

CAUSE NO 762351

THE STATE OF TEXAS	X	IN THE 232 ND DISTRICT
	X	
V.	X	COURT OF
	X	
BERNARDO ABAN TERCERO	X	HARRIS COUNTY, TEXAS

MR. TERCERO'S MOTION TO DETERMINE COMPETENCY
UNDER ART. 46.05, V.A.C.C.P.,
AND
MOTION FOR STAY OR MODIFICATION OF EXECUTION

MR. BERNARDO TERCERO IS SCHEDULED TO BE EXECUTED ON AUGUST 26, 2015.

COMES NOW, Bernardo Tercero, by and through his attorneys Walter C. Long and Michael Charlton, and presents this his Motion to Determine Competency Under Art. 46.05, V.A.C.C.P., and Motion for Stay or Modification of Execution and, in support thereof would show the following:

The facts set forth below establish a substantial showing of incompetency entitling Mr. Tercero to (1) the appointment of at least two independent mental health experts, TEX. CODE CRIM. PROC. art. 46.05(f); and (2) an evidentiary hearing on the merits of the competency-to-be-executed claim, TEX. CODE CRIM. PROC. art. 46.05(k). Counsel also request that the pending execution date be stayed or in the alternative modified to a future date in order to allow these conditions to be satisfied.

A. FACTS ESTABLISHING A SUBSTANTIAL SHOWING OF INCOMPETENCY.

1. Texas Department of Criminal Justice mental health records.

Almost from the moment of his incarceration on Texas Death Row at the Polunsky Unit of the Texas Department of Criminal Justice, Mr. Tercero has received extensive psychiatric and psychological care by the staff of the Polunsky Unit. Initially, he was provided a mental health screening but with no consideration given

to his lack of fluency in English. He was given 90-day Mental Health Assessments though nothing was reported. On December 27, 2004, the evaluator noted that Mr. Tercero was “hard to understand as he thinks he speaks better English than he does. He reports a lot of recent short term memory loss, beyond this it is hard to understand what else he is trying to talk about.” Exhibit 1. A few weeks later, on January 11, 2005, with an interpreter present, Mr. Tercero told a psychologist that he did not want to talk about memory problems. He would speak in English but only in a one on one situation and not in front of other inmates. Exhibit 2. On January 28, 2005, Mr. Tercero again told a psychologist that he wanted to talk about his “pscyh problems and memory loss” but no one took him from his cell to the medical ward. Exhibit 3.

On February 4, 2005 Mr. Tercero “reported: ‘I need some meds, BUT I need to be called out so I can explain myself better. . . no, I don’t want an interpreter. . . I want to talk in private.’ When MHL questioned him further, he put his finger to his mouth often saying in a low voice, ‘SSH, I don’t want other to hear.’ ‘Let me tell you this . . . it scares me.’ At that time, he picked up a bottle of shampoo and showed it to MHL. ‘I know what this is, I know this is shampoo for my hair, but the other day I looked at it and didnt [sic] remember what it was for. Other like that happened before.’ Offender is concerned by this memory loss.” Exhibit 4.

On February 29, 2005 there was another outpatient interview with a psychologist. “Pt. said he would lay things down and then forget where he laid them down. He said he could not remember names of people. He said sometimes he would forget words of songs that he used to know. He said he also felt very sad. The therapist asked how much sleep he was

getting. He said he was sleeping about 7 hours every 24. It was suggested that he write a daily routine for himself and/or a weekly routine that would help him keep up with things. To help improve his memory, he should start memorizing things. It was explained to him that the memory is a skill like other things and can be improved.” **Exhibit 5.** He was continually assessed every 90 days.

On April 25, 2006 in one of the 90 day assessments, the psychologist noted A/V hallucinations (A/V refers to audio/visual). Three days later, the psychologist entered the following note:

Reason for referral is difficulty sleeping. “Pt. is hesitant to speak about the issue. He does speak, but very quietly. ‘I am seeing shadows and movement. I also hear voices. They are outside my head. It calls my name. I look, but nothing is there. I have a hard time sleeping and concentrating. It began about a year ago.’ ‘I have had a loss of memory also. I did not do drugs in the world. No, I never had black outs.’ Discussed whether the patient can tell the difference between what is real or not. ‘I do want to know if it is possible for it to be real or is it fantasy.’ Will send self-help material to pt. Pt. will send a SCR when completed or has more questions. **Pt. seems to be honestly telling his experiences.”**

Exhibit 6 (emphasis added).

In 2011, Mr. Tercero reported several bodily symptoms that were attributed to anxiety. On January 31, 2014, the doctor prescribes 20 mg of Citalopram for Anxiety Disorder. Less than a week later, on February 3, the psychiatrist notes the following:

“Subjective: ‘My mood is much depressed, have poor concentration. I am persecuted by shadow; they follow me in shower, and hear voices telling me that I am demon. I was feeling sleepy after taking medication per your order. I do not get obsessive thoughts or worry about small things. I can exercise; do not get panic or anxiety attacks. I exercise in my cell. I am not having elated mood. I do not hear any voices. I do not feel paranoid.

Diagnosis:

Axis I: Anxiety Disorder due to GMC 293.84

R/O MDD Recurrent sever [sic] with psychotic features 296.34

History of MJ dependence in remission due to incarceration
Axis II: History of Antisocial Personality
Axis III: See medical chart.
Start on “Risperidone for reported psychotic Sx.” 449
Change medication Celexa to Zoloft.

Exhibit 7. Mr. Tercero is prescribed an antipsychotic medication, Risperidone and the Celexa prescription is changed to Zoloft. **Exhibit 8.** Two days later, he writes Dr. Patel and tells the doctor that when he stops his medication he hears voices insulting him and commanding him to do things “Also, shadows being persecuted me. Also, I feel Abraham Lincoln’s spirit, Reincarnation in me. I did not tell anybody here because they do not believe me..” **Exhibit 9.** The antipsychotic medication continues to the end of July, 2014.

On October 27, 2014, there is another psychiatric evaluation which noted the following:

Complained of excessive sedation with Risperdal and Celexa. “Hx of being treated for depression in his teens in Nicaragua. . . . Hx of smoking pot. . . .He says that his family members have hx of mental illness. He has been incarcerated for the past 15 years. In 2010, he thought that his sister was going to be killed. She was stabbed, but she escaped. He says that he saw her spirit coming out of her body. He says that he is having ‘paranormal’ experiences. ‘I see spirits and shadows . . . hear voices . . . hey curse me out . . . they order me stop eating. . . they are angels or devils . . . people like [H]itler are trying to reincarnate into my body . . . spirit is trying to go into my body. I don’t want people to think I am crazy. . . My grandfather is watching me . . . he is not saying anything.’ There is no hx of depression or mania.”

Diagnosis: Psychosis NOS R/O Schizophrenia.
Started on Perphenazine.

Exhibit 10. Perphenazine is a powerful antipsychotic. This prescription continues though January, 2015. This last April, Dr. Nathan Pradan opined that Mr. Terceo “needs to remain s3nr at the least for 2 years in my opinion. He was narrating symptoms of active psychosis. He does not have to be monitored in tarp since he is refusing it. (He will become hostile otherwise.). . . . Do not delete requirement for MH rep to be present for cases.” **Exhibit 11.**

2. Interview with Anne Nisenson

Ann Nisenson, a mitigation investigator, interviewed Mr. Tercero on at least five occasions since June of this year; three of those visits were substantive. During those visits, Ms. Nisenson noted that Mr. Tercero “exhibited severe anxiety and tended to be unable to transition or switch topics appropriately.” **Exhibit 12** (Nisenson Declaration p. 1). He would fixate and find it difficult to move him to another topic. Throughout the interviews, Mr. Tercero would frequently look behind him even though his door to the visitation booth was locked and no one was there.

Tercero believed that the Nicaraguan government was pursuing her. He believed the government had taken photos of her and that a Nicaraguan general was looking into her and asking questions. He warned Ms. Nisenson to be careful. He believed that one of his current counsel, Michael Charlton did not have his best interests at heart and was being manipulated by prior counsel, Don Vernay. He thought that Mr. Charlton would trick Ms Nisenson.

Mr. Tercero did not want people to think him crazy and was worried that the disclosures to Ms. Nisenson would create such an impression.

After a few interviews, Mr. Tercero disclosed that he heard voices. He described his body as separate from his head; it was like a television channel being changed. He would be taken elsewhere even though he wanted to return. He found himself staring at a wall in his cell for hours. **Exhibit 12** (Nisenson declaration p. 2).

3. Evaluation by Dr. Antolin Llorente

At the behest of counsel, Mr. Tercero was given a neuropsychological battery on August 3 and 4, 2015. Dr. Llorente’s full report is attached as **Exhibit 13** and the following is taken from that report.

He admitted to the presence of active auditory (e.g., voices) and visual hallucinations (e.g., shadows) similar to those he experienced in the past as indicated in his prison medical records requiring the use of psychotropic medication in the past. He is suffering from current, active delusions (e.g., he continues to believe that he is there as a result of a plot from the “CIA and “dark” forces, and he feels they were responsible for his incarceration, etc.). Per verbal report, he is not being medicated while in prison at this time in spite that he was diagnosed with a severe mental disorders (e.g., anxiety, depression, and Psychosis, NOS) as noted in his TDCJ medical records while imprisoned, and he has exhibited a history of psychiatric symptoms since early age. When queried, he denied the presence of an established plan to hurt himself at this time, but he has experienced such thoughts and has exhibited such gestures in the past. He has experienced depersonalizations and delusions multiple times in the past and continues to experience them at this time. When a discussion of his childhood took place, such a discussion elicited blunt affect, particularly when a discussion took place related to his mother. Overall, affect appeared to be flat. Mood appeared to be somber.

Llorente report p. 10

Llorente then administered a battery of psychological instruments which are noted on pp. 10 and 11 of his report. Several testing instruments were administered to determine whether Mr. Tercero was malingering; the scores on those instruments ruled that out. Llorente report p. 11. Mr. Tercero’s reading level, in his native language of Spanish, was determined to be at roughly the 3rd or 4th grade level.¹ Llorente report p. 12. His visual and perceptual skills were impaired as were his learning and memory functions, a deficit consistent with what he told the mental health staff at Polunsky. Llorente report at 14-15. Testing revealed impairments in Executive Functioning.

Most importantly, for purposes of this motion, Dr. Llorente concluded that Mr. Tercero easily met the standards for “Delusional Disorder, Paranoid Type”:

In this regard, Mr. Tercero’s current and past psychological status easily satisfied and meets criteria for delusional disorder (Delusional Disorder, [paranoid type]). [FNT: A diagnosis of delusional disorder would assume that he has never been given a diagnosis of schizophrenia. However, if he was ever given a diagnosis of

¹ This belies trial counsel’s repeated elicitation of testimony from family and friends at the punishment phase of Mr. Tercero’s trial that Mr. Tercero was a “good student.”

schizophrenia or schizoaffective disorder, then his delusions would have to be interpreted within such a context. The diagnoses shown above are noted in reference to his present psychological functioning, report from his past symptoms, and TDCJ medical records.] Similarly, based on his history and current interview, his profile met and meets criteria for a recurrent, severe Psychosis, NOS at the very least (if not schizophrenia or schizoaffective disorder) and posttraumatic stress disorder (PTSD). Although his diagnoses relating to depressive and delusional disorders are easier to contemplate, similar to his diagnoses of PTSD, more complex diagnoses also are supported by past medical history and TDCJ documentation and the findings from the current clinical interview without the need to speculate and from his psychiatric background and history including the presence of psychotic episodes (see Summary and Clinical Impressions). However, more complex diagnoses such as the presence of schizophrenia or a schizoaffective disorder would require further, extensive and more comprehensive assessment. If present, a diagnosis of schizophrenia or schizoaffective disorder would subsume several of the diagnoses noted above including his delusions as they would be considered part of the more complex diagnoses of schizophrenia or schizoaffective disorder. However, regardless of past or present diagnostic impressions, what is most relevant and consistent with his current situation, where he finds himself facing capital punishment after he has been accused and found guilty of a homicide, is the fact that this individual appears to suffer from and has suffered for quite some time from severe psychopathology (mental illness) which did not and has not received its due attention or treatment. Unfortunately, his severe mental health problems were attributed or labeled by him and others as stemming from “Dark” forces or demonic possessions or other erroneous attributions, rather than actual, severe psychopathology (severe mental illness).

Lorente report p. 16-17.

Ultimately, Dr. Llorente concluded that Mr. Tercero was severely mentally ill and had been for some time. *Id.* at 21. Dr. Llorente easily concluded that Mr. Tercero met the requirements of PTSD, depressive disorder and delusional disorder. “More important, his past history and medical records including TDCJ and his current symptoms suggest that his profile continues to meet criteria for other debilitating and more severe diagnoses, and although his diagnoses relating to depressive and delusional disorders are easier to contemplate, similar to his diagnoses of PTSD, more complex diagnoses also are supported by his past medical

history documentation and his current profile without the need to speculate including the presence of a psychotic episode (Psychosis, NOS; ICD-9, 298.9). However, more complex diagnoses such as the presence of schizophrenia would require further and more costly and comprehensive assessment in his native country and in the U.S. If present, a diagnosis of schizophrenia or schizoaffective disorder of course, as part of a differential process, would subsume several of the diagnoses noted above.” Llorente report at 21-22.

In addition, and more critical to this case, this is by far not the first time that these disorders have been noted or discovered, and more complex diagnoses (e.g., psychosis) are supported by medical records from his current penal institution. However, an exact determination of the set of diagnoses that best describe his past and current profile would require further assessment and a costly and detailed history conducted in his country of origin and the U.S., and further cooperation from him, his former employers, acquaintances, family, and friends in Nicaragua and the U.S. relating to his past history of psychiatric symptoms. Nevertheless, what is patently clear is that this individual’s present psychological profile and past psychiatric history is not inconsistent with his current situation, where he finds himself facing capital punishment after he was accused and found guilty of a homicide that took place during the course of an armed robbery that may have been significantly impacted by his psychiatric symptoms not excluding delusions, and the critical fact is that this petitioner appears to suffer and has suffered from protracted, severe psychopathology (severe mental illness) requiring the administration of powerful psychotropics including those administered to him by the State of Texas while he has been imprisoned under the care of TDCJ.

Llorente report p. 22.

Using the standards of Art. 46.05, Dr. Llorente concluded that while Mr. Tercero in all likelihood understands that he is about to be executed, “he definitely would not understand the actual reason why he is being executed, and in fact, in his present delusional state he would probably understand that the ‘Dark’ forces are the reason behind his execution. Therefore, it is my opinion that in his current state, and without the assistance of rehabilitation that will include psychiatric care (and a medication consultation) to reduce his psychotic symptoms and increase his level of

competency to be executed, he is not competent to be executed at this time.” Llorente report p. 22-23.

B. LEGAL STANDARDS FOR EXECUTION COMPETENCY.

1. A person who lacks a rational understanding of the reason for his execution is incompetent to be executed under the Eighth and Fourteenth Amendments to the United States Constitution.

Ford v. Wainwright, 477 U.S. 399 (1986), established that the Eighth Amendment forbids the execution of those prisoners “who are unaware of the punishment they are about to suffer and why they are to suffer it.” 477 U.S. at 422 (Powell, J., concurring in part and concurring in judgment). The Fifth Circuit had interpreted that standard to mean that a prisoner need only be aware “that he [is] going to be executed and why he [is] going to be executed.” *See, e.g., Panetti v. Quarterman*, 448 F.3d 815, 819 (5th Cir. 2006) (citing *Barnard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994)).

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court squarely rejected this “bare factual awareness” standard, noting that it “treats a prisoner’s delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution.” 551 U.S. at 958. As the Court explained:

[T]he *Ford* opinions nowhere indicate that delusions are irrelevant to “comprehen[sion]” or “aware[ness]” if they so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Id. Thus, the Supreme Court concluded that the pre-*Panetti* Fifth Circuit standard was “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.” *Id.* at 956-57.

A fundamental tenet of the Fifth Circuit’s pre-*Panetti* flawed standard was the conclusion that a prisoner’s reasoning is “irrelevant” “if the prisoner knows that the State has identified his crimes as the reason for his execution.” *Panetti*, 551 U.S. at 958. In rejecting that conclusion and in holding this test too restrictive, the *Panetti* Court looked in part to the common-law underpinnings of *Ford*’s ban on executing the incompetent. While these underpinnings are numerous, the *Panetti* Court focused on the role the competency requirement holds in serving capital punishment’s retributive purpose. More specifically, the Supreme Court examined the manner in which that retributive purpose is undermined when the inmate “has no comprehension of why he has been singled out and stripped of his fundamental right to life.” *Id.* at 957 (citing *Ford*, 477 U.S. at 409-10). The Supreme Court explained:

Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner’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.

Id. at 958-59. Thus, “[t]he principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State’s announced reason for a punishment or the fact of an imminent execution.” *Id.* at 959.

Instead, a proper *Ford* inquiry must probe the prisoner’s rational understanding of his punishment, the reason for it, and the role his lack of rationality plays in preventing or distorting that understanding to the point at which the execution no longer serves the purpose intended, thus

violating the Eighth Amendment. As the Supreme Court emphasized, “[a] prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.” *Id.* Although *Panetti* did not “attempt to set down a rule governing all competency determinations,” *id.* at 960-61, the Court repeatedly explained that a “rational understanding” test is appropriate and consistent with the reasons supporting the ban on executing the insane announced in *Ford*. *Id.* at 958-62.

C. PROCEDURES UNDER ARTICLE 46.05 AND MR. TERCERO’S BURDEN

Under Art. 46.05(d), V.A.C.C.P. , this Court must determine whether Mr. Tercero has “raised a substantial doubt of the defendant’s competency to be executed on the basis of the motion, any attached exhibits and responsive pleadings. . . .” Substantial showing requires nothing “more than ‘some evidence’ of incompetency but less than establishing incompetency by a preponderance of the evidence.” *Druery v State*, 412 S.W.3d 523, 527 (Tex.Crim.App. 2013). To make this determination, this Court cannot weigh evidence of incompetence against evidence of competency. *Id.* at 540, citing *Rickles v. State*, 202 S.W.3d 759, 763 (Tex.Crim.App. 2006). At this stage any evidence that the prosecution may present to rebut Mr. Tercero’s arguments is irrelevant as the only question is whether Mr. Tercero has met his threshold burden. *Druery*, 412 S.W.3d at 540. (“Article 46.05 does not contemplate an adversarial proceeding at the ‘threshold’ stage.”) citing *Green v. State*, 374 S.W.3d 434, 440 (Tex.Crim.App. 2012).²

² Even if the prosecution presents contradictory evidence that requires this Court to resolve material factual disputes on the issue of Mr. Tercero’s competency, he has met his threshold burden. *Druery*, 412 S.W.3d at 541.

CONCLUSION AND PRAYER

Mr. Tercero has met his threshold burden. His long history of mental illness and Dr. Llorente's diagnosis establish a substantial showing of incompetency. Mr. Tercero respectfully prays that this Court:

1. stay his execution; or
2. modify the execution date to a later date allowing sufficient time for a full competency inquiry under Article 46.05; and,
3. appoint counsel to represent Mr. Tercero in Article 46.05 proceedings; and,
4. provide sufficient funds with which to address the questions raised by Dr. Antolin Llorente in his report, including investigative funding and expert assistance to establish the issues Dr. Llorente has determined need to be addressed (Llorente report at 21-22).

Respectfully submitted,

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¹ Mr. Michael Charlton presently is appointed in federal court to represent Mr. Tercero. A formerly long-time legal practitioner in Texas, he now lives in Oregon and has transferred his bar membership there. A motion for Mr. Charlton to represent Mr. Tercero in this Court *pro hac vice* is being simultaneously filed with this document.

VERIFICATION

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Walter C. Long, who upon being duly sworn by me testified as follows:

I am a member of the State Bar of Texas. I am pro bono counsel for Bernardo Tercero. I have personal knowledge of the facts contained in the foregoing pleading, and I believe all the allegations therein to be true.

Walter C. Long

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of August, 2015.

Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a hard copy of the foregoing motion is being served on the same day as filing, August 18, 2015, by hand delivery on Assistant District Attorney Josh Reiss, Harris County District Attorney's Office, 1201 Franklin Street #600, Houston, Texas 77002.

Walter C. Long

CAUSE NO 762351

THE STATE OF TEXAS	X	IN THE 232 ND DISTRICT
	X	
V.	X	COURT OF
	X	
BERNARDO ABAN TERCERO	X	HARRIS COUNTY, TEXAS

**ORDER ON MOTION TO DETERMINE COMPETENCY
UNDER ART. 46.05, V.A.C.C.P., AND MOTION FOR STAY
OR MODIFICATION OF EXECUTION**

On this the _____ day of August, 2015, came on to be heard Mr. Tercero's Motion to Determine Competency under Article 46.05, V.A.C.C.P., and Motion for Stay or Modification of Execution, and after due consideration, this Court is of the opinion, and it is hereby ORDERED, that said Motion is:

_____ GRANTED with a stay of execution;

_____ GRANTED with a modification of execution until

_____ Date

_____ DENIED

SIGNED this the ____ day of August, 2015.

HON. JUDGE MARY LOU KEEL