

In the
Supreme Court of the United States

RANDALL MAYS,
Petitioner,

v.

TEXAS,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

OFFICE OF CAPITAL AND FORENSIC WRITS

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REPLY TO BRIEF IN OPPOSITION

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to this Court.

I. MR. MAYS'S PETITION FOR CERTIORARI IS NOT MOOT BECAUSE THE TRIAL COURT MAY DENY MR. MAYS'S SECOND COMPETENCY-TO-BE-EXECUTED MOTION BASED ON ITS PRIOR REASONING IN DETERMINING HE WAS COMPETENT

In its Brief in Opposition, the State contends that because Mr. Mays has filed a second motion challenging his competency to be executed, the issues raised in his petition are now moot. BIO at 6. However, the State fails to acknowledge that Mr. Mays has not yet been granted a hearing on his second competency-to-be-executed motion. A review of the statutory basis under which Mr. Mays has filed his second motion reveals that the questions presented in his petition to this Court remain a live controversy.

As the order to withdraw the execution date states, the trial court withdrew the execution date simply to review whether Mr. Mays has met the threshold *prima facie* showing to warrant a hearing for incompetency under Texas Code of Criminal Procedure 46.05(e). Under section 46.05(e), if the person challenging their competency to be executed has previously filed such a motion and was determined competent to be executed, there is a presumption built into the statute that the person is competent to be executed. TEX. CODE CRIM. PROC. ART. 46.05(e). With that presumption, a person is not entitled to a hearing on the second motion unless there is a “*prima facie* showing of a substantial change in circumstances sufficient to raise

a significant question as to the defendant's competency to be executed.” *Id.* The language of article 46.05(e) appears to require a different, and higher, standard to obtain a hearing on a second competency motion.

Thus, the second motion may be dismissed if the trial court determines that Mr. Mays has not overcome the presumption of competency under article 46.05(e). If the TCCA agrees with the trial court’s determination, Mr. Mays will then have a new execution date set without having a hearing on his second competency-to-be-executed motion. If Mr. Mays’s second motion gets denied and another execution date is set, the state courts would have necessarily taken the position that Mr. Mays’s did not show “a substantial change in circumstances.” The State of Texas will set a new execution date based on its original junk-science and lay-stereotype determination that Mr. Mays is competent to be executed.

Further, the State’s analogy to other situations when a case becomes moot are irrelevant. This is not a case where a law has been repealed. *See* BIO at 7. Additionally, while the procedural posture of Mr. Mays’s petition is perhaps slightly more complex than the State appreciates, the fact the state court has withdrawn Mr. Mays’s execution date is also irrelevant. The State assumes that “a new execution order and warrant setting a new date will necessarily implicate this subsequent competency determination by the state courts” and that “should [Mr.] Mays challenge that superseding decision, the facts will necessarily be different than those prevented for review here.” *Id.* However, as discussed above, even if Mr. Mays appeals any

future order denying his second competency-to-be-executed motion, the issues in his petition remain a live controversy.

The State relies on *Nelson v. Campbell*, 541 U.S. 637 (2004), for the proposition that this Court should deny review of Mr. Mays's case because “[t]he execution order is now expired. Thus, Mr. Mays cannot be executed pursuant to it.” BIO at 7-8. However, the *Nelson* case is significantly distinguishable from Mr. Mays's case. First, it is important to note that *Nelson* was a 42 U.S.C.S § 1983 civil rights case challenging the method of execution and was remanded for further review pursuant to the opinion rendered by this Court. *Nelson*, 541 U.S. at 639-40. Mr. Mays, in this petition, is asserting neither a claim about execution methods, nor a § 1983 civil rights claim. Second, the State appears to cite *Nelson* because in that case, this Court declined to address other issues related to an overbroad stay of execution request, because if the State sought a new execution date, the lower courts would have to address “future issues.” BIO at 7-8. The stay motion in *Nelson* did not complain about the actual method of execution, but merely asked that the execution be stayed. *Id.* Therefore, there was an issue contained in the prayer for relief in that it broadly asked for a stay of execution, rather than specifically complaining about the execution method. *Id.* This Court merely articulated that, should the State reschedule the execution, there may be further issues to address which the petitioner apparently intended to litigate. *Id.* To that, it appears that this Court recognized in *Nelson* that the issue remained relevant to that petitioner's case, even though the execution date had been withdrawn.

The issues raised in Mr. Mays's petition are still pertinent. If this Court denies the petition based on the State's argument that the petition is now moot, Mr. Mays may be executed without this Court having fairly reviewed whether the state court could rely on junk science and stereotypes to deny Mr. Mays's incompetency claims, and whether it is sufficient for Mr. Mays to understand that he was sentenced to death for a crime he committed, but believes he is now being executed due to a grossly delusional belief system. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("as long as the parties shave a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)).

II. MR. MAYS IS NOT JUDICIALLY ESTOPPED FROM PRESENTING TO THIS COURT THE QUESTION AS TO WHETHER A COURT CAN RELY ON STEREOTYPES AND JUNK SCIENCE TO ADJUDICATE A *FORD* CLAIM

In its BIO, the State contends that Mr. Mays's question presented regarding the trial court's reliance on lay stereotypes and junk science should be judicially estopped. BIO at 8. The State claims that Mr. Mays did not present this argument to any of the state courts, but instead presented a contrary argument. *Id.* at 8, 10. The State references the fact Mr. Mays cited to and attached the checklist to a motion as support for his claim. *Id.* at 12.

However, the checklist was merely intended as an aid for the experts, and not as tried and true guidelines for them to strictly follow. Mr. Mays never argued that the trial court should only credit an expert opinion that rigidly adhered to the checklist or that utilized a section of the checklist the trial court expressly forbade

the experts from following. Rather, in a motion seeking to compel discovery, Mr. Mays cites the checklist as a way to acknowledge the importance of reviewing collateral information contained in relevant records that document “life history, psychological history and disorders, deterioration-data, previous and current written reports, and interviews with persons who have had extensive opportunities to observe the subject.” EHCR 55; BIO at 11.

In a later motion filed in the trial court outlining a proposal for Article 46.05 proceedings, Mr. Mays cites to the checklist again for the proposition that a “review of relevant medical, mental health, and other records must play a critical role in assessing Mr. Mays current competency to be executed” and in recognizing that “the importance of these records is well-recognized by mental health professionals.” EHCR 84. To support these propositions, Mr. Mays cited to the checklist at issue. Those propositions remain true today, however, and are irrelevant to the concerns about the checklist that are the subject of Mr. Mays petition.

The State also falsely contends that Mr. Mays never addressed concerns over the checklist to any of the state courts, including the TCCA. BIO at 12. Mr. Mays’s brief on appeal to the TCCA from the order determining that Mr. Mays was competent to be executed, however, expressly states the guidelines were created before this Court decided *Panetti*. State.App.53. The brief also states that the “the principal author of the 2003 Guidelines later published an article expressly acknowledging the limitations of the 2003 Guidelines in light of *Panetti*.” State.App.54. Therefore, Mr. Mays expressly put the TCCA on notice that there were concerns about the checklist

and its application post-*Panetti*. See *US v. Wells*, 519 U.S. 482, 487 (1997) (holding that government's contrary position in supplemental filings did not constitute invited error and could not "dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was 'pressed [in] or passed on' by the Court of Appeals.") (quoting *United States v. Williams*, 504 U.S. 36, 42, 112 S.Ct. 1735, 1739, 118 L.Ed.2d 352 (1992)). Further, Mr. Mays asserted that it was error for the trial court to credit only Dr. Price's competency finding because of his strict and exclusive adherence to the checklist, including a section he was not ordered to use, and in asking closed-ended questions based off the checklist.

Id.

The brief also informs the CCA that the checklist was provided only to "assist" [the experts] in conducting the evaluations as they saw fit" and that the authors of the checklist "stress that 'simply going through the checklist is not enough to assess every individual adequately with respect to competency for execution.'" State.App.53. To that, the trial court was also on notice that there were issues with the checklist that prompted two of the experts to not strictly adhere to it. Indeed, the brief includes that Drs. Woods and Agharkar "included" the guidelines from the checklist in their assessment to bring attention to the fact that it cannot be relied on as the sole competency determination standard. Therefore, the trial court erroneously concluded that Mr. Mays is competent simply because it found that only Dr. Price "included" the checklist. State.App.66-67.

Finally, the fact that counsel for Mr. Mays's proposed that the checklist be included as an aid for the experts evaluating Mr. Mays is irrelevant to the issues at hand. An attorney representing a client with intellectual disability cannot propose the *Briseno* factors denounced in this Court's decision in *Moore* because they violate the Eighth Amendment. *See Moore v. Texas*, 137 S. Ct. 1039 (2017). Here, too, a lawyer representing a client who is incompetent to be executed could not propose that a court wholly rely on the invalidated and repudiated checklist at issue.

III. THE QUESTIONS PRESENTED IN MR. MAYS'S PETITION INVOLVE CONSTITUTIONAL QUESTIONS REGARDING THE FORD PROCEEDINGS AND DO NOT INVOLVE FURTHER FACTUAL REVIEW

The State contends that Mr. Mays's complaints turn on credibility findings of the experts by the state courts, and that the issues presented in his petition are "merely a request for further factual review and error correction of the state court's decision." BIO at 34, 37. The questions presented in Mr. Mays's petition are not a guise for error correction. A recitation of the facts underlying the reasons Mr. Mays is not competent is necessary because they stand in contrast to the reasons articulated by the trial court in concluding that Mr. Mays is competent, which were affirmed by the TCCA. However, the question presented is whether the trial court, in ignoring compelling facts suggesting incompetency to be executed, could a) rely on a checklist that does not comport with this Court's precedent in *Panetti*; b) fail to incorporate the modern medical community's understanding of mental illness; and c) rely on layperson stereotypes of mental illness. Just as this Court in *Moore* held that a court cannot consider stereotypes to determine intellectual disability, which

inherently incorporated facts from Mr. Moore's case, Mr. Mays has presented the constitutional question whether a court can do the same in cases involving mental illness and competency to be executed claims.

Mr. Mays's second question presented for review to this Court is also constitutional in nature. This Court articulated in *Panetti* that a person's "severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced" should be considered when assessing competency to be executed. Through that holding, this Court answered that a person's delusions may rise to the level of making them unable to rationally understand the State's meaning and purpose in executing him, in violation of the Eighth Amendment. Accordingly, while the issue may be fact intensive in deciding whether the person's delusions rise to a level of incompetency, this does not change the constitutional nature of the question presented.

This Court accepted for review the question whether an inmate who suffers from dementia rather than a psychotic disorder could satisfy the *Panetti* standard requiring a person to have a rational understanding of the reasons why the State seeks to execute him. *Madison v. Alabama*, 139 S.Ct. 718, 728 (2019) (holding that the *Panetti* standard "has no interest in establishing any precise *cause*: psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension"). Similarly to *Panetti* and *Madison*, Mr. Mays's question at hand asks this Court to decide whether a person's

ability to articulate that they were sentenced to death for a crime they were convicted of is sufficient to satisfy the Eighth Amendment when that person has a gross delusion enabling him to believe that he is now being executed for wholly irrational purposes unrelated to his conviction. That is not factual review or error correction. Rather, it is a clear constitutional question that merits review today.

CONCLUSION

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

Respectfully submitted,

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