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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	KNOX COUNTY
v.	)	NO. M1987-00131-SC-DPE-DD
	)	
BILLY RAY IRICK,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE KNOX COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the evidence in the record preponderates against the trial court's presumptively correct factual finding that Irick is competent for execution.

STATEMENT OF THE CASE

Billy Ray Irick ("Irick") was convicted on November 1, 1986, of the felony murder and two counts of aggravated rape of a seven-year-old girl. *See State v. Irick*, 762 S.W.2d 121, 124 (Tenn. 1988). After he had completed the standard three-tier appeals process,[1] the State moved this Court to set an execution date. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. May 10, 2010). In his response, Irick asserted a "good faith claim" of present incompetency for execution based on evaluations conducted by Dr. Peter Brown in December 2009 and January 2010. *Irick*, No. M1987-00131-SC-DPE-DD (Tenn. May 27, 2010) (resp. at 54-55). The Court set an execution date of December 7, 2010, and remanded the matter to the Criminal Court of Knox County for an expeditious determination of his present competency. *Irick*, No. M1987-00131-SC-DPE-DD (Tenn. July 19, 2010) (order setting execution date at 2).

After Irick filed his petition to determine competency in the trial court, the court ordered an evidentiary hearing and appointed two mental health experts, including Dr. Brown, to evaluate him. (T.R. 90.) The hearing was conducted on August 16 and 17, 2010. (Tr. 1, 89.) By order dated August 20, 2010, the trial court found that "the evidence presented more than sufficiently establishes that the Petitioner has the mental capacity to understand the fact of his impending execution and the reason for it." (T.R. 129.) Irick timely appeals. (T.R. 130.)

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[1] *See id.* (direct appeal); *Irick v. State*, 973 S.W.2d 643 (Tenn. Crim. App. 1998) (state post-conviction proceedings), *perm. app. denied* June 15, 1998; *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009) (federal habeas corpus proceedings), *cert. denied*, 130 S.Ct. 1504 (Feb. 22, 2010), *pet. reh'g denied*, 130 S.Ct. 2142 (Apr. 19, 2010).

STATEMENT OF THE FACTS

Although the trial court ordered an evaluation by Dr. Peter Brown (T.R. 90), it was not conducted. Instead, Dr. Brown relied on the five-hour, forty-five-minute interviews that he had performed ending on January 21, 2010—nearly eight months before the evidentiary hearing. (Tr. 18, 46.) That evaluation was not performed for the purpose of determining competence for execution; rather, it was directed to ascertaining Irick's sanity at the time of the offense. (Tr. 46, 47.) Consequently, although Dr. Brown was aware of the guidelines and standards set forth by the American Academy of Psychiatry and the Law for the assessment of competence to be executed, he did not apply them in a systematic way. (Tr. 49.) As to the questions that Dr. Brown did pose relating to current competency, Irick indicated that knew that he was on death row expecting to be executed, that he knew the offense of which he had been convicted, and that he knew the name of his victim. (Tr. 49-50.)

Because Dr. Brown performed no competency evaluation, he testified that "I don't have an opinion about that." (Tr. 68.) When asked whether Irick "has a rational understanding of why he's going to be put to death," however, the psychiatrist responded:

> The best answer that I can give is that his rational understanding of events is that of a child in the seven- to nine-year-old range. So that by the legal standards are obviously not my business, but the—his—the capacity of his brain to work in forming a rational understanding is in that of a preadolescent child.

(Tr. 45.) On cross-examination, Dr. Brown agreed that a seven-to-nine-year old understands the concept of doing something wrong and then receiving punishment. (Tr. 50.)

Dr. Brown did, however, opine that Irick was incapable of appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law. (Tr. 38, 42-43.) In this regard, Dr. Brown arrived at a diagnosis of "psychotic disorder not otherwise specified," a condition manifested by gross perceptual and thinking deficits such as hallucinations, delusions, and gross disorganization of behavior. (Tr. 22-23.) Dr. Brown's own interview of Irick yielded no evidence of a formal thought disorder. (Tr. 64.) The psychiatrist's diagnosis accordingly was based on "history". (Tr. 22.) That history did not include Irick's twenty-four-year sojourn at the Riverbend Maximum Security Institution, where he had no documented episodes of psychosis or uncontrollable behavior and had not been treated for mental health issues. (Tr. 55, 62-63, 67.) Rather, the "best examples" of psychotic behavior were contained in lay affidavits first generated in 1999 during federal habeas corpus proceedings relating that Irick reported hearing voices, talked to himself, and had acted violently toward others in the days leading up to his 1985 offense. (Tr. 23.) Dr. Brown acknowledged that these affidavits represented the most recent report of a psychotic episode. (Tr. 66.)

For his part, Irick denied any memory of the events recounted in the affidavits and he denied any psychological impairment. (Tr. 25, 30, 62.) Dr. Brown

explained that someone suffering from paranoia and psychosis views the world as a threatening place and has the tendency to minimize or deny symptoms. ((Tr. 26.) Consequently, the "most reliable information" typically is the reports of third parties witnessing the same symptoms. (*Id.*) In Dr. Brown's view, all the data from Irick's childhood, including a report that Irick feared his own impulses and felt threatened by those in his environment at age six, were consistent with a severe psychiatric condition. (Tr. 27-28.) The typical patient, Dr. Brown explained, employs externalization as a coping mechanism and is poor at articulating memories. (Tr. 29-30.) Dr. Brown further indicated that psychotic symptoms tend to wax and wane according to circumstance. (Tr. 31.) Emotional conflict, he testified, can trigger a psychotic episode. (Tr. 31-32.) The marital issues that the victim's mother and stepfather were experiencing at the time of Irick's crime, Dr. Brown opined, amounted to such a stressor. (*Id.*)

For his second diagnosis, Dr. Brown concluded that Irick suffered from "cognitive disorder not otherwise specified," a condition manifested by significant problems in the processing of information that has no alternative explanation. (Tr. 22, 34.) This diagnosis was based on neuropsychological testing performed by Dr. Malcolm Spica during the same timeframe that Dr. Brown had conducted his own evaluation, and was consistent with Irick's history. (Tr. 34.) Dr. Spica found gross impairment in Irick's executive function, relating to his ability to integrate information from various processes in order to make decisions, plan, and control

impulses. (Tr. 34-35.) An individual having this disorder, Dr. Brown indicated, would not be able to resist paranoid delusions or command hallucinations. (Tr. 35.) Dr. Brown further explained that the condition affects memory because "there isn't a way of planning in a meaningful and comprehensive way and of monitoring ongoing function, that part of the memory isn't there." (Tr. 36.) Irick additionally has gross deficit in language function, Dr. Brown stated, meaning that his ability to use words as props to structure memory is impaired. (*Id.*)

Dr. Brown lastly diagnosed Irick with two personality disorders. (Tr. 22, 36-37.) The first was paranoid personality disorder, meaning that Irick has deficits in terms of evaluating people because of his level of suspiciousness, and has a tendency to look for attacks from a variety of sources. (Tr. 36.) Irick also has a schizoid personality structure, Dr. Brown opined, amounting to "gross disorganization". (Tr. 37.) The psychiatrist based this impression on the impossibility of finding a time in Irick's life when he was succeeding "at meeting the goals and standards of his age group," and further noted that Irick's primary coping mechanism is withdrawal. (*Id.*)

Overall, Dr. Brown found evidence of two significant features in his evaluation of Irick. (*Id.*) First, Dr. Brown noted "[l]ifelong severe psychiatric illness and evidence of episodes from reliable reporters of some of the most severe and the most dangerous psychiatric symptoms." (*Id.*) Second, Dr. Brown found clear evidence of impairment of Irick's "ability to control, plan, and effectively execute or refrain from engaging in behavior with his cognitive disorder." (Tr. 37-38.) Based on

the evident impairment in Irick's memory and on his cognitive abilities, Dr. Brown concluded that Irick's capacity to relate his actions at the time of the crime to his current situation fell in the range of a seven- to nine-year-old child. (Tr. 39.)

Irick next presented the testimony of licensed clinical social worker Nina Braswell Lunn, who had testified in mitigation at his original trial. (Tr. 74-75.) As she had done in the earlier proceeding, Ms. Lunn testified concerning Irick's childhood psychiatric problems and institutionalizations. (Tr. 76-85.) The last time that Ms. Lunn had seen Irick on a professional basis was in 1967. (Tr. 87.)

In response, the State called Bruce Seidner, a clinical psychologist. (Tr. 91, 93.) Dr. Seidner evaluated Irick for twelve and a half hours on August 14 and 15, 2010, and he followed professional guidelines for assessing competence for execution in so doing. (Tr. 91, 95.) Dr. Seidner found Irick to be entirely cooperative during the evaluation, noting that he did not appear to be malingering. (Tr. 99, 100.) "He has the intelligence, vocabulary, and experience to use competence in a meaningful and accurate way," Dr. Seidner stated. "So, yeah, there's no question that he knew what we were about." (Tr. 100.)

According to Dr. Seidner, Irick fully understands the history of this litigation. (Tr. 101.) He knows the date of his execution. (Tr. 102.) He knows why that date was set, and is able to name the victim. (Tr. 102-103.) "There's no question about his identification of the victim." (Tr. 104.) Although Irick maintains his innocence of the crime—believing that the victim's stepfather had "enormous

motivation" to commit it—"[t]here's no question that he understands" that the State has convicted him of the murder of Paula Dyer and obtained the death penalty. (Tr. 104-105.) Irick further knows that his life will end with the execution. (Tr. 107.) "He fully understands that if and when he is executed that is the end of his life." (Tr. 108.)

Dr. Seidner administered a Wechsler Adult Intelligence Test and noted that "there's a lot of mental status evaluation going on during the administration of an IQ test . . . ." (Tr. 96, 108.) The results reflect that Irick has "at least an average IQ"—"there's no question about his intellectual competence." (Tr. 108.) Dr. Seidner found relative strengths in abstract verbal capacity. (Tr. 108-109.) "He can put together ideas. He can abstract ideas, see their commonalities and differences and carry on pretty high level abstract discussions." (Tr. 109.) Dr. Seidner also noted strength in perceptional organizational capacities. (*Id.*)

Irick's relative deficits were in the speed of processing information. (*Id.*) "He's pretty deliberate .... he's not efficient but he's accurate." (*Id.*) Although Irick described some memory deficits, Dr. Seidner noticed no deficits that he would not consider "well within the range of age-related memory decline." (*Id.*) There was no impairment in Irick's cognitive function that the psychologist could find. (Tr. 110.)

Dr. Seidner additionally administered the Minnesota Multiphasic Personality Inventory ("MMPI"). (Tr. 96, 110.) Irick's scores on the scales for assessing the validity of the administration made the subsequent clinical scales uninterpretable.

(Tr. 110.) In Dr. Seidner's view, the invalid MMPI did not reflect that Irick was malingering so much as relating a life filled with turmoil. (Tr. 110-12.)

On the basis of Dr. Seidner's evaluation, it is his opinion within a reasonable degree of psychological certainty that Irick is aware of the punishment that he is about to suffer and that he has a rational understanding of the reason for it. (Tr. 114-15, 116.)

ARGUMENT

Irick Is Competent To Be Executed

Under Tennessee law, a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it. *Van Tran v. State*, 6 S.W.3d 257, 266 (Tenn. 1999). The ultimate question as to whether the prisoner is competent is a question of fact. *Id.* at 271. The trial court's finding on the issue of competency is presumed correct unless the evidence in the record preponderates against it. *Id.* at 272.

Irick's competency proceeding was used as a vehicle to relitigate his sanity at the time of his crime. As a result, he has presented scant evidence of his present competency—his psychological evaluations are nearly eight months' stale—and that evidence is not addressed to *Van Tran*'s cognitive test. *Cf. id.* at 269 ("We emphasize that the proof required to meet the threshold showing must relate to *present* incompetency."). The following facts are undisputed:

1) Irick knows that he will be executed on December 7, 2010 (Tr. 49, 102);

2) Irick knows that the reason for the execution is his murder of Paula Dyer (Tr. 49-50, 102-104);

3) Irick does not presently manifest any symptoms of a formal thought disorder (Tr. 64, 108, 110);

4) Irick's last alleged psychotic episode was reported to be in 1985 (Tr. 66);

5) Irick has not been treated for any significant mental illness while in prison (Tr. 55, 62-63, 66, 67, 116);

6) Irick has an IQ of 96 or 97 according to recent testing (Tr. 53, 108); and

7) Irick disclaims any psychosis (Tr. 62-63, 115.)

On that record, the trial court scarcely could have found that Irick had rebutted the presumption that he is competent to be executed by a preponderance of the evidence. *See Van Tran*, 6 S.W.3d at 270-71.

Indeed, Irick's argument is not a factual but a legal one. Invoking *Panetti v. Quarterman*, 551 U.S. 930 (2007), Irick contends that, because he disclaims any memory of the crime—due to mental impairment at the time of its commission—it would be impossible for him to have a rational understanding of his execution. (Appellant's Br. at 41-42.) *Panetti* does not stand for such proposition. As an initial matter, *Panetti* did not purport to alter substantive state standards for competency. The state court there failed to provide the petitioner with a constitutionally adequate procedure under the predecessor case of *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti*, 551 U.S. at 950-52. Consequently, the state court's application of *Ford* as to the question of competency was not entitled to deference under the Anti-Terrorism and Effective Death Penalty Act of 1996. *Id.* at 954. The federal habeas courts' subsequent interpretation of *Ford* was subject to plenary review. Moreover, the Supreme Court was faced with a petitioner who presented evidence of a current delusional belief system. *Id.* at 954-55. Considering that claim, the Court rejected the lower federal courts' reading of *Ford* to embrace "a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." *Id.* at 960.

The Court thereafter declined to "set down a rule governing all competency determinations." *Id.* at 960-61.

Panetti does not alter this Court's authoritative interpretation of *Ford* as set forth in *Van Tran v. State*, 6 S.W.3d 257, 266 (Tenn. 1999). Even if it did, as the trial court appears to have believed, (T.R. 125), the case avails Irick nothing—as the trial court recognized (T.R. 129). Irick does not presently suffer from delusions. The only evidence of current impairment upon which Irick relies is the testimony of his expert to the effect that he functions at the level of a seven- to nine-year-old child. (*See* Appellant's Br. at 41.) Since that evidence is contradicted by the testimony of Dr. Seidner, who could find no impairment in Irick's cognitive function (Tr. 110), the evidence cannot be said to preponderate against the trial court's finding of competency. At any rate, Irick's expert admitted that a seven- to nine-year-old understands the concept of doing wrong and receiving punishment. (Tr. 50.) Simply put, under *Van Tran* and facts that are not subject to significant dispute, Irick is competent to be executed.

Equally unavailing is Irick's reliance on *Atkins v. Virginia* and *Roper v. Simmons*. (Appellant's Br. at 42-44.) The former case prohibits the execution of mentally retarded persons. *Atkins*, 536 U.S. 304, 318 (2002). Irick is not. (Tr. 53.) The latter decision forbids the imposition of the death penalty upon juvenile offenders. *Roper*, 543 U.S. 551, 575 (2005). Irick was not. (*See* Ex. 2, at 1 (noting date of birth).) The time for such challenges has passed. The Eighth Amendment prohibits

the execution of those who are presently incompetent. *See Van Tran*, 6 S.W.3d at 262. Irick is not. The judgment of the trial court accordingly should be affirmed.

CONCLUSION

For the reasons stated, the judgment of the criminal court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid on this the 8th day of September, 2010 to: Howell G. Clements, Clements & Cross, 1010 Market Street, Suite 401, Chattanooga, TN 37402 and C. Eugene Shiles, Spears, Moore, Rebman, & Williams, P.O. Box 1749, Chattanooga, TN 37401.

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by Facsimile at (615) 532-7791.

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