The United States' Continuing Practice of Executing the Mentally Ill

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The United States’ Continuing Practice of Executing the Mentally Ill

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One of the many cruel facts about the United States’ death penalty system is that a number of people sentenced to death suffer from mental illness, including serious mental conditions such as schizophrenia or other psychotic or delusional disorders. The United States Supreme Court prohibits the imposition of the death penalty on mentally retarded defendants,1 on juveniles,2 and on persons who do not commit a homicide.3 With respect to persons who suffer from mental illness, the Court in Ford v. Wainwright continued the long-recognized common-law tradition of prohibiting the execution of persons who are “insane” at the time of their executions.4 Unfortunately, this exemption fails to encompass many people suffering from severe mental illness,5 thus leaving mentally ill death row inmates still subject to the executioner’s needle.

This article examines two major Supreme Court decisions addressing the execution of the mentally ill in the United States: Ford v. Wainwright,6 and Panetti v. Quarterman.7 In considering the shortcomings of the standards set out in these cases, the article then discusses the American Bar Association’s recommendations as well as the United Nations Commission on Human Rights’ statements regarding the execution of the mentally ill. Ultimately, the article finds the United States’ current systems for protecting the mentally ill from execution are inadequate and calls for a more comprehensive remedy to this problem.

1. United States Supreme Court Case Law Regarding the Execution of the Mentally Ill


In Ford v. Wainwright, the Supreme Court considered the pending execution of Alvin Bernard Ford, a mentally ill death row inmate who had been sentenced to death in Florida for a 1974 murder.8 In the years leading up to his execution, Ford displayed increasingly bizarre and irrational behaviors, including delusions and paranoia.9 At one point Ford deteriorated into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word ‘one,’ making statements such as ‘Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.’10

At least one doctor diagnosed Ford with a severe mental disorder, which appeared similar to paranoid schizophrenia, and Ford’s attorneys sought review of Florida’s ability to carry out the death penalty on someone as mentally ill as Ford.11 A psychiatrist who examined Ford on behalf of the defense “concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves.”12 Nonetheless, the State of Florida still wanted to execute him.13

Under the state process for determining competency for execution, the psychiatrists assigned to evaluate Ford found him suffering from some form of mental illness or disorder, but nonetheless concluded that he was sufficiently competent to be executed.14 Florida’s governor, accordingly, found that Ford was not insane and could be executed.15 Eventually, Ford’s appeal of the governor’s decision reached the Supreme Court.

The Eighth Amendment of the Constitution prohibits the execution of someone who is insane or has become insane since the imposition of his death sentence.

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violates the Eighth Amendment’s protection against cruel and unusual punishments. In reaching this conclusion, Justice Marshall traced the long common law history prohibiting the execution of the insane. Justice Marshall’s plurality opinion observed that in 1791, at the time of the ratification of the Eighth Amendment to the Bill of Rights of the United States Constitution, the common law outlawed the execution of the insane. Indeed, the opinion noted that in the eighteenth century, Blackstone denounced the execution of the insane as “savage and inhuman.” As Justice Powell observed in his concurring opinion in Ford, some of the major legal writers of the late eighteenth century described the execution of the insane as “a miserable spectacle . . . of extream inhumanity and cruelty” and “against christian charity to send a great offender quick . . . into another world, when he is not of a capacity to fit himself for it.” In 1985, the year the Supreme Court was considering Ford’s claim, no state allowed an execution to be carried out on a person deemed insane. In accord with the common law and the contemporary prohibition on the execution of the insane, the Ford Court found that the Eighth Amendment of the Constitution prohibits the execution of someone who is insane or has become insane since the imposition of his death sentence.

The question remains, however, as to what is sufficient to prove that a capital defendant is insane and therefore exempt from the death penalty. Justice Marshall’s opinion in Ford does not address this issue directly, but rather focuses on the procedures that must be afforded a capital defendant making a claim that his mental state renders him insane and ineligible to suffer execution. In fact, in spite of all the evidence of Ford’s delusions and disorganized thinking, the Ford Court did not decide that Ford was in fact insane and no longer eligible for the death penalty. Rather, the Court remanded the case to the lower federal courts to make that determination. Despite all the evidence of Ford’s mental illness that the Supreme Court referred to in its decision, in 1989, a federal district court found Ford was sane and could be executed. Ford died in prison at the age of thirty-seven while his appeal of the district court’s sanity order was before the U.S. Court of Appeals for the 11th Circuit.

Although Justice Marshall’s plurality opinion in Ford did not define insanity, Justice Powell’s concurrence opined that insanity for purposes of exempting a defendant from the death penalty applies to “those who are unaware of the punishment they are about to suffer and why they are to suffer it.” As Justice Powell observed, one of the chief justifications for the modern death penalty is retribution and this goal cannot be achieved if the defendant is so mentally disabled that he is unaware of, or incapable of comprehending, his impending execution or the reason for it. Thus, at a minimum, Justice Powell concluded that states must set standards to prevent the execution of prisoners “who are unaware of the punishment they are about to suffer and why they are to suffer it.” It is this definition of insanity that legislatures and courts often use to guide their protection of the mentally ill facing execution.


Recently, the Court again faced the dilemma of a severely mentally ill man slated to die. In Panetti v. Quarterman, the Court considered the fate of Scott Louis Panetti who has suffered from severe mental illness for many years. As his execution approached, Panetti sought state judicial review of his mental competency to face execution. However, as detailed by the United States Supreme Court, this Texas state process was woefully deficient and failed to meet the minimal procedural protections required by Ford. In addition to the deficiencies in the state proceedings, the Supreme Court also found that the federal court reviewing Panetti’s case erred, at least in part, because it employed an approach to mental illness that was too narrow to afford the appropriate scope of constitutional protection to the mentally ill sentenced to die.

As the Supreme Court noted, Panetti suffers from a long history of severe mental illness. One expert described Panetti’s illness as a “schizo-affective disorder,” and

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Evidence that Panetti did not have a rational understanding of his execution and the reason for it was deemed not relevant to the determination of competency.
defense experts opined that Panetti suffers from delusions, including delusions about the effect and reality of his pending execution. Even the state's expert witnesses acknowledged that Panetti suffers from mental problems, although these experts disagreed about his perceptions, cognitive ability, and competency to face execution. The Fifth Circuit Court of Appeals found Panetti mentally competent to be executed based on the fact that Panetti was aware that he was going to be executed and why he was going to be executed; evidence that Panetti did not have a rational understanding of his execution and the reason for it was deemed not relevant to the determination of competency. The United States Supreme Court reversed the Fifth Circuit, finding the lower court's interpretation of the Ford test of insanity too narrow.

In articulating the standard for mental competence to be executed, the Supreme Court recognized that the complexity of mental illness could cause an individual to have an awareness of his pending execution and the stated reason for the execution, but nonetheless deprive him of the ability to rationally comprehend the basis for the execution. The Court reasoned, "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." As the Court put it, "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." The Supreme Court remanded Panetti's case to the lower federal courts for further proceedings to determine if Panetti could suffer execution notwithstanding his mental illness. On March 26, 2008, the federal district court tasked with re-examining Panetti's claim of incompetency once again found that the State of Texas could execute Panetti. The district court chronicled Panetti's history of alcohol abuse, voluntary and involuntary admissions to mental hospitals, psychotic episodes, paranoia, delusions, and diagnoses of major depression, schizoaffective disorder and schizophrenia. Much of this mental health history pre-dates the murders of his in-laws for which he was sentenced to death. The opinion also discussed Panetti's bizarre behavior during trial where, among other things, Panetti represented himself dressed in a cowboy outfit and subpoenaed John F. Kennedy and Jesus Christ as witnesses. The court also noted that after the trial and during his time on death row, Panetti was referred to psychiatric treatment on several occasions, although some of the doctors questioned the extent of the mental illness and the reliability of Panetti's representations of his symptoms.

The court summarized the doctors' assessment of Panetti for present competence. One of the defense experts described Panetti's behavior and performance on multiple cognitive and mental tests as "consistent with the frontal-executive deficits that one expects to see in individuals with chronic psychotic disorders such as Schizoaffective disorder and Schizophrenia." Another expert for the defense found Panetti genuinely delusional, not malingering, and suffering from schizophrenia. A third defense expert opined that Panetti suffered from a severe psychotic condition and lacked the ability to rationally understand the reasons for his pending execution. In contrast, the state's experts disagreed with the defense experts' diagnoses, finding that Panetti could talk rationally about other subjects and believing that Panetti was malingering. One state doctor found that Panetti had a rational understanding of his death sentence and the reason for that sentence. The court also described taped conversations between Panetti and his family, opining that Panetti's conversations with his family

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Panetti represented himself dressed in a cowboy outfit and subpoenaed John F. Kennedy and Jesus Christ as witnesses.

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The court concluded that Panetti had a rational understanding of the causal connection between his crime and his pending execution.

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were rational and organized, if somewhat self-centered."

In reviewing the record, the district court concluded that “Panetti is seriously mentally ill. He has suffered from severe mental illness, aggravated by alcohol and substance abuse, since well before he murdered Joe and Amanda Alvarado. He was under the influence of this severe mental illness when he killed the Alvarados as well as when he insisted on representing himself at trial.” The court further stated that while there is mixed evidence on the extent of malingering behaviors, “it is not seriously disputable that Panetti suffers from paranoid delusions of some type, and these delusions may well have contributed to his murder of Joe and Amanda Alvarado.” Nonetheless, the court concluded that Panetti had a rational understanding of the causal connection between his crime and his pending execution. The court recognized that Panetti is a mentally ill, delusional man and that Panetti “was mentally ill when he committed his crime and continues to be mentally ill today.” Nonetheless, the district court determined that Panetti “has both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two. Therefore, if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti.”

C. Concluding Thoughts on Ford and Panetti

Both Ford and Panetti can be praised for making clear that severely mentally ill death row inmates, who lack a rational understanding of their execution and the purpose for it, are not competent enough for the state to kill. Yet, it is both telling and disturbing that in both Ford and Panetti, the defendants, who displayed delusional, disorganized and bizarre behavior for many years, were nonetheless found by lower federal courts to be sane enough to be executed. Ford’s death in prison precluded the Supreme Court from reviewing Ford’s sanity determination. Panetti’s case is still pending in the appeal process. However, the fact that both of these men failed to meet the test of insanity according to a lower federal court raises serious questions and doubts about the real value of the insanity exemption for executions.

2. ABA Recommendation on the Execution of the Mentally Ill

The case of Panetti, even under the Supreme Court’s presumably more protective definition of competence to be executed, demonstrates that mentally ill people who suffer from psychosis and delusions can and will be executed in the United States. The American Bar Association has sought to deal with this problem, and it offers solutions more humane and protective than the current standard tolerated by the Supreme Court while at the same time more consistent with the penological goal of retribution.

In August of 2006, the American Bar Association House of Delegates adopted a recommendation on the imposition of the death penalty on persons with mental disabilities, including mental illness. The first paragraph of the ABA Recommendation and Report calls for a ban on the execution of persons with “significant limitations in both their intellectual functioning and adaptive behavior.” This recommendation implements the United States Supreme Court’s holding in Atkins v. Virginia, in which the Supreme Court decided that the execution of persons with mental retardation violates the Eighth Amendment’s Cruel and Unusual Punishment Clause.

The second and third paragraphs of the ABA Recommendation and Report address more specifically persons suffering from severe mental illness. The second paragraph of the Report provides:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

This recommendation would “prohibit execution of
persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability."

This recommendation focuses on limiting the application of the death penalty to persons who possess a sufficient degree of blameworthiness for a properly proportional imposition of the death penalty, and is meant to apply the principles of Atkins v. Virginia and Roper v. Simmons to persons with severe mental illness, particularly persons suffering from DSM-IV-Tr Axis I diagnoses, including schizophrenia and psychotic disorders. Given Panetti’s severe mental illness at the time of the commission of his crime, it is possible that he would have fallen within the protection of this recommendation and been spared the death penalty.

The third recommendation deals with death row inmates who become mentally ill after their conviction and sentence. The third recommendation provides that “a sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.” This recommendation addresses circumstances where the inmate is severely mentally ill at the time of execution, and the recommendation seeks to provide greater clarity as to when this exemption applies. In particular, the recommendation seeks “to emphasize the need for a deeper understanding of the state’s justifying purpose for the execution,” and to “require that an offender not only must be ‘aware’ of the nature and purpose of punishment but also must ‘appreciate’ its personal application in the offender’s own case — that is, why it is being imposed on the offender.” To a certain degree, Panetti’s requirement that the offender have a rational understanding of the reason for his pending execution is consistent with this recommendation, although it remains to be seen if the language of Panetti will effect a practical change in the scope of the protection for the severely mentally ill. In addition, the ABA recommendation emphasizes the importance of the offender’s awareness of the punishment of death and notes that severe mental illness with delusional belief systems can often cause an individual to fail to understand meaningfully that an execution will result in physical, permanent death.

3. International Calls for a Ban on the Execution of the Mentally Ill

The international community also recognizes the moral and ethical concerns raised by executing mentally ill prisoners. The United Nations Commission on Human Rights “urges all states that maintain the death penalty not to impose it on a person suffering from any form of mental disorder; not to execute any such person.” While promoting abolition and applauding states that have eliminated the death penalty, the Commission provides recommendations for retention states to assure that the punishment is meted out only for the most serious crimes and to the most blameworthy persons. In this regard, the Commission calls on states not to subject the mentally ill to the process of execution. The Commission’s recommendation is broader than either the protection afforded by the United States Supreme Court or arguably that proposed by the ABA. It would assure that persons suffering from severe mental illnesses, including delusions, would not be forced to suffer execution.

4. Conclusion and Call for Greater Protection of the Mentally Ill

Although the United States Supreme Court has provided some protections for the mentally ill facing executions, these protections are inadequate and do not sufficiently protect many mentally ill death row inmates. It is far too easy for courts to find an individual who suffers from serious or severe mental illness nonetheless competent to suffer the penalty of death. This practice offends many in the international community and runs counter to the values and recommendations of the United Nations Commission on Human Rights. If adopted, the approach advocated by the ABA in its recommendation and report would be an important step forward in eliminating the execution of the mentally ill in the United States. Ultimately, however, a broad prohibition of the execution of the mentally ill remains the best solution to the ugly practice of subjecting the mentally ill to the perils and arbitrariness of the American death penalty system.
Id. at 15-16. 23; (“[i]f after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith suspend execution of the warrant directing the execution of the sentence of death upon a convict . . . if it appears to their satisfaction that the convict has become insane”); N. M. S. A. 1978, § 31-14-7 (“If it is found that the defendant is insane, the warden shall suspend the execution”); McKinney’s Correction Law of New York, Ch. 43, § 656 (“[i]f it be found by the examination that the defendant is insane, the judge shall suspend the execution”); 22 Okla. Stat. Ann. § 1008 (“if it is found that the defendant is insane, the warden must suspend the execution”); O.R.S. § 137.463 (“[n]otwithstanding any other provision in this section, if the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications”); S.D. Codified Laws § 23A-27A-22 (noting process and warden’s obligations if inmate appears mentally incompetent to be executed). See also People v. Geary, 298 Ill. 236, 131 N.E. 652 (Ill. 1921) (noting state cannot execute person who is insane); State v. Allen, 204 La. 513, 15 So.2d 870, 871 (La.1943) (“[o]ne who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane”, cannot be put to death while in that condition”).

Id. at 417, n.4. The Court in Ford did not prescribe the precise procedures that must be employed in determining whether a death row inmate is too mentally disabled to suffer execution. Rather, the Court left it to the states to devise the appropriate procedures and referred states to the types of procedures used in determinations of competency to stand trial or for involuntary civil commitment. Id. Nonetheless, the Court cautioned jurisdictions devising such procedures: “Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the ‘evidence’ will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and employing the experts responsible for producing that ‘evidence’ be conducive to the formation of neutral, sound, and professional judgments as to the prisoner’s ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.” Id. at 417.
The DSM-IV-TR, which is published by the American Psychiatric Association, provides comprehensive diagnostic classification criteria and terminology for mental disorders and conditions. As stated in the DSM-IV-TR Cautionary Statement, “[t]he specified diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses, because it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators.” DSM-IV-TR at xxvii.

The DSM-IV-TR employs a multi-axial assessment system based on the five axes set out in the manual, “each of which refers to a different domain of information that may help the clinician plan treatment ad predict outcome.” Id. at 27. Axis I sets out clinical disorders; Axis II sets out personality disorders and mental retardation; Axis III sets out general medical conditions; Axis IV sets out psycho-social and environmental problems; and Axis V addresses global assessment of an individual’s functioning. The DSM-IV-TR states that “[t]he use of the multiaxial system facilitates comprehensive and systemic evaluation with attention to the various mental disorders and general medical conditions, psychosocial and environmental problems, and level of functioning that might be overlooked if the focus were on assessing a single presenting problem.” Id.

ABA Recommendation and Report, at 670.

Id. at ¶ 3. The third recommendation also provides that a death sentence should not be carried out on an individual who is unable “(ii) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence.” or is unable “(iii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner’s participation.”

Id. at 675. The recommendation also sets out procedures for determining competency to execute. These procedures are set forth below:

(1) Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case, the sentence of death should be reduced to the punishment, or to appreciate the reason for its imposition in the prisoner’s own case, the sentence of death should be reduced to the

Id. at 676.

