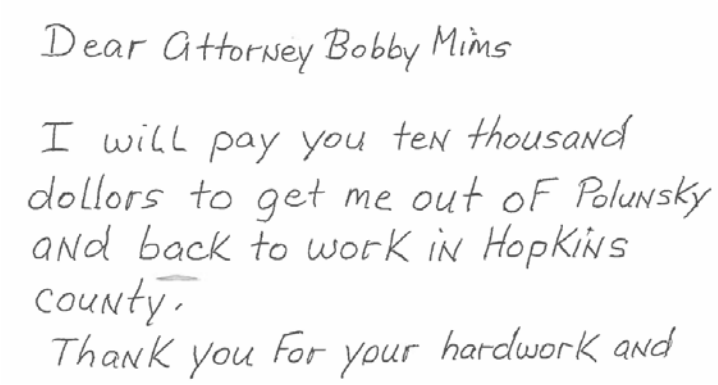
Mays would have been thirty-six years then. *Id.* When asked why he was in prison, Mays failed to give a clear answer and seemed to be confused by the question. *Id*.

Mays's letters to family members are peppered with complaints about guards conspiring to poison him, poisoned air in his cell, and other signs of chronic paranoia, for instance, suggesting to his mother that ISIS Muslims everywhere might be causing the problems a relative was having with his vehicle:


Mom I wish you will please answer my questions and remember that ISIS and ISIL Muslims are everywhere. They may be whom causes Johnnys vehicles Problems.

DX12 at RM2128.

More recently, Mays, who is indigent, has taken to writing letters offering to pay people large sums, including his former lawyer Bobby Mims, if they will help Mays develop his renewable energy business or bring disability lawsuits. 4 EHRR 33-38. In July 2017, Mays wrote to Mims, who has not represented Mays since his trial in 2008, offering $10,000 if Mims would help him "go back to work in Hopkins County":


Dear Attorney Bobby Mims

I will pay you ten thousand dollors to get me out of Polunsky and back to work in Hopkins county.

Thank you for your hardwork and

DX50; *see also* DX52. Mays, who is indigent, would have no way under TDCJ rules to send money from Polunsky to someone in the free world even if he had money to send. 3 EHRR 59, 66.

III. Mays Exhibited Symptoms of Mental Illness and Delusional Thinking When Interviewed by Court-Appointed Experts.

Three court-appointed mental health experts were tasked with reviewing copious records and then interviewing and assessing Mays. In each of these interviews, he exhibited symptoms consistent with his history of paranoia and delusional thinking.

Court-appointed expert Dr. Agharkar met with Mays first on June 6, 2016. During this initial interview, Mays described hearing the voice of God intermittently since he was a child. Dr. Agharkar found that Mays appeared paranoid and refused to answer or elaborate on many questions. DX36 at 1.[7] But Mays did tell Dr. Agharkar that he had received a patent for a renewable energy design, that it was not

[7] Dr. Agharkar's report is attached as APPENDIX D.

for sale, and, importantly, that the State was trying to execute him to prevent him from making his invention. *Id*. Dr. Agharkar interviewed Mays a second time on August 18, 2016. During this second interview, Mays displayed more odd behavior. In addition to expanding on his belief that the State was trying to execute him because of his wind energy design, he thought that Dr. Agharkar's shirt had a secret code on it, and he did not believe Dr. Agharkar when he denied there being a code:

> at one point, this was the second interview, [Mays] began responding to some writing that was on my T-shirt. There was a series of numbers, and he asked me about those. He said, What does this mean? And I looked down, and I said, It's the manufacturer of the shirt. I don't know. And he clearly did not believe me, and he absolutely believed there was some sort of code there that he -- that I was pretending not to know about, really. That's called ideas of reference, and that's actually a very well-known psychotic symptom as well.

2 EHRR 54-55.

Court-appointed expert Dr. Price, whom the State had recommended, met with Mays on September 13, 2016. Although Mays remained guarded during Dr. Price's short interview, Dr. Price's notes show that Mays described his breathing problems caused by the "ozone" and "acid in the air" and how he had had "problems w/breathing since in 20s." DX40.[8] Dr. Price noted that Mays "cried" spontaneously at one point, but then said he did not want to talk about his family, the past, what it means to be executed, and many other subjects. *Id.* When Mays was asked about the

[8] Dr. Price's report is attached here as APPENDIX F.

details of the crime, Dr. Price reported that Mays said they "*say* that I murdered 2 police officers." *Id.* He also told Dr. Price that "the Bible says the devil is trying to kill me." *Id.*

Court-appointed expert Dr. Woods met with Mays on April 27, 2017. During Dr. Woods's clinical interview, Mays described developing a wind device to be used in the energy sector. He believes it is worth "billions of dollars." DX42.[9] When asked if he was willing to sell the technology to Texas to save his life, he asked, "How much are they willing to pay?" He then said, "No." He then explained his belief that Texas is trying to kill him to keep the device from coming to market. He believed he had a 50/50 chance of getting out and selling his technology. *Id.* at 19-20.

Mays explained to Dr. Woods his belief that this wind device would hurt the oil industry tremendously and, therefore, he is being conspired against. Mays acknowledged working on his project more than his legal case and stated that he reads about little else, except for the Bible. When asked if he would trade the secrets of his device in return for his life, he replied, "No." *Id.*

When Dr. Woods asked Mays how the State of Texas found out about his windmill business, he said they copied his mail to his sister. He said he knew they read it. He then elaborated about his attempts to bring his sister into the business because she had worked in the "electrical" business for more than twenty years. He

[9] Dr. Woods's report is attached as APPENDIX E.

reported that she said she was "too busy with other things like family" to be part of his business, but he hoped to get her help when he was released. In reality, Mays's sister has long worked in plumbing sales, not electricity, and Mays was not going to be released. *Id.* at 20; DX4 at RM198.

During Dr. Woods's clinical interview, Mays also showed a profound lack of understanding about his health situation. He said he took Ibuprofen for his "asthma," attributing his breathing problems to "different air in the cells." *Id.*

IV. All Three Court-Appointed Experts Found That Mays Has a Mental Illness and Two Found Him Incompetent To Be Executed.

A. Dr. Agharkar diagnosed Mays with a mental illness and found him incompetent to be executed.

Dr. Agharkar concluded that Mays has a mental illness or mental impairment. Specifically, he found that Mays suffers from both schizophrenia and a neurocognitive disorder, dementia. 2 EHRR 64.

Dr. Agharkar's report describes a history of symptoms of mental illness captured in the records and corroborated by his clinical interview of Mays. These symptoms include paranoia, delusions, hallucinations, and persecutory beliefs. DX35 at 2-4. "Mays appears to have had a long history of psychotic mental illness most consistent with Schizophrenia. There are a number of reports of odd and bizarre behavior dating back at least thirty years." *Id.* at 5. Dr. Agharkar also noted that

"Mays has a severe and persistent deteriorating brain disease," specifically dementia. *Id.* at 6.

Dr. Agharkar testified as to his diagnosis at the hearing. He explained that dementia is a degenerative brain disease that is debilitating over time; dementia cannot be cured and is irreversible. 2 EHRR 41-42. He gave Mays screening tests, whose results were consistent with neuropsychological testing undertaken by Dr. Mayfield and Dr. Woods; those tests revealed a major neurocognitive disorder. *Id.* at 41, 53.

Dr. Agharkar opined that, to qualify for a diagnosis of schizophrenia, the individual needs to show just two of five symptom clusters identified in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM).[10] 2 EHRR 64. Dr. Agharkar found that Mays exhibited *three* symptom clusters: hallucinations, delusions, and disorganized thinking. *Id.* Because Mays had exhibited these symptoms for longer than six months, Dr. Agharkar believed a diagnosis of schizophrenia was justified. The records show signs of Mays's mental illness over time, including paranoia, exemplified by Mays's frequent complaints about being poisoned by guards or the environment. 2 EHRR 39. Dr. Agharkar also found a history of delusions and hallucinations. *Id.* In Dr. Agharkar's professional

[10] The DSM is published by the American Psychiatric Association (APA). 3 EHRR 83. It is now in its fifth edition: the DSM-5.

opinion, the consistency of reported symptoms of mental illness supported the conclusion that Mays was ***not malingering*** regarding his symptoms. *Id.* at 40. He also opined that Mays qualified for a diagnosis of schizophrenia. *Id.*

Dr. Agharkar concluded that Mays does not have a rational understanding of why he is to be executed:

> while Mr. Mays knew where he was located and that the state of Texas intended to execute him, he did not evidence a rational understanding as to why. His beliefs about why he is to be executed are rooted in delusional thinking, the product of a severe psychotic mental illness and a damaged brain. Indeed, it is particularly his significant brain damage that makes it extremely unlikely that Mr. Mays will ever rationally understand why he is to be executed as this condition exacerbates his paranoia and severely hampers his ability to rationally consider his present situation. It is therefore my opinion, to a reasonable degree of psychiatric certainty, that Mr. Mays is incompetent to be executed.

APPENDIX D at 6. Therefore, Dr. Agharkar concluded that Mays is not competent to be executed under the controlling standard.

B. Dr. Price diagnosed Mays with a mental illness.

Dr. Price concluded that Mays has a mental illness or mental impairment. Specifically, he concluded that Mays has mild Neurocognitive Disorder among other mental illnesses and a paranoid personality disorder. 3 EHRR 56; DX39.

Dr. Price based his diagnosis, in part, on a one-page dementia screening instrument that he administered to Mays, the Montreal Cognitive Assessment (MoCA). Dr. Price made multiple math errors in assessing the results of this test, thereby artificially inflating Mays's score. 2 EHRR 193; 3 EHRR 94; 3 EHRR 203.

Despite his scoring errors, Dr. Price concluded that Mays has a neurocognitive disorder.

Dr. Price found no fault with Dr. Mayfield's neuropsychological testing from 2009, which showed that Mays was profoundly impaired. Yet Dr. Price disagreed with Dr. Mayfield's conclusion regarding the degree of Mays's impairment, without explaining why her diagnosis was inappropriate in light of her testing. *See* 3 EHRR 80-82. He also failed to discuss her findings in his report. *See* DX39.

Dr. Price acknowledged that the DSM-5 considers the distinction between mild neurocognitive disorder (his diagnosis) and major neurocognitive disorder (Dr. Woods's and Dr. Mayfield's diagnoses) to be arbitrary; both labels refer to a mental illness that is degenerative and incurable. 3 EHRR 83-84.

Dr. Price also testified that Mays has a "somatoform disorder," such that the many physical symptoms about which he complains cannot be fully explained by an underlying medical condition and more likely reflect a mental disorder. 2 EHRR 170-72. Dr. Price admitted that a somatoform disorder likely indicates masked mental health issues that Mays himself may not recognize. 2 EHRR 202. Yet Dr. Price did not discuss this conclusion, supported by a range of records, in his report. *See* DX39.

Dr. Price admitted that the records he reviewed reflected a long history of paranoia, and he diagnosed Mays with a "paranoid personality disorder" and as

being delusional "about the ozone and the air in the prison." *See id.*; 2 EHRR 148. Dr. Price also admitted that Mays's pronounced paranoia would likely explain his suspicion about being asked to sign away some perceived right or answering certain kinds of questions. 2 EHRR 172, 179, 187.

Dr. Price acknowledged that his report emphasizes his belief that there was a correlation between Mays's drug use in the 1980s and his current mental illness. Yet Dr. Price admitted that the cause of the mental illness or impairment is not relevant to the competency inquiry and that there was no evidence that Mays has used drugs for several decades and was, instead, evidence that he had *quit* using drugs entirely about 25 years before Dr. Price's assessment. 2 EHRR 151-52; DX39.

Dr. Price further admitted that Article 46.05 does not require a specific kind of mental illness or make the cause of the mental illness or mental impairment relevant. 2 EHRR 150-52.

Despite finding "[s]everal mental disorder diagnoses are appropriate for Randall Mays[,]" Dr. Price concluded: "these mental disorders do not deprive Randall Mays of a rational understanding of the connection between his crime and his punishment even though he is against the death penalty, feels his conviction was totally unfair, and is so depressed and anxious about his impending execution that he intentionally will not say the words 'death penalty' or 'execution.' He is extremely reluctant to discuss his punishment because it seems to upset him so much.

He also has difficulty discussing the concept of death." DX39 at 17. Therefore, Dr. Price concluded that Mays is "competent for execution." *Id.* When asked to explain how he defined the term "rational understanding," Dr. Price could not do so. 2 EHRR 221.

C. Dr. Woods diagnosed Mays with a mental illness and found him incompetent to be executed.

Dr. Woods concluded that Mays has a mental illness or mental impairment. Specifically, in his professional opinion, Mays suffers from a major Neurocognitive Disorder as defined by the DSM-5 and has psychosis. DX42 at 24-25; 3 EHRR 135-36. Dr. Woods found Dr. Mayfield's 2009 neuropsychological testing comprehensive and "very important." 3 EHRR 25; 3 EHRR 118. He, the expert who had assessed Mays closest in time to the evidentiary hearing, also found evidence that Mays has declined in terms of his delusions and paranoia since Dr. Mayfield's testing was performed. *Id.* at 3 EHRR 196.

Dr. Woods noted that Mays has been free of substance abuse for more than twenty years, which allows distinguishing his neurobehavioral disorder from a substance use disorder. DX42 at 25. Dr. Woods found that the history of delusions and hallucinations, with symptoms spanning decades, is inconsistent with the conclusion that his psychosis was drug-induced.[11] *Id.* at 26.

[11] The cause of a mental illness is not relevant to the competency inquiry. *See* TEX. CODE CRIM. PROC. art. 46.05.

In addition to a major Neurocognitive Disorder, Dr. Woods found that Mays manifests symptoms that are consistent with the diagnostic criteria for schizophrenia, thus that diagnosis cannot be ruled out. *Id.* at 25; 3 EHRR 133. Dr. Woods concluded that Mays has psychosis but found insufficient social history records to determine what type of psychosis he has. 3 EHRR 135-36, 157.

Dr. Woods noted Mays's long history of paranoia, as reflected in the records, and described him as a "profoundly demented man with additional delusional thinking." DX42 at 26. He saw ***no evidence to indicate that Mays was malingering***. *Id.* at 27; *see also* 3 EHRR 206-09 (explaining at length how "no one has found Mr. Mays to malinger in any way" during any assessments over the years).

Dr. Woods distinguished paranoia as a symptom of a mental illness from "Paranoid Personality Disorder," which Dr. Price had found. 3 EHRR 137-39, 164. Mays had a documented "history of paranoid ideation" and of acting on paranoid beliefs, dating back to the 1970s and up through his recent visits with all three court-appointed experts; but, by all accounts, he had "been a pretty pleasant guy …. gotten along well with people. He's been married for 20 years. He writes lovely letters to his wife. In the trial, a doctor came in who he did work for and said that he did good work for him, although he noticed -- even the doctor noticed" his odd behavior. 3 EHRR 138-39. As Dr. Woods explained, Mays's ability to make some social attachments as well as the depth of his delusions are inconsistent with a paranoid

personality disorder diagnosis, as opposed to with the diagnosis of a mental illness, such as schizophrenia. *Id.* at 139.

Dr. Woods described at length the nature of delusional thinking and how Mays's delusions are based on deeply held, fixed beliefs that are pervasive and rooted in his rural Texas culture and experiences. 3 EHRR 120-28; DX42 at 27.

Dr. Woods concluded that Mays does not have a rational understanding of why he is to be executed:

> Randall Mays is a profoundly demented man with additional delusional thinking. His delusional thinking, a deeply held belief that Texas want[s] to kill him in order to protect their oil business from his wind-driven sustainable concoction, is consistent with the fixed, false belief required for delusional thinking. His delusional beliefs are intermixed with an eroding brain that is no longer working, a brain that believes he is developing a wind-driven, sustainable energy source that he will be able to walk off Death Row to launch a successful business.
>
> Mr. Mays does not understand Texas is attempting to execute him for committing a crime. He recognizes that he was convicted of a crime. He does not have a rational understanding of the connection between his crime and punishment. Mr. Mays does not connect the crime to his pending execution. Rather, he believes the State of Texas is vigorously attempting to prevent him from being able to perfect his technology and personally bring it to the energy market place. Mr. Mays' mental state is so distorted by a mental illness that his awareness of the crime and punishment has no relationship to the understanding of those concepts shared by the community.

APPENDIX E at 26-27. Therefore, Dr. Woods concluded that, in his professional opinion, "to a reasonable degree of neuropsychiatric certainty, that Randall Mays meets the Ford standard for incompetence and is therefore incompetent to be

executed." *Id.* at 27.

ARGUMENT

I. The Trial Court Abused Its Discretion by Misrepresenting the Factual Record, Ignoring the Reliable Experts' Assessments, and Misapplying the Relevant Legal Standard required by *Panetti*.

The trial court abused its discretion in assessing Mays's competency-to-be-executed, making multiple categorical errors in a two-page Order. That Order does not merit deference where the record demonstrates that Mays more than carried his burden to establish his incompetency by a preponderance of the evidence and where the only bases offered by the trial court for a finding to the contrary are divorced from "any guiding rules and principles" and reflect "arbitrary or unreasonable" decision-making. *Downer*, 701 S.W.2d at 241-42 (Tex. 1985); *see also Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op'n on rehearing, explaining trial court abuses its discretion "when it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason").

A. The trial court's Order reflects disregard for the professional opinions of the qualified experts who used a reliable methodology.

1. The Order ignores one mental health expert entirely.

The trial court's Order does not even mention the opinions of Dr. Agharkar or explain why his assessment as a medical doctor should be disregarded.

Dr. Agharkar is a graduate of the Emory University School of Medicine, where he also had a Forensic Psychiatry Fellowship and an Adult Psychiatric Residency. Dr. Agharkar additionally served as Chief Resident at Emory University Hospital. DX34. He has a medical license in the State of Georgia and is a Diplomate in both Forensic Psychiatry and Adult Psychiatry from the American Board of Psychiatry and Neurology. *Id.* Dr. Agharkar has a private practice in psychiatry, Comprehensive Psychiatric Services of Atlanta. *Id.* Dr. Agharkar estimated that he spends 60% of his time on forensic psychiatry, 30% in clinical work treating patients, and 10% teaching. 2 EHRR 30. He is currently a professor at Emory University School of Medicine and Morehouse School of Medicine and has held other teaching positions. DX34. Dr. Agharkar has been retained numerous times by both the State and the defense to conduct forensic evaluations and has conducted evaluations for various law enforcement agencies. 2 EHRR 73, 120. He has conducted competency evaluations previously, including competency-to-be-executed evaluations. *Id.* at 118.

Dr. Agharkar found that Mays lacks a rational understanding of why Texas seeks to execute him. Dr. Agharkar determined that Mays's lack of rational understanding is reflected in his delusional, paranoid thought process. DX35 at 6. Mays, who has a ninth-grade education and a markedly low IQ, told Dr. Agharkar that, since he had been incarcerated on death row, he had received a patent for a

renewable energy source. *Id.* at 2. Mays believes that the prison had leaked his design to the public, because after he sent out paperwork to get his patent he started seeing the technology discussed in the newspapers. *Id.* at 2-3. Dr. Agharkar elaborated in his report:

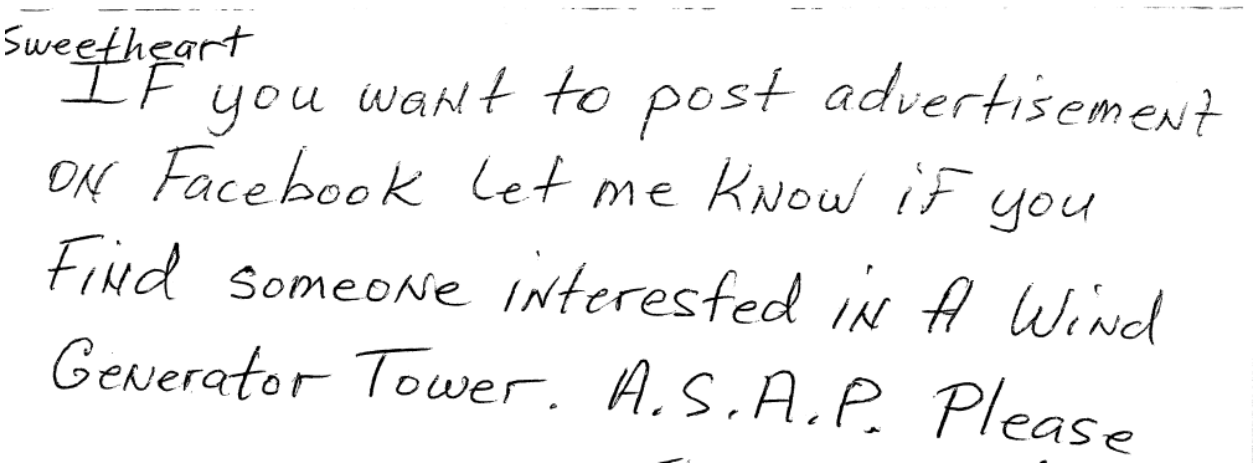
> Based on Mays's perception that the prison is aware of his technology patent, he believes the state of Texas is trying to execute him to keep him from making his invention. He said, "a lot of businesses would lose a ton of money," and the major electric and oil companies would not want to see this invention made because it would save the average consumer a great deal of money and put them out of business. He also believes Texas wishes to execute him so they would not have to pay for all his medical costs, which he believes to be significant. Mays also stated to me that the warden could be pressured by the power companies to execute him since they would stand to lose "billions of dollars" if his invention was made. He also told me the warden makes "a lot of money by executing me" and that he's "paid a lot of money to do it," though it was not clear to me if this money would come from the electric/power companies.

Id. at 3.

In Dr. Agharkar's professional opinion, while Mays understands that Texas is trying to execute him, he believes that this is because of his energy invention and medical costs. 2 EHRR 66. He believes that big corporations are actively involved with the State in trying to kill him to silence him regarding his invention. *Id.* Mays believes that the corporations are concerned that he will cost them money to the point that it can put the corporations out of business if his invention is used. *Id.* at 60, 66. He thinks that the corporations want to "steal his technology and bury it." *Id.* at 60.

Dr. Agharkar concluded that Mays's lack a rational understanding and his delusional thinking are not malingered. DX35 at 6-7; 2 EHRR 40.

The only mention the trial court's Order makes of Dr. Agharkar is in conjunction with an incorrect assertion about letters that Mays had written to family members that were admitted into evidence. Judge Clayton claimed that he did not see in these letters "any sign of [Mays's] obsession with wind energy that Dr. Woods and Dr. Agharkar referred to." APPENDIX A at 1. But letters that were admitted into evidence (which did not purport to be comprehensive) actually contain numerous references to Mays's windmill obsession. *See, e.g.*, DX4 at RM16971; DX12 at RM2063, 2069, 2086, 2097, 2115, 2133; *see also* DX4 at 2085:


Sweetheart
IF you want to post advertisement
ON Facebook Let me KNOW if you
FIND someone interesfed in A Wind
Generator Tower. A.S.A.P. Please

Thus, the trial court's characterization is flat-out wrong—and yet this incorrect assessment is the only basis offered for entirely ignoring Dr. Agharkar's expert opinions. A conclusion based on an incorrect assessment of the factual record is an abuse of discretion.

2. The Order dismisses another mental health expert on indefensible grounds.

The trial court's Order cavalierly dismisses the opinions of Dr. George Woods, a highly qualified and experienced neuropsychiatrist retained by the court.

Dr. Woods received his medical degree from the University of Utah. DX41. He conducted his residency in psychiatry at Pacific Medical Center in San Francisco, California. *Id.* He has a medical license in the State of California and is a Diplomate of the American Board of Psychiatry and Neurology. *Id.* Dr. Woods is the Immediate Past President of the International Academy of Law and Mental Health. *Id.* He has maintained a private practice in psychiatry for over thirty years. He is a physician specializing in neuropsychiatry, which involves taking information obtained from neuropsychologists and neurologists and using it, along with his medical training, to assess mental disorders. 3 EHRR 99, 108. Dr. Woods estimated that he spends about 65% of his time on forensic psychiatry, 20-25% in clinical practice, and the remaining 10-15% consulting with companies on projects dealing with neurology. *Id.* at 111. Dr. Woods has had numerous teaching positions throughout his career and is currently a lecturer at the University of California, Berkeley, School of Law. DX41. He has also taught and conducted evaluations for various law enforcement agencies. *Id.*; 3 EHRR 112.

Dr. Woods found that Mays lacks a rational understanding of why Texas seeks to execute him. In his report, Dr. Woods explained that Mays has "a deeply held

belief that Texas wants to kill him in order to protect their oil business from his wind-driven sustainable concoction." DX42 at 26. According to Dr. Woods, Mays's "delusional beliefs are intermixed with an eroding brain that is no longer working, a brain that believes he is developing a wind-driven, sustainable energy source" with which "he will be able to walk off Death Row to launch a successful business." *Id.* Dr. Woods found that this delusion prevents Mays from having a rational understanding of the connection between the crime that he was convicted of and his pending execution. *Id.*

Dr. Woods explained that Mays's delusion is not simply his belief in a renewable energy plan, but that Texas is trying to execute him to prevent him from marketing and developing his wind energy design. 3 EHRR 197. Mays is under the impression that the State found out about his design by reading his mail. *Id.* at 162. Mays is so paranoid that he told Dr. Woods he would not sell his design in exchange for getting off of death row. *Id.* at 158.

Dr. Woods found that Mays has two primary fixed delusions: (1) that the state government is conspiring with oil companies to deprive him of his windmill device and wants to kill him to keep it off the market and (2) his long-standing somatic delusions that people have been trying to poison him or contaminate his food or the air. 3 EHRR 122-26, 155-57, 159. Dr. Woods testified that these delusions are not inconsistent with the knowledge that the State says he is in prison for shooting two

police officers and was convicted for that crime. 3 EHRR 129; *see also Panetti*, 551 U.S. at 958 (ruling that mere knowledge of the stated reason for the execution does not show that the death-sentenced individual has a "rational understanding" sufficient to be found competent). These beliefs can co-exist, but, in Dr. Woods's opinion, Mays's "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." 3 EHRR 129.

Dr. Woods further explained that having dementia, being delusional, and lacking a rational understanding of his circumstances do not preclude Mays from being able to write; the brain is sufficiently complex that a person can have a severe mental illness, be "unable to weigh and deliberate," and still be able to do all kinds of tasks. *Id.* at 131 (describing the circumstances of a basketball coach with Alzheimer's dementia who could, for an extended period, still win basketball championships).

Dr. Woods opined that, because Mays is profoundly paranoid, that is exactly why he would not describe in letters sent to his family, which he knew the State was reading, his deeply held belief that the State is trying to kill him to prevent his wind technology from destroying the oil industry. 3 EHRR 248-49.

Yet the trial court wholly dismissed Dr. Woods's clinical opinions without discussion. Instead, the trial court suggested that Dr. Woods's objectivity could be questioned (and all of his expertise and specific conclusions disregarded) because

the judge observed him "passing written notes to counsel for the Defendant during her examination of Dr. Randall Price." APPENDIX A at 2. This observation somehow led the court to conclude that Dr. Woods "had become an advocate" rather than someone offering "an objective assessment." *Id.* at 2.

The trial court's conclusion is unsound for at least two reasons. *First*, the Court had no way of knowing what the content of Dr. Woods's note was since no such note was admitted into evidence or described on the record. *Second*, if passing a note were a basis to disavow an expert's opinion, than it seems decidedly odd that the trial court relied solely on Dr. Price who was observed meeting privately with counsel for the State repeatedly before and during the proceeding—a fact noted on the record. 2 EHRR 138-39. The decision to disregard Dr. Price's extended conferences with the State in private (as opposed to a note passed openly in court) is even more troubling considering that it was developed on the record that Dr. Price was laboring under an conflict of interest during this engagement that was not disclosed to the court when he was appointed. *Id.* at 135-37.

3. <u>The Order ignores not only Dr. Price's conflict of interest but also his deficient technique.</u>

The trial court elevated Dr. Price's opinions over the other two court-appointed experts while disregarding Dr. Price's conflict of interest and then ignoring his patently flawed methodology.

Dr. Price's conflict of interest came to light during the evidentiary hearing. Dr. Price, a neuropsychologist, not a medical doctor, owns a private practice called Price, Proctor, and Associates. The other named partner in the group is Dr. Timothy Proctor. In this proceeding, the State had submitted both Dr. Proctor's and Dr. Price's names as experts whom the court could appoint to conduct an objective evaluation of Mays's competency to be executed. 2 EHRR 133-34; DX47.[12] At the time, the State did not disclose that Dr. Proctor had been previously retained by the State ***in this same cause*** to assist the State at the time of Mays's trial. 2 EHRR 135. On the stand, Dr. Price admitted being aware that his practice partner had assisted the State in securing a death sentence against Mays. Yet Dr. Price agreed to accept the court appointment to assess Mays's competency-to-be-executed without revealing this conflict to the court. *Id.* at 136. This fact alone should have caused the court to discount Dr. Price's objectivity in this matter.[13]

Moreover, Dr. Price lacked the requisite clinical experience to conduct the assessment. He spends 80% of his time doing forensic assessments and 20% doing occupational assessments. *Id.* at 141. He does not have a clinical practice treating patients. *Id.* at 142. As noted in the 2003 Guidelines that the experts were supposed

[12] In addition to Price and Proctor, the State's list of proposed experts included Dr. Edward Gripon, M.D. DX47. Dr. Gripon has been sanctioned by the Texas Medical Board. 2 EHRR 134.

[13] Notably, when the State began its examination of the friendly witness, Dr. Price, counsel slipped and referred to him as "Dr. Proctor." *See* 3 EHRR 4.

to use to assist them in assessing Mays, experts selected to conduct a competency-to-be-executed evaluation should have demonstrated skill in clinical practice. 3 EHRR 182; *see also* APPENDIX C. Dr. Price's lack of clinical experience may explain his demonstrably flawed technique, which prevented him from building the rapport necessary to assess the deeply held delusions of a paranoid man.[14]

Dr. Price acknowledged the importance of building rapport to conducting a forensic evaluation and to making an accurate mental health assessment. 2 EHRR 157-63. He also agreed that rapport-building with someone with a history of paranoia, like Mays, might be particularly challenging. 2 EHRR 187. Yet Dr. Price elected to begin his interview with Mays by stating that he thought the State likely proposed him as an expert and then asking Mays to sign an "informed consent" form. 2 EHRR 162, 169. Dr. Price then spent a significant portion of his brief interview asking Mays questions regarding the offense itself, even though Dr. Price recognized that this was not a good way to establish rapport with Mays. *Id.* at 180; *see also* 3 EHRR 121-27 (describing the nature of delusional thinking and the challenges of confronting delusional beliefs directly).

Dr. Price found that many subjects made Mays uncomfortable, including his experiences in the Terrell State Hospital, his family history, and the facts

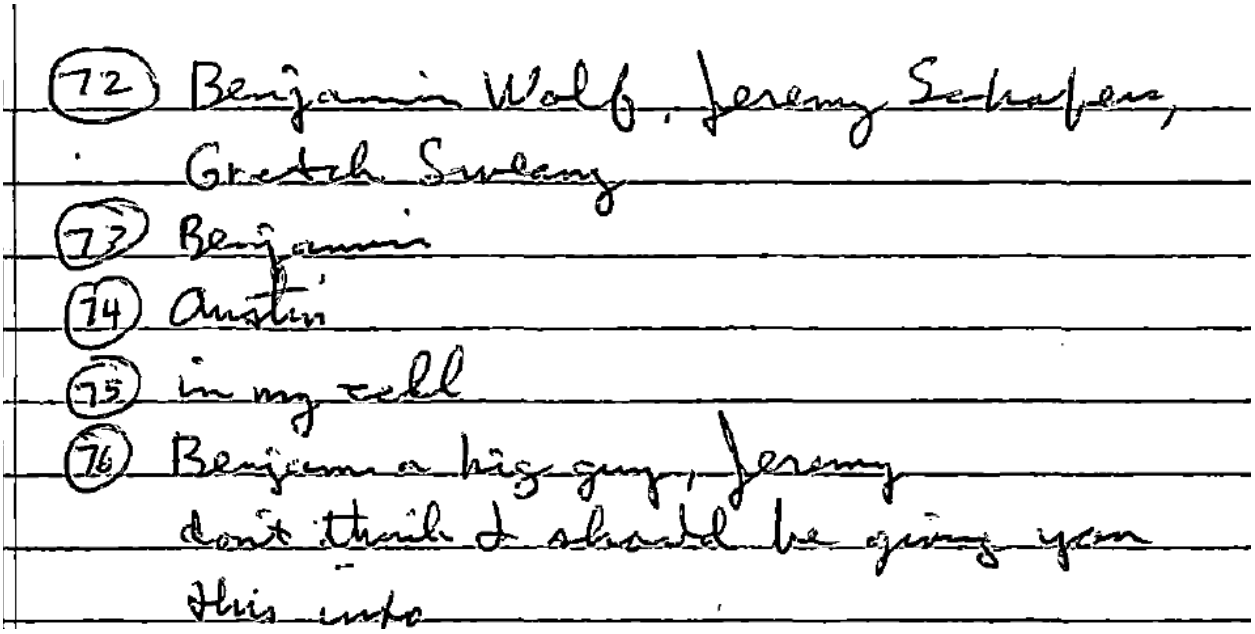
[14] Dr. Price admitted that the available records reflect that Mays had a long history of paranoia, especially with regard to his treatment, and that the records show a pattern of resisting treatment for both mental and physical illness. 2 EHRR 205-07.

surrounding the underlying offense. 2 EHRR 175-76, 179-80. Instead of inducing Mays to open up, Dr. Price spent most of the interview trying to ask 104 close-ended questions he had brought with him into the interview. DX39 & DX40. Dr. Price stated in his notes that Mays started crying during the interview (a fact that Dr. Price did not include in his final report). DX40 at 6. But instead of exploring the reason for this emotional outburst, Dr. Price changed the subject. 2 EHRR 174.

Dr. Price admitted that he could not speak about Mays's beliefs as to why the State plans to execute him because Dr. Price was unable to engage Mays in a conversation about that topic. 3 EHRR 71. Therefore, Dr. Price had no basis to opine about the ultimate issue of whether Mays has a rational understanding of why he is to be executed—yet Dr. Price presumed to do so anyway.

The trial court should have recognized that Dr. Price permitted his frustration about his own failure to build rapport with Mays to cloud his professional judgment. *See* 2 EHRR 210 (Dr. Price admitting that he found Mays's resistance to answering certain kinds of questions significant to finding that Mays is competent to be executed). Dr. Price testified that Mays had refused to take the neuropsychological tests that Dr. Price had wanted to administer. 2 EHRR 168-70. Dr. Price tried to administer these tests after he had triggered Mays's paranoia by asking him numerous questions, including about what his lawyers looked like and other matters irrelevant to the competency inquiry. *See, e.g.,* Dr. Price's notes (DX40) recording

Mays's responses to Questions 72-76 found in "Appendix C' in Dr. Price's Report (DX39):



Mays reacted to the barrage of questions by saying "[I] don't think I should be giving you this info," then he shut down. *Id.* Subsequently, Dr. Price failed to overcome Mays's paranoia so as to be able to administer additional testing he had planned to give. This circumstance is more indicative of Dr. Price's deficient interviewing skills than of whether Mays has a rational understanding of the connection between the crime and his punishment.

Dr. Price made no inquiry about going back for a follow-up interview to try again. 2 EHRR 169-70. Instead, he went ahead with writing a report based on an

interview he felt was incomplete. 2 EHRR 44-47.[15] If the testing that Dr. Price wanted to do was essential to his assessment, he should not have reached a conclusion until the testing was accomplished. Alternatively, if the testing was not really necessary,[16] than it is unclear why Mays's paranoia about being subjected to further testing should support Dr. Price's hastily reached conclusion that Mays has a rational understanding of the connection between his crime and punishment. *See* DX39; DX40. Although Dr. Price concluded that Mays has a "rational understanding," Dr. Price could not provide a definition of this key term—despite having been tasked by the court to reach this issue. 2 EHRR 221. Dr. Price's inability to define "rational understanding" and his contorted notion of what constitutes "rational" expectations among those awaiting execution cast serious doubt on the reliability of his conclusions. For instance, Dr. Price opined that Mays's belief that he could run a windmill business from death row was reasonable, just a "day dream," akin to what other inmates do to pass the time. 2 EHRR 217-18. That facially absurd suggestion should have engendered skepticism in the trial court. Dr. Price's

[15] Dr. Agharkar, who also had some difficulty with Mays's resistance to questions, made arrangements to return to the Polunsky Unit for a second interview.

[16]Dr. Price did not identify any problems with the extensive neuropsychological testing that had been previously administered to Mays by Dr. Mayfield or with the screening tests administered to Mays by Dr. Woods. Thus, Dr. Price could not explain why, in light of that testing, Dr. Mayfield and Dr. Woods were incorrect in concluding that Mays has a *major* neurocognitive disorder whereas Dr. Price considers the mental illness to be a *mild* neurocognitive disorder. 3 EHRR 80-82.

unsupported, unexplained conclusion regarding Mays's rational understanding is especially troubling as Dr. Price, like the other mental health experts, found no evidence that Mays is malingering. 3 EHRR 43.

Dr. Price ultimately admitted that Mays's refusal to cooperate in the clinical interview was irrational under the circumstances and consistent with a long history of Mays refusing to accept or authorize treatment, predating his time in prison. Yet Dr. Price used this symptom of mental illness to support his conclusion that Mays nevertheless had a rational understanding of the connection between his crime and his punishment, a decidedly circular assessment that strains credulity.

The trial court's Order contains no basis for the decision to ignore the opinions of the two credible court-appointed experts and to rely instead on an expert who, after a truncated interview, hastily reached a conclusion about Mays's competence that the expert was unable to defend. *See* 2 EHRR 148-221.

B. The trial court's Order disregards the fact that all of the court-appointed experts found Mays to be mentally ill.

The trial court's Order also asserts (incorrectly) that Mays "has not been diagnosed, treated, or received prescribed medications for any mental illness or obsession." APPENDIX A at 2. This false assertion of fact is troubling for multiple reasons.

First, all three court-appointed experts *agreed* that Mays has a mental illness or mental impairment. They even all agreed that he has a neurocognitive disorder;

they simply disagreed about the precise diagnosis. *See* APPENDIX D; APPENDIX E; APPENDIX F. Therefore, the trial court's suggestion to the contrary reflects blatant disregard for the relevant evidence, constituting an abuse of discretion.

Second, if what the trial court means is that Mays has not received mental health treatment while on death row, even if true, that circumstance would not be dispositive of anything—other than the poor mental health treatment afforded those incarcerated on Texas's death row. Back in 2014, a TDCJ record indicates that a UTMB employee concluded that Mays ought to be scheduled for a mental health evaluation after he had been continuously complaining about "gases in the air affecting his breathing." DX7 at 21. Yet there is no evidence that the proposed evaluation ever took place.

Notably, only when Mays's counsel obtained an order in this proceeding permitting the deposition of Dr. Joseph Penn, the director of mental health services for UTMB Correctional Managed Care, did the latter arrange for Mays to have a meeting with a psychiatrist via video-conferencing sometime in late July 2017. 5 EHRR 15. It was very unusual for Dr. Penn to make a referral of this nature, directly to his mental health staff, involving a specific inmate, *id.*; and the timing of the referral is highly suspect. Dr. Penn's directive occurred in conjunction with his testimony purporting to describe the outstanding mental health services provided to

individuals incarcerated in TDCJ and, particularly, the Polunsky Unit, and, more specifically, on death row.

Nothing about the substance of the drive-by psychiatric evaluation was offered into evidence (or produced to Mays's counsel). It is highly likely that the State reviewed a recording of the eleventh-hour psychiatric video-conference as well as the recordings of visitations that TDCJ routinely makes, looking for evidence that Mays is secretly lucid.[17] It is equally likely that, had the State found anything "incriminating," it would have introduced such recordings into the record during the evidentiary hearing—as the State has done in *Battaglia* and *Panetti* and other competency-to-be-executed cases. Therefore, the reasonable conclusion is that Mays's serious mental illness is apparent during any extended conversation with him, which the State learned upon reviewing those recordings.

Instead of producing recordings of Mays, the State offered the entire transcript of the deposition of Dr. Penn, a UTMB administrator, into evidence during the evidentiary hearing. SX1A. The State also played the entire recording during the hearing. 4 EHRR 64. Many of the assertions that Dr. Penn made were contradicted by his own employees or correctional officers assigned to the death row unit. *See, e.g.,* 5 EHRR 9, 25, 31-32, 66. Others were facially absurd. For instance, Dr. Penn

[17] The record reflects that the State searched Mays's cell after his 46.05 motion was filed, presumably seeking evidence to rebut the claim of incompetency. *See* SX2-8.

testified that death row inmates have access to "group therapy;" that attorneys and advocacy groups have access to a mysterious phone number to request mental health services for their clients; and that death row inmates who become psychotic are transferred to the Jester IV Unit for inpatient care "that day or the next day." SX1A at 30, 53, 67. State's witness Nina Foster, the current head of mental health services at the Polunsky Unit, admitted there was no group therapy, acknowledged ignorance of a phone number attorneys and family members can use to inquire about inmates' mental health treatment, and explained that psychotic individuals are sometimes moved from Polunsky to Jester IV, but only after seriously injuring themselves (such as gouging their eyes out) or attempting suicide. 5 EHRR 42-43.

Ms. Foster also testified regarding the limited circumstances whereby individual therapy is provided to death row inmates. It occurs "cell side" for a few minutes through the cracks of a steel door while the therapist is dressed in a Kevlar vest. *Id.* at 68. This questionable practice demonstrates why inmates with serious mental illnesses, like Mays, may not seek out mental health treatment and why seriously impaired individuals continue to be housed at the Polunsky Unit instead of being removed to the Jester IV Unit, as Dr. Penn suggested.

Despite the consensus among the court-appointed mental health experts that Mays suffers from long-standing mental illness, the trial court's Order seems to imply that Mays is not actually mentally ill because he was observed writing notes

during the court proceeding. That is, the trial court seems to have based its competency decision on the observation that Mays "and his counsel had a steady stream of written notes passed between them" and thus concluded he "appeared to be fully participating in the hearing as much as he physically could." APPENDIX A at 2.

First of all, as Dr. Woods explained at length, people with mental illness and even dementia can still read and write and do other tasks. 3 EHRR 129-31. Yet the trial court's Order implies that the mere act of reading and writing at all somehow establishes an inmate's competency-to-be-executed. Competency, however, is a legal term of art that must be assessed through the lens of mental-health expertise, which is why 46.05 requires the appointment of mental health experts. *See* TEX. CODE CRIM. PROC. art. 46.05(f). As noted in *Panetti*, a person can have schizophrenia and still have normal *cognitive* functioning; indeed, a person can have a serious mental illness and still be "clear and lucid" at times. *Panetti*, 551 U.S. at 955. The trial court here seems to have confused the concept of "competency" with the concept of "basic cognition," implying that being a sentient being, instead of a vegetable, forecloses a finding of incompetency-to-be-executed.

Second, the trial court was not privy to the content of any notes exchanged between Mays and his counsel. For all the court knows, those notes could have contained requests for bathroom breaks, drawings of his windmill design,

expressions of concern about being poisoned, and complaints about how his lame arm was being wrenched by the shackles he was wearing during court. In short, there is no basis for the trial court's assumption that these notes reflected any comprehension of what was taking place on the stand. The court's decision to take judicial notice of attorney-client communications that the court did not read constitutes a further abuse of discretion.

The use of "judicial notice" is only justified "where a fact is easily determinable with certainty from sources considered reliable," such that "it would not make good sense to require formal proof." *Holloway v State*, 666 S.W.2d 104, 108 (Tex. Crim. App. 1984); *see* TEX. R. EVID. 201. For these reasons, courts generally take judicial notice of facts outside the record *only* to determine jurisdiction or to resolve matters ancillary to decisions that are mandated by law. *In re R.A.*, 417 S.W.3d 569, 576 (Tex. App.—El Paso 2013, no pet.). By contrast, courts properly eschew taking judicial notice of matters that go to the merits of a dispute. *SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ); *see also Gaston v. State*, 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001, no pet.). "Reliance on judicial notice rather than the normal requirements of proof must be justified by a high degree of indisputability." *Garza v State*, 996 S.W.2d 276, 280 (Tex. App.—Dallas 1999, pet. refused). There could be no "high

degree of indisputability" about the contents of notes that the trial court did not even see.

C. The trial court's Order misrepresents the factual record regarding how the mental health experts reached the ultimate issue.

1. The Order inaccurately characterizes whether Mays brought up a key topic with all three experts.

Two of the three court-appointed experts found Mays incompetent-to-be-executed because he lacks a rational understanding as to why the State of Texas plans to execute him. Dr. Agharkar and Dr. Woods explained at length the information gleaned from interviewing Mays that they believe confirmed that he has long-standing, fixed delusions about being "poisoned" and targeted by the authorities, more recently because of his reputedly patent-worthy plans for clean energy windmills that will bring down Big Oil. *See* DX36; DX37; DX43; APPENDIX D; APPENDIX E. The trial court offered no coherent explanation for disregarding Mays's lack of rational understanding, evidenced by the contents of both Dr. Agharkar's and Dr. Woods's clinical interviews, written reports, and live testimony. Instead, the trial court incorrectly suggested that Dr. Woods's and Dr. Agharkar's medical opinions could be ignored because Mays "did not even mention his so-called 'obsession' over his clean energy design" to Dr. Price "much less indicate it was the reason he was to be executed." APPENDIX A at 2.

In fact, the record shows that Mays ***did*** bring up his plans for renewable wind energy with Dr. Price; yet when this happened, Dr. Price disdainfully suggested that he "acted like [he] was interested" and then tried to change the subject. 3 EHRR 46. In Dr. Price's opinion, Mays's attempt to discuss his renewable energy plans were just an example of a person trying to "use up the time on things that are not important." *Id.* By contrast, Dr. Woods and Dr. Agharkar (correctly) recognized that Mays's discussion of his renewable energy plans was quite important, as it was symptomatic of Mays' underlying mental illness and consonant with underlying records reflecting that illness. Therefore, they focused their assessment on exploring his delusional thoughts about his renewable energy wind device and then explaining that thought process in clinical terms.

Dr. Price's failure to dig into Mays's delusional thought processes, which are reflected in records Price was charged with reviewing, is a sound reason to *disavow* his conclusion regarding the ultimate issue. Significantly, the trial court's assertion that Mays "did not even mention his so-called 'obsession' over his clean energy design" to Dr. Price ***contradicts Dr. Price's own testimony and interview notes***. Dr. Price's own notes capture the following comments Mays made to Dr. Price:

- "Renewable energy very imp for people to think about"
- "If not in here … I would be trying to build houses w/renewable energy – I think underground houses are an option – also rock houses are a good idea."

- "I think they should take a good look at ozone air and what it is doing to us"

DX40. Indeed, the only page of Dr. Price's notes that seems to reflect an open-ended conversation with Mays is all about Mays's renewable energy "obsession." Dr. Price's notes also show that, soon after this discussion, Dr. Price shifted gears. *See also* 3 EHRR 46 (Dr. Price admitting that he sought to change the subject because he saw Mays's discussion about his renewable energy plans as using "up the time on things that are not important."). Dr. Price spent most of his time with Mays trying to ask the 104 close-ended questions he had written out based on the checklist in the 2003 Guidelines, including section four that Judge Tarrance had expressly excluded as irrelevant. *See id.*; APPENDIX B; APPENDIX C;

The trial court's mischaracterization of the record on a key point—whether Mays had brought up his renewable energy obsession with all three experts—reflects another abuse of discretion.

2. The Order incorrectly suggests that only Dr. Price "included" the court's "guidelines" in assessing Mays.

Dr. Price is the only expert who concluded that Mays is competent-to-be-executed. The only basis the trial court's Order provides for its unreasonable reliance on Dr. Price's conclusion about the ultimate issue is the demonstrably false suggestion that Dr. Price was "the only expert who included the guidelines specified by the Court in the Order of Appointment." APPENDIX A at 2. It is unclear what the

trial court means by "included." Presumably, the trial court means "used." The "guidelines" to which the Order refers are the 2003 Guidelines that Mays's counsel had proposed giving to the court-appointed experts and which Judge Tarrance had agreed would be attached to his order asking the experts to assess Mays's competency. *See* APPENDIX B; APPENDIX C. The court's Agreed Order directed the appointed experts to review the 2003 Guidelines and to use sections one, two, and three, but not four, of the checklist found in the appendix to "assist" in conducting the evaluations as they saw fit. *See* APPENDIX B at 19-23.[18]

Significantly, these 2003 Guidelines were created before the Supreme Court decided *Panetti* in 2007. Further, the 2003 Guidelines themselves include multiple precautions with respect to the checklist of questions found in an appendix to the guidelines. In a section entitled "Using the Checklist," the authors stress that "simply going through this checklist is not enough to assess every individual adequately with respect to competence for execution. We think of this checklist as an organizing

[18] Mays's counsel had recommended providing the court-appointed mental health experts with the 2003 Guidelines and Judge Tarrance agreed. But the terms of the appointment did not direct any of the experts to follow all of the recommendations contained therein. For instance, no experts were able to conduct collateral interviews with Mays's friends and family. APPENDIX C [Zapf, 21 BEHAV. SCI. LAW] at 110. Nor were any of the experts' interviews with Mays video- or audio-recorded, as the 2003 Guidelines recommend. *Id.* at 111 n.4. A debate developed during the evidentiary hearing about whether Dr. Price's decision to read to Mays 104 close-ended questions based on the entire checklist constituted poor clinical technique or an appropriate "use" of the 2003 Guidelines. The State's defense of Dr. Price's robotic use of a checklist, including questions based on section four that he had been expressly directed *not* to use, is ironic since the State initially resisted the idea of giving the court-appointed experts these guidelines at all. *See* 6 EHRR 9-10; DX40; APPENDIX B at 23-24.

structure to be used to guide the evaluator through relevant topic areas in the assessment of competence for execution." APPENDIX C [Zapf, 21 BEHAV. SCI. LAW] at 106, 115. Also, the authors note: "the checklist represents a first step that will need to go through a process that includes field-testing, standardization, and the development of norms"—which did not ultimately happen. *Id.* at 116; 3 EHRR 188-89, 191-93. Moreover, the principal author of the 2003 Guidelines later published an article expressly acknowledging the limitations of the 2003 Guidelines in light of *Panetti*. *See* Patricia Zapf, *Elucidating the Contours of Competency for Execution*: *The Implications of Ford and Panetti for Assessment*, 37 THE JOURNAL OF PSYCHIATRY & LAW 269 (Summer-Fall 2009).

In any event, all three experts used the 2003 Guidelines to assist them in assessing Mays. But only Dr. Price asked Mays questions from section four of the checklist that Judge Tarrance had expressly excluded as irrelevant to the assessment. APPENDIX B at 19. Additionally, only Dr. Price converted the opened-ended checklist of topics in the 2003 Guidelines into close-ended questions that he pursued in a rote fashion at the expense of building rapport and probing the nature of Mays's delusional thinking, although decades' worth of documents that Dr. Price was charged with reviewing reflected long-standing delusional thinking and paranoia. *Compare* APPENDIX F at Appendix C (pp. 39-43) and DX40 *with* APPENDIX C at "Appendix" (pp. 117-120).

3. Dr. Agharkar's methodology included the 2003 Guidelines.

As directed, Dr. Agharkar used the 2003 Guidelines to assist in conducting his evaluation of Mays. 2 EHRR 33-34, 122. He testified that he "read the whole checklist, but I didn't carry it with me to do [the] examination. That's not good technique." *Id.* at 114. When conducting an evaluation, either clinical or forensic, Dr. Agharkar explained that it is generally not a good idea to simply go down a list of questions, particularly if they are close-ended questions. *Id.* at 33. In contrast, open-ended questions allow a better understanding of the individual being evaluated. *Id.* at 34.

Dr. Agharkar explained that building rapport is "extremely" important when conducting a forensic evaluation. *Id.* at 46. Rapport is the process of "establishing a relationship with the person so that they feel that they can talk with you and they can open up and share with you . . . [a]nd if they don't trust you, they're not likely to be open to you." *Id.* In Dr. Agharkar's opinion, "if you hit somebody with a barrage of questions or you just go down a list, there's really not a chance to build a rapport in my opinion and my experience." *Id.* Because of this, he avoids using checklists in a mechanical fashion, as it hampers his ability to build rapport. *Id.* Dr. Agharkar also testified that, when evaluating individuals like Mays with a history of paranoia and delusions, building rapport is "vital" to the reliability of the evaluation. *Id.* at 47.

When conducting his evaluation, Dr. Agharkar utilized a semi-structured interview format based on the 2003 Guidelines. *Id.* at 109. This allowed him to address necessary areas, while permitting him "to be able to go freely between topics" as needed during the interview. *Id.* He asked Mays why he was on death row, 2 EHRR 111, then focused his evaluation on Mays's mental illness and delusions. *Id.* at 117-18; DX35-DX37. Dr. Agharkar also based his opinion regarding Mays's incompetency-to-be-executed on his review of the relevant records and prior neuropsychological testing. 2 EHRR 120.

4. Dr. Woods methodology included the 2003 Guidelines.

Dr. Woods was familiar with the 2003 Guidelines well before being appointed to evaluate Mays and utilized them when conducting his evaluation. 3 EHRR 102. Dr. Woods discussed the useful nature of the article itself, but also identified some problems with the checklist and noted that section 4, regarding the ability to assist an attorney, is not relevant to the competency-to-be-executed inquiry, as Judge Tarrance had also recognized. *Id.* at 188-89, 191-93; APPENDIX B at 19.

Dr. Woods testified that when preparing to conduct a competency-to-be-executed evaluation, it is important to ensure that there is a clear referral question, that the evaluator is familiar with the statutory requirements, and that the evaluator keeps in mind that some factors that may be important to a competency-to-stand-trial evaluation—such as a detailed analysis of the crime itself—are not relevant to

a competency-to-be-executed evaluation. *Id.* at 115. Instead, Dr. Woods explained that the real issues are whether the person understands they were convicted of a crime, that there is an imminent possibility of execution, and whether they have a factual and rational understanding of why they are to be executed. *Id.* at 116. The methodology used by the evaluator should be geared toward getting answers to these questions. *Id.*

Dr. Woods testified in detail regarding the process he uses to determine whether an individual is competent to be executed. First, he attempts to determine whether the person has a mental illness; if they do not, they must be found competent to be executed. 3 EHRR 171. Second, if the mental illness exists, he tries to "cross the bridge from that mental disease or defect to the question that is asked":

> [Y]ou want to see if there is a relationship between the mental disease and defect, the symptoms that are there, and the legal question that you're asking. For example, in this case, if you have someone that appears to be delusional, first of all, you don't assume that they're delusional. You try to get in there and see. . . . Once you determine that perhaps this person does have a delusion, then it changes the way that you cross that bridge because you can't just confront them and say, hey, what do you think, or, I don't -- I don't believe that, or, I don't buy that. And you really talk to them about their delusion in ways that gets you to the information that you're looking for.

Id. at 171-172. He also explained that he would not necessarily go through the items in the checklist attached to the 2003 Guidelines in a set order, but instead allows for flexibility when conducting the interview. *Id.* at 171; *see also* APPENDIX C [Zapf, 21

BEHAV. SCI. LAW] at 106, 115 ("We think of this checklist as an organizing structure . . . ").

During his interview, Dr. Woods asked Mays why he was on death row. After building rapport with him, he then spent a significant amount of time discussing with Mays the substance of what Dr. Woods found to be fixed, pervasive delusions reflecting Mays's mental illness and relevant to assessing his competency-to-be-executed, as reflected in his report and interview notes. *Id.* at 172-73; DX42; DX43.

Dr. Woods also gave Mays standardized neuropsychological tests, including the Montreal Cognitive Assessment (MoCA) and Cognistat Cognitive Assessment. He specifically mentioned the Picture Test, Serial Sevens Test, and Trail-Making Test results as relevant to his conclusions. While the State's counsel questioned Dr. Woods's method for scoring these tests, these are standardized instruments whose scoring is governed, not by the test administrator, but by the published test manuals. 3 EHRR 203, 237-38.[19]

Dr. Woods emphasized that one cannot "clinically leap to certain conclusions" based on what someone in a clinical interview does *not* say. 3 EHRR 116-17. Dr.

[19] Dr. Woods has served as a consultant to neuropsychologists regarding neuropsychological tests, such as the Wisconsin Card Sorting Test, Halstead Reitan Battery, the Cognistat, the Montreal Cognitive Assessment Instrument (MoCA), and Delis Kaplan Executive Function System (DKEFS). DX42 at 4. Moreover, Dr. Price, a neuropsychologist who reviewed Dr. Woods's report, did not testify as to any defects in Dr. Woods's scoring of the neuropsychological tests he gave to Mays.

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Woods found this precaution particularly important with someone like Mays who is known to have "significant cognitive impairment" and "significant mental illness" including a history of paranoid thinking. *Id.* at 117. Yet that is precisely what Dr. Price did: he reached a conclusion about Mays's understanding of his circumstances based on what Mays did *not* discuss with Dr. Price, although it was Dr. Price who failed to earn the trust of Mays, whom all experts recognized was a deeply paranoid individual. Dr. Price's approach is analogous to a teacher reducing a student's grade for failing to solve a problem that the teacher failed to include in the exam.

Dr. Woods explained at length the nature of delusions, the role they play in making mentally ill persons feel more in control, and the importance of building rapport by avoiding confronting the person's delusions directly. *Id.* at 127. Dr. Woods certainly used, but did not limit himself to, the checklist of questions in the 2003 Guidelines.

5. Only Dr. Price misused the 2003 Guidelines.

Dr. Price testified that he read the 2003 Guidelines prior to evaluating Mays and used the attached checklist to prepare 104 questions to ask during the interview. 2 EHRR 188, 190; 3 EHRR 5-6, 74. He brought this checklist with him to the evaluation. 2 EHRR 187. While he testified that he did not go through his questions in a mechanical fashion, his notes reflect that he spent only about two hours with Mays; thus much of the interview was devoted to reviewing an "informed consent"

disclosure form and then attempting to ask the 104 close-ended questions he had prepared based on the entire checklist, including section four that the court had *excluded* because those questions are not relevant to the competency-to-be-executed inquiry. *See* DX40; 2 EHRR 162, 169; DX45; 2 EHRR 132; APPENDIX B at 19.

The trial court's conclusion about Mays's competency seems to be based on the notion that Dr. Price was the only court-appointed expert to "include" the 2003 Guidelines in his evaluation, yet that representation is demonstrably false. That conclusion also reflects a lack of understanding about the proper relationship between the 2003 Guidelines and the Supreme Court's 2007 decision in *Panetti*. Concerns about the limitations of the 2003 Guidelines, particularly the checklist, in the wake of *Panetti* have been noted by the principal author of the 2003 Guidelines herself. *See* Zapf, *Elucidating the Contours of Competency for Execution*: *The Implications of Ford and Panetti for Assessment*, 37 THE JOURNAL OF PSYCHIATRY & LAW 269 (Summer-Fall 2009). Moreover, this important context and concerns about the checklist were brought to the court's attention during the evidentiary hearing. 3 EHRR 131-33, 188-89, 191-93. This context is not, however, discussed in the trial court's Order. Only Dr. Price disregarded the appointment order (APPENDIX C) regarding the scope of the checklist; and only Dr. Price seemed ill-informed about the subsequent history of the 2003 Guidelines and the need for caution with respect to the checklist. And because it is incorrect that Dr. Price was

the only expert who "included the guidelines" in his assessment (APPENDIX A at 2), the trial court's decision to credit Dr. Price's conclusion over those of the other experts on this basis was an abuse of discretion. *See, by contrast*, the discussion of the district court's analysis in *Billiot v. Epps*, 671 F. Supp.2d 840 (S.D. Miss 2009), cited favorably by this Court in *Battaglia v. State*, 537 S.W.3d 57, 68 (Tex. Crim. App. 2017). As this Court explained, the district court in *Billiot* "was compelled to credit one set of opinions over the other" because the experts' "ultimate opinions on Billiot's competency to be executed differed[.]" *Id.* To decide which of the mental health experts' opinions to credit, the *Billiot* court undertook an independent review of the medical recordings and otherwise explained in cogent terms the basis for the court's conclusion that Billiot was incompetent. No independent review occurred here.

D. The trial court's Order reveals a misapprehension of the governing standard.

The few additional clues in the trial court's stream-of-consciousness Order reveal a fundamental disregard for the governing legal standard and thus a failure to apply it in this 46.05 proceeding.

1. The trial court improperly relied on evidence that Mays has a bare factual awareness that Texas plans to execute him.

The trial court seems to have labored under the misconception that if Mays knew, at one time, that his execution was imminent, that is somehow dispositive of his competency. *See* APPENDIX A. It is not.

In *Panetti*, the United States Supreme Court squarely rejected the bare factual awareness standard, noting that it "treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution." *Panetti*, 551 U.S. at 958. Thus, the Supreme Court concluded that the pre-*Panetti* Fifth Circuit standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 956–57.

Instead, the Eighth Amendment requires that a competency inquiry must probe whether the person has a rational understanding of his punishment and the reason for it. If the person's lack of rationality prevents or distorts that understanding to the point at which the execution no longer serves the purpose intended, the Eighth Amendment is violated. As the Supreme Court emphasized, "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Id*. at 959. *Panetti* repeatedly emphasizes that the "rational understanding" test is the appropriate one, as it is consistent with the reasons supporting the ban on executing the insane announced in *Ford*. *Id.* at 958–62.

Inquiring solely into whether a prisoner "understands"—in the narrow sense—that "he or she is to be executed and that the execution is imminent" and "the

reason he or she is being executed" is not enough. Such a limited inquiry fails to reach the heart of whether the prisoner has a *rational* understanding of his crime and punishment sufficient to justify his execution under the Eighth Amendment.

The trial court's conclusion is supported by an elliptical description of evidence suggesting that Mays was aware that his execution—or at least his death—was at one time imminent. The Order states: "less than one month prior to the original execution date[,]" Mays wrote to his sister about the costs that would be associated with building "the wood box" and "informed her of the burial plots purchased for the Mays Family in Dunbar cemetery"—suggesting, without explaining, that the trial court believes this letter somehow proves Mays's competency. APPENDIX A at 1. But no one contested that Mays knew at one time that Texas was planning to execute him. The argument was, and remains, that there is uncontroverted evidence, from the only experts who were able to engage Mays in a discussion of his delusional beliefs, establishing that he *lacks a rational understanding of why* that execution is to take place.

As this Court recently explained, "the standard for incompetence in this context which focuses exclusively upon the defendant's awareness of his situation but which *ignores … thought processes which interfere with his ability to rationally comprehend the causal link* between his capital offense and his imminent execution

is unconstitutionality narrow." *Battaglia*, 537 S.W.3d at 81 (quoting *Wood v. Quarterman*, 572 F. Supp.2d 814, 818 (W.D. Tex. 2008) (emphasis added)).

That Mays, at one time, had a bare awareness that he was to be executed does not establish that he has a rational understanding of how his punishment arises from his crime. Under current Supreme Court law, the failure to consider information regarding Mays's mental illness, delusions, and irrational thought processes is plainly unconstitutional. That is why this Court has construed the statute's use of the word "understanding" to mean "rational understanding," as *Panetti* requires. *See Mays*, 476 S.W.3d at 457 n.4 (citing *Panetti* to support the proposition that *"*[w]ith respect to the second prong [of 46.05(h)], a defendant does not understand the reason for his execution unless he has a 'rational understanding' of that reason"); *see also Green*, 374 S.W.3d at 443-44. Absent this construction, the competency inquiry falls short of constitutional mandates—as it fell short here.

2. The trial court improperly relied on ancillary, irrelevant evidence.

Odder still, instead of relying on the opinions of highly qualified mental health professionals whom the court itself had appointed, the trial court devoted the longest paragraph in its slapdash opinion to discussing the testimony of a TDCJ guard, Cynthia Cooper. When subpoenaed by the State to testify, Ms. Cooper had been working as a correctional officer for only 16 months and had no mental health background. 5 EHRR 46, 65. She testified that Mays was "always polite" and had

not, in her "few conversations with him," ever heard him mention his green energy theories or his fears of poisoned food or ozone. From this the trial court inferred that these obsessions must not exist. APPENDIX A at 2; 4 EHRR 53-54. Such a conclusion is baseless.

For one thing, TDCJ's own records capture Mays's long-standing fears about being poisoned by the food and by the ozone. *See, e.g.*, DX7 at 21. Moreover, Ms. Cooper admitted under oath that she does not spend a significant period during the day observing Mays and, in fact, had no experience of Mays during most of the time he has been incarcerated at the Polunsky Unit. 4 EHRR 64, 66. The trial court's attempt to discount the uncontroverted evidence of Mays's long-standing delusions by recourse to a guard's testimony is indefensible.

In short, the trial court's Order contains material misrepresentations of the factual record, ignores the reliable experts' assessments, and fails to apply the relevant standard in concluding that Mays is competent to be executed. As such, the Order "lies outside the zone of reasonable disagreement" and reflects an abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). Deferring to this Order would make a mockery of the relevant legal precedents and of Mays's state and federal constitutional rights.

II. The Dispositive Facts and Rationale Underlying *Battaglia v. State* Are Readily Distinguishable from this Case.

To determine whether a trial court abused its discretion, a reviewing court must know the basis for the trial court's ruling. Yet the Order at issue here is devoid of legal analysis. *See* APPENDIX A. The Order includes no more than a fleeting reference to two legal precedents in the following sentence: "Randall May is competent to be executed pursuant to TCCP Article 46.05 and the guidelines set forth in Panetti and Battaglia." *Id.* at 2. Presumably, "Battaglia" refers to this Court's decision in *Battaglia v. State*, 537 S.W.3d 57 (Tex. Crim. App, 2017), which issued on September 20, 2017—the same day that Proposed Findings of Fact and Conclusions of Law were filed on Mays's behalf and 12 days before the Order at issue here was entered.

The factual underpinnings of *Battaglia* are, however, fundamentally different from the instant case. Therefore, reliance on *Battaglia* to support the trial court's conclusion is unjustified. None of the rationales identified in *Battaglia* are found in the evidentiary record adduced below.

A. The trial court undertook no legal analysis, so it failed to apprehend that *Battaglia* is readily distinguishable.

1. *Battaglia*, unlike this case, specifically rests on findings that the movant was malingering.

The central theme in both the trial court's and this Court's opinions in *Battaglia* was the belief that John Battaglia was malingering and therefore did not

actually suffer from a mental illness—or at least was faking a lack of rational understanding about his imminent execution.

Of the 28 findings the trial judge noted under the rubric of "Mental Health Evaluations," 21 of them (19-39) highlighted the belief that Battaglia was malingering. *See* **APPENDIX G** [*Texas v. Battaglia*, No. F01-52159-H (Tex. Dist. Ct. Nov. 18, 2016]. The trial judge's conclusions are also expressly based on testimony related to possible malingering. The trial judge, for instance, voiced "serious concerns about Battaglia's credibility" and therefore found that "the Court does not believe that Battaglia suffers from a severe mental illness" and that "the Court believes that Battaglia is feigning or exaggerating his symptoms of mental illness." *Id.* at *9, 11, 13.

Similarly, much of this Court's lengthy opinion in *Battaglia* is dedicated to discussing evidence that Battaglia was malingering with respect to his mental illness and delusions. *See Battaglia v. State*, 537 S.W. 57 (Tex. Crim. App. 2017). Indeed, the word "malingering" is mentioned 40 times in the majority's opinion. *See id.*

To support its concerns about malingering, this Court in *Battaglia* quotes at length from a recorded call between Battaglia and his father in which Battaglia discussed his competency litigation as "the old Catch-22," alluding to Joseph Heller's famous novel:

> Battaglia said "I've been trying to let everybody know how competent I was, but I wasn't sure if I was being successful or not." Battaglia

> described it as "the old Catch-22" that "You can't be incompetent unless unless [sic] you think you're not incompetent." Battaglia told his father, "it's been awhile since I've read Joseph Heller."

537 S.W.3d at 92-93. This Court's opinion also highlights suspicious material extracted from other TDCJ-recorded calls in which Battaglia stated that:

- I am "doing the best I can, alright. They're going to kill me December 7th, ok, no matter what. So whatever I do I'm gonna [sic] try to keep that from happening;"
- "I can't sit here and just do nothing. That's how everybody else gets killed;"
- "It's a damn chess game."

Id.

By contrast, during the evidentiary hearing in this case, the State had no recordings, or any competent evidence whatsoever, to support the argument that Mays might be malingering symptoms of mental illness. Plainly, the State would have attempted to marshal such evidence if any such evidence actually existed. Indeed, the record establishes that the State photographed Mays's cell and confiscated materials after his 46.05 motion was filed, presumably looking for such evidence. *See* DX53:

Quite simply, malingering is not an issue in this case. That critical fact distinguishes Mays's case not only from Battaglia's but from other competency-to-be-executed cases highlighted in this Court's *Battaglia* decision. *See, e.g.*:

- *Battaglia*, 537 S.W.3d at 66: discussing *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at *2 (W.D. Tex. Mar. 26, 2008) and noting that two experts had, at one point, concluded that Scott Panetti might be fabricating his symptoms to thwart their attempts to administer structured examinations designed to detect malingering; *id.* at 95 ("Like Battaglia, there was evidence that Panetti had a sophisticated understanding of his case, and there was some evidence of malingering, exhibited by his normal telephone conversations with his family members");

- *Battaglia*, 537 S.W.3d at 69-71: discussing *Wood v. Thaler*, 787 F. Supp. 2d 458 (W.D. Tex. 2011), wherein an expert found that the defendant was

malingering, the court ruled that the defendant's allege mental illness "was little more than a 'ruse'";

- *Battaglia*, 537 S.W.3d at 74-75: discussing *Eldridge v. Thaler*, No. H-05-1847, 2013 WL 416210 (S.D. Tex. Jan. 31, 2013), wherein two experts who had evaluated Eldridge believed he was malingering; *id.* at 95-96 ("Like Battaglia, Gerald Cornelius Eldridge also expressed delusional beliefs…. and there was evidence to support a finding of malingering, thus the trial court's conclusion that he was competent to be executed was upheld.").

No such comparison could be made with respect to the opinions of the court-appointed experts who examined Mays because no expert suggested Mays might be malingering.

Additionally, in *Battaglia*, this Court emphasized that the *absence* of evidence of malingering should be significant to the competency analysis. *Battaglia*, 537 S.W.3d at 76-77 (discussing *Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1190 (11th Cir. 2017).[20] The Court made this point by explicitly contrasting the facts of *Battaglia* with *Madison*: "[s]ignificantly, unlike in this case, all experts agreed that there was no indication that Madison was malingering." *Battaglia*, 537 S.W.3d at 96. That is, in *Battaglia* this Court's view that three of the four experts' testimony supported the notion that Battaglia was malingering was significant, if not

[20] The 11th Circuit's decision was subsequently overruled in *Dunn v. Madison*, 138 S. Ct. 9 (2017). However, the Supreme Court's decision was narrowly based on the standard of review available under the Antiterrorism and Effective Death Penalty Act. There was no mention of malingering in the decision. Thus, the aspect of the 11th Circuit's decision that is cited approvingly in *Battaglia* remains good law. Moreover, the Supreme Court has since granted Madison's petition of certiorari to address the merits of his *Ford* claim. *See Madison v. Alabama*, No. 17-705 (2018).

conclusive. *Battaglia* certainly suggests a causal connection between evidence of possible malingering and the decision to affirm the conclusion that Battaglia was competent to be executed: "there is evidence in the record to support the trial court's ruling that *Battaglia is malingering* ***and therefore*** *competent to be executed." Battaglia*, 537 S.W.3d at 96 (emphasis added).

Again, **there is no evidence whatsoever that Mays is malingering**. None of the three mental health experts found any indication that Mays is malingering symptoms of mental illness. DX42 at 27 (Dr. Woods); 3 EHRR 43 (Dr. Price); DX35 at 6-7; 2 EHRR 40 (Dr. Agharkar). Further, all *agreed* that he suffers from an incurable, degenerative mental illness. *See* pp. 23-31, *supra*.

2. *Battaglia*, unlike this case, emphasizes the movant's superior intellect as support for the proposition that he was malingering.

In *Battaglia*, one key reason the trial court offered for finding that Battaglia was malingering was "[t]he undisputed evidence" that he was "not a typical inmate. He is highly intelligent, educated, and well-read." APPENDIX G at *9. Battaglia held Bachelors and Masters degrees and had been both a practicing CPA and a CFO for an oil company. *See id*. at *9-10. He had a "superior IQ and a memory ability regarding long strings of words and concepts higher than 99% of the population." *Id.* at *10. The trial judge also gave much weight to the fact that Battaglia had read *Catch-22* and that he had taken pains to obtain case law about the issue of

competency-to-be-executed from the prison library just two weeks before his scheduled execution. *See* APPENDIX G at *10-11.

This Court similarly upheld the trial court, in part, because of Battaglia's intelligence. *See Battaglia*, 537 S.W.3d at 92 ("In this case, the trial court found that Battaglia . . . has a motive and the intellectual capability 'to maintain a deliberate ploy or ruse to avoid his execution.'"). This Court explained that Dr. Proctor admitted that "it is possible for an intelligent person to 'feign delusions.'" *Id.* at 84. The Court similarly explained that Dr. Womack testified that Battaglia was a "highly intelligent person who has had the time and motivation to begin creating a complex, paranoid story line that he could have practiced over the years," *id.* at 88, and that "Battaglia is intelligent and sophisticated enough to be able to fake the tests such that an examiner would believe that he has a delusional disorder or some other mental illness." *Id*. at 89.

By contrast, Mays did not make it to the tenth grade. DX4 at RM199. When given a mental health screening by UTMB, the results suggested at least below-average intelligence and below-average executive functioning. *See* DX9 at RM 1152. Then, when Dr. Mayfield gave Mays a full battery of neuropsychological tests, his scores showed significant impairment in attention and memory abilities across multiple tests and a markedly low IQ. *See* DX4 at RM176-78.

To fail to account for this considerable factual distinction in relying on *Battaglia* reflects an abuse of discretion.

B. *Battaglia*, unlike this case, involves a movant whose delusions seemed to emerge in the lead up to his execution.

In *Battaglia*, both the trial court and this Court emphasized that Battaglia's delusional thinking did not seem to manifest in records until shortly before his scheduled execution. As the trial court noted:

> in fourteen years on death row, Battaglia has not been prescribed any psychiatric medication, not been on the mental health caseload, and not raised any red flags during the mandatory 90-mental status [sic] exams. Moreover, with the exception of his initial intake screening, Battaglia has received only one other mental health referral, which was ultimately determined to be a misunderstanding.

APPENDIX G at *9. Likewise, this Court noted the lack of mental health "red flags" during Battaglia's more than fourteen years on death row. *Battaglia*, 537 S.W.3d at 93.

By contrast, the evidentiary record amassed in this case suggests that it is an ill-advised *ipse dixit* to leap to the conclusion that the lack of mental health *treatment* on death row alone indicates a lack of mental illness. As the current head of mental health services for Texas's death row acknowledged on the stand, most referrals for psychiatric treatment arise only when someone is a flagrant danger to themselves or others. 5 EHRR 42-43. In any event, the evidence of Mays's specific symptoms date back decades. *See* pp. 8-23, *supra*. Even TDCJ/UTMB has repeatedly noted his

mental illness and recommended him for psychiatric evaluations. DX3 at RM21; DX4 at RM308; DX4 at RM608-9; DX 9 at RM1152. But those recommendations were not followed—until the eve of the evidentiary hearing in this 46.05 proceeding. 5 EHRR 15. Conspicuously, the State made no attempt to introduce into evidence the results of its agent's most recent psychiatric evaluation of Mays.

Unlike the record before the Court in *Battaglia,* Mays has a long history of severe mental illness stretching back to well before he was sentenced to death. To find Mays competent to be executed based on *Battaglia*, where the movant had *no* history of delusional thinking until his execution date was set—and who was an affluent, highly educated individual with access to resources that Mays never had—is an abuse of discretion.

C. *Battaglia*, unlike this case, involves a movant whose delusions are reputedly typical of a prison subculture.

Yet another critical distinction is that the ruling in *Battaglia* is based in part on a finding that Battaglia's late-onset delusions revolved around conspiratorial notions that this Court believes are typical of a prison subculture and thus, per the Court's reading of the DSM, should not necessarily be a basis for finding a person clinically delusional. *See Battaglia*, 537 S.W.3d at 92.

By contrast, Mays's delusions are not just persecutory feelings that actors in the criminal justice system are "out to get him." For instance, talking to someone who was not there," as Mays has done, is not accepted in any subculture. DX4 at

RM260. Also, the evidentiary record shows that Mays's long history of mental illness, which included paranoid thinking and fears of being poisoned, arose well before he was incarcerated. *See, e.g.,* DX42 at 26 (finding that Mays had a history of delusions and hallucinations, with symptoms spanning decades).

Additionally, Mays believes that he has invented novel technology for a renewable windmill, which is hardly the type of persecutory delusion that is commonplace in a prison environment. *See* DX35 at 2. Similarly, his belief that "gases in the air [were] affecting his breathing," DX7 at 21, is not a delusion related to "claims of wrongful prosecution and conspiracies by judges, witnesses, prosecutors, and defense attorneys [that] are common and normally accepted within a prison subculture." APPENDIX G at *9; *Battaglia*, at 537 S.W.3d at 924. Although Mays now believes he is being persecuted as a result of his invention, his delusional thinking was evident well before his incarceration, reflecting decades of untreated mental illness. *See* pp. 8-14, *supra*.

As outlined above, no conceivable basis exists for the trial court's blithe reliance on *Battaglia*. When applying precedent "one well-established rule" is that "each case must be considered on its own facts." *Etheredge v. State*, 542 S.W.2d 148, 150 (Tex. Crim. App. 1976). That is, when applying precedent a court is "obligated to consider all circumstances of this case, both obvious and unique, that might set it apart from" the precedential case. *Hernandez v. State*, 939 S.W.2d 173,

177–78 (Tex. Crim. App. 1997). Significant factual circumstances distinguish the facts of *Battaglia* and Mays's case. *Battaglia* cannot, therefore, provide a sound basis for finding Mays competent-to-be-executed without accounting for these material factual distinctions. Because the trial court made no effort to address these distinctions, its Order is not entitled to any deference. *See* APPENDIX A. Moreover, a fair review of the evidentiary record shows that Mays adduced more than the requisite preponderance of the evidence to establish his incompetency-to-be-executed. *See* 1-19 EHRR.

D. If *Battaglia* can be used to justify affirming the trial court's Order, then *Battaglia* cannot be squared with the Supreme Court's incompetency-to-be-executed jurisprudence.

Were this Court to hold that *Battaglia* permits affirming the trial court's Order, such a holding would expose a rift with the Supreme Court's incompetency-to-be-executed jurisprudence in violation of Mays's rights under the Eighth and Fourteenth Amendments to the Constitution, as articulated in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).

The Fifth Circuit initially misconstrued the constitutional dictates announced in *Ford*, which led to the Supreme Court having to revisit the issue in *Panetti*. In holding that the Fifth Circuit's test was too restrictive, *Panetti* looked to the common-law underpinnings of *Ford*'s ban on executing an incompetent person, focusing on the role competency plays in furthering the retributive purpose of capital

punishment. If a death-sentence offender "has no comprehension of why he has been singled out and stripped of his fundamental right to life," then the retributive purpose of the punishment cannot be fulfilled. *Panetti*, 551 U.S. at 957 (citing *Ford*, 477 U.S. at 409–10). According to the Supreme Court, a key justification for capital punishment is to "make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Id.* at 958. These goals, however, are not achievable "if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.* at 958–59. Thus, "[t]he principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution." *Id.* at 959.

If this Court's recent decision in *Battaglia* can be construed as permitting a return to the pre-*Panetti* standard, then *Battaglia* needs to be revisited. *Battaglia* is factually distinguishable from Mays's case in every material way. Thus, the only way *Battaglia* could dictate an affirmance is if *Battaglia* somehow stands for the proposition that, in 46.05 proceedings, trial courts are free to decide that an offender's delusions are largely irrelevant so long as there is evidence that he knows

the State plans to execute him and there is evidence that he can read and write at a sixth-grade level.

That is not and cannot be the test.

A trial court is supposed to make its merits determination regarding the issue of incompetency-to-be-executed based on the assessments of qualified mental health experts in accordance with the relevant professional standards because the Eighth Amendment prohibits the execution of inmates who are presently incompetent. *Ford*, 477 U.S. at 409-10; TEX. CODE CRIM. PROC. art. 46.05(k).

The competency inquiry is analogous to the inquiry arising from claims of intellectual disability. In both instances, the legal inquiry arises from a categorical ban announced by the Supreme Court of the United States: in *Ford v. Wainwright* and *Atkins v. Virginia*, respectively. And in both instances, the Supreme Court has directed that the legal inquiry be based on prevailing clinical understanding regarding matters of mental health. *See Panetti*, 551 U.S. at 962 (emphasizing the crucial role of expert psychiatric evidence in assessing competency-to-be-executed); *Moore v. Texas*, 137 S. Ct. 1039, 1050-53 (2017) (rejecting reliance on nonclinical factors and requiring reliance on prevailing clinical standards for assessing intellectual disability). In both instances, the decision-maker should not rely on court-invented standards that risk executing those whom the Supreme Court has made clear are to be exempt under the Eighth Amendment.

Both clearly established federal constitutional law and the plain language of Article 46.05 say that assessments by mental health experts are required to resolve the issue of competency-to-be-executed. If a trial court can whimsically disregard the reliable opinions of duly qualified mental health experts and invent random reasons to justify its conclusion, then the engagement of such experts is no more than a ruse. This Court cannot endorse such cynicism under the auspices of a lower court's "discretion" without risking a demoralizing effect on the law.

Any of the numerous errors recounted above is a reason to conclude that the trial court abused its discretion. Cumulatively, these errors suggest an alarming disregard for the gravity of the task at issue, for the constitutional principles at stake, and for the relevant legal precedents.

The record amassed below contains overwhelming evidence that Randall Mays has long suffered from serious mental illness, that he is currently tormented by delusions, and that he lacks a rational understanding of why the State of Texas intends to execute him. Since executing him in this condition would serve no legitimate penological purpose, under *Panetti*, Mays is currently incompetent to be executed. The Court, therefore, should find that the trial court abused its discretion and render judgment that Randall Mays is currently incompetent to be executed.

PRAYER

For the foregoing reasons, this Court should reverse the decision of the trial court and render judgment that Mays established by a preponderance of the evidence that he is currently incompetent to be executed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 9, 2018, a true and correct copy of this document was served on Mark Hall of the Henderson County District Attorney's Office by Texas efile and email. *See* Tex. Rule App. Proc. 9.5 and Tex. Rule App. Proc. 68.11.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 37,500 words. Using the word-count feature of Microsoft Word, this document contains 17,729 words excluding the following: caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service certification, certificate of compliance, and appendices; and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font, 12-point font for footnotes. *See* TEX. R. APP. Proc. 9.4.

__/s/_____
Gretchen S. Sween