NO. 10-7092

IN THE
SUPREME COURT OF THE UNITED STATES

BILLY RAY IRICK,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tennessee Supreme Court decided the question of Irick's competency for execution in a way that conflicts with *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986).

II. Whether the Tennessee Supreme Court resolved on independent and adequate state grounds Irick's claim that the Eighth Amendment should categorically preclude the execution of the severely mentally ill.

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OPINION BELOW

The opinion of the Tennessee Supreme Court affirming the determination that Irick is competent for execution is reported at *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). (Pet. App. I.)

STATEMENT OF JURISDICTION

The opinion of the Tennessee Supreme Court was filed on September 22, 2010. (Pet. App. I, at 1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Billy Ray Irick ("Irick") was sentenced to death for the felony murder and aggravated rape of a seven-year-old girl in 1986. *See State v. Irick*, 762 S.W.2d 121, 131-32 (Tenn. 1988). His direct appeal and petition for post-conviction relief in the state courts were unsuccessful. *See id.*; *Irick v. State*, 973 S.W.2d 643, 657-58 (Tenn. Crim. App. 1998), *perm. app. denied*, June 15, 1998. Irick filed a petition for a writ of habeas corpus, which the United States District Court for the Eastern District of Tennessee dismissed. *See Irick v. Bell*, 565 F.3d 315, 319 (6th Cir. 2009). The United States Court of Appeals for the Sixth Circuit affirmed, and this Court denied Irick's petition for a writ of certiorari. *Id.* at 318, 327, *cert. denied*, 130 S. Ct. 1504 (Feb. 22, 2010), *pet. reh'g denied*, 130 S. Ct. 2142 (Apr. 19, 2010).

Following completion of the standard three-tier appeals process, the State moved the Tennessee Supreme Court to set an execution date. (*See* Pet. App. I, at 3.) In response, Irick raised a claim of incompetency to be executed. (*See id.*) The Tennessee Supreme Court set an execution date of December 7, 2010, and remanded the matter to the Criminal Court of Knox County, Tennessee, for an expeditious determination of Irick's present competency. (*See id.*)

The state trial court ordered an evidentiary hearing and appointed two mental health experts, psychiatrist Peter Brown and clinical psychologist Bruce Seidner, to evaluate Irick. (*See id.* at 3, 4.) Dr. Brown, relying on examinations conducted nearly eight months before the evidentiary hearing, reported that Irick displayed no signs of a formal thought disorder. (*See id.* at 4-5.) Nevertheless, Dr. Brown opined—based largely on lay affidavits first adduced in 1999 during federal habeas proceedings—that Irick suffered a psychotic episode at the time of his offense in 1985. (*See id.* at 5-6.) Because Irick disclaimed any memory of the murder, and because neuropsychological testing reflected impairments in his executive functioning, Dr. Brown believed that Irick's capacities were those of a seven- to nine-year-old child. (*See id.* at 4-6.) Dr. Brown expressed no opinion on the ultimate question of Irick's competency—since his evaluation was not conducted for that purpose—but he did testify as to Irick's understanding of the reason for his execution:

> 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.

(*Id.* at 4.) On cross-examination, Dr. Brown agreed that a seven-to-nine-year old understands the concept of doing something wrong and then receiving punishment. (*Id.* at 5.)

Dr. Seidner evaluated Irick the weekend before the evidentiary hearing and found no impairment in his cognitive functioning.[1] (*See id.* at 8.) He opined that Irick was competent for execution. (*See id.* at 9.)

The state 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." (Pet. App. II, at 6.) The Tennessee Supreme Court affirmed. (Pet. App. I, at 1, 3, 17.) Irick now petitions for a writ of certiorari.

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[1] The State must dispute Irick's assertions that Dr. Seidner testified that Irick experienced a psychotic episode at or near the time of the offense. (*See* App. at 38, 43); Sup. Ct. R. 15(2). When presented with the 1999 affidavits, Dr. Seidner agreed that "there's no question that this is the description of someone who is having" hallucinations, but he went on to state, "Now, what is the predicate of that, I don't know," and "I mean, I don't know the credibility of this witness." (Hr'g Tr. at 130-31, *available at http://tscaoc.tsc.state.tn.us/OPINIONS/TSC/CapCases/IrickBR/Case%20File/Transcript%20of%20Evidence%20April%2016%20&%2017%202010%20Vol%202-Irick.pdf.*) The trial court would later sustain an objection to this line of questioning, in part, on the ground that Dr. Seidner was not "in a position to be able" to make a determination of Irick's mental state at the time of the offense. (*Id.* at 133.)

REASONS WHY THE PETITION SHOULD BE DENIED

Irick is not presently delusional—and that fact is undisputed. (*See* Pet. 40 (conceding that Irick is "presently asymptomatic".) Consequently, his case presents no substantial constitutional or factual question.

I. The State Courts' Competency Determination Accords with *Ford* and *Panetti*.

The Eighth Amendment forbids the execution of those who are unaware of the punishment they are about to suffer and why they are to suffer it, but entrusts to the States the task of devising appropriate ways to enforce this substantive restriction. *See Ford v. Wainwright*, 477 U.S. 399, 422, 427 (1986) (Powell, J., concurring). In *Panetti v. Quarterman*, a prisoner who claimed a delusional belief system received no adequate procedure in the state courts. *Panetti*, 551 U.S. 930, 948-952, 954-56 (2007). Giving plenary consideration to the lower federal courts' treatment of Panetti's claim of insanity, this Court indicated that it was error to derive from *Ford* "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. Having rejected the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution, the Court declined to "set down a rule governing all competency determinations." *Id.* at 960-61.

Irick maintains that Tennessee's courts held "as a matter of law" that non-delusional prisoners who lack memory of their crimes are foreclosed from pressing claims under the Eighth Amendment—a holding which, he submits, presents an unsettled and important question of federal law. (*See* Pet. at 40, 45.) While Tennessee would agree that the question is unsettled—since "presently asymptomatic" (Pet. at 40) prisoners do not customarily claim to be insane—the State denies that it is an important or, in many respects, even a federal one. The state courts gave full consideration to Irick's claim of failing memory but found that he had failed to demonstrate it by a preponderance of the evidence. That factual determination raises no issue that would warrant a grant of certiorari. Moreover, even had the state courts "categorically" (*id.*) rejected a class of claims advanced by unremembering but also unpsychotic prisoners, that ruling would not offend the Eighth Amendment. "[T]he parameters of what it means to have a rational understanding of one's execution were intentionally left undefined in the *Panetti* decision" (*id.*) for the very reason that the definition of those parameters is committed in the first instance to the States.

The Tennessee Supreme Court rejected Irick's argument that he is incompetent because he has no memory of the circumstances of the crime on two factual bases. First, the court found Irick's account to conflict with the testimony of Dr. Seidner, who noticed no memory deficits that he would not consider "well within the range of age-related memory decline." (Pet. App. I, at 14.) The court next observed that Irick's

argument was not consistent with the factual record developed during the course of litigation. (*See id.*) In particular, Irick's written and tape-recorded confessions to the Knoxville police in 1985 suggested that his memory of the murder was rather more intact than he asserted. (*See id.*) Before this Court, Irick proceeds as though the state courts endorsed the testimony of his own expert witness, discredited that of the State's, and then announced a new rule of constitutional law. They did not do so, and Irick's attempt to reconfigure the proceedings below presents no compelling case for certiorari. *Cf.* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

But even had the Tennessee Supreme Court "foreclose[ed] as a matter of law a category of claims (those without memory of their crimes)" (Pet. 42), that ruling would conflict with neither *Ford* nor *Panetti.* The Eighth Amendment issue can arise, as Justice Powell observed in his *Ford* concurrence, only after the prisoner has been validly convicted of a capital crime, at which time he must have been judged competent to stand trial or, as with Irick, his competency must have been sufficiently clear to raise no serious question. *Ford*, 477 U.S. at 425-26 (Powell, J., concurring). Thus, "the only question raised is not *whether*, but *when*, his execution may take place." *Id.* at 426. Ford claimed to believe that the death penalty had been invalidated; Panetti claimed to believe that the State sought to execute him to stop his preaching. *Id.* at 422; *Panetti*, 555 U.S. at 955. In both cases, the prisoner's current delusion might so impair his

concept of reality as to prevent him from connecting his execution to the crime for which he was convicted. *See Ford*, 447 U.S. at 409 (plurality opinion); *id.* at 423 (Powell, J. concurring); *Panetti*, 551 U.S at 958. A prisoner who is "not presently experiencing hallucinations or delusions that might affect his understanding" (Pet. 40)—but claims to have been incompetent at the time of the offense—by contrast, does not seek the protections granted by the Eighth Amendment. Such a prisoner knows of his impending execution, perceives the connection between that event and his crime, and suffers nothing that "obstructs a rational understanding of the State's reason" for carrying out its judgment. *Panetti*, 551 U.S at 957. Such a prisoner, rather, protests his innocence, and the deterrent and retributive goals of the criminal law are not disserved by his punishment. *See id.* at 958.

The state courts, in short, neither "disregarded evidence of psychological dysfunction," nor automatically foreclosed Irick from demonstrating incompetency upon a finding that he could identify the stated reason for his execution, nor treated a "delusional belief system as irrelevant." *See id.* at 958, 959, 960. Irick received a two-day evidentiary hearing complete with live testimony, cross-examination, and oral argument by counsel—the very sort of "full-scale 'sanity trial'" that Justice Powell, at least, suggested was not required by due process. *See Ford*, 477 at 425, 426 (Powell, J., concurring). In considering Irick's appeal, the Tennessee Supreme Court adjusted its own precedent to account for *Panetti*, invoking the decision of another state court of last

resort in so doing. (Pet. App. I, at 12-13 & n.9); *see Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S. Ct. 458 (2008). Irick cannot complain of the process that he received in the state courts; rather, he invites this Court to constitutionalize a definition of "rational understanding," *Panetti*, 551 U.S. at 959, in a way that would transform state-court competency proceedings into vehicles for re-litigating prisoners' sanity at the time of their crimes. That invitation should be declined. *Cf. District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2326 (2009) (Alito, J., concurring) ("this is an area that should be (and is being) explored through the working of normal democratic processes in the laboratories of the States" (internal quotation marks omitted)).

II. The Tennessee Supreme Court Resolved the Remainder of Irick's Eighth Amendment Claim on Independent and Adequate State Grounds.

Irick alternatively seeks review of the question whether evolving standards of decency should preclude his execution on account of his "undisputed lifelong mental illness." (Pet. 40.) Although Irick presented this argument to the Tennessee Supreme Court, the state tribunal declined to reach it: "We agree with the State that the present appeal from the trial court's judgment finding Mr. Irick competent to be executed is not the proper proceeding in which to ask this Court to adopt a new constitutional rule barring execution of persons who suffer from severe mental illnesses but who are otherwise competent under the standards adopted in *Panetti*, *Ford*, and [the state precedent] *Van Tran*." (Pet. App. I, at 16.) The appropriate time for Irick to seek an

enlargement of the law regarding his claim of "lifelong" mental illness was in connection with his trial, and his failure to do so counsels against review at this late hour. *See Henry v. Mississippi*, 379 U.S. 443, 446 (1965) ("It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions.").

Although the adequacy of the state court's procedural ruling is itself a federal question, *see Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009), Irick fails to suggest that it is an important one. Moreover, his case would be an unusually poor vehicle for addressing his underlying claim. As Irick acknowledges, he is "presently asymptomatic" (pet. 40); the record reflects that he has not been treated for mental illness during his twenty-four-year sojourn at the Riverbend Maximum Security Institution (pet. app. I, at 5, 13); and his argument that he was symptomatic at the time of his offense rests on evidence of a questionable character (*see* pet. app. I, at 5-6). Finally, the merits of his underlying Eighth Amendment claim are insubstantial. The clearest and most reliable objective evidence of evolving standards of decency is the "[l]aws enacted by the Nation's legislatures." *Roper v. Simmons*, 125 S.Ct. 1183, 1207 (2005). As the state court noted "[n]otwithstanding the issues of timeliness and procedural propriety" of Irick's claim (pet. app. I, at 16), there is no apparent national consensus favoring a categorical ban on the execution of severely mentally ill prisoners. Irick, despite invoking *Roper* (pet. 46-

47), does not suggest that there is. Consequently, further review of the second question presented in Irick's petition is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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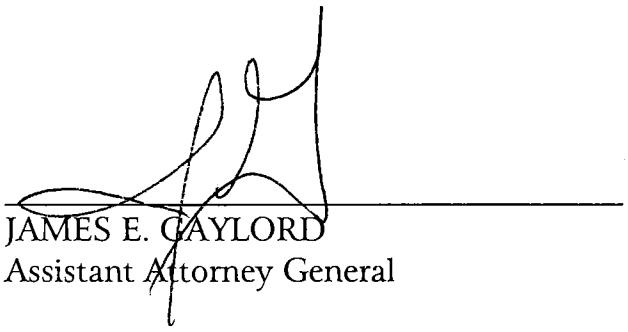
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by United Parcel Service, overnight delivery, 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, on the 19th day of November, 2010.



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Pursuant to Rule 39, the undersigned certifies that this pleading complies with the type limitations of this Rule.

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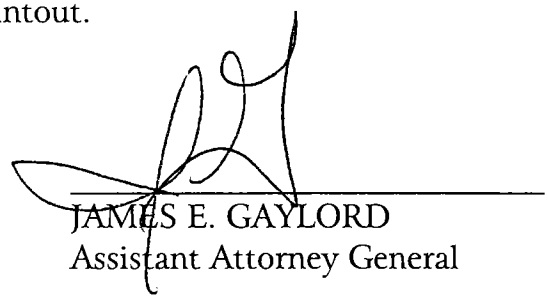

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