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## The Challenge of "Rationally Understanding" A Schizophrenic's Delusions: An Analysis of Scott Panetti's Subsequent Habeas Proceedings

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**THE CHALLENGE OF “RATIONALLY UNDERSTANDING” A SCHIZOPHRENIC’S DELUSIONS: AN ANALYSIS OF SCOTT PANETTI’S SUBSEQUENT HABEAS PROCEEDINGS**

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## I. INTRODUCTION

In *Ford v. Wainwright*, the Supreme Court of the United States interpreted the Eighth Amendment's prohibition of cruel and unusual punishment to include, "inflicting the penalty of death upon a prisoner who is insane."<sup>1</sup> Yet, Scott Louis Panetti, a man with a voluminous history of psychiatric disorders, is currently waiting to pay the ultimate penalty.<sup>2</sup> In 2007, the Supreme Court granted certiorari to hear Scott Panetti's Eighth Amendment challenge to his death sentence.<sup>3</sup> In that case—*Panetti v. Quarterman*—the Supreme Court, building upon the procedural requirements mandated in *Ford*, articulated the standard for determining whether the State may take the life of a mentally ill prisoner: a prisoner must have knowledge of his imminent death and rationally understand the retributive nexus between the crime and punishment before execution.<sup>4</sup>

On remand to the United States District Court for the Western District of Texas, the court determined that Scott Panetti was competent for execution because he could articulate a relatively sophisticated understanding of the facts of his case and could rationally articulate that his punishment was unjust.<sup>5</sup> The United States Court of Appeals for the Fifth Circuit affirmed.<sup>6</sup> However, the district court and the Fifth Circuit's application of *Panetti's* rational understanding standard violated the Eighth Amendment because it provided no more protection to the mentally ill sentenced to death than that required by *Ford*, and thus failing to satisfy the more exacting standards of *Panetti*.

This note argues that the district court and Fifth Circuit's application of the rational understanding standard was reprehensively deficient based on the courts' holdings that Scott Panetti, a man with a well-documented mental illness accompanied by gross delusions, was competent for execution in light of *Ford*.<sup>7</sup> Part II examines the Court's decision in *Ford v. Wainwright* establishing a categorical exemption to protect the insane from execution, followed by an examination of the factual and procedural history of *Panetti v. Quarterman*.<sup>8</sup> Part III analyzes the district court and the Fifth Circuit's application of the rational understanding standard on remand, ultimately positing that the applications were flawed because there was insufficient evidence to conclude that Scott Panetti possessed

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1. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

2. *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013). Moreover, since *Ford*, the 5th Circuit has not found a single inmate incompetent for execution in Texas. See *Scott Panetti*, OFF CENTER MEDIA, <http://www.off-center.com/projects/scott-panetti> (last visited Mar. 13, 2014). For an understanding of the difference between insanity and mental illness, see Joseph Hess, *The Death Penalty for Mentally Ill Offenders: Atkins, Roper, and Mitigation Factors Militate Against Categorical Exemption*, 90 U. DET. MERCY L. REV. 93 (2012).

3. *Panetti v. Quarterman*, 551 U.S. 930 (2007). The Court additionally reached the issue of whether the Antiterrorism and Effective Death Penalty Act of 1996 foreclosed Panetti's second habeas petition, though this note does not address the procedural issues in *Panetti*. For a discussion of whether Eighth Amendment jurisprudence will depend on substantive or procedural claims see Carol S. Steiker, *Panetti v. Quarterman: Is There A "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 297-300 (2007).

4. *Panetti*, 551 U.S. at 958.

5. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*36 (S.D. Tex. Mar. 26, 2008).

6. *Panetti*, 727 F.3d at 410.

7. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."); *Panetti*, 727 F.3d at 414; *Panetti*, 2008 WL 2338498, at \*37.

8. *Ford*, 477 U.S. 399; *Panetti*, 551 U.S. 930.

the requisite rational understanding of the nexus between his crime and his imminent execution.<sup>9</sup> Part IV concludes by highlighting the courts' failure to appreciate the effects of severe mental illness on death row inmates, explains the importance of psychological science in competency hearings, advocates that placing a double evidentiary burden on the prisoner minimizes the protective effect of the *Panetti* standard, and discusses the consequence of indigence on the seriously mentally ill prisoner.<sup>10</sup>

## II. FRAMING A CATEGORICAL EXEMPTION FOR THE SEVERELY MENTALLY ILL

### A. *Ford v. Wainwright*

*Ford v. Wainwright* was the first case to explicitly create a categorical exemption for prisoners sentenced to death.<sup>11</sup> In *Ford*, the Supreme Court held that executing the insane was repugnant to the Eighth Amendment.<sup>12</sup> In 1974, the State of Florida convicted Alvin Bernard Ford of first-degree murder and sentenced him to death.<sup>13</sup> Though presumably competent at the time of the offense, trial, and sentencing, Ford gradually began showing signs of mental illness leading up to his scheduled execution.<sup>14</sup> Particularly, he had an obsession with the Ku Klux Klan and was under the delusion that there was a conspiracy to force him to commit suicide.<sup>15</sup> He believed that the prison held 135 of his friends and family hostage and that he had appointed nine new justices to the Florida Supreme Court; in addition, he referred to himself as "Pope John Paul, III."<sup>16</sup>

Eventually, psychiatrist Dr. Jamal Amin evaluated Ford and diagnosed him as a paranoid schizophrenic with suicidal attributes.<sup>17</sup> After refusing further meetings with Dr. Amin because of his belief that Dr. Amin joined the conspiracy against him, Ford met with Dr. Harold Kaufman.<sup>18</sup> When Dr. Kaufman asked Ford if the State would execute him, Ford explained, "I can't be executed because of the landmark case. I won. *Ford v. State* will prevent executions all over."<sup>19</sup> Dr. Kaufman posited that Ford did not understand the reasons for his execution and made no connection between his crime and the death penalty.<sup>20</sup> Instead, Ford believed that the State could not execute him because he owned the prison and controlled the governor using "mind waves."<sup>21</sup>

Subsequently, the Governor of Florida appointed three psychiatrists to evaluate Ford and determine whether he possessed the capacity to understand the nature of the death

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9. *Panetti*, 727 F.3d 398.

10. *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007).

11. *Ford*, 477 U.S. at 409-10; Jonathan Greenberg, *For Every Action There Is A Reaction: The Procedural Pushback Against Panetti v. Quarterman*, 49 AM. CRIM. L. REV. 227, 255 (2012) (noting "*Ford* was the first Eighth Amendment case to establish a categorical exclusion shielding defendants from capital punishment, not because of conduct, but because of class-wide characteristics"). For further discussion of *Ford*, see Anthony J. Bishop, *Ford v. Wainwright: Insanity of The Death Row Inmate—A Second Chance*, 11 AM. J. TRIAL ADVOC. 311 (1987).

12. *Ford*, 477 U.S. at 410.

13. *Id.* at 401.

14. *Id.* at 401-02.

15. *Id.* at 402.

16. *Id.*

17. *Ford*, 477 U.S. at 402-03.

18. *Id.* at 403.

19. *Id.* (internal quotation marks omitted).

20. *Id.*

21. *Id.*

penalty and the State's reasons for imposing it on him.<sup>22</sup> One psychiatrist concluded that Ford was cognitively capable of understanding the nature of the death penalty as well as the State's intent to execute him for committing murder.<sup>23</sup> Reaching a similar conclusion, the second psychiatrist found Ford was psychotic, but fully understood the imminence of his execution.<sup>24</sup> The third psychiatrist, who believed Ford's mental illness seemed contrived, also determined that he completely understood his situation.<sup>25</sup> Thereafter, without comment, the governor signed a death warrant authorizing Ford's execution.<sup>26</sup>

After the court denied his motion for a competency hearing, Ford filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida requesting an evidentiary hearing to determine his competency to suffer execution.<sup>27</sup> The district court denied Ford's appeal and the United States Court of Appeals for the Eleventh Circuit affirmed.<sup>28</sup> The Supreme Court granted certiorari to decide whether executing the insane violated the Eighth Amendment.<sup>29</sup>

### 1. Plurality Opinion in *Ford v. Wainwright*

The plurality in *Ford* began its analysis by examining the common law bar against executing the insane and the various rationales for the rule.<sup>30</sup> At early English common law, Sir Edward Coke explained that executing the insane was extremely inhumane and cruel and served no consequentialist purpose.<sup>31</sup> Similarly, William Blackstone commented:

[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? [sic] If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.<sup>32</sup>

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22. *Ford*, 477 U.S. at 403; see Peggy M. Tobolowsky, *To Panetti and Beyond-Defining and Identifying Capital Offenders Who Are Too "Insane" to Be Executed*, 34 AM. J. CRIM. L. 369, 385 (2007) (indicating that each of the psychiatrists appointed by the governor, spent only thirty minutes interviewing Ford).

23. *Ford*, 477 U.S. at 404.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Ford*, 477 U.S. at 404-05.

29. *Id.* at 404. As a secondary issue, the Court considered whether "the District Court should have held a hearing on petitioner's claim." *Id.*

30. *Id.* at 406.

31. *Id.* at 407 (stating "by intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law and of extream inhumanity and cruelty, and can be no example to others") (quoting 3 E. COKE, INSTITUTES 6 (6th ed. 1680)).

32. *Id.* at 406-07 (quoting 4 W. BLACKSTONE, COMMENTARIES D4 – 25).

The plurality then discussed "The Common Law 5,"— the five most common rationales for the prohibition of executing the insane: (1) executing the insane was repugnant to humanity; (2) executing the insane provided no example to others, thus it served no deterrent purpose; (3) religious underpinnings condemned executing the insane; (4) executing the insane was superfluous because insanity was its own punishment; and (5) retribution was not served because an insane person's life has less value than that of a sane person.<sup>33</sup>

Concluding that the common law bar against executing the insane and the accompanying rationales remained valid in 1986, the plurality held that the Eighth Amendment prohibited the State from executing the insane.<sup>34</sup> According to the plurality, "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."<sup>35</sup> For the plurality, the challenging issue of whether a prisoner is too insane to comprehend the nature of the ultimate penalty requires trustworthy fact-finding and evidence conducive to establishing a neutral, sound, and professional determination.<sup>36</sup> Essentially, the plurality recognized that in a civilized society it is imperative to employ fair principles to resolve whether a prisoner is competent to face the penalty of death by execution.<sup>37</sup>

## 2. Justice Powell's Concurrence in *Ford v. Wainwright*

Though the plurality's broad holding in *Ford* was that the Eighth Amendment prohibited executing the insane, Justice Powell's narrow concurrence is the controlling opinion because no opinion obtained the required number of Justices to reach a majority.<sup>38</sup> Justice Powell began his concurrence by stating that the common law prohibited executing the insane because it constituted cruel and unusual punishment, and he concluded that the Eighth Amendment prohibited it for that same reason.<sup>39</sup> Justice Powell's concurrence, in part, attempted to define "the mental awareness" a prisoner must possess upon execution to satisfy the Eighth Amendment.<sup>40</sup>

Justice Powell essentially rejected Blackstone's common law rationale that executing an insane prisoner is wrong because the prisoner, if competent, may have provided exculpatory information prior to execution.<sup>41</sup> According to Justice Powell, contemporary

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33. *Ford*, 477 U.S. at 407-08; see also J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine As Applied in Capital Cases*, 79 TENN. L. REV. 461 (2012) (providing a more in-depth discussion of common law rationales for the bar against executing the insane).

34. *Ford*, 477 U.S. at 409-10.

35. *Id.* at 410.

36. *Id.* at 414 ("psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms") (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)); *id.* at 417-18 (indicating that "in light of the clear need for trustworthiness in any fact finding . . .").

37. *Id.* at 417.

38. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)); *id.* at 409-10.

39. *Id.* at 418 (Powell, J., concurring).

40. *Id.* at 419 (Powell, J., concurring) (also considering the procedures required by states to avoid de novo review in deferral court under 28 U.S.C. § 225(d)).

41. *Id.* at 419 (Powell, J., concurring).

jurisprudence provided greater review of convictions and afforded certain due process protections that were largely unavailable at common law.<sup>42</sup> These mechanisms left Blackstone's rationale with little merit.<sup>43</sup> Justice Powell accepted Coke's proposition that the purpose of the death penalty is to deter future crime—a consequentialist goal—which does not justify executing the insane because doing so is repugnant to human decency.<sup>44</sup> Justice Powell concluded that Coke's consequentialist rationale retained vitality, adding that executing the insane cannot satisfy retributivist goals because retribution depends upon the prisoner's awareness of the penalty and the purpose for it.<sup>45</sup> He also recognized that society commonly valued the ability to prepare mentally and spiritually for death.<sup>46</sup> Thus, because executing the insane offends common ideas of morality and does not fulfill one of the chief justifications of the death penalty, many states, even at the time of *Ford*, required a minimum showing that a death row inmate understood his or her imminent execution and the reason for it.<sup>47</sup>

In light of the various rationales regarding the prohibition against executing the insane, Justice Powell agreed that as a prerequisite to an inmate's execution, the inmate must "know the fact of [his or her] impending execution and the reason for it."<sup>48</sup> Perhaps the thrust of Justice Powell's argument, or at least what is most relative to Scott Panetti, was that an inmate must know of the impending execution because an inmate can only prepare for death if he or she knows that death is approaching.<sup>49</sup> In addition, an inmate must know the reason for the impending execution because there is no retribution if a prisoner cannot appreciate the retributive connection between crime and punishment.<sup>50</sup>

### B. *The Scott Panetti Story*

From 1986 to 2014, the State of Texas has executed almost 500 prisoners, and the Fifth Circuit has not found a single Texas inmate incompetent for execution, including

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42. *Ford*, 477 U.S. at 419-21 (Powell, J., concurring) ("if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory he might allege somewhat in stay of judgment or execution") (internal quotations omitted) (quoting 1 M. HALE, PLEAS OF THE CROWN 35 (1936)). Justice Powell also cites 4 W. BLACKSTONE, COMMENTARIES 388-89 (9th ed. 1783).

43. *Ford*, 477 U.S. at 419-21 (Powell, J., concurring).

44. *Id.* at 419. n.3 (Powell, J., concurring). See 3 E. COKE, INSTITUTES 6 (1794). ("[A] miserable spectacle . . . of extream inhumanity and cruelty . . . can be no example to others."). Consequentialists recognize that the purpose of punishment is to create positive societal consequences, such as rehabilitating the offender, incapacitating the offender, and deterring the offender and other members of society from engaging in criminal activity. Retributivists, though, believe that the offender's conduct justifies punishment simply because he or she deserves it. See Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 856-57, 859-860 (2002).

45. *Ford*, 477 U.S. at 421 (Powell, J., concurring).

46. *Id.*

47. *Id.* at 421-22 (Powell, J., concurring) ("A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence.") (quoting FLA. STAT. § 922.07 (1985 & Supp. 1986)).

48. *Id.* at 422 (Powell, J., concurring) (explaining that "[s]uch a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition").

49. *Id.*

50. *Id.*; see also Greenberg, *supra* note 11, at 231 (explaining that Powell's test sets the "constitutional floor," allowing states to create heightened competency requirements). The Supreme Court ultimately remanded Alvin Ford's competency determination and the district court held that he was sane. Ford died of natural causes while his appeal was pending. *Alvin Ford, 37, Dies; Stricken on Death Row*, N.Y. TIMES, Mar. 9, 1991, <http://www.ny-times.com/1991/03/09/obituaries/alvin-ford-37-dies-stricken-on-death-row.html>.

Scott Panetti.<sup>51</sup> Scott Panetti exhibited signs of mental illness well before he murdered his wife's parents and well before he arrived on Texas's death row.<sup>52</sup> With the exception of a near-drowning accident at age five, which may have somewhat hindered his cognitive development, Panetti exhibited all the characteristics of an ordinary child.<sup>53</sup> However, as a teenager he drew further away from his family.<sup>54</sup> On some days he acted completely normal, and on others he seemed like a completely different person.<sup>55</sup> His first documented encounter with a mental health professional was at age eighteen.<sup>56</sup>

In 1978, shortly after his first evaluation, Panetti sustained severe electrical burns and a psychiatrist diagnosed him with moderate to severe sociopathic personality disorder and early schizophrenia.<sup>57</sup> His symptoms included a low frustration tolerance, flight of ideas, hallucinations of red flashing lights, and confusing his voice with others.<sup>58</sup> Three years later he involuntarily entered a psychiatric hospital where he received treatment for substance abuse and aggressive, delusional, and paranoid behavior.<sup>59</sup> Then, in 1986, Panetti entered a drug treatment center where, upon admission, evaluators diagnosed him as psychotic.<sup>60</sup> While at the treatment facility, Panetti chased his wife's car, leaving with her only to return the following day.<sup>61</sup> The next month, doctors diagnosed Panetti with chronic undifferentiated schizophrenia.<sup>62</sup> Panetti transferred to another psychiatric hospital, where his wife described his episodes of paranoid behavior as including a belief that the devil occupied his belongings causing him to bury his furniture outside and to nail the curtains shut so that the neighbors would not film him.<sup>63</sup> His wife also explained that Panetti presented a coherent front, or the appearance of normalcy, after his transfer, but soon disintegrated.<sup>64</sup>

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51. *Executed Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (Mar. 10, 2014), [https://www.tdcj.state.tx.us/death\\_row/dr\\_executions\\_by\\_year.html](https://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html) (providing a list of executions); *Scott Panetti*, *supra* note 2; *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013) (affirming the trial court's determination that Scott Panetti is competent for execution).

52. *See* Brief for Petitioner at 6, *Panetti, v. Quarterman*, 551 U.S. 930 (2007) (No. 06-6407) (noting "Panetti suffered from a severe mental illness long before he ever arrived on Texas's death row"). Mary Solbrig, an attorney, who was once Scott's payee for SSI benefits, stated Scott mentally deteriorated in the last twenty years. *Scott Panetti*, *supra* note 2.

53. *Id.*

54. *Id.* His mother, Yvonne, opined that she first thought his bizarre behavior was merely a phase, which he would out grow. Yvonne commented that he was a terrific child, but exhibited bizarre behavior during his teen-aged years. On one occasion, when he was sixteen, Yvonne remembered Scott acting like he heard music, and when she asked, he responded, "it is just the music in my hear." *Id.*

55. *Id.* It was also around this age when Scott's sister noticed that he was sick. She recalls Scott incessantly calling a radio station, requesting that they play his song, and referring to himself as "Sergeant Iron Horse." *Id.*

56. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*3 (S.D. Tex. Mar. 26, 2008).

57. *Id.*; THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 153 (Am. Psychiatric Ass'n 4th ed. 2000) [hereinafter DSM-IV-TR] (defining schizophrenia as at least two of the following symptoms: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and/or negative symptoms, such as affective flattening, alogia, or avolition).

58. *Panetti*, 2008 WL 2338498, at \*4.

59. *Id.*

60. *Id.* at \*5.

61. *Id.*

62. *Id.*; DSM-IV-TR, *supra* note 57, at 156 (explaining that undifferentiated means that an individual meets the criteria for schizophrenia, but do not meet the specific criteria for paranoid, disorganized or catatonic schizophrenia).

63. *Panetti*, 2008 WL 2338498, at \*5. *See also Panetti*, *supra* note 2 (explaining that Scott believed that the devil was out to get him and he washed his belongings to exercise the devil).

64. *Panetti*, 2008 WL 2338498, at \*5.



After Panetti's release, he and his wife separated and he moved to Wisconsin where he entered yet another hospital for psychiatric treatment.<sup>65</sup> Based on Panetti's statements that he heard strange voices and music since adolescence and his dependence on controlled substances "to quiet the voices," the psychiatrist diagnosed Panetti with chronic undifferentiated schizophrenia and alcohol and drug dependence.<sup>66</sup> That same month, he entered a hospital to treat his suicidal thoughts.<sup>67</sup> The psychiatrist diagnosed Panetti with major depression with psychotic features.<sup>68</sup>

Panetti then moved back to Texas and returned to the drug treatment center.<sup>69</sup> The evaluator at the treatment center "emphatically state[d], '[t]here is no doubt in my mind that he is delusional and that at this point he is unable to have any realistic orientation towards his own situation . . . I'm also sure that he is unable to function in any form or fashion at this point.'"<sup>70</sup> Over the next three months, Panetti received treatment for schizoaffective disorder and alcohol and substance abuse.<sup>71</sup>

For the next three years, Panetti remained relatively stable; he received outpatient treatment and married his second wife.<sup>72</sup> However, in 1990, Panetti swung a cavalry sword at his wife, threatening to kill her, their child, his father-in-law, and himself by burning down the house.<sup>73</sup> This resulted in another involuntary commitment to a psychiatric hospital.<sup>74</sup> Around this same time, he called himself "Sergeant Iron Horse."<sup>75</sup> In 1991, Panetti checked himself into a hospital, where evaluators noted that Panetti had some preoccupation with religion and poor impulse control.<sup>76</sup> He continued outpatient treatment intermittently for the next year, but eventually stopped taking his antipsychotic medications and going to his appointments.<sup>77</sup> A notation in Panetti's outpatient treatment file from September 1, 1992 indicated that Panetti failed to refill his prescribed medications.<sup>78</sup>

Seven days after that notation, on September 8, 1992, Panetti shaved his head, donned military camouflage fatigues, and went to the home of his parents-in-law—Joe and Amanda Alvarado—with a sawed-off shotgun and a deer rifle.<sup>79</sup> He shot Joe and Amanda

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65. *Id.* at \*6.

66. *Id.* (internal quotation marks omitted).

67. *Id.*

68. *Id.*; DSM-IV-TR, *supra* note 57, at 168, 174-75 (explaining Major Depressive Disorder as having two or more Major Depressive Episodes, which include at least five of the following symptoms existing during the same two week period, representing a change in previous function, and at least one of the symptoms is either depressed mood or loss of interest or pleasure: depressed mood most of the day or nearly every day; diminished interest or pleasure; significant weight loss; recurrent insomnia or hypersomnia; psychomotor agitation or retardation; fatigue or loss of energy almost daily; feelings of worthlessness or excessive guilt; diminished ability to think clearly; and/or recurrently thinking of death).

69. *Panetti*, 2008 WL 2338498, at \*7.

70. *Id.*

71. *Id.* at \*8.

72. *Id.*

73. *Id.*

74. *Panetti*, 2008 WL 2338498, at \*8.

75. *Id.* See also *Scott Panetti*, *supra* note 2 (wherein Panetti's sister recalls him referring to himself as "Sarge" as early as eighteen or nineteen).

76. *Panetti*, 2008 WL 2338498, at \*8.

77. *Id.* at \*9.

78. *Id.*

79. Brief for Petitioner, *supra* note 52, at 7. For a more detailed account of the crime, see *Panetti*, 2008 WL 2338498, at \*9 (quoting *State v. Panetti*, 891 S.W.2d 281 (Tex. App. 1994)); see also *Scott Panetti*, *supra* note 2.

in front of his wife and daughter.<sup>80</sup> Panetti forced his wife and daughter into the bunkhouse where he lived.<sup>81</sup> After a standoff with police that lasted most of the night, Panetti eventually released his wife and daughter without physical harm.<sup>82</sup>

The State of Texas indicted Panetti on September 18, 1992.<sup>83</sup> Based on Panetti's long history of mental illness, the trial judge ordered a psychiatric evaluation and appointed Preston Douglas as his defense counsel.<sup>84</sup> Dr. E. Lee Simes evaluated Panetti and reported that Panetti did not know what year it was, nor could he identify the President.<sup>85</sup> Panetti's thought process was loose and tangential, meaning disorganized, and he reported to Dr. Simes that he experienced auditory and visual hallucinations, including visions of Jesus Christ visiting his cell.<sup>86</sup> The doctor also reported that Panetti experienced other chronic delusions, including a preoccupation with religion, and that he suffered from "obvious mental difficulties."<sup>87</sup> Notwithstanding the overwhelming evidence of Panetti's mental incompetence, Dr. Simes concluded that Panetti was competent.<sup>88</sup> The court held a competency hearing and the jury found Panetti competent to stand trial.<sup>89</sup> Months later, Panetti refused to take his anti-psychotic medication, claiming that God cured his schizophrenia and requested that the trial court allow him to represent himself.<sup>90</sup> The trial court granted his request.<sup>91</sup>

Panetti wore a purple cowboy outfit and applied for more than 200 subpoenas, requesting testimony from, among others, John F. Kennedy, the Pope, and Jesus Christ.<sup>92</sup> Panetti's standby counsel said his "performance was 'bizarre,' 'scary,' and 'trance-like,' rendering his trial 'a judicial farce and a mockery of self-representation.'"<sup>93</sup> The jury found Panetti guilty of murder and sentenced him to death.<sup>94</sup> After nearly a decade of appeals, the Supreme Court granted certiorari to determine "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the 'mental capacity to understand that [he or she] is being executed as punishment for a crime.'"<sup>95</sup>

### III. THE SUPREME COURT'S RATIONAL UNDERSTANDING STANDARD AND THE LOWER

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80. Brief for Petitioner, *supra* note 52, at 7.

81. *Id.*

82. *Id.*

83. *Panetti*, 2008 WL 2338498, at \*11.

84. Brief for Petitioner, *supra* note 52, at 7-8.

85. *Id.*

86. *Id.*

87. *Id.*; *cf. Panetti*, 2008 WL 2338498, at \*11-12 (internal quotation marks omitted).

88. Brief for Petitioner, *supra* note 52, at 8. For an analysis of Panetti's proceedings at trial see Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007).

89. Brief for Petitioner, *supra* note 52, at 8. The judge ordered a mistrial in the first competency trial, because the jury deliberated for almost twelve hours. It was the second jury that found Scott competent. *Id.*

90. *Id.* at 10-11. Panetti referred to the curing as his "April Fool's Day revelation[.]" *Id.*

91. *Id.* at 11.

92. *Id.* at 11-16. Panetti recanted Jesus Christ's subpoena, stating "Jesus Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that." *Id.*

93. *Panetti v. Stephens*, 727 F.3d 398, 400 (5th Cir. 2013) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 936 (2007)).

94. See *State v. Panetti*, 891 S.W.2d 281 (Tex. App. 1994).

95. *Panetti*, 551 U.S. at 954.

## COURTS' HOLLOW APPLICATION

A. *Panetti v. Quarterman*

In *Panetti v. Quarterman*, the Supreme Court held that a prisoner must have knowledge of his or her imminent death and rationally understand the retributive nexus between the crime and the punishment before execution, finding that the court of appeals' determination of Panetti's competence rested on a flawed interpretation of *Ford*.<sup>96</sup> Though the Court ultimately remanded Panetti's competency determination, its discussion regarding the integrity of Panetti's fixed delusions demonstrated the Court's acceptance that Panetti had a true psychotic disorder that may have prevented him from rationally understanding that the State intended to take his life as a consequence of the murder of his in-laws.<sup>97</sup> The Court reasoned that whether Panetti's delusions prevented him from comprehending the retributive connection between his impending death and the murder of his in-laws was a question for the lower court to resolve with the aid of psychiatric science.<sup>98</sup>

The competency for execution standard applied by the court of appeals was whether the prisoner was aware of his execution and the reason for it.<sup>99</sup> The Court held that this standard was too restrictive to comply with the Eighth Amendment because it disregarded a prisoner's delusional belief system so long as the prisoner in fact knew that the State "identified his [or her] crimes as the reason for his execution."<sup>100</sup> The *Ford* majority suggested that delusions are relevant to comprehension and awareness if they impair the prisoner's ability to grasp a rational understanding of the reasons for the execution.<sup>101</sup> In essence, the court of appeals erred in finding that Panetti was competent for execution based solely on his ability to articulate that the State would execute him and the State's reasons for the execution, without determining whether Panetti's delusional belief system prevented him from truly appreciating that his impending death was a consequence of his capital crimes.<sup>102</sup> The Court reasoned that the competency for execution standard applied by the court of appeals failed to align with *Ford* because *Ford* emphasized that retributivism requires that the offender recognize the gravity of his or her offense.<sup>103</sup>

As recognized by the Court, the record contained a significant amount of evidence supporting that Panetti suffered from severe delusions.<sup>104</sup> Such evidence indicated that Panetti's fixed delusional belief system prevented him from truly grasping that his execution was a consequence of his crimes.<sup>105</sup> One of Panetti's experts stated that his mental health issues were symptomatic of schizoaffective disorder, which caused him to have a "genuine delusion" regarding his understanding of the reasons for his execution.<sup>106</sup> The

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96. *Id.* at 958.

97. *Id.* at 955.

98. *Id.* at 962.

99. *Id.* at 956 (citing *Panetti v. Dretke*, 448 F.3d 815, 819 (5<sup>th</sup> Cir. 2006) (quoting *Barnard v. Collins*, 13 F.3d 871, 877 (5<sup>th</sup> Cir. 1994)).

100. *Panetti*, 551 U.S. at 956, 958.

101. *Id.* at 958.

102. *Id.*

103. *Id.* at 959.

104. *Id.* at 956.

105. *Panetti*, 551 U.S. at 954-56.

106. *Id.*; DSM-IV-TR, *supra* note 57, at 159 (describing schizoaffective disorder as "an uninterrupted period of illness during which, as time there is either a Major Depressive Episode, a Manic Episode, or a Mixed Episode

expert explained that Panetti believed he was "[engaged in] spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light."<sup>107</sup> Although Panetti could articulate on a superficial level that the State sought to execute him for his crimes, the expert determined that Panetti truly believed the State's reason was a sham to conceal the State's true purpose—to stop him from preaching the gospel.<sup>108</sup> Three other expert witnesses reached similar conclusions regarding the genuineness and severity of Panetti's delusions.<sup>109</sup>

The State's expert witnesses opined that Panetti's purported beliefs did not indicate incompetence because Panetti could periodically think clearly and lucidly.<sup>110</sup> However, the Court dismissed the State's witnesses' explanation that Panetti was competent because the Court accepted Panetti's rebuttal witness, who provided that schizophrenia does not necessarily diminish a person's cognitive ability.<sup>111</sup> The rebuttal witness stated that a person with schizophrenia can demonstrate rational thought in connection with reality one moment, but when stimulated, his or her lucid thought becomes tangential.<sup>112</sup> The Court additionally stated that an un-medicated schizophrenic can sporadically hold an orderly conversation but the ability to do so is dependent upon whether the discussion pertains to the person's fixed delusional belief system.<sup>113</sup>

Though the Court remanded Panetti's competency determination, it seemed convinced that Panetti's delusions were genuine and that such delusions might "put [his] awareness of [the] link between [his] crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."<sup>114</sup> It was not enough that Panetti was aware of the State's identified link between his crimes and the punishment.<sup>115</sup> He must have a rational understanding of the State's reason for his execution.<sup>116</sup> Thus the court's task on remand was to determine whether Panetti's delusional beliefs prevented him from comprehending that his execution was a consequence of his crimes—not a consequence of demonic spiritual warfare.<sup>117</sup> The Court was clear that psychiatric science—including the conclusions of physicians, psychiatrists, and other experts in the field—should determine the extent to which Panetti's delusions prevented him from appreciating the retributive connection between his crimes and his punishment.<sup>118</sup>

#### B. Evidence Presented at Panetti's Subsequent Habeas Corpus Proceeding

The evidence presented in *Panetti II* failed to meet the *Panetti* standard because it did not demonstrate that Panetti rationally understood the nexus between the murder of his

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concurrent with symptoms that meet [the criteria for] Schizophrenia;" during the time of the illness there are delusions are hallucinations for at least two weeks; the symptoms that meet the criteria for a mood episode exist for a substantial portion of the illness; and the disturbance is not a result of a substance or medical condition).

107. *Panetti*, 551 U.S. at 954-56 (internal quotation marks omitted).

108. *Id.*

109. *Id.*

110. *Id.* at 955.

111. *Id.*

112. *Panetti*, 551 U.S. at 955.

113. *Id.*

114. *Id.* at 960.

115. *Id.*

116. *Id.*

117. *Panetti*, 551 U.S. at 960.

118. *Id.* at 962.

in-laws and his execution.<sup>119</sup>

### 1. Psychiatric Evaluations

The district court included testimony from three of Panetti's experts in its opinion.<sup>120</sup> First, Dr. Leslie Rosenstein evaluated Panetti in 2007 and administered more than sixteen tests.<sup>121</sup> She remarked that during cognitive testing, Panetti "put[] forth good effort" and he demonstrated disappointment and frustration when he did not perform perfectly.<sup>122</sup> In addition, his speech was clear and normal in rate, rhythm, and tone.<sup>123</sup> However, Panetti demonstrated difficulty focusing his attention, often becoming tangential.<sup>124</sup> She concluded that the likelihood of Panetti's malingering was low and that his behavior was indicative of frontal-executive deficits, which are symptomatic of chronic psychotic disorders like schizoaffective disorder and schizophrenia.<sup>125</sup>

Two more of Panetti's experts provided opinions as to whether he had a rational understanding of the retributive connection between his crimes and punishment.<sup>126</sup> Dr. Mary Alice Conroy interviewed Panetti in December, 2007.<sup>127</sup> She stated that Panetti's speech was less pressured than when she evaluated him in 2004.<sup>128</sup> Consistent with Dr. Rosenstein's evaluation, Dr. Conroy described that Panetti intermittently provided logical and organized responses to her questions, but would subsequently devolve, "becom[ing] increasingly tangential unless redirected."<sup>129</sup> She reported that while interviewing Panetti, he talked of conspiracies involving corporations and the Bush family in league with the devil.<sup>130</sup> When Dr. Conroy asked Panetti about his execution, Panetti explained that God revealed to him that he would become a very old preacher.<sup>131</sup> He also described two instances when angels visited him, disguised as correctional officers.<sup>132</sup>

119. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*36 (S.D. Tex. Mar. 26, 2008).

120. *Id.* at \*19-22.

121. Report or Affidavit of Leslie D. Rosenstein, *Panetti v. Quarterman*, No. 04CV00042, 2007 WL 7119864 (W.D. Tex. Dec. 20, 2007):

Dr. Rosenstein is a clinical neuropsychologist, board certified by the American Board of Professional Psychology. She practices in the Neuropsychology Clinic, P.C. in Austin and provides consultation to the Mary Lee Foundation Rehabilitation Center. She is a member of the American and Texas Psychological Associations, the International and Austin Neuropsychological Societies, and is a board member of the American Academy of Clinical Neuropsychology and the American Academy of Clinical Neuropsychology Foundation. Dr. Rosenstein has also served as a consultant for the Jurisprudence and Oral Examinations administered by the Texas State Board of Examiners of Psychologists. She received a bachelors degree and a doctorate of Psychology from the University of Texas and completed a doctoral specialization in Clinical Psychology with a major in Neuropsychology at the University of Arizona. Leslie D. Rosenstein, Ph.D., Texas State Directory.

<https://www.txdirectory.com/online/person/?id=37992&office=20103>.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Panetti*, 2008 WL 2338498, at \*19-20.

126. *Id.* at \*20-22.

127. Forensic Evaluation Competence for Execution of Mary Alice Conroy, Ph.D., *Panetti v. Quarterman*, No. 04CV00042, 2008 WL 7650343 (W.D. Tex. Jan. 29, 2008). She also interviewed him twice in August of 2004. *Id.*

128. *Id.*

129. *Id.*

130. *Panetti*, 2008 WL 2338498, at \*21-22.

131. *Id.*

132. Forensic Evaluation Competence for Execution of Mary Alice Conroy, Ph.D., *supra* note 127.

In addition, Dr. Conroy administered the Structured Interview of Reported System ("SIRS") to measure forms of dissimulation, such as malingering.<sup>133</sup> Panetti's results revealed honesty in seven of the eight primary scales of the SIRS, thus yielding a ninety-five percent probability that he was not malingering.<sup>134</sup> In Dr. Conroy's opinion, Panetti's symptoms demonstrated "a very real schizophrenic condition."<sup>135</sup> She ultimately diagnosed Panetti with Schizoaffective Disorder, denoting that Panetti's level of confusion and mood varied, but his underlying thought disorder remained consistent.<sup>136</sup> According to Dr. Conroy, Panetti did not rationally understand that the State sought to execute him as retribution for his crimes.<sup>137</sup> Instead, he genuinely believed that evil forces sought his death to silence him from preaching God's word, and that he was invulnerable to execution because God wanted him to become a very old preacher.<sup>138</sup> Dr. David Self, Panetti's third expert, reached the same conclusions regarding Panetti's mental health and competency, adding that Panetti was also incompetent to stand trial.<sup>139</sup>

The district court's opinion also contained testimony from six State experts, including three deposed psychotherapists the prison hired to conduct routine assessments of death row inmates.<sup>140</sup> Dr. Tom Allen did not provide an opinion with regard to Panetti's competence for execution but did provide an assessment of Panetti's psychological functioning.<sup>141</sup> He concluded that the probability of Panetti's malingering was high because his

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133. *Id.*

134. *Id.*

135. *Id.* Dr. Conroy concluded that Panetti was schizophrenic for the following reasons:

Mr. Panetti evidenced this disorder over time for a number of years prior to the murder of his in-laws. His delusions have a consistent theme and his symptoms are described by observers with relative consistency. Mr. Panetti has responded favorably in the past to treatment with antipsychotic agents. The symptoms go well beyond those that could be attributed simply to substance abuse and have persisted in the absence of substances. The type of thought disorder displayed by Mr. Panetti during lengthy interviews (i.e., flight of ideas, loose associations, tangential thinking) is nearly impossible to fake. Mr. Panetti does not claim obvious symptoms of mental illness, claims one often sees in those who malingers. For example, when asked directly and given every opportunity to endorse hallucinations, he demurs. He is currently adamant that he is not mentally ill, saying that he probably was at one time (even admitting to symptoms in the distant past) but insisting that he was a "born again April Fool," when God healed him on April 1, 1995. His behavior during this evaluation was totally consistent with reports of his behavior in TDCJ over recent years. Almost everyone interviewed on the record noted that he does not socialize with others, but preaches to them constantly - even in the face of rejection and hostility. This is totally consistent with his delusional belief that he is on Death Row on God's mission and that the forces of evil are trying to execute him to silence his preaching. Neuropsychological assessment results are consistent with a psychotic process. On the only test of functional malingering administered, the SIRS, Mr. Panetti's scores indicate a 95% probability that he is responding honestly.

*Id.*

136. *Id.* Dr. Conroy explained that:

Schizoaffective Disorder is a severe and chronic psychotic disturbance. It is often characterized by significant thought disorder (i.e., flight of ideas, loose associations, disorganization, tangential speech), hallucinations, and delusional thinking. Mood and affect may change with some frequency; however, some of the underlying psychotic ideas are consistent over time.

*Id.*

137. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*22 (S.D. Tex. Mar. 26, 2008).

138. *Id.*

139. *Id.* at \*21.

140. *Id.* at \*23-27.

141. *Id.* at \*23-24.

scores on the Green's Word Memory Test were similar to experimental groups of patients asked to fake schizophrenia and because Panetti's past schizophrenic-like behaviors were symptomatic of substance abuse.<sup>142</sup>

Dr. Alan Waldman was skeptical that Panetti had any psychotic disorder whatsoever, and thus concluded that he had a rational understanding.<sup>143</sup> In the course of Dr. Waldman's interview, he asked Panetti direct questions about the reason for his execution.<sup>144</sup> For example, when Dr. Waldman asked Panetti why he was on death row, Panetti responded, "[t]hey're trying to rub me out, it's unjust."<sup>145</sup> When Dr. Waldman asked Panetti why it was unjust Panetti explained, "it is a conspiracy."<sup>146</sup> Dr. Waldman next asked Panetti why the conspiracy targeted him, and Panetti provided a "nonsensical personalized religious answer."<sup>147</sup> Dr. Waldman stated that when Panetti *wanted* to answer a question he was organized and coherent, but when he did not want to answer a question he replied with nonsensical religious statements.<sup>148</sup> Contrary to his statement that Panetti answered nonsensically, Dr. Waldman also explained that Panetti recited "biblical response[s], but [they were] always organized and understandable."<sup>149</sup> Dr. Waldman essentially asserted that each of Panetti's diagnoses of psychotic disorders were incorrect and that Panetti's "so-called 'delusion' [was] wholly self-serving and [had] but one purpose that [was] to spare him from the sentence handed down by the jury of his peers."<sup>150</sup>

Additionally, Dr. Priscilla Ray provided an expert opinion regarding the extent to which mental health experts are able to aid the court in determining competency for execution eligibility.<sup>151</sup> She explained that while psychiatric science can aid the courts, there are limitations because no objective test can determine what someone knows; therefore, an assessment of a mentally ill prisoner's *capacity* to understand is more feasible than his or her *actual* understanding.<sup>152</sup>

In addition, the State deposed three psychotherapists who routinely evaluated death row inmates.<sup>153</sup> None could independently recollect Panetti and the reports of their routine assessments were unremarkable.<sup>154</sup> Further, none of the deposed witnesses provided an opinion as to whether Panetti's delusions prevented him from having a rational understanding of the nexus between his crimes and punishment.<sup>155</sup>

In essence, only one of the State's experts actually determined whether Panetti had a rational understanding of the reasons for his execution.<sup>156</sup> That expert concluded that

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142. *Panetti*, 2008 WL 2338498, \*23-24.

143. *Id.* at \*24-26.

144. The Evaluation of Scott Louis Panetti of Alan J. Waldman, M.D., *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2007 WL 7085068 (W.D. Tex. Mar. 26, 2008).

145. *Id.* at \*5 (internal quotation marks omitted).

146. *Id.* (internal quotation marks omitted).

147. *Id.*

148. *Id.* at \*3.

149. The Evaluation of Scott Louis Panetti of Alan J. Waldman, M.D., *supra* note 144, at \*9.

150. *Id.* at \*11. However, Panetti's delusions existed before any motive existed, years before he murdered his wife's parents. *Id.*

151. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*26 (S.D. Tex. Mar. 26, 2008).

152. *Id.* The state lost on this issue in *Panetti*. *Id.*

153. *Id.* at \*28.

154. *Id.*

155. *Id.*

156. *Panetti*, 2008 WL 2338498, at \*24-26.

Panetti rationally understood his punishment because he doubted that Panetti suffered from any psychotic disorder whatsoever, a finding that was unsupported by decades of diagnoses, Dr. Rosenstein's testimony, and the Supreme Court's own statement that Scott Panetti suffered from a psychotic disorder.<sup>157</sup> Alternatively, two of Panetti's experts testified that Panetti's gross delusions, caused by his severe mental illness, prevented him from rationally understanding that his execution was a consequence of his crimes.<sup>158</sup>

## 2. Testimony of Inmates, Guards, and Staff

The district court opinion included testimony from Panetti's fellow inmates, guards, and staff who attested to Panetti's unwavering erratic behavior.<sup>159</sup> One inmate deemed Panetti's demeanor bizarre stating, "one minute everything[] [was] good, the next minute he[] [was] ranting and raving fire and brimstone again, like flipping a switch."<sup>160</sup> As previously explained by the Supreme Court in *Panetti v. Quarterman*, this behavior is entirely consistent with schizophrenia because a person with schizophrenia can demonstrate rational thought in one moment and tangential thought the next.<sup>161</sup> In addition, the inmate testified that Panetti screamed Bible passages at the top of his lungs, often up to seven hours a day, and when other inmates yelled, threw water, and shot sharp objects at him, he appeared unfazed.<sup>162</sup> The other inmate gave similar testimony, adding that Panetti insisted that the inmate call him "Ranahan."<sup>163</sup> Additionally, five death row guards and staff members also attested to Panetti's compulsive preoccupation with religion.<sup>164</sup>

## 3. Recorded Conversations Between Panetti and His Family

The State also presented eleven hours of audio recordings of visits between Panetti and his family.<sup>165</sup> The district court explained that Panetti's pace of speech remained normal even when he spoke of corrupt Texas politics, never becoming irrational, tangential, or pressured.<sup>166</sup> In addition, when he spoke of corrupt politics and the trial court's "screwups" and made the statement, "Fredericksburg had to have a hanging[.]" he did not mention spiritual corruption.<sup>167</sup> The court described his comments as remarkably self-centered.<sup>168</sup> He often quoted scripture and spoke religiously but did not rant.<sup>169</sup> In initiating a conversation about the death penalty, Panetti expressed his moral opposition to it while

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157. *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007); *Panetti*, 2008 WL 2338498, at \*5-8, \*20, \*25, \*28.

158. *Panetti*, 2008 WL 2338498, at \*21-22.

159. *Id.* at \*26-28.

160. *Id.* at \*26 (internal quotation marks omitted).

161. *Panetti*, 551 U.S. at 555.

162. *Panetti*, 2008 WL 2338498, at \*26.

163. *Id.*

164. *Id.* at \*27-28. Sadly, one staff additionally testified that the guards placed trouble inmates in Panetti's cell as punishment. The courts did not address Dr. Waldman's interview with Phyllis Morrow, the prison's mailroom supervisor, whose opinion was that Panetti was not schizophrenic, because Panetti did not act like her nephew who had schizophrenia. Her testimony is entirely unscientific and based upon her subjective conception of schizophrenia. *Id.*

165. *Id.* at \*28-30.

166. *Id.* at \*28.

167. *Panetti*, 2008 WL 2338498, at \*28 (internal quotation marks omitted).

168. *Id.*

169. *Id.*



maintaining organized speech.<sup>170</sup> With regard to Panetti's statements about his habeas case, the court explained that Panetti "demonstrate[d] a fairly sophisticated understanding of his circumstances."<sup>171</sup> As an example, the court pointed out that Panetti instructed his parents to tell a member of his defense team about a character witness and seemed paranoid about the conversation being recorded, assuring any listeners that he was not in cahoots with the character witness.<sup>172</sup>

#### 4. Culmination of the District Court's Evidence

In sum, the district court's opinion included more evidence of Panetti's incompetency than of his competency.<sup>173</sup> Three experts for Panetti concluded that he was not malingering and did not rationally understand that his execution resulted from murdering his in-laws.<sup>174</sup> Three inmates and five guards testified that Panetti's insane behavior was constant and existed outside the purview of evaluators.<sup>175</sup> The court's opinion provided no testimony evidence asserting that Panetti stated that he knew his execution was a consequence of his in-law's murder.<sup>176</sup> The district court rested its determination of Panetti's competency on only two factual bases: the testimony of a State's witness, Dr. Waldman, and the recorded conversations between Panetti and his family.<sup>177</sup>

#### C. *The District Court's Misapplication of the Rational Understanding Standard*

Though the district court articulated the appropriate standard, its application was reprehensively deficient based on the extreme dissonance between the evidence presented and the court's conclusion that Panetti had a rational understanding of the nexus between murdering his in-laws and his execution.<sup>178</sup> The court found Panetti competent for three primary reasons, all of which were fundamentally flawed due to the court's unscientific conception of mental illness.<sup>179</sup> First, Panetti had a sophisticated understanding of his case.<sup>180</sup> Second, Panetti understood the adversarial process.<sup>181</sup> Third, Panetti believed that the State and trial court were corrupt, and that it was wrong to execute him because he was mentally ill at the time he committed his crimes.<sup>182</sup>

##### 1. Panetti's "Sophisticated Understanding" of His Case

The court's first premise was that Panetti necessarily rationally understood his punishment because he had "a fairly sophisticated understanding of his case."<sup>183</sup> The court supported this conclusion with Panetti's reference to a character witness who could testify

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170. *Id.*

171. *Id.* at \*28-29.

172. *Panetti*, 2008 WL 2338498, at \*29.

173. *Id.* at \*20-29.

174. *Id.* at \*19-22.

175. *Id.* at \*26-28.

176. *Id.* at \*20-29.

177. *Panetti*, 2008 WL 2338498, at \*24-26, \*36.

178. *Id.* at \*20-29.

179. *Id.* at \*24-26, \*28-29, \*36.

180. *Id.* at \*28-29.

181. *Id.*

182. *Panetti*, 2008 WL 2338498, at \*36.

183. *Id.* at \*28-29.

to his preaching and Panetti's statement that his parents should not worry about the outcome of his competency hearing because he could appeal it to the Supreme Court.<sup>184</sup> However, in making this determination, the district court did not comply with the Supreme Court's instruction in *Panetti* to meaningfully consider expert testimony and develop a record supporting the competency determination.<sup>185</sup> Instead, the district court excluded much of the expert testimony from its analysis, including two of Panetti's psychiatric evaluators who concluded that Panetti was not competent for execution, and instead substituted its own conclusions.<sup>186</sup> By ignoring the Supreme Court's instructions, the district court deemed Panetti's delusions irrelevant because it concluded he was cognitively aware of his circumstances.<sup>187</sup>

Psychiatric science establishes that it is unwarranted for a court to infer that a prisoner rationally understands the reason for his or her execution merely because he can regurgitate facts he heard.<sup>188</sup> A schizophrenic can articulate a semantic connection, or identify the State's purported reason for his execution while believing that reason is a sham.<sup>189</sup> The court's conclusion that Panetti's sophisticated understanding of his case necessarily meant that he rationally understood the retributive value of his execution is the type of danger noted by the National Alliance on Mental Illness ("NAMI"), which remarks that courts "assessing competency repeatedly engage in factual reasoning that is wholly unsupported by the scientific understanding of psychotic disorders."<sup>190</sup>

## 2. Panetti's Understanding of the Adversarial Process

The district court based its second premise on Panetti's understanding of the adversarial process reflected in his rational understanding of the case, as evidenced by his willingness to cooperate with Dr. Rosenstein and unwillingness to cooperate with the State's experts.<sup>191</sup> The defense argued that his refusal to cooperate with the State's experts was because of his fixed delusion that the experts were part of a demonic conspiracy.<sup>192</sup> The court dismissed this explanation, stating that Panetti's recognition of the State's witness as a member of "other side" meant that he rationally understood the adversarial process.<sup>193</sup> In actuality, Panetti's understanding of the adversarial nature of his case was, once again, nothing more than a reflection of his cognitive ability to factually understand his case.<sup>194</sup> A prisoner can have awareness of various aspects of the world around him or her, including the adversarial nature of habeas proceedings, yet harbor delusional beliefs.<sup>195</sup> Regardless,

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184. *Id.* at \*28-29.

185. *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Panetti*, 2008 WL 2338498, at \*28-29.

186. *Panetti*, 551 U.S. at 962; *Panetti*, 2008 WL 2338498, at \*28-29.

187. *Panetti*, 551 U.S. at 962; *Panetti*, 2008 WL 2338498, at \*28-29.

188. Bonnie, *supra* note 88, at 257. Essentially, a semantic connection is a prisoner's generalized identification of the State's purported reason for execution, or the superficial realization that "people who are convicted of crimes are sent to prison or executed." Further, psychotic decompensation allows the prisoner to possess a semantic connection, while it distorts his ability to appreciate the significance of his punishment. *Id.*

189. Brief for Nat'l Alliance on Mental Illness as Amicus Curiae at 5, *Ferguson v. Crews*, 134 S. Ct. 33 (2013) (No. 13-5507) [hereinafter NAMI].

190. *Id.*

191. *Panetti*, 2008 WL 2338498, at \*36.

192. *Id.*

193. *Id.* (internal quotation marks omitted).

194. *Panetti v. Quarterman*, 551 U.S. 930, 955 (2007).

195. NAMI, *supra* note 189, at 13.

the court failed to explain how Panetti's understanding of the adversarial process meant that he had a rational understanding of his punishment, nor did it provide a reason or any scientific explanation for dismissing the defense's argument that Panetti was speaking of forces of darkness when he referenced the "other side."<sup>196</sup>

### 3. Panetti's Belief in the Unjustness of His Sentence

The district court's final premise was that Panetti had a rational understanding of his punishment because he spoke of corrupt Texas politics in a non-delusional manner, and that he believed it was wrong for the State to execute him because he was insane at the time he committed the murders.<sup>197</sup> Again, the court erred by substituting its own unscientific and subjective opinion for the judgment of qualified psychiatrists.<sup>198</sup> With regard to the recordings, the court extracted a few isolated statements from hours of audio, minimizing the extent of Panetti's delusions and mental illness.<sup>199</sup> In doing so, it ignored statements that demonstrated Panetti's incompetence and rested its findings on a misconceived idea of mental illness.<sup>200</sup> For instance, the court explained that Panetti's statement that the trial judge was corrupt indicated Panetti's ability to discuss his case in a non-delusional manner; however, the court did not mention that Panetti also referred to the trial judge as a "devil worshipper."<sup>201</sup> As yet another example, the court noted that Panetti's recognition that Dr. Waldman treated mental illness necessarily meant that Panetti understood that his execution resulted from him killing his in-laws.<sup>202</sup> However, the court does not explain how Panetti's cognizance of mental illness, or Dr. Waldman's occupation, necessitated a finding that he understood the retributive nature of his punishment.<sup>203</sup>

Moreover, in viewing Panetti's statements in isolation, the court did not consider that Panetti's statement regarding the unjustness of his execution demonstrated the severity of his mental illness.<sup>204</sup> Panetti believed he retrospectively recognized he was insane at the time he committed the murders because God cured him of mental illness on April 1, 1995, which he called his "April Fool's Day Revelation."<sup>205</sup> After that day he refused to take antipsychotic medication, believing he was no longer insane.<sup>206</sup> He further believed that

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196. *Panetti*, 2008 WL 2338498, at \*36.

197. *Id.* at \*28, \*26.

198. *Id.*

199. *Id.*; Oral Argument at 19:44, *Panetti v. Stephens*, 727 F.3d 298 (5th Cir. 2013) (No. 08-705515), available at [http://www.ca5.uscourts.gov/OralArgRecordings/08/08-70015\\_6-4-2013.wma](http://www.ca5.uscourts.gov/OralArgRecordings/08/08-70015_6-4-2013.wma).

200. *Panetti*, 2008 WL 2338498, at \*26, \*28; NAMI, *supra* note 189, at 13.

201. Oral Argument, *supra* note 199, at 51:06.

202. *Panetti*, 2008 WL 2338498, at \*25, \*36.

203. *Id.* In doing so, the court suggests that an individual is not mentally ill if he or she is aware of mental illness. Again, that is not the *Panetti* test. *Id.*

204. *Id.*

205. Brief for Petitioner, *supra* note 52, at 10-11 (internal quotation marks omitted).

206. *Id.* Another salient debate is whether it is constitutionally permissible to forcibly medicate insane prisoners in order to execute them. See generally *ABA Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006); Cf. Douglas Mossman, *The Psychiatrist and Execution Competency: Forging Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1 (1992); see generally Brian D. Shannon & Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for A Change in Texas*, 45 TEX. TECH L. REV. 419, 451 (2013); see also Lyn Suzanne Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 641-42 (2009) ("Given the growing number of mentally ill prisoners on death row and the advances of antipsychotic medications, the Supreme Court will likely face questions of whether a medicated, mentally ill prisoner can be executed

after his revelation God provided him a clean slate, and therefore his execution was not motivated by retribution for killing his in-laws, but rather by demonic suppression.<sup>207</sup> The court erred by focusing on Panetti's statement that his execution was unjust without regard to the indisputable evidence that indicated otherwise.<sup>208</sup>

In substituting its unscientific and subjective conclusions for expert opinions, the court did not consider that Panetti's statement was simply a regurgitation of what he heard while litigating his case.<sup>209</sup> Panetti's statement demonstrated that he was factually aware of the reasons for his punishment, but did not reveal that he rationally understood it.<sup>210</sup> In essence, the court coalesced awareness with understanding.<sup>211</sup> As explained by NAMI, "the distinction between 'awareness' and 'understanding' drawn in *Panetti* does little good if state courts continue to conflate the two and if they rely instead on an intuitive, unscientific conception of mental illness."<sup>212</sup> The Supreme Court carefully distinguished "awareness" and "understanding" in *Panetti*.<sup>213</sup> Conflating the two terms, as the district court did, does not ensure that the offender recognizes the severity of his crime, and thus, does not achieve the retributive purpose that the Eighth Amendment requires.<sup>214</sup>

#### D. *The Fifth Circuit's Flaws in Panetti's Subsequent Habeas Proceeding*

In August 2013, the Fifth Circuit once again reviewed the district court's determination that Panetti was competent for execution.<sup>215</sup> "Satisfied that the district court applied the correct standard," the Fifth Circuit addressed "whether the district court's ultimate findings of competency [was] clearly erroneous in light of the evidence adduced at Panetti's competency hearing."<sup>216</sup> Ultimately, it affirmed, concluding that Panetti was competent for execution for two reasons.<sup>217</sup> First, there was conflicting expert testimony.<sup>218</sup> Second, the recordings of Panetti's conversations with his parents corroborated the State's experts.<sup>219</sup>

##### 1. Conflicting Expert Testimony

The court explained that the conflicting expert testimony was sufficient on its own to sustain the district court's conclusion.<sup>220</sup> It stated that Dr. Waldman, the State's chief

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and whether a state can force a prisoner to take antipsychotic medication in preparation for execution.").

207. The Evaluation of Scott Louis Panetti of Alan J. Waldman, M.D., *supra* note 144. For instance, when Dr. Waldman asked Panetti "Don't you think that any of this has something to do with murdering your in-laws," he responds "All my guilt has been washed away. When a man is in Christ he is a new creation. I pray that you have been given in to Christ." *Id.*

208. *Id.*

209. NAMI, *supra* note 189, at 13.

210. *Panetti v. Quarterman*, 551 U.S. 930, 955-56 (2007); *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*36 (S.D. Tex. Mar. 26, 2008).

211. NAMI, *supra* note 189, at 13.

212. *Id.*

213. *Panetti*, 551 U.S. at 956.

214. *Id.* at 956; NAMI, *supra* note 189, at 13.

215. *Panetti v. Stephens*, 727 F.3d 398, 410 (5th Cir. 2013).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Panetti*, 727 F.3d at 410-11.

expert, concluded that Panetti suffered from no mental illness whatsoever, and thus rationally understood the retributive connection between his crimes and the punishment.<sup>221</sup> Notwithstanding the Supreme Court's instructions to utilize the expertise of psychiatric science in competency for execution hearings, the Fifth Circuit only effectively considered the testimony of one expert.<sup>222</sup> That expert was the *only* expert to claim that Panetti had a rational understanding of the retributivist value of his execution.<sup>223</sup> Dr. Waldman's conclusion that Panetti was not mentally ill conflicted with the Supreme Court and years of psychiatric history, yet the Fifth Circuit ultimately embraced Dr. Waldman's opinions.<sup>224</sup>

Conversely, as recognized by the Fifth Circuit, multiple experts concluded that Panetti genuinely experienced delusions that prevented him from grasping the retributivist nature of his punishment.<sup>225</sup> The court added "that Panetti no longer clearly expressed" the delusion that his execution was part of a satanic conspiracy to keep him from preaching when interviewed in December 2007.<sup>226</sup> In making this statement, the Fifth Circuit, like the district court, minimized evidence of Panetti's mental illness.<sup>227</sup> Dr. Conroy's statement regarding differences in Panetti's delusions from her subsequent interview with him reflected that he was more direct about his delusions in 2004, but in the later interview he continued to believe his execution to be part of a demonic conspiracy.<sup>228</sup> Nonetheless, the court determined that one expert disagreeing with multiple experts regarding Panetti's competency constituted conflicting expert testimony to which the court must give "great deference"; thereby affirming the district court's dependence on Dr. Waldman's testimony.<sup>229</sup>

## 2. Recordings Corroborated Expert Testimony

The Fifth Circuit's second reason for affirming the district court's finding of competency was that the recordings corroborated the expert testimony.<sup>230</sup> The court found that the recordings revealed that Panetti had a "remarkably sophisticated understanding of his capital case," which indicated he was malingering; that he had the *capacity* to rationally understand his situation, as demonstrated by his ability to talk about the death penalty in an abstract way; and, most notably, that he attributed his conviction to political, not spiritual corruption.<sup>231</sup> The court opined that Panetti demonstrated a sophisticated understanding, as evinced by his statements about a character witness, his recognition that the Supreme Court granted certiorari in a lethal injection case, and his prediction that the Supreme Court would again grant certiorari in his case.<sup>232</sup> For the court, this demonstrated

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*; Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at \*25 (S.D. Tex. Mar. 26, 2008).

225. *Panetti*, 727 F.3d at 411.

226. *Id.*

227. *Id.*

228. *Panetti*, 2008 WL 2338498, at \*22. Dr. Conroy explained "that due to Panetti's 'severe psychotic condition, he lacks the ability to rationally understand the reasons for his current situation. . . . [believing] that he is on a mission from God and that evil forces are pursuing his death in order to silence him.'" *Id.*

229. *Panetti*, 727 F.3d at 411.

230. *Id.* at 410-11.

231. *Id.* at 411-12.

232. *Id.*

that he was malingering, which implied that Panetti's cognitive functioning was inconsistent with schizophrenia.<sup>233</sup> Moreover, the court's logic suggested that a prisoner is incompetent for execution only if mental illness cripples reality such that he or she lacks *awareness* of the facts and circumstances surrounding the case; but, that is not the *Panetti* standard.<sup>234</sup>

Additionally, the court found that the recordings revealed Panetti's *capacity* to rationally understand his situation, because he discussed the death penalty's "moral and political implications."<sup>235</sup> However, in *Panetti*, the Supreme Court explicitly stated that the competency for execution standard does not turn upon a prisoner's mental capacity.<sup>236</sup> Resultantly, the Fifth Circuit's assertion that Panetti's statements about the death penalty demonstrated that he was "capable of understanding the retributive connection between his crime and his punishment," was largely unhelpful to the *Panetti* analysis.<sup>237</sup> Even if the court was not referring to Panetti's capacity when it stated that Panetti was *capable* of understanding, the court's examples do not demonstrate that Panetti rationally understood that his execution was a result of killing his in-laws.<sup>238</sup> The court's examples include the following:

On December 4, 2007, Panetti observe[d] that "in the Old Testament God says the greatest part of justice is mercy. And in the Old Testament when it comes to the death penalty, you—you gotta have two or more eyewitnesses. This is in the Old Testament law, and there were many cities in refuge. Where if there's any question of someone accidentally or unknowing [sic] kills somebody, they can go to that city of refuge." On the same date, Panetti reflecte[d] on the likelihood that the 2008 election may lead to changes in capital punishment, observing that "it depends on whoever gets the nomination," that "from what I heard on the news today, Hillary's for the death penalty," and that "[indecipherable] percentage is against the death penalty." When Panetti's mother suggeste[d] that Hillary "works for the Jewish people in her state" and that Jewish people "believe eye for an eye, tooth for a tooth," Panetti disagree[d], urging that "[m]ost all Jewish people, because of the Holocaust, are very much against the death penalty."<sup>239</sup>

These statements indicate at most that Panetti could discuss the death penalty in the abstract, as they did not concern the reasons for his execution; however a schizophrenic's delusions are personalized.<sup>240</sup> While his statements concerned the death penalty, none pertained to Panetti's spiritual or moral responsibility for his crimes, and none contradicted

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233. *Id.*

234. *Panetti*, 727 F.3d at 411-12.

235. *Id.*

236. *Id.*; *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*26 (S.D. Tex. Mar. 26, 2008).

237. *Panetti*, 727 F.3d at 411-12; *Panetti*, 2008 WL 2338498, at \*26.

238. *Panetti*, 727 F.3d at 411-12.

239. *Id.* at 412; *Panetti*, 2008 WL 2338498, at \*26.

240. *See Panetti v. Quarterman*, 551 U.S. 930, 955 (2007).

Panetti's fixed belief that evil forces were responsible for his execution.<sup>241</sup>

Finally, the court explained that the most damning evidence for Panetti was his attribution of his conviction to political corruption, instead of spiritual corruption.<sup>242</sup> The court further stated, "[n]ot once [in the recordings, did] Panetti indicate that the State [sought] his execution to prevent him from 'preaching the Gospel,' as his delusions allegedly cause[d] him to believe."<sup>243</sup> However, the court ignored that Panetti referred to the trial judge as a "devil worshipper" in the recordings.<sup>244</sup> Panetti spoke of political corruption but the recordings contained evidence of Panetti's delusions, as well.<sup>245</sup> The court's statement that Panetti rationally understood that his execution was a consequence of his crime, merely because he stated, "Fredericksburg had to have a hanging," bore the most concern.<sup>246</sup> Viewing this statement in context, it demonstrated that Panetti believed that a demonic conspiracy unjustly sought his execution.<sup>247</sup>

### 3. Summarizing the Fifth Circuit's Failings

Essentially, in giving great deference to the district court, the Fifth Circuit found that Panetti was competent to face execution, disregarding much evidence that warranted an opposite result.<sup>248</sup> Not only did the court ignore evidence of Panetti's severe mental illness, it contradicted psychiatric science by equating Panetti's cognitive functioning with his rational functioning.<sup>249</sup> Given the importance of the issue determined in this case—whether the State could take Scott Panetti's life—the Fifth Circuit should have more thoughtfully considered the evidence before it.<sup>250</sup> The Fifth Circuit's message is clear.<sup>251</sup> That is, in any case where a district court parrots the correct standard, it need not meaningfully apply that standard so long as there is a shred of conflicting expert evidence, even when a man's life is at stake.<sup>252</sup> At least that was the result for Scott Panetti.<sup>253</sup>

## IV. ISSUES HIGHLIGHTED BY PANETTI'S SUBSEQUENT HABEAS PROCEEDINGS

Though *Panetti* established a substantive test for competency, *Panetti II* highlighted significant challenges for the severely mentally ill on death row.<sup>254</sup> First, *Panetti II* illustrated the courts' misconceptions of mental illness.<sup>255</sup> Second, those misconceptions demonstrated a need for psychological science to aid the courts in distinguishing awareness from understanding.<sup>256</sup> Third, *Panetti II* signaled a need for an evidentiary standard

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241. *Panetti*, 727 F.3d at 411-12; *Panetti*, 2008 WL 2338498, at \*26.

242. *Panetti*, 727 F.3d at 411-12.

243. *Id.* at 412.

244. Oral Argument, *supra* note 199, at 51:06.

245. *Id.*

246. *Panetti*, 727 F.3d at 412 (internal quotation marks omitted).

247. *Id.*

248. *Id.* at 410.

249. *Id.* at 411-12.

250. *Id.*

251. *Panetti*, 727 F.3d at 411-12.

252. *Id.*

253. *Id.* at 410.

254. *Panetti*, 727 F.3d at 398; *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498 (S.D. Tex. Mar. 26, 2008).

255. *Panetti*, 2008 WL 2338498, at \*24-26, \*28-29, \*36.

256. *Id.*

to ensure meaningful consideration of the all of the evidence in competency for execution hearings.<sup>257</sup> Finally, *Panetti II* indicated a great disadvantage for the indigent mentally ill prisoner.<sup>258</sup>

A. *Understanding Cognitive Functioning Verses Rational Thinking*

*Panetti II* highlights the criminal justice system's failure to recognize that those who suffer from mental illness do not necessarily have deficient cognitive functioning.<sup>259</sup> Mental illness is not the same as mental retardation.<sup>260</sup> Mental health professionals understand that individuals who suffer from psychotic disorders do not necessarily suffer other types of impairments, allowing a severely ill individual to appear greatly intelligent.<sup>261</sup> John Forbes Nash's story illustrates this point.<sup>262</sup> Nash won the Nobel Prize for his contributions to game theory, while believing that aliens from outer space recruited him to save the world.<sup>263</sup> He later stated, "the ideas I had about supernatural beings came to me the same way that my mathematical ideas did."<sup>264</sup> In this same way, Panetti's ability to sophisticatedly understand his case and his cognizance of the adversarial nature of the justice system did not demonstrate his rational understanding of his punishment.<sup>265</sup>

B. *Distinguishing Awareness and Understanding*

In addition, the courts' misconceptions regarding mental illness reflected the importance of professional guidance in competency hearings to distinguish awareness from understanding.<sup>266</sup> Though the holding in *Panetti* theoretically championed a stringent competency standard, the lower courts conflation of understanding and awareness largely strip *Panetti* of any protective effect.<sup>267</sup> Conflation occurs when a court, as did the courts in *Panetti II*, infers that a prisoner rationally understands the reason for the punishment merely because he or she can recite those reasons.<sup>268</sup> Such inferences do not ensure that a prisoner rationally understands the retributivist thrust of his or her punishment.<sup>269</sup> The *Panetti II* courts recognized the distinction by modeling the correct standard, yet confused awareness with understanding by assuming that Panetti rationally understood the reason for his punishment once they decided that Panetti was aware of his case and the adversarial

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257. *Panetti*, 727 F.3d at 411.

258. Reply Brief of Petitioner-Appellant at 2-3, *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013); *Panetti v. Thaler*, 727 F.3d 398 (5th Cir. 2013).

259. *Panetti*, 2008 WL 2338498, at \*24-26, \*28-29, \*36.

260. NAMI, *supra* note 189, at 5-6.

261. *Id.*

262. *Id.*

263. *Id.* (citing E.F. TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL FOR FAMILIES, PATIENTS, AND PROVIDERS 25-26 (5th ed. 2006)).

264. *Id.* at 7 (internal quotation marks omitted).

265. NAMI *supra* note 189, at 5-6 (citing E.F. TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL FOR FAMILIES, PATIENTS, AND PROVIDERS 25-26 (5th ed. 2006)).

266. *Panetti v. Quarterman*, 551 U.S. 930, 955 (2007); *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*24-26, \*28-29, \*36 (S.D. Tex. Mar. 26, 2008); NAMI, *supra* note 189, at 5-6.

267. NAMI, *supra* note 189, at 5-6.

268. *Id.*

269. *Id.*



process.<sup>270</sup>

Distinguishing understanding from awareness is difficult; and thus courts should base their competency findings on probing questions by qualified experts in structured competency examinations, instead of “attempting to isolate remarks evincing an inmate’s cognitive awareness from a pervasive and deeply-embedded delusional belief system,” as the courts did in *Panetti II*.<sup>271</sup>

C. *Shifting the Second Burden of Proof to the State*

*Panetti II* also indicated that *Panetti*’s stringent standard meant nothing in the absence of an appropriately placed evidentiary burden.<sup>272</sup> As in demonstrated by *Panetti II*, allocating the burden of proof to the prisoner can be dispositive of the outcome in competency for execution hearings.<sup>273</sup> *Panetti* bore the initial burden of making a substantial showing of insanity and the subsequent burden of proving his incompetency by a preponderance of the evidence.<sup>274</sup> On remand, the courts determined that *Panetti* failed to meet his burden despite their recognition that *Panetti* was seriously mentally ill because the record contained conflicting expert testimony.<sup>275</sup> In most cases, though, conflicting expert testimony is commonplace, thereby restricting the likelihood that courts will find insane prisoners competent for execution; and thus in “cases where evidence is conflicting and experts for the parties disagree on the defendant’s level of competence, maintaining the double burden created by the *Panetti II* court[s] will result in repeated Eighth Amendment violations.”<sup>276</sup>

Additionally, as recognized by the Supreme Court, when a person’s life is at stake, “the risk of error that the law can tolerate is correspondingly diminished.”<sup>277</sup> Similarly, in *Ford*, the Court eloquently stated, “the ascertainment of a prisoner’s sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceedings’ due to the ‘high regard for truth that befits a decision affecting the life or death of a human being.’”<sup>278</sup> Placing a double burden on a prisoner to demonstrate incompetency is not only unsupported by case law but is repugnant to it and the common understanding of justice.<sup>279</sup> For Scott *Panetti* the double burden was fatal.<sup>280</sup>

D. *Recognizing the Detriment of Indigence on the Severely Mentally Ill Prisoner*

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270. *Panetti*, 551 U.S. at 555; *Panetti*, 2008 WL 2338498, at \*24-26, \*28-29, \*36; NAMI, *supra* note 189, at 5-6.

271. Reply Brief of Petitioner-Appellant, *supra* note 258, at 15, 24.

272. *Panetti v. Stephens*, 727 F.3d 398, 411 (5th Cir. 2013); Greenberg, *supra* note 11, at 255.

273. Greenberg, *supra* note 11, at 255.

274. *Panetti*, 727 F.3d at 411.

275. *Id.*

276. Danielle N. Devens, *Competency for Execution in the Wake of Panetti: Shifting the Burden to the Government*, 82 TEMP. L. REV. 1335, 1365-66 (2010) (emphasis added).

277. *Id.* (citing *Schriro v. Summerlin*, 542 U.S. 348, 362 (2004) (Breyer, J., dissenting)) (internal quotation marks omitted).

278. *Id.* (citing *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986)) (internal quotation marks omitted).

279. *Id.*

280. *Panetti*, 727 F.3d at 410; *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*36 (S.D. Tex. Mar. 26, 2008).

Finally, *Panetti II* demonstrated the insurmountable disparity between the indigent mentally ill prisoner and the State.<sup>281</sup> The district court provided Panetti \$5,000 for experts, while the State paid Dr. Waldman *alone* more than \$22,000.<sup>282</sup> As a result, the State deposed all of the defense experts, and paid Dr. Waldman to attend two defense expert depositions and inspect the defense experts' documents.<sup>283</sup> At trial, the State experts remained in the courtroom throughout the hearing and assisted State counsel during cross-examination of defense witnesses.<sup>284</sup> Panetti's funds restricted his experts to provide approximately ten hours of assistance each, primarily exhausted by review of Panetti's thirty-year psychiatric history and interviewing him.<sup>285</sup> Most damning to Panetti, though, was the State's ability to pay its experts to analyze the recorded conversations between Panetti and his family.<sup>286</sup> Those recordings weighed heavily in the courts' finding that Panetti rationally understood his punishment, yet Panetti had no opportunity to challenge the significant of the recordings.<sup>287</sup>

## V. CONCLUSION

*Panetti II* signified a long road ahead for the severely mentally ill on death row.<sup>288</sup> More than twenty years after the Supreme Court's decision in *Ford*, which established a categorical death penalty exemption for the insane, the Court provided a substantive test in *Panetti* to ensure that an insane prisoner awaiting death rationally understands the retributive thrust of his or her punishment, which the Eighth Amendment requires.<sup>289</sup> Though *Panetti* theoretically championed a protective competency standard, the rational understanding standard had no protective effect as applied by the district court and the Fifth Circuit.<sup>290</sup> In essence, the district court and Fifth Circuit's application of the rational understanding standard was reprehensively deficient, because they trivialized and ignored symptoms of Panetti's genuine and severe psychiatric disorder.<sup>291</sup> The courts relied on a

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281. Reply Brief of Petitioner-Appellant, *supra* note 259.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Panetti v. Stephens*, 727 F.3d 398, 410 (5th Cir. 2013).

288. *Id.*; *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498 (S.D. Tex. Mar. 26, 2008). The Brief for American Bar Association as Amicus Curiae Supporting Petitioner, *Ferguson v. Sec., Fla. Dept. of Corr.*, No. 13-5507, 2013 WL 3930521, at \*10-15 (S. Ct. July 26, 2013) explains that some courts do not read *Panetti* as requiring a change in their awareness-centered standards, while some courts, like the courts in *Panetti II*, model the correct standard, yet misapply it. The Eleventh Circuit concluded "*Panetti* did not abrogate or otherwise reject the awareness standard articulated by Justice Powell, nor did it impose a new, more rigorous standard for assessing competency to be executed." Instead, it determined that Panetti rejected "an overly narrow interpretation of *Ford* that deems a prisoner's mental illness and delusional beliefs irrelevant to whether he can understand the fact of his impending execution and the reason for it." *Id.* By contrast the Supreme Court of Indiana modeled the correct standard, but misapplied it, concluding that a prisoner was competent because no evidence indicated that he questioned the reality that his execution was punishment for his crime, though he believed that devils and demons were responsible for the crime. *Id.*

289. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

290. *Panetti*, 551 U.S. at 958; *Panetti*, 727 F.3d 298; *Panetti*, 2008 WL 2338498.

291. *Panetti*, 727 F.3d at 414; *Panetti*, 2008 WL 2338498, at \*37.

single expert's testimony, which contradicted years of psychiatric diagnoses.<sup>292</sup> Consequently, the courts found support for that expert's opinion by extracting and isolating a few of Panetti's statements, basing their ultimate findings of Panetti's competence on unscientific misapprehensions of mental illness.<sup>293</sup>

Though the Supreme Court recognized value in the aid of psychological science in competency hearings, the courts' errors demonstrated the imperativeness of well-qualified experts to distinguish a prisoner's awareness from his or her understanding.<sup>294</sup> Additionally, competency hearings commonly include conflicting expert testimony due to the complexities of mental illness. Thus placing a double evidentiary burden on the prisoner diminishes the protective effect of the *Panetti* standard.<sup>295</sup> Finally, *Panetti II* illustrated the fatal effects of indigence on the mentally ill death row inmate, as Panetti's indigence prevented him from hiring an expert to assess his recorded statements on which the courts heavily relied.<sup>296</sup>

On January 27, 2014, Panetti filed a new petition for writ of certiorari to the United States Supreme Court. Though the Court may ultimately deny certiorari, the district court and Fifth Circuit's failings demonstrate the need for further clarification to insulate the severely ill on death row from executions.<sup>297</sup> The deficient record in *Panetti* prevented the Court from providing more definitive guidelines for competency determinations, thus, one task for the district court on remand was to develop a more complete record.<sup>298</sup> Having now a more thorough record than in 2007, the Court may take *Panetti II* as an opportunity to provide additional guidelines to prevent courts from removing the protective effect of the rational understanding standard, as states continue to execute insane prisoners.<sup>299</sup> The Court should grant certiorari and recognize that for *Panetti* to have any significance courts must resist basing competency decisions on unscientific misapprehensions of mental illness and instead meaningfully consider the conclusions of qualified mental health professionals.<sup>300</sup> The Court's failure to do so will allow the State of Texas to execute Scott Louis Panetti without indication that his execution serves any retributive or consequential aim that the Eighth Amendment requires.<sup>301</sup>

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292. *Panetti*, 727 F.3d at 410; *Panetti*, 2008 WL 2338498, at \*20-29.

293. *Panetti*, 727 F.3d at 410; *Panetti*, 2008 WL 2338498, at \*20-29.

294. *Panetti*, 551 U.S. at 962.

295. Devens, *supra* note 276, at 1357.

296. Reply Brief of Petitioner-Appellant, *supra* note 258.

297. *Id.*, petition for cert. filed, (U.S. Jan. 27, 2014) (No. 13-8453).

298. *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007).

299. See e.g. *Federal Habeas Corpus - Death Penalty - Eleventh Circuit Affirms Lower Court Finding That Mentally Ill Prisoner Is Competent to Be Executed - Ferguson v. Secretary, Florida Department of Corrections*, 716 F.3d 1315 (11th Cir.), 127 HARV. L. REV. 1276, 1283 (2014) (explaining "the Eleventh Circuit affirmed the Florida Supreme Court's ruling notwithstanding a possible conflict with *Panetti*").

300. NAMI, *supra* note 189, at 5-6.

301. *Panetti*, 727 F.3d 398, petition for cert. filed, (U.S. Jan. 27, 2014) (No. 13-8453).

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