IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-_____

BILLY RAY IRICK,
Petitioner,

v.

TONY MAYS, WARDEN
Riverbend Maximum Security Institution

Respondent.

APPLICATION FOR STAY OF EXECUTION

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

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To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

Petitioner Billy Ray Irick respectfully moves for an order staying his execution which is set for August 9, 2018, 7 p.m. CDT, in the above-entitled proceeding, pending the filing of and final action by this Court on the original petition for writ of habeas corpus filed concurrently with this Application.

Pursuant to Supreme Court Rules 23.1, 23.2, and 28 U.S.C. § 2101(f), the stay may lawfully be granted.

In the accompanying Original Petition for Writ of Certiorari, Mr. Irick asks this Court to review whether the imposition of the death penalty on Mr. Irick, who was severely mentally ill and psychotic at the time of the offense, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Mr. Irick asserts that the "evolving standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments prohibit the execution of the severely mentally ill. Mr. Irick's psychosis at the time of the offense manifested in "disabilities in areas of reasoning, judgment, and control of [] impulses" which renders the death sentence disproportionate. *See Atkins v. Virginia*, 536 U.S. 304, 306 (2002). Executing a death sentence upon Mr. Irick and those who suffer similar disabilities due to

severe mental illness, does not serve the goals of capital punishment—retribution and deterrence—identified in *Gregg v. Georgia*, 428 U.S. 153 (1976).

In assessing whether the Eighth Amendment prohibits a particular punishment, this Court has looked to objective factors and has, accordingly, sought to identify whether there exists a "national consensus," against the imposition of that punishment.[1] In evaluating national consensus, the Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 331 (1989). This Court also looks to "measures of consensus other than legislation," *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). For example, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Finally, in addition to state legislation and national sentencing trends, this Court has also cited the opinions of relevant professional organizations, polling data, and international consensus in finding that standards of decency have evolved towards prohibition of a particular punishment. *See Atkins*, 536 U.S. at 316 n.21. Taken together, these

[1] *See e.g.*, *Atkins*, 5536 U.S. 304, 316 (2002) (finding a "national consensus" against executing the intellectually disabled); *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (finding a "national consensus" against executing juvenile defendants).

considerations reveal a national consensus against subjecting the severely mentally ill to the death penalty.

As the accompanying petition is an original petition for writ of habeas corpus, this Court has the sole authority to issue a stay of execution. *See* Rule 23.3 ("An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge.")[2] This Court is empowered to grant Mr. Irick a stay of execution in order to adjudicate his claims. As this Court held in *Barefoot v. Estelle*, 463 U.S. 880 (1983), superseded on other grounds by 28 U.S.C. § 2253(c), a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; ... a

[2] Mr. Irick is a plaintiff in litigation challenging Tennessee's newly instituted execution protocol, which has been a moving target through the course of proceedings. Ultimately, the State announced its intention to execute Mr. Irick with a three-drug protocol that includes midazolam. Mr. Irick and the other plaintiffs presented unchallenged eyewitness testimony from witnesses in every single state that has used midazolam that collectively demonstrated widespread and significant problems with midazolam-based executions. The plaintiffs also presented experts who explained in great scientific detail that midazolam does not work in the execution context. The protocol Tennessee intends to utilize to kill Mr. Irick constitutes torture akin to being dismembered or burned at the stake. On Thursday, July 26, 2018, the Chancellor entered an order denying relief. On Monday, July 30, 2018, Mr. Irick filed a motion in the Tennessee Supreme Court moving to vacate his currently scheduled execution of August 9, 2018 at 7 p.m. pending his appeal in the execution protocol challenge. On July 30, 2018, the Tennessee Supreme Court ordered the State to file an answer to the motion to vacate by August 2, 2018. The State's answer was timely filed on that day and Mr. Irick responded to the answer on August 3, 2018. The Tennessee Supreme Court is expected to rule forthwith.

significant possibility of reversal of the lower court's decision; and ... a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot*, 463 U.S. at 895. Further, a stay should be granted when necessary to "give non-frivolous claims on constitutional error the careful attention that they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." *Id.* at 888–89.

Billy Ray Irick has a lifelong severe mental illness which manifested in early childhood and was present before and during the offense for which he was convicted, the rape and murder of his friends' child Paula Dyer. Unbeknownst to trial counsel—who noticed an intent to present an insanity defense which was withdrawn as trial began—Billy was exhibiting psychotic behavior in the days and weeks leading up to Paula Dyer's death. Billy had been living for approximately two years in Clinton, Tennessee, with Kathy and Kenny Jeffers, and their children, as an adopted member of the family. Kenney was stepfather to Paula Dyer. After the family home burned down in March 1985, the family moved to Knoxville into two different residences. Kenny and Billy moved into Kenny's parents' home. Ramsey Jeffers (Kenny's father), Linda Jeffers (his wife), and Cathy Jeffers (Kenny's sister) all lived at that home while Kathy Jeffers and the children stayed

elsewhere. Billy lived in that home in March and April 1985 until his arrest on April 15, 1985.

One night, Ramsey noticed Billy roaming the house at night after everyone had gone to sleep. He stopped Billy, who was carrying a machete, and asked him what he was doing. Billy replied that he was going down the hall "to kill" Ramsey Jeffers' son, Kenny. Ramsey Jeffers knew of no explanation or possible motivation for Billy's bizarre behavior. Mr. Jeffers convinced Billy to put down the machete and return to his room, but apparently no legal action was taken.

In the same time frame, Billy chased a school-aged girl with the same machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." Mr. and Mrs. Ramsey Jeffers, along with their daughter, Cathy Jeffers, stated in affidavits that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." In her affidavit, Cathy Jeffers stated that Billy told her, "[t]he only person that tells me what to do is the voice." She also recalled an evening when he was frantic that the police would enter the home and kill them with chainsaws.

The relevant evidence of Billy's mental state at the time of the offense was not discovered until late in habeas proceedings, was procedurally defaulted, and thus never adjudicated on the merits by the federal courts. The first time Billy was

evaluated by a psychiatrist since prior to trial was by Dr. Peter Brown, in December 2009 and January 2010. Dr. Brown testified in competency to be executed proceedings in 2010. Dr. Brown found that Mr. Irick "has suffered from a lifelong severe psychiatric illness and that at the time of the offense he was suffering from psychosis." *State v. Irick*, 320 S.W.3d 284, 288 (Tenn. 2010). Dr. Brown diagnosed Mr. Irick as suffering from a psychotic disorder, "a condition manifested by gross perceptual and thinking deficits, such as hallucinations, delusions, and gross disorganization of behavior." *Irick*, 320 S.W.3d at 288–89.

Mr. Irick, as captured in neuropsychological testing conducted in November and December of 2009, also suffers from a cognitive disorder— a condition manifested by significant problems in the processing of information. *Id*. at 288–90. Neuropsychological testing indicates "gross impairment in Mr. Irick's executive function, relating to his ability to integrate information from various processes in order to make decisions, to plan, and to control impulses." *Id.* The State's expert in the most recent proceedings addressing Billy Irick's mental state testified there was "no question" that petitioner had experienced "command hallucinations" and "persecutory hallucinations" in the past as recounted in the Jeffers' affidavits. Comp. Tr., pp. 129–30.

Mr. Irick's psychotic illness at the time of the offense was so severe that, given the principles guiding relative culpability in sentencing as set forth by this Court, he is constitutionally ineligible for execution. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the intellectually disabled are categorically exempt from receiving the death penalty. The same characteristics cited by the Atkins Court in finding the intellectually disabled ineligible for execution apply with equal force to individuals with severe mental illness. Because the "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 lack the requisite moral culpability to warrant the penalty of death, this Court should find that individuals such as Mr. Irick are categorically exempt from execution. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

For the foregoing reasons, petitioner requests that an order be entered staying the execution in this case pending completion of certiorari proceedings before this Court.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 7th day of August, 2018, to:

Ms. Andree Blumstein
Solicitor General

Ms. Jennifer Smith
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P.O. Box 20207
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Hard copies will follow in the United States Mail.

/s/ *Kelley J. Henry*
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