

**PANETTI V. QUARTERMAN: SOLVING THE  
COMPETENCY DILEMMA BY BROADENING THE CONCEPT  
OF RATIONAL UNDERSTANDING IN COMPETENCY-TO-BE-  
EXECUTED DETERMINATIONS**

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I. INTRODUCTION

Fifty-three individuals were executed in the United States in 2006,<sup>1</sup> placing the United States sixth on a list of total number of known executions carried out by a country that year.<sup>2</sup> Although this country's criminal justice system protects a person who is incompetent<sup>3</sup> from standing trial<sup>4</sup> and from being held criminally liable,<sup>5</sup> there is a growing concern among legal and mental health organizations over the lack of a clear standard to be used in determining whether a prisoner is mentally competent to be executed.<sup>6</sup> A pris-

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<sup>1</sup> DEATH PENALTY INFORMATION CTR., EXECUTIONS BY YEAR (2008), <http://www.deathpenaltyinfo.org/article.php?scid=&&did=146>.

<sup>2</sup> Amnesty International USA, <http://www.amnestyusa.org/document.php?lang=e&id=ENGA500122007> (last visited Mar. 17, 2008).

<sup>3</sup> References to "competence" in this Comment are understood to refer to a prisoner's mental state, separate and aside from the issue of mental retardation. This term is also synonymous with "insanity" in this context. The Eighth Amendment prohibits the execution of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Competence along the lines of insanity does not necessarily result in diminished intelligence, as is the case with mental retardation. Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1159 (2005).

<sup>4</sup> See *Godinez v. Moran*, 509 U.S. 389, 396 (1993) ("[T]he standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" (citing *Dusky v. United States*, 362 U.S. 402, 402 (1962) (per curiam))).

<sup>5</sup> See *Shannon v. United States*, 512 U.S. 573, 577 (1994) (noting that an insanity defense enables a jury to find a defendant not guilty by reason of insanity).

<sup>6</sup> Linda Greenhouse, *Justices to Consider Impact of Mental Illness on Death Penalty*, N.Y. TIMES, Jan. 6, 2007, at A12.

oner may be deemed competent upon entering death row, but, due to factors such as death row syndrome,<sup>7</sup> a death row inmate's mental state can gradually deteriorate.

In *Ford v. Wainwright*,<sup>8</sup> the Supreme Court of the United States held that the Eighth Amendment, as incorporated by the Fourteenth Amendment, prohibits a state from executing a prisoner who is mentally incapable of understanding the reason for the individual's impending execution.<sup>9</sup> However, the majority failed to specify either a precise legal test for determining whether a prisoner is competent to be executed or the proper procedures for an evidentiary hearing on the inmate's competency.<sup>10</sup> In a concurring opinion, Justice Powell outlined a standard for determining an inmate's competency to be executed, stating "that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."<sup>11</sup> Justice Powell's competency test became the constitutional benchmark for courts to interpret and implement.<sup>12</sup> Until *Panetti v. Quarterman*,<sup>13</sup> the Supreme Court had not analyzed whether Justice Powell's competency standard requires that an inmate simply be "aware" of the factual predicate for the inmate's execution or that an inmate also "rationally understand" the connection between the crime and the execution.<sup>14</sup>

This Comment examines the recent decision in *Panetti* and its effect on the constitutional standard for determining an inmate's competency to be executed. Although the Court rejected the competency test articulated by the United States Court of Appeals for the Fifth Circuit<sup>15</sup> and held that an inmate must rationally, as well as fac-

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<sup>7</sup> The term "death row syndrome" achieved notoriety in a decision by the European Court of Human Rights. See *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 474-77 (1989). The term refers to the extreme psychological stress an inmate faces due to several factors, such as length of time and living conditions on death row. *Id.* at 474-75.

<sup>8</sup> 477 U.S. 399 (1986).

<sup>9</sup> *Id.* at 410.

<sup>10</sup> Kimberley S. Ackerson et al., *Judges' and Psychologists' Assessments of Legal and Clinical Factors in Competence for Execution*, 11 PSYCHOL. PUB. POL'Y & L. 164, 167 (2005).

<sup>11</sup> *Ford*, 477 U.S. at 422 (Powell, J., concurring in part).

<sup>12</sup> Amir Vonsover, Comment, *No Reason for Exemption: Singleton v. Norris and Involuntary Medication of Mentally Ill Capital Murderers for the Purpose of Execution*, 7 U. PA. J. CONST. L. 311, 316 (2004).

<sup>13</sup> 127 S. Ct. 2842 (2007).

<sup>14</sup> Tim Birnbaum, Legal Information Institute, *Panetti v. Quarterman* (06-6407), <http://www.law.cornell.edu/supct/cert/06-6407.html> (last visited Jan. 2, 2009).

<sup>15</sup> The Fifth Circuit test deemed a prisoner's rational understanding of the connection between the prisoner's crime and execution irrelevant to whether the prisoner was competent under Justice Powell's test in *Ford*. See *Panetti v. Dretke*, 448

tually, understand the reasons for the prisoner's execution,<sup>16</sup> the Court declined to articulate a proper test for competency determinations.<sup>17</sup> Part II of this Comment provides a historical overview of the prohibition against executing the mentally incompetent, briefly recounting both ethical and moral considerations as well as case history. Part III discusses the Supreme Court's decision in *Ford* and that decision's impact on both the procedural and substantive aspects of competency determinations from a constitutional perspective. Part IV analyzes the Supreme Court's decision in *Panetti*. Part V discusses the ramifications of *Panetti*, including its broadening of the substantive *Ford* competency test. Finally, Part VI suggests that courts look to other areas of competency law which discuss the issue of rationality in order to craft a proper test for competency-to-be-executed determinations.

## II. HISTORICAL OVERVIEW OF THE PROHIBITION AGAINST EXECUTING THE INCOMPETENT<sup>18</sup>

The prohibition against executing the mentally incompetent dates back to about the thirteenth century.<sup>19</sup> William Blackstone discussed the common law rule and stated that "if a man in his sound memory commits a capital offence . . . and if after judgment he becomes of nonsane memory, execution shall be stayed."<sup>20</sup> There are five historical justifications for the prohibition against executing the mentally incompetent:<sup>21</sup> (1) that it offends humanity,<sup>22</sup> (2) that it contributes little to the goal of deterrence,<sup>23</sup> (3) that it is contrary to religious beliefs,<sup>24</sup> (4) that insanity is a punishment in itself,<sup>25</sup> and (5)

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F.3d 815, 819 (5th Cir. 2006) ("Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only that he must be 'aware' of it.").

<sup>16</sup> *Panetti*, 127 S. Ct. at 2862.

<sup>17</sup> *Id.*

<sup>18</sup> The Eighth Amendment was not incorporated into the Due Process Clause of the Fourteenth Amendment until 1947. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

<sup>19</sup> See Paul J. Larkin, Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 778 (1980) (noting that the prohibition against executing the mentally incompetent dates back to medieval times).

<sup>20</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*24 (1979).

<sup>21</sup> *Ford v. Wainwright*, 477 U.S. 399, 407–08 (1986).

<sup>22</sup> *Id.* at 407.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 407–08.

that retribution is not served because executing an incompetent inmate is unequal in moral value to the inmate's crime.<sup>26</sup>

Prior to the decision in *Ford*, the Supreme Court consistently declined to address the constitutionality of executing the mentally incompetent. In 1897, the Court decided *Nobles v. Georgia*,<sup>27</sup> in which the defendant claimed after sentencing that her insanity precluded her from being executed.<sup>28</sup> The Court disposed of the case on procedural grounds and held that a sentenced defendant who claims insanity does not have a right to a competency determination before a court and a jury; rather, the state legislature has the power to determine whether and how to implement procedures for such a determination.<sup>29</sup>

In 1948, in *Phyle v. Duffy*,<sup>30</sup> the Court faced two questions: (1) whether it was constitutional to execute an insane inmate, and (2) whether a state doctor could make an ex parte decision that an individual was sane to be executed even though the inmate was already declared insane after the conviction.<sup>31</sup> The Court declined to rule on the first question, stating that the petitioner had not exhausted state remedies.<sup>32</sup> As to the second question, the Court held that the Due Process Clause of the Fourteenth Amendment prohibited a state from allowing an ex parte determination that an inmate is sane to be executed without some method for the inmate to challenge the determination.<sup>33</sup>

The 1950 case of *Solesbee v. Balkcom*<sup>34</sup> provided the Court with another opportunity to address the constitutionality of executing the insane. The Court once again declined to address this issue on the grounds that the narrow question before the Court was whether Georgia violated an inmate's due process rights by allowing the governor to ultimately decide an inmate's sanity.<sup>35</sup> The Court held that the prisoner's due process rights were not violated by entrusting the governor with this power.<sup>36</sup>

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<sup>26</sup> *Id.* at 408.

<sup>27</sup> 168 U.S. 398 (1897).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 409.

<sup>30</sup> 334 U.S. 431 (1948).

<sup>31</sup> *Id.* at 433-34, 439-40.

<sup>32</sup> *Id.* at 440.

<sup>33</sup> *Id.* at 437.

<sup>34</sup> 339 U.S. 9 (1950).

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.*

In 1986, when *Ford* was decided, twenty-six states expressly prohibited the execution of the mentally incompetent by statute, and these states had a legal test governing competency determinations.<sup>37</sup> Other states adopted the prohibition against executing the mentally incompetent through judicial decisions.<sup>38</sup>

### III. *FORD V. WAINWRIGHT*<sup>39</sup>

#### A. *Facts and Procedural History*

In 1974, Alvin Ford was convicted of murder and sentenced to death without any indication that he might be incompetent.<sup>40</sup> Ford began to exhibit delusional behavior in 1982, believing that the Ku Klux Klan had a conspiracy to force him to commit suicide and believing that prison officials were holding his family members hostage inside the prison.<sup>41</sup> Under a Florida statute,<sup>42</sup> Ford requested a competency hearing to determine whether he had “the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him.”<sup>43</sup> Three psychiatrists met with Ford, and all of them determined that Ford was competent to be executed under Florida law, despite varying individual diagnoses.<sup>44</sup> Ford attempted to submit psychiatric evaluations conducted by two other psychiatrists, but the Governor of Florida signed Ford’s death warrant without any explanation of his decision or indication of whether Ford’s evidence was considered.<sup>45</sup>

Ford eventually filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on his competency.<sup>46</sup> After the district court denied the writ and the United States Court of Appeals for the Eleventh Circuit affirmed, the Supreme Court granted certiorari to determine two issues: (1) whether the Eighth Amendment prohibits the execution of the mentally incompetent, and (2) if so, what consti-

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<sup>37</sup> *Ford v. Wainwright*, 477 U.S. 399, 410 n.2 (1987).

<sup>38</sup> *Id.*

<sup>39</sup> 477 U.S. 399 (1987).

<sup>40</sup> *Id.* at 401.

<sup>41</sup> *Id.* at 402.

<sup>42</sup> FLA. STAT. § 922.07 (1985).

<sup>43</sup> *Ford*, 477 U.S. at 403–04 (citing FLA. STAT. § 922.07(2) (1985)).

<sup>44</sup> *Id.* at 404.

<sup>45</sup> *Id.* at 404, 413.

<sup>46</sup> *Id.* at 404.

tutional procedures are guaranteed to an inmate who challenges his competency.<sup>47</sup>

*B. Court's Reasoning*

1. Eighth Amendment's Prohibition on Executing the Mentally Incompetent

With Justice Marshall writing for the majority, the Court held that the Eighth Amendment prohibits the execution of the mentally incompetent.<sup>48</sup> Justice Marshall began by noting that the Court's Eighth Amendment jurisprudence had developed to encompass both substantive and procedural requirements regarding the infliction of the death penalty.<sup>49</sup> Justice Marshall articulated the Court's modern approach to the Eighth Amendment and stated that "the [Eighth] Amendment . . . recognizes 'the evolving standards of decency that mark the progress of a maturing society.'"<sup>50</sup>

After discussing the common law's prohibition against executing the mentally incompetent,<sup>51</sup> the Court noted that the common law tradition is still in effect in every state.<sup>52</sup> Justice Marshall reinforced the common law's justifications against executing the mentally incompetent<sup>53</sup> and concluded, "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>54</sup>

2. Procedures for Competency Determinations<sup>55</sup>

Having decided that the Eighth Amendment prohibits the execution of the mentally incompetent, the Court then addressed the due process procedures guaranteed to an inmate who challenges his competency to face execution. Justice Marshall made it clear that

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<sup>47</sup> *Id.* at 404–05.

<sup>48</sup> *Id.* at 410.

<sup>49</sup> *Ford*, 477 U.S. at 405.

<sup>50</sup> *Id.* at 406 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>51</sup> *See infra* Part II; *see also Ford*, 477 U.S. at 406–08.

<sup>52</sup> *Ford*, 477 U.S. at 408.

<sup>53</sup> *See infra* Part II.

<sup>54</sup> *Ford*, 477 U.S. at 410.

<sup>55</sup> There was no majority with respect to the constitutional procedures guaranteed to an inmate who challenges his competency to face execution. *See id.* at 401 (noting that there was no majority for the portion of Justice Marshall's opinion discussing the required constitutional procedures).

even a condemned inmate is protected by the Constitution and stated, “Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether . . . .”<sup>56</sup>

Florida law required that an inmate who challenged his competency to be executed be evaluated by three psychiatrists at the same time.<sup>57</sup> The governor then made a determination, based on the psychiatric reports, whether the prisoner was competent to face execution.<sup>58</sup> The governor’s policy prevented the inmate’s counsel from participating in the competency evaluation process.<sup>59</sup> The entire competency determination process occurred within the executive branch of the state government.<sup>60</sup>

The plurality indicated that Ford received the protections provided by Florida’s statutory procedures.<sup>61</sup> However, Justice Marshall concluded that Florida failed to advance even its minimal constitutional interest in ensuring that mentally incompetent inmates are not executed due to several flaws in Florida’s competency determination process.<sup>62</sup> The first flaw in Florida’s process, according to Justice Marshall, was that the inmate has no input in the determination.<sup>63</sup> The plurality articulated that any process regarding the decision of whether to execute another human is inadequate if it fails to incorporate all relevant information, including the presentation of relevant information by the inmate.<sup>64</sup>

Justice Marshall stated that a second flaw in Florida’s process was that the inmate has no ability to question the state-appointed psychiatrists.<sup>65</sup> The plurality doubted the ability of a factfinder to weigh the various psychiatric opinions without any questioning of the experts in order to evaluate the experts’ methods, conclusions, and potential biases.<sup>66</sup> The “most striking defect” in Florida’s competency determination process, according to Justice Marshall, was that the entire

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<sup>56</sup> *Id.* at 411 (plurality opinion).

<sup>57</sup> FLA. STAT. § 922.07 (1985).

<sup>58</sup> *Ford*, 477 U.S. at 412.

<sup>59</sup> *Id.* at 412–13.

<sup>60</sup> *Id.* at 412.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 413.

<sup>63</sup> *Id.*

<sup>64</sup> *Ford*, 477 U.S. at 414.

<sup>65</sup> *Id.* at 415.

<sup>66</sup> *Id.*

process was confined within the executive branch.<sup>67</sup> Justice Marshall was troubled by the fact that the governor, who commands the state's prosecutors, is in charge of making a determination in which the governor has had a vested interest since the inmate's arrest.<sup>68</sup>

The plurality refuted the idea of "a full trial on the issue of sanity."<sup>69</sup> Justice Marshall declined to articulate the necessary procedures to ensure the states adequately enforce their interest in prohibiting the execution of the mentally incompetent.<sup>70</sup>

### 3. Justice Powell's Concurrence<sup>71</sup>

Although the Court held that the Eighth Amendment prohibits the execution of the mentally incompetent, the majority did not articulate a proper test for courts to employ to determine whether an inmate is mentally incompetent, and there was only a plurality with respect to the constitutional procedures owed to an inmate who makes a competency challenge. As a result, Justice Powell attempted to provide some guidance for courts in making competency determinations. Justice Powell articulated that the Eighth Amendment, at a minimum, prohibits the execution of inmates "who are unaware of the punishment they are about to suffer and why they are to suffer it."<sup>72</sup> According to Justice Powell, this standard satisfies the retributive goal of criminal law by requiring that an inmate understand the connection between the crime and punishment in order to face execution.<sup>73</sup>

In terms of the proper procedures guaranteed to inmates who challenge their competency to be executed, Justice Powell expressed his dissatisfaction with the plurality's "formal" competency determination process.<sup>74</sup> Justice Powell noted that "[d]ue process is a flexible concept" grounded in "fundamental fairness."<sup>75</sup> This fairness, according to Justice Powell, requires that an inmate have an opportu-

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<sup>67</sup> *Id.* at 416.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Ford*, 477 U.S. at 416-17.

<sup>71</sup> Because there is only a plurality as to the minimum state procedures necessary in the context of competency determinations to ensure a prisoner is given due process, Justice Powell's narrow holding controls on this issue. *See Marks v. United States*, 430 U.S. 188, 194 (1977) (noting that the narrowest grounds of a concurrence controls when "no single rationale explaining the result enjoys the assent of five Justices").

<sup>72</sup> *Ford*, 477 U.S. at 422 (Powell, J., concurring in part).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 427.

<sup>75</sup> *Id.* at 424-25.



nity to challenge the state-appointed psychiatrists' findings and submit contrary medical evidence.<sup>76</sup> Justice Powell summarized his conception of the requirements necessary to satisfy due process:

[A] constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied . . . .<sup>77</sup>

### C. *Effects of Ford on Inmate Competency Determinations*

#### 1. Substantive Competency Test

Justice Powell's test for determining an inmate's competency to be executed essentially mirrors the common law prohibition,<sup>78</sup> and the test has been adopted by the Supreme Court.<sup>79</sup> However, Justice Powell noted that his test for mental competence represented only the constitutional minimum guaranteed by the Eighth Amendment, which left states free to create a more "expansive view of sanity."<sup>80</sup>

##### a. Single-Prong Test

A majority of states adopted Justice Powell's standard, which is commonly referred to as the "cognitive" or "single-prong" test.<sup>81</sup> The single-prong test focuses on the inmate's cognitive ability.<sup>82</sup> An inmate is deemed competent to be executed under this test if the inmate is aware of the impending execution and knows the reasons for the punishment.<sup>83</sup> This test narrowly construes the definition of competence by not considering factors, such as mental delusions,

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<sup>76</sup> *Id.* at 424.

<sup>77</sup> *Id.* at 427.

<sup>78</sup> Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 34-35 (2001).

<sup>79</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>80</sup> *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part).

<sup>81</sup> Roberta M. Harding, "Endgame": *Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 134-35 (1994).

<sup>82</sup> *Id.* at 135.

<sup>83</sup> *Id.*

that would allow the factfinder to better assess the inmate's mental state at the time of the competency challenge.<sup>84</sup>

The restrictive nature of the single-prong test is illustrated in the case of *Baird v. State*.<sup>85</sup> In *Baird*, the defendant knew that he was going to be executed for killing his wife and parents, but the defendant claimed that he did not intellectually or emotionally comprehend that he was going to die for the murders.<sup>86</sup> The Supreme Court noted that Baird may have a mental disorder, characterized by a belief that "God will turn back time to before the murders."<sup>87</sup> However, the court concluded that Baird was competent to be executed, within the meaning of Justice Powell's definition of competency articulated in *Ford*, because Baird knew that he was going to die for the murders.<sup>88</sup> As demonstrated, the single-prong test prohibits the consideration of mental delusions in determining an inmate's competency to be executed.

#### b. Double-Prong Test

The double-prong test is the standard adopted by the American Bar Association (ABA).<sup>89</sup> This test is composed of two independent prongs and prohibits the execution of an inmate if the inmate meets either the single-prong test, as formulated by Justice Powell's concurrence in *Ford*, or what is known as the "ability-to-assist-counsel prong."<sup>90</sup> The double-prong test is more favorable to prisoners because the test allows an inmate to proffer evidence regarding the in-

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<sup>84</sup> *Id.*

<sup>85</sup> 833 N.E.2d 28 (Ind. 2005).

<sup>86</sup> *Id.* at 30.

<sup>87</sup> *Id.* at 31.

<sup>88</sup> *Id.* at 30.

<sup>89</sup> See Ackerson et al., *supra* note 10, at 169. The double-prong test is stated as follows:

(a) Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.

(b) A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD § 7-5.6 at 290 (1987).

<sup>90</sup> Ackerson et al., *supra* note 10, at 168-69.

mate's rational understanding of the punishment or the inmate's ability to offer exculpatory or mitigating evidence as opposed to simply being limited to the more stringent single-prong test.<sup>91</sup>

In *Singleton v. State*,<sup>92</sup> the Supreme Court of South Carolina adopted a slightly modified version of the ABA's double-prong test for determining an inmate's competency to be executed.<sup>93</sup> The court stated that South Carolina's adaptation of the ABA's ability-to-assist-counsel prong allows an inmate to offer evidence regarding the inmate's ability to rationally communicate with counsel.<sup>94</sup> The court concluded that Singleton was incompetent to be executed under the ability-to-assist-counsel prong of South Carolina's double-prong test because Singleton was "incapable of rational communication" due to his inability to properly respond to his counsel's questions.<sup>95</sup> *Singleton* demonstrates the prisoner-friendly nature of the double-prong test because the test allows courts to better assess an inmate's rational comprehension of the crime, punishment, and proceedings.

## 2. Procedures for Competency Determinations

*Ford* did little to establish even the most basic procedures necessary for competency determinations in order to ensure compliance with due process requirements.<sup>96</sup> From a purely precedential standpoint, there was no majority on the issue of procedure. Whereas Justice Marshall outlined the plurality's perception of the relevant flaws in Florida's process,<sup>97</sup> Justice Powell advocated a more flexible ap-

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<sup>91</sup> See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD, Commentary §7-5.6 at 291 (1987) (noting that the double-prong test "reflect[s] the substantive concern that individuals should not be executed while they lack the capacity for rational understanding of the nature of the proceedings or of the penalty that is about to be imposed").

<sup>92</sup> 437 S.E.2d 53 (S.C. 1993).

<sup>93</sup> *Id.* at 58.

<sup>94</sup> *Id.* The Supreme Court of South Carolina effectively characterized the ABA's ability-to-assist-counsel prong of the double-prong test as requiring an inmate to "suggest a particular trial strategy" or "think of new issues for counsel to raise" in order to prevail under the double-prong test. *Id.* at 57-58 (citing *State v. Harris*, 789 P.2d 60, 66 (Wash. 1990)).

<sup>95</sup> *Id.* at 84. The Supreme Court of South Carolina concluded that Singleton was incompetent under the single-prong test as well. *Id.* (noting that Singleton's disbelief that he would actually die in the electric chair was evidence that Singleton did not understand his punishment).

<sup>96</sup> Gordon L. Moore III, Comment, *Ford v. Wainwright: A Coda in the Executioner's Song*, 72 IOWA L. REV. 1461, 1469 (1987).

<sup>97</sup> See *supra* Part III.B.2.

proach.<sup>98</sup> However, the Court did reach a consensus on a few basic procedures.

First, an inmate who challenges his competency to be executed is entitled to some sort of evidentiary hearing.<sup>99</sup> This evidentiary hearing must allow the inmate to present evidence on the inmate's mental state.<sup>100</sup> Second, the competency decision-maker provided by the state must be impartial, which effectively eliminates the governor and the executive branch from making the determination due to conflicting interests.<sup>101</sup> Third, the inmate must be able to challenge the state-appointed psychiatrists' findings.<sup>102</sup> Although these procedures may ultimately lead to a battle of the psychiatric experts, it is a worthy price to pay to ensure that evidentiary hearings "comport with basic fairness" by respecting the gravity of a decision that involves whether to take the life of another human being.<sup>103</sup>

#### IV. PANETTI V. QUARTERMAN

The Supreme Court's decision to grant certiorari in *Panetti v. Quarterman*<sup>104</sup> was not all that surprising. Justice Powell's cognitive test for competency, as outlined in *Ford*, failed to resolve the question of what constituted mental competence and what information might be relevant to a competency determination.<sup>105</sup> Panetti's standby counsel framed the issue in the case as follows:

Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the State is executing him, and thus does not understand that his execution is intended to seek retribution for his capital crime?<sup>106</sup>

In the months leading up to the case, the ABA adopted a resolution previously adopted by the American Psychiatric Association, the

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<sup>98</sup> See *supra* Part III.B.3.

<sup>99</sup> Ackerson et al., *supra* note 10, at 167.

<sup>100</sup> Moore, *supra* note 96, at 1470.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Ford v. Wainwright*, 477 U.S. 399, 425 (Powell, J., concurring in part); Moore, *supra* note 96, at 1478.

<sup>104</sup> 127 S. Ct. 2842 (2007).

<sup>105</sup> See Mark Hansen, *A Death Sentence Is Brought to Mind*, A.B.A. J. EREPORT, Apr. 2007, [http://www.abajournal.com/magazine/a\\_death\\_sentence\\_is\\_brought\\_to\\_mind](http://www.abajournal.com/magazine/a_death_sentence_is_brought_to_mind) (last visited Sept. 21, 2008).

<sup>106</sup> Brief for Petitioner at ii, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

American Psychological Association, and the National Alliance of the Mentally Ill, which urged all states that instituted capital punishment to adopt a competency standard that required an inmate to rationally understand the reason for the execution.<sup>107</sup> *Panetti* should be viewed as a substantial step in the Court's modernization and clarification of its competency-to-be-executed jurisprudence because the Court acknowledged that an inmate's delusional beliefs, and therefore rational understanding, of the punishment is relevant to a competency determination.<sup>108</sup>

A. *Facts and Procedural History*

In 1992, Scott Panetti, dressed in camouflage, broke into his estranged wife's house and, in front of his wife and daughter, killed his parents-in-law.<sup>109</sup> Panetti was tried for capital murder in 1995 in a Texas court.<sup>110</sup> The state trial court ordered a psychiatric evaluation, and it determined that Panetti "suffered from a fragmented personality, delusions, and hallucinations."<sup>111</sup> Although it was also revealed that Panetti had been hospitalized several times in the past for delusional behavior, the court found Panetti competent to stand trial and he was allowed to represent himself.<sup>112</sup> Throughout the trial, Panetti exhibited what his standby counsel referred to as "bizarre" behavior, characterized by "irrational" and sometimes "incomprehensible" rambblings.<sup>113</sup> Panetti attempted to subpoena a variety of individuals at trial, including John F. Kennedy, the Pope, and Jesus.<sup>114</sup> He was found guilty of capital murder and sentenced to death.<sup>115</sup>

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<sup>107</sup> American Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REV. 668, 675 (2006). The ABA summarized its recommendation:

The underlying point here is that the retributive purpose of capital punishment is not served by executing an offender who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people. Holding a person accountable is intended to be an affirmation of personal responsibility. Executing someone who lacks a meaningful understanding of the nature of this awesome punishment and its retributive purpose offends the concept of personal responsibility rather than affirming it.

*Id.* at 676.

<sup>108</sup> See *Panetti*, 127 S. Ct. at 2861–62.

<sup>109</sup> *Id.* at 2848.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Brief for Petitioner, *supra* note 106, at 11.

<sup>114</sup> *Id.* at 11–12.

<sup>115</sup> *Panetti*, 127 S. Ct. at 2849.

After Panetti was denied relief on appeal, he filed his first petition for writ of habeas corpus in the United States District Court for the Western District of Texas.<sup>116</sup> Panetti challenged, among other things, his competency to stand trial and waive counsel.<sup>117</sup> These challenges were unsuccessful, and, in October 2003, Panetti's execution date was set by the Texas court.<sup>118</sup> In December 2003, Panetti's standby counsel filed a motion with the state court under a Texas statute,<sup>119</sup> claiming that Panetti was incompetent to be executed.<sup>120</sup> After the trial judge denied the motion without a hearing and subsequent appeals were unsuccessful, Panetti filed his second petition for a writ of habeas corpus in the federal district court, challenging his competency to be executed.<sup>121</sup>

At the time of Panetti's second habeas filing, the state court already had Panetti's renewed motion to determine his competency to be executed, in which Panetti submitted evidence that contained the opinions of a psychologist and a law professor, both concluding that Panetti did not understand the reason for his execution.<sup>122</sup> The state court appointed two mental health experts to assess Panetti's condition.<sup>123</sup> The two mental health experts concluded that Panetti knew that he was going to be executed, the reason for his execution, and that his execution would result in his death.<sup>124</sup> Based on the state experts' reports, and without any indication that Panetti's evidence was considered, the trial court concluded that Panetti was competent to be executed and closed the case.<sup>125</sup>

Panetti returned to the federal district court, seeking a resolution of his second habeas corpus petition.<sup>126</sup> The district court granted Panetti an evidentiary hearing to determine his competency to be executed.<sup>127</sup> On September 29, 2004, the court denied Panetti's

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> TEX. CODE CRIM. PROC. ANN. art. 46.05 (Vernon 2001).

<sup>120</sup> *Panetti*, 127 S. Ct. at 2849.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2850.

<sup>123</sup> *Id.* "If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant . . . to determine whether the defendant is incompetent to be executed." TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (Vernon 2001).

<sup>124</sup> *Panetti*, 127 S. Ct. at 2851.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

habeas corpus petition based on the hearing.<sup>128</sup> The court concluded that, under the Fifth Circuit competency test, Panetti failed to demonstrate incompetency to prevent his execution.<sup>129</sup> After the court of appeals affirmed, the Supreme Court granted certiorari.<sup>130</sup>

*B. Court's Reasoning*

1. Procedural Due Process

After first concluding that the Court had jurisdiction to review Panetti's petition,<sup>131</sup> Justice Kennedy, writing for the majority, addressed Panetti's first claim that the Texas state court deprived him of his procedural due process rights in light of *Ford*.<sup>132</sup> The Court stated that because Panetti made a "substantial showing of incompetency," he was entitled to an evidentiary hearing.<sup>133</sup> The majority expressly adopted Justice Powell's minimum procedural requirements for competency determinations as outlined in *Ford*, concluding that an inmate who has made the requisite initial showing of incompetence is entitled to an "opportunity to be heard," which includes submitting evidence and argument to challenge the evidence presented by the state-appointed psychiatrists.<sup>134</sup>

The majority determined that Panetti made a "substantial threshold showing of insanity"<sup>135</sup> when he filed his renewed motion, which contained the opinion of two experts that Panetti was not competent to be executed.<sup>136</sup> Justice Kennedy asserted that Panetti was denied his procedural due process rights because the state court denied him an opportunity to be heard, which is required after the defendant makes the requisite showing of insanity.<sup>137</sup> Panetti was un-

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2852. The Fifth Circuit test for competency to be executed requires that a prisoner know "no more than the fact of his impending execution and the factual predicate for the execution." *Panetti v. Dretke*, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004).

<sup>130</sup> *Panetti*, 127 S. Ct. at 2852.

<sup>131</sup> The majority concluded that the Antiterrorism and Effective Death Penalty Act's (AEDPA) prohibition on successive habeas petitions did not apply to a *Ford*-based competency challenge when the first habeas claim was ripe for adjudication. *Id.* at 2855.

<sup>132</sup> *Id.* at 2855.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 2856 (citing *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part)).

<sup>135</sup> *Id.* (citing *Ford*, 477 U.S. at 426 (Powell, J., concurring in part)).

<sup>136</sup> *Panetti*, 127 S. Ct. at 2856.

<sup>137</sup> *Id.* at 2857.

able to submit contrary medical evidence, and the state court made its determination on his competence “solely on the basis of the examinations performed by the [state-appointed] psychiatrists.”<sup>138</sup>

## 2. Incorporation of Rational Understanding into Competency Determination

The Court next addressed Panetti’s claim that the Eighth Amendment forbids the execution of a mentally ill prisoner whose delusions deprive him of the mental capacity to understand that his execution is punishment for his crime.<sup>139</sup> In order to analyze this claim, Justice Kennedy characterized Panetti’s mental state at the time of his competency challenge, noting that Panetti suffered from the delusional belief that the state’s real reason for executing him is to prevent him from preaching.<sup>140</sup> Justice Kennedy characterized the court of appeals’s relevant findings as to Panetti’s competency: “[F]irst, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question.”<sup>141</sup>

The majority held that the court of appeals impermissibly ended its factual inquiry by concluding that Panetti was aware of the reason for his execution based on the presence of those three facts.<sup>142</sup> Justice Kennedy articulated that the Fifth Circuit test foreclosed an inquiry into Panetti’s delusional state of mind and ultimately his rational understanding of the reason for his execution, because the circuit court concluded that “rational understanding” and “awareness” are not synonymous.<sup>143</sup> The Court rejected the narrow Fifth Circuit test and stated that *Ford* did not foreclose an inquiry into an inmate’s rational understanding of the reason for his execution.<sup>144</sup> Justice Kennedy asserted that there is no indication that Justice Powell’s cognitive test in *Ford* treated delusions as irrelevant to the question of an inmate’s “awareness” or “comprehension.”<sup>145</sup> The Court summarized its holding, “[i]t is . . . error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2859.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2860.

<sup>142</sup> *Panetti*, 127 S. Ct. at 2860.

<sup>143</sup> *Id.* For a summary of the Fifth Circuit test, see *supra* note 129.

<sup>144</sup> *Panetti*, 127 S. Ct. at 2861.

<sup>145</sup> *Id.*



strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.”<sup>146</sup>

The Court questioned the retributive value of executing an inmate whose perception of the crime and punishment has virtually no similarities with those shared by the community.<sup>147</sup> Justice Kennedy noted that an inmate with a distorted perception of the reason for the execution fails to recognize the severity of the crime, which prevents the victim’s surviving family and friends from believing that death is the proper punishment.<sup>148</sup>

The majority recognized the implications of broadening the test for competency. Justice Kennedy noted that more inmates will, based on the Court’s holding, challenge their competency to be executed.<sup>149</sup> However, Justice Kennedy asserted that an inmate’s lack of a rational understanding of the reason for the execution would not render the inmate incompetent to face execution if the inmate is “so callous as to be unrepentant,” “so self-centered and devoid of compassion as to lack all sense of guilt,” or “so adept in transferring blame to others as to be considered . . . out of touch with reality.”<sup>150</sup> The Court attempted to silence critics of expanding the competency test, stating that “[t]he beginning of doubt about competence in a case like petitioner’s is not a misanthropic personality or an amoral character. It is a psychotic disorder.”<sup>151</sup>

Based on the Court’s adoption of a rational understanding component into the competency-to-face-execution test, the majority concluded that Panetti’s evidence regarding his delusional state of mind should have been considered by the district court.<sup>152</sup> Although the Court expressly rejected the narrow Fifth Circuit competency test, the Court declined to outline a specific competency test for the courts to implement.<sup>153</sup> However, Justice Kennedy noted that, on remand, the district court should consider the evidence of both Panetti’s and the state’s physicians, psychiatrists, and other experts.<sup>154</sup>

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<sup>146</sup> *Id.* at 2862.

<sup>147</sup> *Id.* at 2861.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 2862.

<sup>150</sup> *Panetti*, 127 S. Ct. at 2862.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 2863.

*C. Justice Thomas's Dissent*

Justice Thomas disagreed with the majority regarding whether Panetti was denied constitutionally mandated procedures for a competency determination and the majority's approach to creating a new substantive competency-to-be-executed test.<sup>155</sup> The dissent first argued that Panetti failed to make the requisite showing of incompetence necessary to even trigger the procedural competency mandates implicit in *Ford* because Panetti's renewed motion failed to include medical records, sworn testimony from a medical professional, or a mental health diagnosis.<sup>156</sup>

Even conceding that Panetti made the requisite showing, Justice Thomas concluded that Panetti received the necessary procedures for his competency determination as outlined by Justice Powell in *Ford*.<sup>157</sup> Justice Thomas contended that Panetti was entitled to a competency determination made by an impartial board in which Panetti had the opportunity to submit contrary medical evidence to that of the state-appointed psychiatrists.<sup>158</sup> The dissent noted that Panetti's competency determination was made by the state court, which satisfies the requirement of impartiality.<sup>159</sup> With regard to the opportunity to challenge the state's own psychiatric examination, Justice Thomas stated that the majority failed to highlight the fact that Panetti submitted a seventeen-page brief objecting to the state-appointed psychiatrists' reports and that the state court informed Panetti that he had the right to submit additional evidence.<sup>160</sup> Justice Thomas indicated that the state's order concerning Panetti's competency only referred to the state's report because the state's evidence was persuasive while Panetti's was unpersuasive.<sup>161</sup>

Justice Thomas declined to consider whether the majority's substantive standard for competency determinations was proper but rejected the Court's approach to creating a new standard.<sup>162</sup> Justice Thomas asserted that *Ford* concerned actual knowledge as opposed to rational understanding and that there was no indication in Justice Powell's concurrence in *Ford* that awareness is synonymous with ra-

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<sup>155</sup> *Id.* at 2867 (Thomas, J., dissenting). Justice Thomas also contended that Panetti's successive habeas petition should be dismissed under AEDPA. *Id.*

<sup>156</sup> *Panetti*, 127 S. Ct. at 2868.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2869.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 2870.

<sup>161</sup> *Id.*

<sup>162</sup> *Panetti*, 127 S. Ct. at 2873.

tional understanding.<sup>163</sup> The dissent contended that the majority took unconstitutional liberties with the language in *Ford* while failing to adhere to the Court's Eighth Amendment jurisprudence.<sup>164</sup>

## V. EFFECTS OF *PANETTI*

### A. *Broadening of "Awareness" in the Competency Test*

At first glance, the Court seems to have simply repeated a previous course of conduct in *Ford* by declining to outline a substantive competency-to-face-execution standard. However, by broadening the considerations and evidence, a court can take into account when making a competency determination, the majority took a significant step in modernizing its competency jurisprudence. Prior to the decision in *Panetti*, the law arguably afforded less protection to individuals who challenged their competency to face execution than it did for those who challenged their competency prior to trial.<sup>165</sup> Whether or not Justice Powell intended for the single-prong test announced in *Ford* to require no more than an inmate's factual awareness of the reason for the inmate's execution, a majority of states narrowly interpreted the single-prong test in this manner.<sup>166</sup>

*Panetti* effectively recognizes that although an inmate may be cognitively aware of the state's pronounced reason for seeking death, the inmate may not be able to internally rationalize the stated reason due to a mental illness.<sup>167</sup> There was no dispute that *Panetti* was factually aware that Texas wanted to execute him for murdering his parents-in-law.<sup>168</sup> However, *Panetti*'s delusional state of mind "prevent[ed] him from comprehending the meaning and purpose of the punishment to which he ha[d] been sentenced."<sup>169</sup>

In *Ford*, both Justice Marshall and Justice Powell recognized the important role retribution plays in the institution of capital punish-

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 2874.

<sup>165</sup> See Greenhouse, *supra* note 6.

<sup>166</sup> *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part).

<sup>167</sup> See Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. OF CRIM. L. 257, 270-71 (2007) ("[P]sychotic decompensation associated with severe mental illness can leave such a formal understanding intact, while erasing or distorting a person's ability to recognize the meaning and significance of his behavior and the behavior of others.").

<sup>168</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2859 (2007) (majority opinion).

<sup>169</sup> *Id.* at 2862.

ment.<sup>170</sup> Therefore, when viewed in terms of retribution, *Panetti* logically evolves from *Ford* by affirming the principle that there is little to no societal value in executing a person who, due to a serious mental disorder, has a distorted perception of the reason for punishment.

*B. Invariable Increase in the Number of Competency Challenges*

In her partial concurrence in *Ford*, Justice O'Connor expressed concern over the fact that, as a result of the Court's conclusion that the Eighth Amendment prohibited the execution of the mentally incompetent, inmates could repeatedly challenge their competency to be executed up until the time of their execution.<sup>171</sup> With the *Panetti* Court's incorporation of rational understanding into the substantive competency-to-be-executed test, Justice O'Connor's concern is even more pervasive because inmates have wider latitude to challenge their competency. The *Panetti* Court did its best to defuse this concern by noting that a "psychotic disorder," not a "misanthropic personality," is the basis for a competency challenge.<sup>172</sup>

The obvious purpose of this statement is to drastically limit the types of mental illnesses that could possibly provide a basis for a competency challenge. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), classifies 297 mental disorders,<sup>173</sup> ranging from "antisocial personality disorder"<sup>174</sup> to "trichotillomania."<sup>175</sup> Clearly, the Court's classification of a mental illness that deprives the inmate of a rational understanding of the reason for the punishment excludes a substantial number of the DSM-IV-TR's mental disorders.<sup>176</sup>

By requiring a mental problem along the lines of a "psychotic disorder," the Court attempted to establish a clearer rule for deter-

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<sup>170</sup> *Ford*, 477 U.S. at 409 (majority opinion); *id.* at 421 (Powell, J., concurring in part).

<sup>171</sup> *Id.* at 429 (O'Connor, J., concurring in part).

<sup>172</sup> *Panetti*, 127 S. Ct. at 2862.

<sup>173</sup> See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION (4th ed. 2000). The DSM-IV-TR is the leading guidebook on psychiatric disorders. W. John Thomas et al., *Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias*, 89 NW. J. CRIM. L. & CRIM. 615, 643 (1999).

<sup>174</sup> AMERICAN PSYCHIATRIC ASS'N, *supra* note 173, at 685. Antisocial personality disorder is defined as "a pattern of disregard for, and violation of, the rights of others." *Id.*

<sup>175</sup> *Id.* at 674. Trichotillomania is categorized by "the recurrent pulling out of one's own hair that results in noticeable hair loss." *Id.*

<sup>176</sup> See Mark Hansen, *Mentally Ill Death Row Inmates Get Another Chance*, A.B.A. J. REPORT, July 6, 2007, <http://www.abanet.org/journal/ereport/jy6panetti.html>.

mining when there is a sufficient basis for an inmate's competency challenge while at the same time avoiding tying its hands to a select number of mental disorders. However, not even the most cleverly crafted medical phrase, such as "psychotic disorder," can save the Court from opening the competency challenge floodgates. Advances in modern behavioral science continue to demonstrate that behavior is a "complex phenomenon," which will certainly give rise to an increasing number of mental conditions that possibly qualify for Eighth Amendment protection from execution.<sup>177</sup> Nevertheless, the benefit of ensuring that no incompetent inmate is put to death far outweighs any judicial economy concerns. The vindication of an inmate's constitutional rights requires the judicial system to tolerate delays in carrying out executions because the issue at stake is literally one of life or death.<sup>178</sup>

C. *Continued Procedural Missteps*

In the twenty-one years since *Ford* was decided, *Panetti* is evidence that the Texas state courts continue to deny inmates who challenge their competency to be executed their procedural due process rights. Arguably one of the clearest holdings in *Ford* is that an inmate who challenges his competency is entitled to an opportunity to be heard, which includes the submission of contrary medical evidence to that of the state-appointed psychiatrists.<sup>179</sup> The *Panetti* Court noted that the Texas state court committed an "impermissible" error by denying *Panetti* these procedures.<sup>180</sup> If states were unsure as to the constitutionality of their competency-to-be-executed procedures after *Ford*, *Panetti* provides enough of an incentive for states to correct their constitutionally deficient procedures.

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<sup>177</sup> Steven K. Erickson, *Minding Moral Responsibility* 12 (Yale University Working Paper Series), available at <http://ssrn.com/abstract=1008863>.

<sup>178</sup> See Harding, *supra* note 81, at 141. Of course, there is not unanimous support for this position. See, e.g., Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 399–400 (1962) (noting that the prohibition against executing the incompetent precludes any judicial finality on the issue of an inmate's competence because an inmate's competence can change after a previous competence determination).

<sup>179</sup> Ebert, *supra* note 78, at 34.

<sup>180</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2857 (2007).

VI. CRAFTING A COMPETENCY-TO-BE-EXECUTED TEST<sup>181</sup>

Although the *Panetti* Court concluded that *Ford* does not preclude an inquiry into an inmate's rational understanding of the reason for the state's decision to impose execution, the Court expressly declined to articulate a competency-to-be-executed test for district courts to implement.<sup>182</sup> To construct a competency test, it is important to be cognizant of one underlying consideration raised by Justice Kennedy: an inmate's competence raises an issue as to whether the inmate rationally understands the reason for execution only if there is evidence of a "psychotic disorder."<sup>183</sup> With this in mind, courts should look outside the narrow area of the competency-to-be-executed doctrine and consider the larger framework of legal competencies in general, of which the competency to be executed is merely a sub-category of adjudicative competence.<sup>184</sup> These other legal competency doctrines are instructive in determining the factors relevant to a competency determination.

A. *First Element: Presence of Delusional Behavior*

The first prong of a competency test should determine which inmates have a proper basis for making a competency challenge due to a mental condition. The DSM-IV-TR categorizes nine Axis I clinical disorders as psychotic disorders: schizophrenia, schizophreniform disorder, schizoaffective disorder, delusional disorder, brief psychotic disorder, shared psychotic disorder, psychotic disorder due to a general medical condition, substance-induced psychotic disorder, and psychotic disorder not otherwise specified.<sup>185</sup> Schizophrenia, the most common psychotic disorder on the list, is categorized by severe

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<sup>181</sup> Part VI addresses the incorporation of "rational understanding" into the competency-to-be-executed framework. An inmate who lacks a factual understanding of the reason for execution is still incompetent under *Panetti*. The Court acknowledged that the competency inquiry does not end simply because an inmate has cognitive awareness of the reason for execution. *See id.* at 2862 (noting that an inmate who can identify the factual basis for the state's reason for execution is not foreclosed from challenging his competency).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1382-83 (2006). Adjudicative competence includes all relevant competency determinations in the criminal context, including pleading guilty and waiving the right to counsel. *Id.* at 1383. The competency to contract, to execute a will, and to consent to medical research are just a few of the legal competencies, along with adjudicative competence, that make up the framework of legal competencies. *Id.* at 1382.

<sup>185</sup> AMERICAN PSYCHIATRIC ASS'N, *supra* note 173, at 297.

distortions to a person's thinking and behavior that even compromises the individual's ability to care for himself.<sup>186</sup>

The DSM-IV-TR's use of the word "psychotic" is meant to denote individuals who exhibit symptoms including hallucinations, delusions, disorganized speech, or grossly disorganized or catatonic behavior.<sup>187</sup> Delusions and hallucinations affect an individual's method of rationalizing his environment, which includes "the motives and meanings of others' behavior."<sup>188</sup> Individuals with schizophrenia may be unable, at times, to distinguish delusions from reality.<sup>189</sup> In *Panetti*, Justice Kennedy concluded that Panetti's delusion—that is, his belief that Texas's actual motivation to execute him was to prevent him from preaching—was relevant to a consideration of whether Panetti rationally understood the reason for his punishment.<sup>190</sup> Delusions cross the line from being acceptable beliefs to unacceptable beliefs.<sup>191</sup> Therefore, a component of a competency-to-be-executed test must examine whether the type of delusional behavior exhibited by Panetti exists.

Courts have attempted to define what constitutes a delusion for purposes of other competency determinations. These definitions are generally synonymous with the DSM-IV-TR's discussion of delusional behavior. For example, in *In re Estate of Scott*,<sup>192</sup> the California court addressed delusional behavior in the context of the competency to execute a will.<sup>193</sup> The plaintiff widower husband claimed that his deceased wife was delusional at the time she executed her will, believing that her husband was unfaithful and that her husband was trying to poison her.<sup>194</sup> The court articulated a definition of a delusion:

If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is the spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument, the delusion may be truly called insane; but if there is any evi-

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<sup>186</sup> Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 368 (2006).

<sup>187</sup> AMERICAN PSYCHIATRIC ASS'N, *supra* note 173, at 297–98.

<sup>188</sup> Ryan & Berson, *supra* note 186, at 366.

<sup>189</sup> Honberg, *supra* note 3, at 1161.

<sup>190</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007).

<sup>191</sup> Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 962 (1991).  
<sup>192</sup> 60 P. 527 (Cal. 1900).

<sup>193</sup> *Id.* at 528.

<sup>194</sup> *Id.* at 529.

dence, however slight or inconclusive, which might have a tendency to create the belief, it cannot be said to be a delusion.<sup>195</sup>

This definition of delusion distinguishes beliefs that have no evidentiary basis whatsoever from beliefs which might have a factual basis. In other words, patent falsehoods form the basis for delusional beliefs and behavior.<sup>196</sup>

The first element to a proper competency-to-be-executed test need not—although it certainly would aid in the competency determination process—require a finding of a DSM-IV-TR Axis I psychotic disorder. Rather, the question should be whether there is a disconnect between the defendant’s “reality” and the actual world due to the presence of a delusional state of mind that potentially precludes the defendant from rationally perceiving and understanding the state’s rationale for choosing execution as punishment for the underlying crime.

*B. Second Element: Capacity to Rationalize*

Having determined that a competency-to-be-executed test must first determine whether the defendant’s behavior and current mental state is sufficient to make a competency challenge, the next consideration is whether the defendant satisfies the ever-elusive rational understanding standard. It goes without saying that rational understanding is, in some form, a component of other legal competency doctrines. In the realm of the competency-to-stand-trial doctrine, the question is whether the defendant rationally understands his interactions with his attorney and whether the defendant rationally, as well as factually, understands the legal proceedings against him.<sup>197</sup> The competency-to-make-medical-decisions framework asks whether the patient can effectively reason and understand the health procedure at issue.<sup>198</sup> With regard to the insanity defense, most state jurisdictions allowing the defense use a definition of criminal insanity derived from the M’Naghten test.<sup>199</sup> A defendant has a defense to

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<sup>195</sup> *Id.* at 528–29.

<sup>196</sup> Saks, *supra* note 191, at 963.

<sup>197</sup> Maroney, *supra* note 184, at 1385–86.

<sup>198</sup> Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1038 (1991).

<sup>199</sup> Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 NW. J. CRIM. L. & CRIM. 713, 716 (2003). See, e.g., *State v. McGhee*, 742 N.W.2d 497, 669 (Neb. 2007) (noting that Nebraska follows the M’Naghten test) and *State v. McLaughlin*, 725



criminal liability under the M’Naghten test if the defendant, at the time the act was committed, did not know: (1) “the nature and quality of the act he was doing”; or (2) that the act was morally wrong.<sup>200</sup> This second prong of the insanity defense effectively incorporates a rational understanding component into a determination of legal culpability.<sup>201</sup>

The common thread that weaves these various legal competency doctrines together is an analysis of whether the defendant possesses sufficient mental capabilities for comprehension and reasoning in order to understand the circumstances surrounding the underlying decision, crime, legal proceedings, and so on. In the criminal law context, in general, the decision to mitigate a defendant’s blame or punishment is a product of the belief that the defendant should not be responsible unless the defendant possesses “a reasonable capacity for rationality.”<sup>202</sup> As Justice Kennedy noted, punishment serves no proper purpose when, due to gross delusions, there is a disconnect between the crime and punishment.<sup>203</sup> The second prong of the competency-to-be-executed test must inquire whether the inmate possesses a reasonable capacity for rationality in order to comprehend and reason, independently of the mental disorder, through the state’s rationale for deciding that the inmate will be executed.

This definition of rationality highlights the shortcomings of and expands on Supreme Court precedent. In *Rees v. Peyton*,<sup>204</sup> the Court addressed the role of competence and rational understanding in the context of whether a defendant could direct his counsel to terminate post-conviction proceedings.<sup>205</sup> The Court stated that the lower court on remand should determine whether the inmate had the “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.”<sup>206</sup> The *Rees* test essentially deems a prisoner rational for purposes of aban-

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N.W.2d 703, 708 n.3 (Minn. 2007) (noting that defendants who plead insanity in Minnesota must meet the M’Naghten standard).

<sup>200</sup> Peter Western, *The Supreme Court’s Bout with Insanity*: Clark v. Arizona, 4 OHIO ST. J. CRIM. L. 143, 143 (2006) (internal citations omitted).

<sup>201</sup> Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 294–95 (2003).

<sup>202</sup> *Id.* at 294.

<sup>203</sup> Panetti v. Quarterman, 127 S. Ct. 2842, 2862 (2007).

<sup>204</sup> 384 U.S. 312 (1966) (per curiam).

<sup>205</sup> *Id.* at 313.

<sup>206</sup> *Id.* at 314.

doning further litigation if the prisoner's decision was not attributable to a mental disorder.<sup>207</sup> In most circumstances involving the termination of post-conviction litigation, courts find inmates competent under the *Rees* test because, generally, inmates understand that the result of abandoning further litigation will be execution, which constitutes rational choice under the test.<sup>208</sup>

There are two related problems with applying the *Rees* test's definition of rationality in creating a competency-to-be-executed test. First, *Panetti* adopted a significantly broader interpretation of rational understanding than had previously been recognized.<sup>209</sup> To the extent that *Rees* only requires an awareness that execution will occur if further litigation is foregone, in order to find the existence of rational choice, this is inconsistent with *Panetti*. Second, the *Rees* test fails to adequately address the prisoner's stated reason for wanting death.<sup>210</sup> As long as an inmate can proffer a seemingly rational reason for abandoning further litigation, courts generally will not dig deeper to determine if a mental disorder is substantially limiting the inmate's thought process.<sup>211</sup> *Panetti* expressly rejected this approach to analyzing an inmate's rational understanding by stating that delusions can severely distort an inmate's perception of reality so as to render the inmate incompetent.<sup>212</sup> After *Panetti*, an inmate is no longer precluded from challenging his competence to be executed merely because the inmate appears to have a rational understanding of the state's reason for seeking execution.<sup>213</sup> The *Rees* test is analogous to the limited Fifth Circuit competency-to-be-executed test that the Court ultimately rejected in *Panetti* because both tests assume that a prisoner who appears rational at times is therefore rational for purposes of competence determinations.

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<sup>207</sup> See Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1187 (2005).

<sup>208</sup> *Id.* at 1186. See, e.g., *Ford v. Haley*, 195 F.3d 603, 613, 617 (11th Cir. 1999) (concluding that the inmate was competent to abandon post-conviction relief because he thought further litigation would be fruitless, despite believing that after death he would be part of a "Holy Trinity" with God, that he had many concubines and children in various parts of the world that he had visited while in prison, and that he had once visited heaven).

<sup>209</sup> See Bonnie, *supra* note 207, at 1186 (noting that a prisoner's awareness of the state's reason for seeking death is not the same as a rational understanding of that reason).

<sup>210</sup> *Id.* at 1188.

<sup>211</sup> *Id.*

<sup>212</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2863 (2007).

<sup>213</sup> *Id.* at 2862.

The definition of rationality proposed here, unlike in the *Rees* test, takes into account the reality that an inmate's mental condition can significantly affect a seemingly rational thought process. For example,<sup>214</sup> consider an inmate convicted of murder in Texas who, at all times after his trial, including while awaiting execution, suffered from schizophrenia, although it was not properly diagnosed until after trial. Assume the following: (1) the inmate knows that the state is seeking his death for his crime; (2) the inmate does feel and exhibit remorse for his crime; (3) the inmate exhibits delusional behavior at times, believing that he must sacrifice his life to the state for the state to release his family from captivity; and (4) the inmate's remorse is actually an attempt to appear competent in order to face execution in order to further his delusional belief.

Under the *Rees* test, if the inmate chose to abandon post-conviction relief, the inmate would probably be deemed competent to make this decision because the court would conclude that the inmate made the rational choice to do so out of remorse. In other words, the court would probably not assess the degree to which the delusional behavior affected the inmate's seemingly rational and genuine feelings of remorse. Now assume the aforementioned facts, except that instead of believing that he must sacrifice himself to save his family, the inmate does not want to die, and he believes that the state actually wants to execute him to prevent him from becoming "ruler of the world." The definition of rationality proposed here asks whether the inmate possesses a sufficient capacity for rationality in order to comprehend and reason, independently of the mental disorder, through the state's reason for seeking execution. If the inmate challenged his competency to be executed under this definition of rationality, the inmate would probably not be competent to be executed. The inmate's delusional beliefs compromise his rationality to the point where his reality is severely distorted.

## VII. CONCLUSION

The Supreme Court took a significant step in expanding its competency-to-be-executed jurisprudence in *Panetti* by affirming the principle that an inmate who does not possess a rational understanding of the state's reason for execution is incompetent to be executed under the Eighth Amendment. By recognizing that an inmate's delusions are relevant to a competency determination, the Court rejected

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<sup>214</sup> This example is not intended to suggest that the test for the competency to be executed should be the same as the test for the competency to abandon post-conviction relief.

a narrow interpretation of competency derived from *Ford* and left it to district courts to determine what constitutes rational understanding. In order to craft a competency test based on the Court's rationale in *Panetti*, courts should look outside the narrow framework of competency to be executed. The other areas of legal competencies are instructive for purposes of analyzing what criteria are relevant to a substantive competency test.