IN THE
SUPREME COURT OF THE UNITED STATES
Nos. 18-5495 & 18A145

BILLY RAY IRICK,
Petitioner,

v.

TONY MAYS, WARDEN
Riverbend Maximum Security Institution
Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR A STAY OF EXECUTION

THIS IS A CAPITAL CASE
EXECUTION SET FOR AUGUST 9, 2018 AT 7 PM

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CAPITAL CASE
QUESTION PRESENTED

Does the imposition of the death penalty on a person who was severely mentally ill at the time of the offense constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution?

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The State of Tennessee asserts in its Response to Mr. Irick's Petition for Writ of Habeas Corpus and Application for a Stay of Execution that his claim that the imposition of the death penalty on a person who was severely mentally ill at the time of the offense constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution is time-barred and procedurally defaulted. Further, the State urges this Court not to exercise its authority to reach the merits of the claim and to deny the application for a stay of execution so that Mr. Irick will be killed tomorrow without any adjudication of the important questions raised in this case. Mr. Irick responds as follows:

I. Mr. Irick's Eighth And Fourteenth Amendment Claims Are Not Time-Barred Because The Nature Of The Claims Is Such That It Ripens As Standards Evolve

The State of Tennessee asserts that pursuant to 28 U.S.C. § 2244(d)(1), Mr. Irick's claims were defaulted by April 24, 1997 or, at the latest, June 1998. State's Response, p. 5. Thus, in the State's view, Mr. Irick was obligated to raise the claim that, due to his severe mental illness, evolving standards of decency precluded his execution twenty years ago. Notably, this was several years before this Court issued its opinions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court recognized exemptions to the death penalty for the intellectually disabled and for juveniles. *Atkins* and *Simmons* thus post-date Mr. Irick's exhaustion of state court remedies, as do the very recent developments

underlying the evolving standards of decency argument in Mr. Irick's Original Petition for Writ of Habeas Corpus.

Mr. Irick asks this Court—the only court with the authority to do so—to announce a new constitutional rule interpretating the Eighth and Fourteenth Amendments. This necessarily requires the Court to either reject previous holdings, as it did in *Atkins*, overruling *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302 (1989) or craft a new principle out of other longstanding principles (such as the goals of deterrence and retribution) based on evolving standards of decency. At the heart of this matter: Mr. Irick's claims cannot be time-barred because they are dependent upon developments as various jurisdictions address the unconscionability of executing persons, who like Mr. Irick, possess "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," *see Atkins*, 536 U.S. at 318, and therefore lack the requisite degree of moral culpability to justify a state taking their life.

II. It Is Unconstitutional To Impose The Death Penalty Upon The Severely Mentally Ill Because Of Their Diminished Personal Culpability And Mr. Irick's Eighth And Fourteenth Amendment Claims Are Not Procedurally Defaulted

The State asserts that "Petitioner claims for the first time in a federal habeas corpus action that his 1986 death sentence violates the Eighth Amendment due to his alleged severe mental illness." State's Response, p. 6. The State does acknowledge that Mr. Irick presented this claim to the Tennessee Supreme Court during proceedings on incompetency to be executed and that it was found to not

properly be before that Court. *Id.*, p.7 (citing *State v. Irick*, 320 S.W.3d 284, 298 (Tenn. 2010)). The State argued in that case, and the Tennessee Supreme Court[1] agreed, "that 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" to be executed. *Id.* Thus, it appears there is not a time or forum in which the State would find determination of this constitutional question to be appropriate. This Court is the last and only forum available to Mr. Irick for disposition of the merits of his claims.

III. Mr. Irick Should Be Exempt From Execution Due To His Severe Mental Illness At The Time Of The Offense And The Circumstances Call For This Court To Exercise Discretionary Authority To Reach The Merits Of Mr. Irick's Eighth And Fourteenth Amendment Claims

While true that an original petition for writ of habeas corpus in this Court is rarely granted, Mr. Irick's Petition is not an attempt at forum-shopping, as the State alleges. State's Response, p. 9. This Court is the court of last resort for important constitutional questions and should grant relief when warranted. *See, e.g.*, *In re Davis*, 557 U.S. 952 (2009), in which this Court transferred the case on an original petition for writ of habeas corpus to the District Court for further proceedings. The majority noted that the dissent's assumption as a matter of law that, the District Court would have no power to grant relief in light of 28 U.S.C. §

[1] Prior to this Court's opinion in *Atkins*, the Tennessee Supreme Court in *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) found the execution of the "mentally retarded" (now "intellectually disabled") would violated the Tennessee Constitution. Thus, it was conceivable that that court could reach this question and answer in the affirmative prior to this Court. Mr. Irick tried and his claim was rejected. Again, years have passed since that opinion and standards continue to evolve.

2254(d)(1) was incorrect. The majority found that the District Court could "conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this." *Id.* at 1(citing *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions)).

The majority noted that the lower court "may also find it relevant to the AEDPA analysis that Davis is bringing an 'actual innocence' claim. *See, e.g., Triestman v. United States*, 124 F.3d 361, 377–380 (C.A.2 1997) (discussing "serious" constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims) . . . ." *Id.* Further, the Court noted that

> [e]ven if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it "would be an atrocious violation of our Constitution and the principles upon which it is based" to execute an innocent person.

In re Davis, 557 U.S. 952 at 1–2.

While the claims before the Court in Mr. Irick's Petition do not address "actual innocence," they do involve the constitutionality of execution of his death sentence—a question of utmost importance to Mr. Irick, to other similarly situated death-sentenced individuals, and to our society. *See Kennedy v. Louisiana,* 554 U.S. 407, 420 (2008) ("This [principle] is of particular concern . . . in capital cases. When

the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.").

IV. A Stay Of Execution Is Warranted For The Court To Review This Important Constitutional Question And To Avoid Irreparable Harm to Mr. Irick

Billy Ray Irick suffers from the severe mental illness of psychotic disorder and from a cognitive disorder which grossly impairs his ability to make decisions, to plan, and to control impulses. He was psychotic at the time of the offense and in the days leading up to then, chasing a school-aged girl with a machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." The people with whom he was living noted that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil."

His claims involve the important constitutional questions of whether "standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments have evolved to the point that society agrees that severely mentally ill individuals, such as Mr. Irick, lack the requisite moral culpability to warrant the penalty of death and are thus exempt from execution. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

If Mr. Irick is executed tomorrow, his life will be extinguished without an answer to this important question. For all the reasons herein, this Court should grant a stay of execution and address the merits of Mr. Irick's Petition.

CONCLUSION AND PRAYER FOR RELIEF

This Court should grant *certiorari*, schedule this case for briefing and oral argument, and grant a stay of execution while review of the merits is pending.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response was forwarded by United States mail, first-class postage prepaid, and by email on the 8th day of August, 2018, to Office of the Tennessee Attorney General, Jennifer L. Smith, Associate Solicitor General, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202-0207.

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