No. 19-5839

IN THE

Supreme Court of the United States

RANDALL WAYNE MAYS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a petition challenging a prior determination an inmate is competent to be executed is rendered moot when the execution date is withdrawn pursuant to a subsequent challenge to competency and there will necessarily be a superseding competency determination before another execution date will be set.

2. Whether Mays should be allowed to make an argument in this Court when he did not present it to the state courts; instead, he advanced a counter position invoking the reliance of the state district court and Texas Court of Criminal Appeals on his contrary stance.

3. Whether the Court should expend its limited resources to engage in further factual review and error correction of a high state court's decision.

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BRIEF IN OPPOSITION

Petitioner Randall Wayne Mays was scheduled to be executed on October 16, 2019, for the capital murder of Deputy Sheriff Tony Ogburn, an on-duty peace officer, but the convicting court withdrew the execution order on October 3, 2019, in order to review a second challenge to his competency to be executed under Texas Code of Criminal Procedure Article 46.05. Mays first contested his competency to be executed under Article 46.05 in 2015, which resulted in a stay of execution from the Texas Court of Criminal Appeals (CCA).

The state district court conducted a four-day hearing that included the testimony of three experts and several lay witnesses. After considering all the evidence presented, the district court found Mays competent and denied his motion, and the CCA affirmed. Mays petitions this Court for a writ of certiorari off that state court decision. Mays's petition is now ultimately moot because the execution date was withdrawn and there will necessarily be a superseding competency determination before a new date is set. Alternatively, Mays did not present his first argument regarding the guidelines and checklist to the state courts, and he is judicially estopped from making the argument now. The rest of his arguments merely seek further factual review, which is not a compelling ground for this Court to issue a writ of certiorari. Thus, his petition should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

On the afternoon of May 17, 2007, Mays's neighbor called 911 to report that Mays was shooting a handgun at his wife. When officers responded to the dispatch call, Mays initially displayed a calm demeanor. He explained that he had been "target practicing" and that his gun was inside his house. However, when Mays realized he was going to be arrested, he pulled out a knife and ran in the front door of his house. He emerged with a rifle, warned the officers to "back off," then went back inside his house. Deputy Billy Jack Valentine tried to persuade Mays to put down the rifle and come outside. Other officers, including Deputy Ogburn, took turns talking to Mays. During the stand-off, Mays remarked that he feared the officers would kill him. He expressed confusion about why he was "the bad guy." And he commented that he was "sick" and "about to die" because he "was poisoned."

Mays eventually climbed out of a window without his rifle. As another deputy talked to Mays in an effort to keep him calm, Valentine tried to position himself between Mays and the window. When Mays saw what Valentine was doing, he re-entered his house by diving head-first through the window. Mays then fired his rifle from inside his house, striking Deputy Ogburn in the head and killing him. Mays yelled, "Where's the other one? I'll take him out, where is he?" He then killed Inspector Paul Habelt by shooting him in the head. The surviving officers returned gunfire, and Mays shot Deputy Kevin Harris in the leg. Mays was eventually wounded, and he surrendered.

Mays v. State, No. AP-77,055, 2019 WL 2361999, at *1; Pet.App.A at 2–3.

II. Prior State and Federal Court Proceedings

Mays filed a direct appeal with the CCA in which he raised issues regarding his mental health. *Mays v. State*, 318 S.W.3d 368, 379–87 (Tex. Crim. App. 2010). The CCA unanimously affirmed Mays's conviction and sentence. *Id.* at 397. And this Court denied Mays's petition for a writ of certiorari. *Mays v. Texas*, 131 S. Ct. 1606 (2011). Mays then raised nine grounds of error in a state habeas application, including issues related to competency and insanity. *Ex parte Mays*, No. WR-75105-01, 2011 WL 1196799, *1 (Tex. Crim. App. Mar. 16, 2011). The CCA adopted the state habeas court's findings and conclusions and denied relief. *Id.* Again, this Court denied Mays a writ of certiorari. *Mays v. Texas*, 132 S. Ct. 453 (2011).

Mays initiated habeas proceedings in federal district court again raising several grounds for relief related to mental health, including competency, intellectual disability, and insanity. *Mays v. Director*, No. 6:11-CV-135, 2013 WL 6677373, at *2–3 (E.D. Tex. Dec. 18, 2013). The lower court denied federal habeas relief and denied a COA. *Id.* at *2. The Fifth Circuit also denied Mays a COA. *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014). And again, this Court denied Mays a writ of certiorari. *Mays v. Stephens*, 135 S. Ct. 951 (2015).

III. State Competency Proceedings

Mays's execution was initially set for March 18, 2015. *Mays v. State*, No. AP-77,055, 2015 WL 1332834, at *1 (Tex. Crim. App. Mar. 16, 2015). He filed a motion in state district court under Article 46.05 challenging his competency to be executed (46.05 motion). *Id.* That court originally found he failed to make a threshold showing which raised a substantial doubt as to his competency. *Id.* However, on appeal the CCA stayed the execution, *Id.*, and ultimately remanded the case back to the district court for further factual development. *Mays v. State*, 476 S.W.3d 454, 462 (Tex. Crim. App. 2015).

Back in district court, the judge appointed three experts to evaluate Mays to determine his competency to be executed: Dr. Bhushan Agharkar (who was selected from Mays's list of proposed experts), Dr. Randall Price (who was selected from the State's list of proposed experts); and Dr. George Woods (who was jointly proposed by Drs. Agharkar and Price). Pet.App.A at 9. The court held a four-day hearing that included the testimony of the three experts and several lay witnesses. *Id.* Based on that testimony and the other evidence submitted, the state district court concluded that Mays failed to prove by a preponderance of the evidence that he is incompetent to be executed. *Id.* at 29. Specifically, the court found that Mays: (1) has a rational understanding that he is to be executed and that the execution is imminent; (2) has a rational understanding of the reason for which he will be executed; (3) has some form

of mental illness, but that it does not prevent him from rationally understanding the connection between his crime and the punishment received; and thus, (4) is competent to be executed. *Id.* at 31–32.

Mays appealed this decision to the CCA. *See generally* State.App.1. In a forty-three-page, unanimous decision the CCA affirmed the district court's determination that Mays failed to prove that he is incompetent to be executed. Pet.App.A at 42–43. From this state court decision, Mays seeks a writ of certiorari. *See generally* Pet. for Writ of Cert. (Pet.).

After Mays filed his petition for writ of certiorari in this Court, he filed a second motion in the state district court challenging his competency to be executed under Article 46.05. Along with this motion, he filed a motion to withdraw the execution date. On October 3, 2019, the state district court granted this second motion and withdrew the execution date to allow for more time to properly review all the evidence before it. State.App.2.

REASONS FOR DENYING THE WRIT

I. Because Mays is no longer set to be executed, and there will necessarily be a superseding competency determination before another execution date is set, this case is now moot.

In his petition Mays asks this Court to review the CCA's affirmance of the state court's determination that he is competent to be executed. However, after filing this petition, Mays filed in state district court a second motion challenging his competency and a motion to withdraw the current execution date. The state district court granted the second motion and has withdrawn the date for further consideration of Mays's second competency motion. As such, a second, superseding competency determination by the state district court (and presumably by the CCA if Mays appeals) will necessarily occur before Mays would be executed. Therefore, this case is moot and any decision by this Court regarding the merits the prior competency determination would be an advisory opinion.

"A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). This occurs "only when it is impossible to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). "[A]s long as the parties have a concrete interest,

however small, in the outcome of the litigation, the case is not moot." *Id.* at 307–08 (alteration in original) (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)).

When a party challenges a law that has been repealed by the time the issue reaches the Court, the case is moot. *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414–15 (1972) (per curiam). Also moot is a challenge to a bill that expires by its own terms prior to landing on the Court's docket. *Burke v. Barnes*, 479 U.S. 361, 363–64 (1987). And this rule applies to self-expiring executive orders losing effect before the Court can issue an opinion on the merits. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353, 353 (2017). This case presents a similar situation.

Although in *Trump*, the executive order (or the bill in *Burke*) "expired by its own terms," the effect is the same here. The execution order is now expired. Thus, Mays cannot be executed pursuant to it. *See Nelson v. Campbell*, 541 U.S. 637, 648 (2004) (declining to address issues related to a prior stay of execution because "the execution warrant has now expired"). A new execution order and warrant setting a new date will necessarily implicate this subsequent competency determination by the state courts. And should Mays challenge that superseding decision, the facts will necessarily be different than those presented for review here. *See*, *e.g.*, *id.* (noting that, "[i]f the State

reschedules the execution while this case is pending on remand and petitioner seeks another . . . stay, the District Court will need to address" future issues).

When the last execution date was withdrawn, at Mays's request, it effectively expired and so did this case as a live controversy. *See Trump*, 138 S. Ct. at 353; *Burke*, 479 U.S. at 363. Thus, it is impossible to grant Mays any effectual relief here. *Knox*, 567 U.S. at 307. Further, "federal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Thus, this Court should deny the petition as moot.

II. Alternatively, Mays Did Not Present His Complaints Regarding the Checklist to the State Courts, and He Is Judicially Estopped from Making the Argument Here.

A. Because Mays did raise this issue in the state courts, it was not pressed nor passed on by the CCA.

If the Court does not find this case is moot, it should still deny Mays a petition for certiorari. In his first ground, Mays complains at length about the role a specific set of guidelines and checklist played in his competency proceedings. Pet.18–25. He summarized the argument as follows:

> In Mr. Mays's case, the trial court ordered the appointed experts to utilize a checklist during their evaluation of whether Mr. mays is competent to be executed. All three experts appointed in this case agreed it had limited application. The checklist was also created before this Court decided *Panetti* [*v. Quarterman*, 551 U.S. 930 (2007)] and failed to incorporate questions regarding whether the prisoner has a rational understanding of why he is being executed, consistent with the requirements of the Eighth

> Amendment. Despite that, the trial court credited the one expert opinion who deemed Mr. Mays competent to be executed, [Dr. Price,] noting that he was the only expert who relied upon the checklist. In doing so, the trial court failed to heed the experts' caveats regarding the checklist.

Pet.16 (citations omitted).

However, Mays never presented this argument to the CCA. *See generally* State.App.1. Conversely, he asserted other arguments which necessarily maintain that the checklist was an appropriate tool, in direct contradiction to his argument here. Pet.38–61; *see also infra* Reasons.II.B. For example, when castigating Dr. Price's lack of "the requisite clinical experience," Mays cites the guidelines' emphasis on an expert's "skill in clinical practice" to support his argument that Dr. Price's opinion was inherently flawed. Pet.39–40. When taking issue with the district court's factual finding "that Dr. Price was the only expert who *included* the guidelines," Pet.App.B at 2 (emphasis added),[1] Mays stressed that Drs. Agharkar and Woods also used the checklist, they just did so in a proper manner. State.App.1 at 52–59. Mays also criticizes Dr. Price's

[1] Note that Mays argues here that the district court improperly relied on Dr. Price's opinion, finding that "he was the only expert who *relied* upon the checklist." Pet.16 (emphasis added). That is not what the district court found. Rather, it found that Dr. Price was the only expert who "included" the guidelines. Pet.App.B at 2. In his brief on appeal to the CCA he acknowledged the word "included" but presumed "the trial court mean[t] 'used.'" State.App.1 at 53. However, it's likely the district court meant exactly what it said, i.e., "included" them with the report. In fact, this is true for Dr. Price. *Compare* Pet.App.F (Dr. Price's report) *with* Pet.App.D (Dr. Agharkar's report) *and* Pet.App.E (Dr. Woods's report).

use of the report and, thus, the trial court's reliance on his opinion. State.App.1 at 59–60.

The failure to present an argument in a state case, which then comes to this Court off direct review, implicates jurisdiction. This is because it was "'not pressed nor passed upon' in state court." *Illinois v. Gates*, 462 U.S. 213, 219 (1983). Thus, it was not part of the "[f]inal judgment[] or decree[] rendered by the highest court of" Texas necessary to give the Court jurisdiction over the issue. 28 U.S.C. § 1257(a). But even if Mays's lack of fair presentation is not jurisdictional, *see Gates*, 462 U.S. at 219 (noting a "lack of clarity as to the character of the 'not pressed or passed upon rule'"), "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

Here, Mays did not fairly present to the CCA the argument he raises now. More importantly, in that court he presented arguments which stressed the completely opposite point: that the guidelines and checklist included by the district court were a useful tool in the expert evaluations of Mays's competency. Thus, this Court cannot, or at the very least should not, consider this as a ground for certiorari.

B. Because Mays invoked the district court's and CCA's reliance on the guidelines and checklist as a useful tool in assessing competency, he is judicially estopped from now asserting an argument to the contrary.

In the procedural section of his petition for certiorari Mays explains:

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

Pet.9 (citations omitted). However, in this recitation Mays neglects to mention an essential fact: the guidelines and checklist were provided to the experts by Mays himself.

After the CCA remanded the case to the district court, Mays filed a "Motion to Compel Expedited Discovery to Facilitate Article 46.05 Proceedings." 2017.CR.54–58.[2] In that motion, beginning a section titled "Argument & Authorities," Mays wrote:

> The court-appointed mental health experts will, in accordance with professional guidelines for conducting competency

[2] "2017.CR" refers to the Clerk's Record of pleadings and documents filed in the state district court after remand from the CCA. This record was filed in the CCA on November 16, 2017, under cause number AP-77,055.

evaluations, need to review, at a minimum, the following collateral information:

> Information regarding life history, psychological history and disorders, deterioration-related data, previous and current written reports, and interviews with person who have had extensive opportunities to observe the subject.

See P. Zapf, Ph.D., *et al*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. Law 103, 106 (2003), attached here as Exhibit A.

2017.CR.55. Indeed, Mays attached the guidelines and checklist, about which he now complains, to this motion.

In his brief on appeal in the CCA, Mays's recitation of the procedural history as it regards these guidelines reads very different than in his petition before this Court. He admits he attached the guidelines to the motion. State.App.1 at 2. But regarding the district court's order, he says: "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*." *Id.* at 3 (emphasis added). And as discussed above, *see supra* Reasons.I.A, in that brief he argued that the guidelines and checklist included by the district court where a useful tool in the expert evaluations of Mays's competency.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the

prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Although there is no formulaic rule as to when judicial estoppel is appropriate, the following guidelines should be considered:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled.". . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750–51 (citations omitted). Here, every factor lies in favor of judicial estoppel.

Mays's position now is "clearly inconsistent" with his earlier stance. He argues to this court that the trial court's reliance on "an unscientific, unvalidated checklist," Pet.19, "tainted the trial court competency determination," Pet.23. Yet in the district court Mays introduced the court to the guidelines and recommended they be used by the experts. 2017.CR.55. Again, even by Mays's own admission in the CCA, they were included with the

district court's order "as an exhibit *at the suggestion of Mays's counsel*." State.App.1 at 3 (emphasis added). And in the high state court he argued that the guidelines and checklist included by the district court were a useful tool in the expert evaluations of Mays's competency. *See supra* Reasons.I.A. He should not be allowed to sow the very seed of discontent into the proceedings and later complain about it, especially after invoking the state courts' reliance on his prior position.

III. Mays Is Competent to Be Executed, And the State Courts Did Not Improperly Rely on Junk Science or Lay Witnesses in Reaching this Determination.

A. Legal Standards

"The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). Although "insanity" has never been fully defined by the Supreme Court, the Eighth Amendment at the very least, "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring). And whether in terms of "awareness" of an execution or "why" it is to occur, prisoners must have a "rational understanding of the reason for the execution." *Panetti*, 551 U.S. at 958. While the contours of a "rational understanding" might not be altogether clear, it is at least known what could negate such an understanding: "[g]ross delusions stemming from a severe mental disorder may put an awareness of a

link between the crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id.* at 960; *see State v. Irick*, 320 S.W.3d 284, 295 (Tenn. 2010) ("Stated differently, under *Panetti*, execution is not forbidden so long as the evidence shows that the prisoner does not question the reality of the crime or the reality of his punishment by the State for the crime committed.").

To even implicate a lack of rational understanding under *Panetti*, a prisoner must first show a severe psychotic disorder. *Id.*; *see Overstreet v. State*, 877 N.E.2d 144, 172 (Ind. 2007) ("As we read *Panetti*, a prisoner is not competent to be executed within the meaning of the Eighth Amendment if (1) he or she suffers from a severe, documented mental illness; (2) the mental illness is the source of gross delusions; and (3) those gross delusions place the 'link between a crime and its punishment in a context so far removed from reality' that it prevents the prisoner from 'comprehending the meaning and purpose of the punishment to which he [or she] has been sentenced.'"). This requirement naturally follows from the fact that competency is typically measured in terms of capacity to understand, not one's willingness to engage in such understanding. *See Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) ("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings.").

Indeed, the *Panetti* Court acknowledged the difference between capacity and willingness when it stated:

> The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what [Panetti] contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like [Panetti's] is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Panetti, 551 U.S. at 959–60.

In Texas, the standard a procedure for determining competency is codified in Texas Code of Criminal Procedure Article 46.05.

> [A] prisoner is competent to be executed under Article 46.05 if he knows he is to be executed by the State, he knows the reason he is to be executed, he knows that the execution is imminent, and, despite any delusional beliefs or other mental illness he may have, and despite the fact that he may deny having committed the capital offense, he comprehends that there is a "causal link" between his capital offense and his imminent execution, beyond merely identifying the State's articulated rationale for the execution.

Battaglia v. State, 537 S.W.3d 57, 81 (Tex. Crim. App. 2017). A person who invokes this article must show by a preponderance of the evidence that he or she is incompetent to be executed. Tex. Code Crim. Proc. art. 46.05(k). Under Texas law, preponderance is defined as the "greater weight and degree of the

credible evidence in the case." *Rickels v. State*, 202 S.W.3d 759, 763–64 (Tex. Crim. App. 2006).

B. State court competency hearing

The district court held a four-day hearing on Mays's motion challenging his competency to be executed. The court appointed three experts to evaluate Mays: Dr. Bhushan Agharkar (who was selected from Mays's list of proposed experts), Dr. Randall Price (who was selected from the State's list of proposed experts); and Dr. George Woods (who was jointly proposed by Drs. Agharkar and Price). 2017.CR.165. The court instructed the experts to answer the following questions:

> 1. Does Mr. Mays suffer from a mental illness or mental impairment?
>
> 2. If so, does Mr. 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 [Mr. 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).

2017.CR.124.

The court further instructed the experts to "consider whether Mr. Mays's mental illness or mental impairment deprive 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 being executed." *Id.* (citing Tex.

Code Crim. Proc. art. 46.05(h)). The court attached to this order the guidelines and checklist which were provided at the suggestion of Mays's counsel. 2017.CR.126–44. The court ordered that the experts use the guidelines "to assist in conducting their evaluations and as the basis for framing the conclusions that shall be set forth in their written reports." 2017.CR.123.

1. Dr. Bhushan Agharkar

All three experts testified at the hearing and their reports were included as exhibits. *See* Pet.Ex.D, E, F. Dr. Agharkar was the first of the three experts to testify. He is a medical doctor and psychiatrist in private practice in Atlanta, Georgia. 2.RR.29.[3] [credentials]

Dr. Agharkar was asked about his use of the guidelines and checklist attached by the court to its order regarding the expert evaluations. 2.RR.34. He said that he read and utilized the article in conducting his evaluation; but he testified that he eschewed the checklist because he preferred to ask open-ended questions. *Id.* When asked about the guidelines and checklists on cross-examination, Dr. Agharkar was openly dismissive of them: "That's just somebody's opinion. I mean, they surveyed some folks and then wrote a guideline up, but that doesn't mean we have to follow that or it means that that's the only way to do things." 2.RR.70.

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[3] "RR" refers to the Reporter's Record from the competency hearing that occurred rom August 9 through 12, 2017.

Dr. Agharkar met with Mays for two hours on June 16, 2016, and again for one-and-a-half hours on August 18, 2016. 2.RR.44. Dr. Agharkar testified that Mays seemed guarded and paranoid. 2.RR.47. Mays discussed with Dr. Agharkar a fear of being poisoned either in through his food or the environment. 2.RR.40, 55. Mays claimed that he heard voices and suffered from other hallucinatory experiences. 2.RR.39. Mays also said that he did not take medication provided by the prison for headaches, stomachaches, etc., because they made him hallucinate. 2.RR.39, 62–63.

Mays told Dr. Agharkar that he had been awarded a patent for a renewable energy source that could be delivered directly to consumers. 2.RR.60. In Mays's estimation this would put "big gas or electric companies" out of business. *Id.* Mays told Dr. Agharkar he believed they would lose "billions of dollars" because of this idea. 2.RR.66. Mays expressed a belief to Dr. Agharkar that his execution was a means to silence him so the technology was never realized. 2.RR.60.

Dr. Agharkar testified that Mays was admitted to Terrell State Hospital in 1983 and 1985 for symptoms of paranoia, hallucinations, and delusions. 2.RR.37–38. He acknowledged that the doctors who treated him believed these symptoms were related to Mays's methamphetamine abuse. 2.RR.38. However, Dr. Agharkar opined that because Mays demonstrated "persisting" symptoms, they were not related to methamphetamine abuse. 2.RR.38–40. Dr. Agharkar

did agree, though, that these two admissions were the only documented history of mental illness for Mays. 2.RR.80

Dr. Agharkar conducted "screenings" of Mays to detect for the presence of brain damage. 2.RR.45. Dr. Agharkar noted that his basic screening results were consistent with a prior diagnosis of dementia by Dr. Joan Mayfield in 2009. 2.RR.41, 46, 64. He noted that Mays's thoughts were tangential, that he would repeat the same statements over and over again, and that he remembered some facts about Dr. Agharkar during the second visit, but not why Dr. Agharkar was there. 2.RR.45, 47, 58.

Dr. Agharkar opined that Mays suffered from both schizophrenia and a neurocognitive disorder, i.e., dementia. 2.RR.64–65. However, he acknowledged that Mays was not being treated for either diagnosis. 2.RR.66. He further acknowledged that there was never a prior diagnosis of schizophrenia. 2.RR.77–80, 103–04.

However, Dr. Agharkar acknowledged that he did not perform a "neuropsychological battery" and that he "would never diagnose someone based on [his] screenings." 2.RR.85. He also mentioned that people with dementia eventually lose the ability to conduct "activities of daily living," or "ADLs." 2.RR.104–05. But he saw no evidence of Mays losing ADLs. 2.RR.105–06.

Indeed, Dr. Agharkar admitted that as a medical doctor, he was not trained to give psychological exams.

> Q. Now, let me talk about your role. You talked a little bit about on direct the difference between an M.D. and a Ph.D. And you said y'all work together sometimes.
>
> A. Sure.
>
> Q. And Ph.D.'s are actually more specially trained, would you agree with me, to give some of these psychological tests?
>
> A. Oh, I agree. Medical doctors are not trained to give psychological tests.
>
> * * *
>
> Q. And if you work in conjunction with neuropsychologists in your tests, it's probably a pretty good idea to give these pretty thorough testings, as thorough as possible, before you can get an accurate diagnosis.
>
> A. Oh, sure. I mean, I want it to be clear, I conducted screenings. The screenings are consistent. And I would never diagnose someone based on my screenings. I diagnose them based on the fact that my screenings actually match up with the extensive testing already done. But I don't want you to get the impression, I don't want to give the Court the impression, that I gave a neuropsychological battery. I did not.

2.RR.81–82, 85.

Dr. Agharkar noted that Mays did not like discussing his symptoms or his legal circumstances, including the crime. 2.RR.59, 86. Dr. Agharkar said that Mays became agitated and paranoid during the second meeting when Dr. Agharkar tried to explore more of Mays's mental process. 2.RR.47–48.

However, he acknowledged that Mays spoke specifically about several of these things in great detail with Dr. Price. 2.RR.86–87.

Dr. Agharkar, like all the experts, believed that Mays had a rational understanding that he was to be executed and that the execution was imminent. 2.RR.96. He also agreed, like all the experts, that Mays had an understanding that he committed a capital murder and that he was convicted for that crime. 2.RR.103, 110–12. However, Dr. Agharkar did not believe Mays had a rational understanding that the State was going to execute him because of that crime. 2.RR.66–67. Thus, Dr. Agharkar concluded that Mays was not competent to be executed. *Id.*

2. Dr. Randall Price

Dr. Price testified next. He is a forensic psychologist and neuropsychologist. 2.RR.129. Price reviewed Mays's legal and medical records and conducted an over-two-hour, face-to-face clinical interview with Mays. 2.RR.169; 3.RR.20. Unlike Dr. Agharkar, Dr. Price believed that it was the "best practice" to use checklists in evaluations. 3.RR.18–19. And although Dr. Price utilized the checklist provided in the district court's order, he did not mechanically follow it. 2.RR.186–87. He testified that he had the discretion to skip some of the questions. 2.RR.191.

Although it was not mandated by the trial judge, Dr. Price also utilized Section IV of the checklist, which pertained to Mays's "ability to assist [his]

attorney," because he thought it might be important. 2.RR.188–89. In addition, Dr. Price used his own checklist of 104 questions, which he called "The Structured Competency for Execution Interview." 2.RR.188; Pet.App.F at 3. He described this in his report as "a focused inquiry consist[ing] of a series of questions to guide the evaluator in the evaluation of his competency for execution as set forth in *Panetti v. Quarterman* (2007) and in Article 46.05 of the Texas Code of Criminal Procedure." Pet.App.F at 3.

Price described Mays as friendly and polite, 2.RR.203, but he also noted that when Mays did not want to talk about a subject, he would not answer questions, 2.RR.179. Mays said he understood the purpose of the evaluation, but he refused to sign an informed consent form, reportedly on the advice of his attorney. 2.RR.163–64. Dr. Price believed that when asked specific questions about his legal proceedings, including his refusal to sign the consent, Mays demonstrated a reasonable awareness of the circumstances. 3.RR.28. Mays also described his prior hospitalization at the Terrell State Hospital. 2.RR.175. Mays acknowledged his methamphetamine use and said "[t]hat was a crazy part of [h]is life." *Id.*

Dr. Price detailed his extensive examination procedures, including the several testing instruments he used in the evaluation. 2.RR.165–68. Mays only cooperated with a couple of these instruments, specifically the Montreal Cognitive Assessment (MoCA) and the Rey Fifteen Item Test (RFIT).

2.RR.167–69. Dr. Price's scoring of the MoCA showed that Mays may have mild cognitive impairment with a deficit "in memory, specifically in delayed recall for unrelated words." Pet.App.F. at 11. But Dr. Price this impairment was not enough to make him incompetent. 3.RR.56.

Dr. Price also saw some evidence of Paranoid Personality Disorder with Mays. 3.RR.55. Dr. Price also saw some evidence of delusions, "including paranoid ideation concerning air quality, food contaminants, somatic processes, and the legal system." Pet.App.F at 10. However, Dr. Price found that "[n]o psychotic thinking was evident." *Id*. He did not diagnose Mays with dementia. 3.RR.55. He saw "no evidence of a decline" from 2009 to 2016. *Id.* He also did not believe Mays was truly delusional, especially where it regarded the impending execution. 3.RR.74–79.

Mays demonstrated an acute awareness of the legal proceedings. He knew that he was convicted for capital murder and even recalled details of the incident. 2.RR.179–181; 3.RR.30–31. He remembered "that the police officers came on his property when he told them not to and drew guns and that's why this happened." 3.RR.30–31. He believed his conviction was unjust because of this, but Dr. Price testified it was common for inmates to deny or deflect their fault in the offense. *Id.* He believed that he could get his case overturned through the appeals process. 2.RR.219. But Mays was also anxious about his impending execution. 2.RR.215.

Dr. Price stated that Mays enjoyed talking about the environment and energy alternatives. 3.RR.30, 46. In fact, Mays continually tried to turn the conversation to these topics. 3.RR.46. Dr. Price testified: "[Mays] said that he wanted to help people, his friends and family, to build things that were environmentally friendly, and he though he could help them from prison by correspondence, et cetera." 2.RR.217. Dr. Price stated that Mays sounded rational about these issues. *Id.*

However, Mays never told Dr. Price that his execution was somehow linked to a design for green energy. 3.RR.16. In fact, Mays never discussed this in terms of a business. 2.RR.217. Dr. Price further testified that because Mays had a rational understanding of the crime he committed, he would have doubts about the veracity of such a belief by Mays. *Id.*

Ultimately, Dr. Price diagnosed Mays with several mental disorders: "Stimulant Use Disorder (Amphetamines), in Remission Secondary to Controlled Environment, a Paranoid Personality Disorder, a Mild Substance-Induced Neurocognitive Disorder, and both Mild Depressive and Anxiety Disorders." Pet.App.F at 17. However, Dr. Price testified that these disorders did not deprive Mays of a rational understanding of the connection between his crime and his punishment, nor did Mays's apparent belief that "miracle might happen" which would prevent the execution. 2.RR.218; Pet.App.F at 17. Dr. Price opined that Mays "understands that he will be executed because he

was convicted of capital murder even though he believes his conviction was totally unfair." Pet.App.F at 17. Therefore, Dr. Price concluded that Mays is competent to be executed. 3.RR.64.

3. Dr. George Woods

Dr. Woods was the last of the experts to testify. He is a medical doctor specializing in neuropsychiatry. 3.RR.99. He testified that he "tried to utilize [the guidelines and checklist] to the degree I could . . . ." 3.RR.102. He agreed that the foundational principles and areas of inquiry in the guidelines were important in formulating an accurate assessment. 3.RR.177–93. However, he criticized the guidelines because there were no reliability or validity studies conducted to test or measure their accuracy. 3.RR.101.

In his report, Dr. Woods described Mays as "easily distractible despite attempts to focus." Pet.App.E at 17. Like Dr. Price, Dr. Woods gave Mays a variety of screening tests. 3.RR.118, 144. From these, Dr. Woods opined that Mays had impaired memory, mixed visuospatial skills, limited constructional ability, significantly impaired executive functioning, and severely impaired abstraction ability. Pet.App.E at 21–23. Dr. Woods thought Mays was "generally cooperative," but Mays declined to answer many questions due to his "paranoid ideation," particularly questions "about his personal life and the instant offense." Pet.App.E at 18. However, Dr. Woods disagreed with Dr.

Price's assessment that he exhibited signs of Paranoid Personality Disorder. 3.RR.138.

Dr. Woods reported that Mays "had difficulty with test instructions." Pet.App.E at 18. Woods reported that Mays's thought processes were "connected, but delusional." Pet.App.E at 19. His thought content was "paranoid, delusional, suspicious, [and] grandiose." *Id.* He "denie[d] hallucinations on a consistent basis." *Id.* Though Dr. Woods described a hallucination that Mays discussed, Mays believed this hallucination was caused by medication. *Id.* Dr. Woods, like the other experts, testified regarding Mays's belief "that he's being poisoned by the air . . . ." 3.RR.156.

Mays told Dr. Woods that he was "developing some energy deal" but that he believed there was a "conspiracy by the Texas state government and the oil companies in Texas" to kill him "so that it won't come to light . . . ." 3.RR.128. Dr. Woods asked "if [Mays] would trade the secrets of his device in return for his life," Mays replied, "No." Pet.App.E at 19. Dr. Woods testified that Mays believed the state found out about his business by reading his mail. 3.RR.162. Dr. Woods described Mays as having a "preoccupation" or "pervasive quality" in his thinking about renewable energy. 3.RR.161–62.

Dr. Woods opined that Mays "suffers from a Major Neurocognitive Disorder which is dementia-form in nature." 3.RR.165. Dr. Woods believed that Mays also suffers from "a psychotic disorder," though Dr. Woods was "on the

fence about whether it's schizophrenia or not." *Id.* In his report Dr. Woods wrote that Mays "manifests symptoms that are consistent with the diagnostic criteria for schizophrenia;" however, he also noted that Mays lacked a "period of social deterioration [that] occurs in Schizophrenia . . . ." Pet.App.E at 26. When asked if Mays had experienced a decline since the 2009 evaluation, Dr. Wood's testified: "He's gotten worse in terms of his delusions and his paranoia and psychosis. It's not clear that he's gotten worse in terms of his cognition." 3.RR.196.

Dr. Woods concluded that Mays is incompetent to be executed because "[h]e does not have a rational understanding of the connection between his crime and punishment." Pet.App.E at 26. Dr. Woods testified that, although Mays has a factual understanding of his execution, he does not have a rational understanding of the reason why he will be executed. 3.RR.165–66. Instead, Mays's "overwhelming belief is that the Texas state government is trying to kill him to keep him from promoting this wind machine that he believes he has developed." 3.RR.165.

Towards the end of his testimony, the district court asked Dr. Woods some questions regarding Mays's purported beliefs of the reason for his execution:

THE COURT: I have looked at these letters --

THE WITNESS: Yes, sir.

THE COURT: -- that he's written over the period of 2014 to 2016. I haven't added up the number here, but there's a significant number of letters.

THE WITNESS: Yes, sir.

THE COURT: Which all of y'all have seen. I'm having a hard time finding his obsession, as you testified that he talked to you about but did not talk to one of the other professionals about, of the State and this wind power.

THE WITNESS: Yes, sir.

THE COURT: Of all these letters, there's eight that mention wind power. And in all of these, he's attempting to get a family member or a friend to do it so they can save themselves money.

THE WITNESS: Yes, sir.

THE COURT: I've seen nothing in here where there's any gain to him in any of these letters.

3.RR.243–44. The court then continued:

> But I don't see anything there in any of this . . . . of an obsession with the government being interested in his wind farm ideas. . . . . So I'm having a hard time connecting this, which is his everyday life for the last few years, with an obsession that the government is after him, because there's nothing in here that would indicate that.

3.RR.245–46. And Dr. Woods responded:

> THE WITNESS: . . . I'm not sure that anybody had asked him in this position. Nobody in his family asked him why did he get these ideas. Nobody -- I mean, this did not come up until this particular situation came up. So I'm not clear that anybody has ever asked him what did he think, because no one has ever had to confront him with, well, why are you getting executed?

THE COURT: I would think if he was obsessed with it, he would have said something to somebody in some of these letters he was writing and say, the government is trying to kill me to get this wind farm information. I would think that would come from him, not from somebody's family member asking him. You know, they wouldn't know to ask a question like that.

THE WITNESS: But that is exactly what you see in paranoid persons and people that are paranoid. They don't provide that information. These conversations were enlightening, but they were basically pretty light. It wasn't until this legal issue came up that, in my opinion, this occurred.

THE COURT: So it's your opinion, as you sit here today, that the gentleman sitting here, Mr. Mays, doesn't know why the State is trying to execute him?

THE WITNESS: No. It's my opinion his greatest belief is that the State is trying to execute him in order to keep this green thing and to keep him away. That's his greatest belief.

* * *

THE COURT: All right. Are you telling me that, as he sits here today, he doesn't have a rational understanding why the State is attempting to execute him for killing two people?

THE WITNESS: That's correct. I am saying that he knows that he's been convicted and he knows that ostensibly the reason is because of his conviction. But his real -- his real belief is what I've described.

3.RR.248–49, 250.

4. Lay Witnesses

In addition to the three experts, several lay witnesses also testified. Bobby Mims was Mays's original trial counsel for Mays. 4.RR.6. He testified about his decision to not have Mays examined for competency prior to his trial.

4.RR.12–17. Mims discussed odd behaviors by Mays, some of which Mims later came to believe were "psychotic episodes." 4.RR.12. He gave examples of these odd behaviors: Mays's disorientation in the hospital room after being shot, talking to the press and giving incriminating statements, and not cooperating with counsel on the release of records. 4.RR.7–12. Other apparently unusual behavior included having no trespassing signs at his house, fire extinguishers in every room of the house, Mays collapsing during trial while going back to his cell, changes in his demeanor during trial, and having to settle him down when he confronted deputies. 4.RR.19–22.

The State introduced the deposition testimony of Dr. Joseph Penn. 4.RR.63–64. Dr. Penn is the Director of Mental Health Services for the University of Texas Medical Branch (UTMB), which provides medical and mental health care to inmates in the Texas prison system. State.Ex.1-A.[4] He generally described the mental and physical healthcare that is provided to inmates and the services available. *Id.*

Nina Foster also testified. She is the Mental Health Manager at the Polunsky Unit. 5.RR.9 She discussed the mental health staff serving the unit and the procedures for seeing and treating the prisoners. 5.RR.11–14. In the more-than-two years that Foster had been at the Polunsky Unit, she never

[4] This refers to the State's Exhibit 1-A from the 2017 competency hearing.

performed an evaluation on Mays until approximately two-and-a-half weeks prior to the competency hearing. 5.RR.14. At that time, her supervisor Dr. Penn gave her a referral to see him. *Id.* Until that time, Mays had not been "on the radar." 5.RR.16.

Foster described the assessment she conducted with Mays as "open and honest." Mays indicated he had some depression, and although he mentioned having hallucinations during his twenties when he was on drugs, he said he was not having hallucinations now. 5.RR.17–18. Mays did not exhibit any signs of paranoia or psychotic symptoms and never mentioned anyone poisoning his food. 5.RR.18. He did mention his idea about renewable energy, but again, he did not claim that was the reason for which the state was seeking to execute him. 5.RR.19–20. He did not express any thoughts of a greater conspiracy at play trying to keep him from pursuing his ideas. *Id.*

After meeting with Mays, Foster referred him to a psychiatrist for depression who prescribed medication. 5.RR.21–22. This referral placed him on the mental health case load for the first time since he arrived at the Polunsky Unit. *Id.* Prior to that he had been on the regular ninety-day scheduled visits by the mental health staff. *Id.*

Finally, Cathleen Cooper testified. She was a corrections officer at the Polunsky Unit. 5.RR.46. She had worked there for sixteen months at the time of her testimony. She testified that she had regular, sometimes daily, contact

with Mays for that sixteen-month period. *Id.* She described her interactions with Mays as generally cordial. 5.RR.54. However, he did get angry with her and placed her name on his "hateful list" for not handcuffing him in the front, which was a common complaint for Mays. 5.RR.54–55. As part of her duties, Cooper would deliver books to inmates from the prison library. 5.RR.52. Mays would generally check out one or two volumes of the encyclopedia, and often relate to Cooper "fun facts" that he learned. 5.RR. 56–59.

Though she was not a "mental health expert," Cooper received training on observing an inmate's mental health, especially looking for deviations in that behavior. 5.RR.60. If she noticed something of concern, she reported the inmate so he or she could receive mental health services. *Id.* Cooper had reported inmates in the past for this reason. *Id.* However, she had never reported Mays, nor seen a report on Mays. 5.RR.59. Over the sixteen-month period she never observed any decline in Mays's mental state. *Id.* Importantly, Mays never discussed his green energy plans with her nor made comments regarding a conspiracy involving the state to execute him because of these plans. 5.RR.61.

C. Mays now merely seeks further factual review of the state court's determination that he is competent to be executed.

Mays raises several complaints about the decision by the lower courts. Pet.25–37. Ultimately, this case turns on the credibility determinations of the three experts made by the state courts. As the CCA noted, Dr. Agharkar acknowledged that he as a medical doctor did not have full training to give psychological tests. Pet.App.34. Thus, he only conducted screenings with Mays, screenings which he admitted he does not use as a basis for diagnosis. *Id.*

The district court in its final order wrote: "In determining the credibility of all witnesses, the Court considered their observed attitudes, their interest in the outcome, their relationship with the parties, if any, and the probability or improbability of their testimony." Pet.App.B at 1. With that in mind, the court voiced grave concerns about the objectivity of Dr. Woods. The court noted its appointment of Dr. Woods was specifically "to provide the court with an objective report." Pet.App.B at 2. Yet the court observed Dr. Woods "passing written notes to counsel for [Mays] during her examination of Dr. Randall Price." *Id.* "It appeared to the Court that Dr. Woods had become an advocate by such action rather than fulfilling his charge by the Court to provide the Court the benefit of an objective assessment." *Id.* Conversely, both state courts found Dr. Price to be very credible. The CCA made particular note of Dr. Price's experience in these cases. Pet.App.A at 35. These credibility determinations

are crucial to the ultimate determination that Mays is competent to be executed. And the state courts were in a better position to assess the credibility of the witnesses, particularly the experts.

Mays complains that the state courts ignored evidence regarding a supposed belief that he is to be executed as part of a conspiracy involving his plans for a renewable energy business. Pet.28–36. Because of this, Mays says he does not have rational understanding of the reason for his execution. Apart from the ultimate opinions of the three experts here, the evidence belies any notion that Mays truly holds this delusion.

Mays spoke at great length with Dr. Price about his interest in the environment and cleaner energy sources. Yet, at no point did Mays mention his delusion that the State will execute him to keep his plans for a renewable energy quiet. Moreover, Mays directly acknowledged that he understood he was on death row because he was convicted of the capital murder of a police officer. And although he felt it unjust, Dr. Price testified that this was common for inmates to feel. Even Dr. Woods acknowledged, "whether a person believes they are justly [convicted] -- that's not really an issue for you when it comes to competency." 5.RR.116.

Several letters written by Mays to friends and family between 2014 and 2016 were admitted into evidence at the hearing. Again, in eight of the letters he discussed clean energy as a concept. Yet nowhere did he mention a business

plan, a new renewable energy source he discovered, or the State's plan to silence Mays by executing him. Dr. Woods offered a paltry explanation that his family and friends had not asked Mays the specific question to illicit that response. But that simply strains credulity to believe that Mays, if he truly believed this, would not proffer that without the prompt.

Mays also did not tell this to any UTMB staff member, despite being seen at least every ninety days. Nor did he discuss it with Cooper, who had seen him nearly every day for sixteen months leading up to trial. Indeed, the only sources of this information are Drs. Agharkar and Woods, both of whom were on Mays's list of proposed experts for the hearing, 2017.CR.145, and one of whom was determined to be purely an advocate for the defense.

Mays briefly complains that the district court also relied on "lay stereotypes" when making its decision. Pet.25–27. Specifically, he complains the court noted that he appeared to interact with counsel during the hearing. Mays claims this violates the Court's ruling in *Moore v. Texas*, 157 S. Ct. 1039 (2017). Here though, Mays stretches the holding and lessons of *Moore* far too thin.

First, *Moore* dealt with intellectual disability, which has a much more clearly defined methodology of diagnosis. *See Moore*, 157 S. Ct. at 1045 (discussing the diagnostic criteria listed in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition). Unlike intellectual disability

which is a diagnosis, "rational understanding" is a legal concept with unclear contours. *Panetti*, 551 U.S. at 958–60. Second, *Moore* did not announce a categorical rule against the consideration of lay perception. Rather, it chastised the great weight placed on such perceptions by the CCA's case law, particularly where "the CCA defined its objective as identifying the 'consensus of Texas citizens' on who 'should be exempted from the death penalty.'" *Moore*, 157 S. Ct. at 1051 (quoting *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2014). The courts did not place any such emphasis on that type of evidence here. Indeed, without mention of Mays's discussions with his counsel, the district court and CCA's orders read every bit as firm in its analysis.

All three experts agreed that Mays knows he was charged with and convicted of capital murder. They also agreed that Mays knows he is going to be executed. All three experts also acknowledged that Mays suffers from some form of mental illness, though each differed on the particular diagnosis. However, the state courts found that the particular delusion Mays claims was not otherwise supported by the record. Absent this delusion, there can be no question that Mays has a rational understanding of the connection between his crime and punishment. Mays's arguments to the contrary are merely a request for further factual review and error correction of the state court's decision, for which this Court need not expend its limited judicial resources.

CONCLUSION

Mays's petition is now ultimately moot because the execution date was withdrawn and there will necessarily be a superseding competency determination before a new date is set. Alternatively, Mays did not present his first argument regarding the guidelines and checklist to the state courts, and he is judicially estopped from making the argument now. The rest of his arguments merely seek further factual review, which is not a compelling ground for this Court to issue a writ of certiorari. Consequently, his petition should be denied.

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