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Hiding behind Precedent: Why Panetti v. Quarterman Will Create Confusion for Incompetence Death Row Inmates

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Hiding Behind Precedent: Why *Panetti v. Quarterman* Will Create Confusion for Incompetent Death Row Inmates*

On the morning of September 8, 1992, Scott Panetti awoke before dawn, shaved his head, dressed himself in camouflage, grabbed a shotgun and a rifle, and drove to the home of his estranged wife's parents.[1] He broke into the house, shot and killed his parents-in-law, and then held his wife and daughter hostage.[2] In 1995, Mr. Panetti defended himself in his capital murder trial after undergoing a competency evaluation, which revealed that he "suffered from a fragmented personality, delusions, and hallucinations," but he was nonetheless deemed competent to stand trial and to waive his right to counsel.[3] Mr. Panetti presented his case to the jury wearing a cowboy outfit, complete with boots and a hat, and attempted to subpoena John F. Kennedy, the Pope, and Jesus Christ.[4] Nevertheless, Scott Panetti was found guilty of capital murder and sentenced to death.[5]

On June 28, 2007, the Supreme Court of the United States delivered a decision in Panetti's case which, although wrapped in language purporting to simply uphold precedent, will in effect alter the current application of the Eighth Amendment. In *Panetti v. Quarterman*,[6] the Court, in a five-to-four decision, held that Scott Panetti was not competent to be executed based on the Eighth Amendment's bar against cruel and unusual punishment unless he had a "rational understanding" of his punishment.[7] This decision was a departure from the interpretation of the Eighth Amendment most courts had adopted after the decision in *Ford v. Wainwright*,[8] the first

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1. Brief for Petitioner at 7, Panetti v. Quarterman, 551 U.S. __, 127 S. Ct. 2842 (2007) (No. 06-6407).

2. *Id.* After taking his wife and daughter to his bunkhouse, Scott Panetti informed them that he was not yet sure whether he was going to shoot them. He held them until dawn before finally releasing them; he surrendered later that afternoon. *See* Brief for Respondent at 2, *Panetti*, 551 U.S. __, 127 S. Ct. 2842 (No. 06-6407).

3. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2848.

4. *See* Brief for Petitioner, *supra* note 1, at 11–12. Mr. Panetti's appearance at trial was described as "like an old TV western" and included pants tucked into cowboy boots, a cowboy-style shirt, a bandana, and a cowboy hat which hung on his back. *Id.* at 11 n.9.

5. *Id.* at 15.

6. 551 U.S. __, 127 S. Ct. 2842 (2007).

7. *Id.* at __, 127 S. Ct. at 2862.

8. 477 U.S. 399 (1986); *see, e.g.*, Walton v. Johnson, 440 F.3d 160, 170 (4th Cir. 2006) (holding that the *Ford* standard only requires a finding that the defendant understand that

case to hold that the Constitution barred the execution of the insane.[9] However, while the Supreme Court expanded the application of the Eighth Amendment and narrowed the standard for competency in *Panetti*, it gave very little direction as to how the new standard would function. Rather, as the dissenters point out, the majority did nothing more than present a "half-baked holding that leaves the details of the insanity standard for the District Court to work out."[10] This new standard, then, will likely create more confusion in lower courts, lead to higher costs due to increased petitions, and establish a circular system which will benefit neither capital defendants nor societal interests. Thus, the Court would be wise to establish a bright-line rule for determining the competency necessary to be executed under the Eighth Amendment.

This Recent Development will argue that, despite the Court's emphatic affirmation that its decision lies within the standard articulated by the concurrence in *Ford*, the Court, in fact, established a new standard for determining the requisite level of competency for execution. Furthermore, it will explain that this new standard will significantly affect the lower courts' ability to render decisions in two ways: first, they will be faced with the daunting task of defining competency in light of *Panetti*, and second, they will be forced to handle the inevitable increase in the number of petitions and hearings likely to be filed. Additionally, this Recent Development will illustrate that, prior to the *Panetti* decision, the majority of lower courts applied a fairly uniform interpretation of competency to be executed. Therefore, the new standard will likely create confusion and variance in application, which will have further negative effects on judicial economy. Finally, it will explain that courts would be well served to create a more succinct test for competency and to use a clear, easily applied definition throughout the criminal justice system.

Before discussing the Court's opinion in *Panetti*, a brief procedural discussion about the methods by which death row inmates may challenge their sentences based on claims of incompetency would be helpful. In *Ford*, the Supreme Court addressed for the first time "whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner."[11] In finding that the Eighth Amendment does place some restriction on the execution

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he is to be punished via execution and that this punishment is a consequence of the criminal conduct).

9. *See Ford*, 477 U.S. at 409–10.

10. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2873 (Thomas, J., dissenting).

11. *Ford*, 477 U.S. at 405.

of the insane, the Court implicitly created the right for death row inmates to file federal habeas petitions claiming incompetency to be executed.[12] This petition, however, can only be made after an execution is imminent, meaning that an execution date is set, because "the issue of sanity is properly considered in proximity with the execution."[13] Therefore, once an inmate files a ripe *Ford* claim, a federal habeas petition in which the petitioner claims incompetency,[14] his execution date is stayed until his claim of incompetency can be adjudicated.[15] Adjudication of federal habeas petitions is governed by 28 U.S.C. §§ 2241–2255, which create certain requirements, including mandates that, with few exceptions, all claims must be made in a single habeas petition[16] and that all state remedies must be exhausted before a federal petition is heard.[17] Once a federal habeas proceeding is instituted, " 'a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.' "[18] Thus, a death row inmate can claim incompetency to be executed once an execution date is set, at which point the inmate is entitled to a full and fair hearing on the matter. This was precisely the type of petition that Scott Panetti filed.

The Court in *Panetti* addressed two distinct issues. First, the Court held that the Antiterrorism and Effective Death Penalty Act ("AEDPA")[19] did not bar Scott Panetti from filing a *Ford* claim, despite the fact that it was the first time he raised such a claim and it was his second federal habeas petition.[20] The Court rooted this decision in a discussion of judicial efficiency and conservation of

12. *See id.* at 409–10 (establishing that a defendant who does not meet a certain level of competency cannot be executed based on the Eighth Amendment's ban on cruel and unusual punishment, and establishing as a corollary that a claim of such incompetency can be asserted in federal habeas petitions). These types of habeas petitions have since been referred to as *Ford* claims.

13. Herrera v. Collins, 506 U.S. 390, 406 (1993); *see also* Martinez-Villareal v. Stewart, 118 F.3d 628, 630 n.1 (9th Cir. 1997) (noting that performing a competency determination before a warrant for execution has been given would be futile and would "certainly have to be repeated when the time for execution finally arrives").

14. *See supra* note 12 and accompanying text.

15. *See* 28 U.S.C. § 2251 (2000).

16. *Id.* § 2244(b).

17. *Id.* § 2254(b)(1).

18. *Ford*, 477 U.S. at 411 (quoting Townsend v. Sain, 372 U.S. 293, 312–13 (1963)).

19. *See* § 2244(b)(2) (providing that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed," except under certain, narrow circumstances, which are not applicable in Mr. Panetti's case).

20. *See* § 2244(b)(1); Panetti v. Quarterman, 551 U.S. __, __, 127 S. Ct. 2842, 2854 (2007).

resources. Thus, it held that a rule which "require[d] prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies."[21] The decision, then, suggests that perhaps *Ford* claims "deserve a special (and unjustified) exemption"[22] from the AEDPA. It is a stretch to fit this exemption within the plain language of the statute, and the Court held in the same term that the mere fact that a claim is unripe during an initial filing is not enough for an exception.[23] Thus, since this petition was not barred by the statute, the Court went on to address the procedures the Fifth Circuit followed to establish competency and the merits of the claim that Scott Panetti was incompetent to be executed under the Eighth Amendment.[24]

In assessing the lower court's adjudication of Scott Panetti's claim of incompetency, the Supreme Court found that it had failed to adhere to the appropriate procedures required by the Federal Constitution.[25] Therefore, under federal law, the Supreme Court was required to consider the claim without deference to the lower court's decision.[26] The Court then determined, upon assessment of the merits, that the standard used by the Fifth Circuit was "too restrictive" and did not afford Scott Panetti the protections guaranteed by the Eighth Amendment.[27] The standard used by the Fifth Circuit "require[d] [that] the petitioner know no more than the

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21. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2854 (suggesting that the filing of unripe *Ford* claims, claims which seek to stay an execution based on incompetency before there is any indication that the inmate is incompetent, or claims which seek to stay execution before execution is imminent, is a waste of judicial resources).

22. *Id.* at __, 127 S. Ct. at 2867 (Thomas, J., dissenting) (stating that the Court has carved out an exception in the AEDPA for *Ford* claims because, under the statutory language, the claim should be considered second and successive).

23. *See* Burton v. Stewart, 551 U.S. __, __, 127 S. Ct. 793, 797 (2007) (holding that the mere fact that a claim was unripe during the filing of the initial habeas application does not mean it can be raised in a successive application since an unripe claim alone shows that state remedies have not been exhausted).

24. *See infra* notes 25–33 and accompanying text.

25. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2855–56. Under *Ford*, once a substantial showing of insanity is made, a defendant is entitled to a " 'full and fair hearing' " on the merits of his *Ford* claim. Ford v. Wainwright, 477 U.S. 399, 411 (1986) (quoting 28 U.S.C. § 2254(d)(2) (1982)). In this case, the Court found that the lower court's failure to provide a hearing allowing Scott Panetti to present his own expert evidence violated his right to a fair hearing. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2856; *see Ford*, 477 U.S. at 425 (Powell, J., concurring) (noting that, while there is not a requirement of a "full-scale 'sanity trial,' " procedures should comport with basic notions of fundamental fairness).

26. *See* 28 U.S.C. § 2254(d)(1) (2000) (stating that a federal court can only grant a habeas petition and review that petition on its merits if the state court's adjudication of the claim was based on an "unreasonable application of[] clearly established Federal law").

27. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2860.

fact of his impending execution and the factual predicate for the execution."[28] While acknowledging that the *Ford* decision did not actually define competency or the precise standard for determining it, the Court nevertheless held that the Fifth Circuit's test for competency "rests on a flawed interpretation of *Ford*."[29] The Court noted that in order to meet the *Ford* standard, a lower court needed to find not only that a prisoner "knows that he is going to be executed and that the execution will result in death," but also that the prisoner has a "rational understanding" of the relationship between the two.[30] This articulation of the *Ford* standard, then, demanded that Scott Panetti's case be remanded for further inquiry into his rational understanding.[31] Scott Panetti professed a belief that the State's purported reason for execution (the murder of his ex-parents-in-law) was a "sham" and that he was really going to be executed to be silenced from preaching.[32] The issue to be addressed on remand, therefore, was whether this belief "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."[33]

In articulating this decision, the Court uses vague language[34] and neglects to establish a standard or easily applied rule for deciding the level of competency required for a constitutional execution. Indeed, the decision is rooted in the desire to maintain precedent, a precedent which itself never defined "sanity" in the first place. In *Ford*, the Court for the first time held that the Eighth Amendment forbade a State from executing a mentally ill person.[35] This decision was

28. Panetti v. Dretke, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004).

29. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2860.

30. *Id.* at __, 127 S. Ct. at 2860–61 (finding that the district court's analysis of competency, which was based on the defendant's awareness that he had committed, and was convicted of, murder, awareness that he was going to be executed, and awareness of the state's given reason for his execution, was not supported by the holding in *Ford* because factual awareness and rational understanding are different and the *Ford* decision requires analysis of the latter).

31. *Id.* at __, 127 S. Ct. at 2863.

32. *Id.* at __, 127 S. Ct. at 2859, 2862; *see* Brief for Petitioner, *supra* note 1, at 18–19 (noting that Scott Panetti believed he was in a "struggle with the devil" and that his approaching execution was part of a "satanic conspiracy to prevent him from preaching the Gospel").

33. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2862.

34. For example, Justice Kennedy stated, "a prisoner's awareness of the State's rationale . . . is not the same as a rational understanding." *Id.* Later, he also wrote that "a concept like rational understanding is difficult to define," but that this term does not require that the prisoner "be considered 'normal,' or even 'rational,' in a layperson's understanding of those terms." *Id.*

35. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986).

grounded in language highlighting " 'evolving standards of decency,' " and it outlined procedures that should be followed in order to assure justice and fairness for a capital defendant.[36]

While the *Panetti* Court purports to be simply applying a logical extension of *Ford*, this claim is less than compelling. First, *Ford* was decided absent a majority opinion.[37] In fact, the language which was adopted as controlling is from Justice Powell's concurrence,[38] an opinion in which no other Justice joined. His opinion suggests that the Constitution forbids the punishment "only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[39] Furthermore, his competency analysis hinges on the requirement that defendants on death row "know the fact of their impending execution and the reason for it."[40] Nothing in this language suggests that competency demands that death row inmates actually believe the reason for execution given by the State or even understand that reason.

The *Panetti* Court further stated that "the *Ford* opinions nowhere indicate that delusions are irrelevant to 'comprehen[sion]' or 'aware[ness]' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding . . . [and] [i]f anything, the *Ford* majority suggests the opposite."[41] However, even this assertion is flawed, as the *Ford* "majority" suggests nothing of the sort. Rather, the majority does not address a standard at all. Justice Powell's concurrence is the only opinion which even attempts to define sanity, but it never addresses delusions, and the opinions taken as a whole

36. *See id.* at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality)) (recognizing that execution of the insane may be unconstitutional even if it would have been allowed under historical precedent and the common law because it " 'mark[s] progress of a maturing society' " (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality))); *see also supra* notes 11–18 and accompanying text (describing these procedures, which entitle a defendant to a full and fair hearing).

37. The *Ford* decision was a splintered one. Justice Marshall maintained a five-to-four majority in holding that the execution of an insane person would violate the Eighth Amendment. *See Ford*, 477 U.S. at 410. However, there was no majority with regard to the procedure that should be followed in assessing insanity or the actual meaning of insanity, and Justice Powell's concurrence has come to be regarded as controlling. *See id.* at 418 (Powell, J., concurring in part and concurring in the judgment); *Panetti*, 551 U.S. at __, 127 S. Ct. at 2856.

38. *See infra* note 66 and accompanying text (citing various cases that adopted language from Justice Powell's concurrence).

39. *See Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment) (stating that because Mr. Ford did not understand that he was going to die and because he was unable to connect his execution to the crime, the death penalty was cruel and unusual punishment and violated the Eighth Amendment).

40. *Id.* at 422.

41. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2861 (first and second alterations in original).

seem to suggest little more than that "awareness" should be considered. Thus, the need for "rational understanding" certainly resembles a new standard much more than it does a mere application or extension of the *Ford* holding.

As the dissent in *Panetti* vividly points out, the Court, by purporting to simply apply *Ford*, "imposes a new standard for determining incompetency" without ever engaging in the Eighth Amendment analysis which should define the limits of this new standard.[42] Indeed, *Panetti* can be seen as establishing a new requirement that must be met before finding a death row inmate competent to be executed, the requirement of "rational understanding." The Court's decision to impose a new standard in this fashion, without a full Eighth Amendment inquiry and without defining insanity, must serve some greater purpose. The Court, as the dissent puts it, "bends over backwards to allow *Panetti* to bring his *Ford* claim despite no evidence that his condition has worsened" and despite the fact that it required a "special (and unjustified) exception" to the AEDPA.[43]

The decision to hear this claim on its merits required jumping though numerous hoops before the Court could decide that a "rational understanding" was necessary.[44] First, the Court had to hold that it could hear the habeas petition through the creation of an exemption to the AEDPA.[45] Second, the Court had to find that the procedure the lower court followed violated the standards set out in *Ford*, so that it would be able to determine the case on its merits.[46] The Court followed all of these complicated steps so that it could hear the claim and then stopped short of making an Eighth Amendment analysis and instead claimed to be logically extending the ruling of *Ford*.[47] Then, after all of this, it remanded the case to the lower court

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42. *Id.* at __, 127 S. Ct. at 2864 (Thomas, J., dissenting). The dissenters, Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, allege that "[t]he Court refuses to acknowledge that *Ford* simply does not resolve this question one way or the other." *Id.* at __, 127 S. Ct. at 2874 n.12.

43. *Id.* at __, 127 S. Ct. at 2864; *see supra* note 22 and accompanying text.

44. *See Panetti*, 551 U.S. at __, 127 S. Ct. at 2859–60.

45. *See id.* at __, 127 S. Ct. at 2866–67 (Thomas, J., dissenting).

46. *See id.* at __, 127 S. Ct. at 2858–59 (majority opinion).

47. A full Eighth Amendment analysis would include: (1) considering whether execution of the insane would have been viewed as " 'cruel and unusual at the time that the Bill of Rights was adopted,' " *id.* at __, 127 S. Ct. at 2874 (Thomas, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)); (2) considering whether the punishment would be "deemed cruel and unusual according to modern 'standards of decency,' " *id.* at __, 127 S. Ct. at 2874 (quoting Roper v. Simmons, 543 U.S. 551, 560–61 (2005)); and (3) "looking for 'objective evidence of contemporary values,' " *id.* at __, 127

and demanded that the lower court muddle through the meaning of "rational understanding" and its appropriate application to Scott Panetti's professed beliefs.[48] The Court went out of its way to fit these facts into the *Ford* format only to heighten the requirement for competency when this could have been accomplished just as easily by an Eighth Amendment analysis. Considering the importance of this decision for the death penalty in this country, perhaps the Court feared making the tough decision and, therefore, declined to establish a bright-line test.

The importance of this decision demands a look into the complexities and interconnectedness of mental illness and criminal courts or, more specifically, capital offenders. The decision to extend the definition of insanity by expanding it to "rational understanding" will affect hundreds of defendants on death row. While the decision in this case may seem at first to "deal[] with an issue that arises rarely, is doctrinally narrow, and has little connection with other domains of criminal and constitutional jurisprudence," its impact has the capacity to be much broader.[49] It is estimated that at least sixty people who have been executed in the United States since 1983 have been diagnosed as mentally ill or mentally retarded.[50] Likewise, although hard statistics would be difficult to compile, it has been estimated that five to ten percent of people on death row have a "serious mental illness."[51] Thus, hundreds of people on death row are afflicted with a mental illness and have a stake in the new standard for determining competency.[52] While the Court in *Panetti* contends that this new

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S. Ct. at 2874 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)). *See also Ford*, 477 U.S. at 406–10 (noting, after undertaking a full Eighth Amendment analysis, that based on the totality of the factors, execution of the insane is cruel and unusual).

48. *See Panetti*, 551 U.S. at __, 127 S. Ct. at 2863.

49. Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 257 (2007).

50. *See* ACLU, Mental Illness and the Death Penalty in the United States (Jan. 31, 2005), http://www.aclu.org/capital/mentalillness/10617pub20050131.html; *see also* Press Release, Bureau of Justice Statistics, U.S. Dept. of Justice, Eighty-Nine Percent of State Adult Correctional Facilities Provide Mental Health Services for Prisoners (July 15, 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/mhts00pr.htm (noting that, in 2000, about sixteen percent of all inmates were identified as mentally ill and that one in ten state inmates were receiving psychotropic medication).

51. ACLU, *supra* note 50. The ACLU defines mental illness as "[a]ny of various conditions characterized by impairment of an individual's normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic, or other factors." *Id.* Further, it lists bipolar disorder, borderline personality disorder, post-traumatic stress disorder, schizoaffective disorder, schizophrenia, depression, and recurrent thoughts of death or suicide as those most common to death row prisoners. *Id.*

52. As of December 31, 2006, there were 3,350 inmates on death row. *See* ACLU CAPITAL PUNISHMENT PROJECT, DEATH PENALTY 101, at 1 (2007), *available at*

standard will be limited in its application to those inmates who suffer from "severe mental illness,"[53] focusing primarily on psychotic disorders and delusions, the ruling will not be so confined.

Scott Panetti was diagnosed with schizoaffective disorder and schizophrenia,[54] a disease that affects approximately 2.4 million American adults.[55] Likewise, "on any given day, there are more than four times as many people with schizophrenia, bipolar disorder, and major depression in our nation's jails and prisons as there are in hospitals," as well as "hundreds of people with schizophrenia and other severe mental illness on death row around the country."[56] Thus, hundreds of death row inmates suffer from the types of delusions and psychotic disorders that the Court highlights, and it is these inmates that will potentially be affected by the move to a higher standard.

In addition to death row inmates who have well-documented mental illnesses, there are also new cases of mental impairment which arise in death row inmates on a regular basis. The so-called "death row phenomenon,"[57] the theory that an inmate's mental health deteriorates while on death row, has the potential to render formerly competent prisoners incompetent once they reach this new threshold and can show a lack of "rational understanding." The phenomenon theory suggests that "death row inmates live in a state of constant uncertainty over when they will be executed" and that "this isolation and anxiety results in a sharp deterioration of the[] mental capacity" of some inmates.[58] Therefore, the length of time an inmate remains on death row can be directly relevant to competency. Recently, the

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http://www.aclu.org/images/asset_upload_file758_29292.pdf; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT STATISTICS, http://www.ojp.usdoj.gov/bjs/cp.htm (last visited Apr. 10, 2008) (noting that at the end of 2006, 3,228 prisoners were on death row).

53. *Panetti*, 551 U.S. at __, 127 S. Ct. at 2862.

54. Brief for Petitioner, *supra* note 1, at 7. Scott Panetti suffered from severe mental illness long before his criminal trial. He "was hospitalized over a dozen times in numerous institutions for schizophrenia, schizoaffective disorder, bipolar disorder, depression," and various other mental illnesses. *Id.*

55. *See* NAT'L INST. OF MENTAL HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml (last visited Apr. 10, 2008).

56. Ronald S. Honberg, *The Injustice of Imposing the Death Penalty on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1153–54 (2005).

57. The death row phenomenon is the idea that periods of long confinement in harsh conditions can lead to deterioration of an inmate's mental condition and can cause an inmate to become "suicidal, delusional, and insane." DEATH PENALTY INFO. CTR., TIME ON DEATH ROW, http://www.deathpenaltyinfo.org/article.php?&did=1397 (last visited Apr. 10, 2008).

58. Stephen Blank, *Killing Time: The Process of Waiving Appeal, The Michael Ross Death Penalty Cases*, 14 J.L. & POL'Y 735, 752 (2006).

time an inmate waits for execution has increased steadily, from seventy-four months in 1984 to 145 months in 2006.[59]

This phenomenon, combined with the harsh conditions on death row,[60] could "easily lead to physical and mental deterioration,"[61] which could significantly affect the number of claims brought under the new standard. Similarly, the last-minute staying of executions will, logically, only exacerbate the problem.[62] With hundreds of inmates on death row possibly suffering from delusions, the extension of the *Ford* standard could seriously increase the number of *Ford* claims filed and adjudicated.

Because the new standard has such a potentially extensive impact, the way it will be interpreted and applied in the lower courts is of vast importance, especially since these are literally life-and-death decisions. The death penalty is recognized under federal law and in thirty-eight states,[63] and "[c]urrently, no states that recognize the death penalty [categorically] prohibit the execution of people with mental illness."[64] Therefore, different courts could interpret this new standard in a variety of different ways. While the Court contends that a "rational understanding" requirement is a mere extension of the *Ford* holding,[65] none of the lower federal courts adopted such a requirement when adjudicating a death row inmate's competency to be executed after *Ford* was handed down. Five federal circuit courts

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59. *See* DEATH PENALTY INFO CTR., *supra* note 57.

60. *See* Blank, *supra* note 58, at 753 (noting that death row inmates are isolated from other prisoners for up to twenty-three hours a day in addition to being "excluded from prison educational and employment programs[] and sharply restricted in terms of visitation and exercise"); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451–52 (1983) (tracing the mental health deterioration in fourteen inmates after a stint of solitary confinement, which included conditions similar to most death row experiences in which an inmate lives in a room furnished with only a steel bed, steel table and stool, and an open steel toilet, all lit by only a single sixty-watt light bulb).

61. Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L LAW 833, 836 (2000); *see id.* at 834–36 (discussing the death row phenomenon generally and suggesting that the increase in wait time for execution coupled with confinement to small cells for up to twenty-three hours a day and restricted privileges not only reduces sanity but also violates notions of basic human rights).

62. Last-minute stays of execution have become a common occurrence in capital cases. In the first quarter of 2007 alone, eighteen scheduled executions were stayed in five different states. *See* Andrew Cohen, *Staying Executions: After Expanding the Death Penalty, the Pendulum Swings Back*, HUM. RTS., Spring 2007, at 21, 21.

63. *See* Honberg, *supra* note 56, at 1159.

64. *Id.* (noting that, despite the fact that states often impose restrictions on the execution of the mentally ill, no states have prohibited it outright).

65. *See* Panetti v. Quarterman, 551 U.S. __, __, 127 S. Ct. 2842, 2861 (2007).

have addressed this issue, and each has applied an interpretation of Justice Powell's concurrence similar to that of the Fifth Circuit—namely, holding that the defendant need only be aware of the fact that he is going to be executed and of the reason for it.[66] None of the courts have extended the *Ford* standard to "rational understanding" the way the Court does in the *Panetti* decision, despite having heard cases involving defendants who suffer from severe and delusional mental disorders, such as schizophrenia. Consequently, since no court has yet to hold that *Ford* demands rational understanding, the potential for disparate application is a genuine concern.

The new standard the Court creates calls for "rational understanding" but leaves the definition and application of this term to the musing of the lower courts. The failure of the Court to define "rational understanding" could certainly reflect an intentional policy decision, but it also leaves the lower courts in the awkward position of having to define an abstract concept. In fact, it is difficult, if not impossible, for "someone who has not experienced psychosis first-hand to understand it," even for "defense attorneys and their experts."[67] For instance, in *Barnard v. Collins*,[68] the Fifth Circuit was required to determine the level of awareness of a defendant who at times knew the factual reason for his execution but, based on his delusions, attributed negative occurrences to a conspiracy against him

66. *See supra* notes 27–28 and accompanying text (discussing the Fifth Circuit's interpretation of *Ford*); *see also* Walton v. Johnson, 440 F.3d 160, 171 (4th Cir. 2006) (holding that the defendant's understanding that he would be executed and that the execution is punishment for his conviction of murder is sufficient for a finding of competency under the *Ford* standard); Scott v. Mitchell, 2001 FED App. 0166P, ¶5 (6th Cir.), 250 F.3d 1011, 1014–15 (holding that incompetency should be found when a defendant " 'does not have the mental capacity to understand the nature of the death penalty and why it was imposed' " and finding that the schizophrenic defendant had not made a substantial showing that he did not understand the nature of the punishment and therefore should not be granted a stay of execution (quoting OHIO REV. CODE ANN. § 2949.28(A))); Massie *ex rel* Kroll v. Woodford, 244 F.3d 1192, 1195 n.1 (9th Cir. 2001) (citing *Ford* for the proposition that execution is only forbidden under the Eighth Amendment when the defendant is "unaware of the punishment they are about to suffer and why they are to suffer it"); Fearance v. Scott, 56 F.3d 633, 640 (5th Cir. 1995) (holding that a person must "know the fact of his impending execution and the reason for it" and finding the defendant competent to be executed, despite a diagnosis of paranoid schizophrenia); Rector v. Clark, 923 F.2d 570, 572 (8th Cir. 1991) (holding that competency depends on "(1) whether the petitioner understands that he is to be punished by execution; and (2) whether petitioner understands why he is being punished," and rejecting the notion that the defendant must be able to work with his attorney in a "collaborative" manner).

67. Honberg, *supra* note 56, at 1162.

68. 13 F.3d 871 (5th Cir. 1994).

by "Asians, Jews, Blacks, homosexuals, and the Mafia."[69] The court found that Barnard knew his execution was imposed because he had been found guilty of a crime, but under the new standard, this fact may not meet the threshold for a finding of rational understanding. It would depend on how much of his punishment and his actions he blamed on the "conspiracy." It may also depend on which expert is asking the questions, how the questions are phrased, and how Barnard is feeling on that particular day at that particular time. Furthermore, it is unlikely that the courts will agree on a generally accepted meaning of the "idea that the prisoner must be able to understand (or be aware of) the nature and purpose of (or reason for) the execution."[70] Additionally, even before this decision, competency standards were "often misunderstood, and unevenly applied."[71] Considering all of the possible scenarios, the reasonable differences of opinion among experts, and the stakes in each case, the Court has placed the lower courts in a precarious place: they have to decide how to define and how to discover a death row inmate's "rational understanding." The new standard will likely begin as a "work in progress" as the lower courts struggle to draw the line between overinclusion and underinclusion. Consequently, disparate application is likely, though less than desirable.

For example, consider the way the new standard may be applied in North Carolina and the Fourth Circuit. The Fourth Circuit recently decided in *Walton v. Johnson*[72] that the *Ford* standard requires no more than that the defendant Walton " 'understands that he is sentenced *to die* by execution' for his crimes, and even more precisely, that Walton 'understands that to be executed means that *he will die*,' " despite the fact that he did not comprehend that death would be the end.[73] The Fourth Circuit did not at any point address the defendant's rational understanding. In fact, the court ignored his understanding completely and focused on his factual awareness.[74] In light of the recent *Panetti* decision, the Fourth Circuit will have to

69. *Id.* at 876.

70. Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1172 (2005).

71. Honberg, *supra* note 56, at 1163.

72. 440 F.3d 160 (4th Cir. 2006).

73. *See id.* at 175 (quoting Walton v. Johnson, 306 F. Supp. 2d 597, 600–01 (W.D. Va. 2004), *vacated*, 407 F.3d 285 (4th Cir. 2005)) (holding that, although Walton did not understand that he was not going to come back to life after his execution, he was competent to be executed under the *Ford* holding).

74. *See* Bonnie, *supra* note 70, at 1173 (noting that understanding the nature of a proceeding and appreciating its personal application are different and that an analogous distinction is often drawn between factual understanding and rational understanding).

reframe its analysis, taking up the issue of competency from square one. The situation the Fourth Circuit now faces will be very similar to the situations the other circuits will likely face.

While neither the Fourth Circuit nor the North Carolina courts have yet addressed the complexities involved in applying the rational understanding standard when adjudicating a defendant's competency to be executed, the North Carolina courts have used a similar standard in other types of competency cases. The North Carolina courts define competency to be executed in section 15A-1001 of the General Statutes of North Carolina, which states that a defendant can not be punished "when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner."[75] However, the use of the term "rational" within the statute has only been interpreted to require that the defendant be capable of assisting in his defense by communicating with his attorney in a meaningful way.[76]

This limited application of the term "rational" under the competency statute can be seen clearly though the case of Guy Tobias LeGrande,[77] a North Carolina death row inmate whose history bears a striking resemblance to that of Scott Panetti. LeGrande was allowed to represent himself in his murder trial wearing a Superman t-shirt, believing he was "receiving signals from Oprah Winfrey and Dan Rather over the television," and suffering from delusions.[78] The Supreme Court of North Carolina affirmed his conviction after finding him incompetent both to stand trial and to waive his right to counsel because he "was able to respond to the court's inquiry in a

75. N.C. GEN. STAT. § 15A-1001(a) (2005).

76. *Cf.* Noland v. Dixon, 831 F. Supp. 490, 506–07 (W.D.N.C. 1993) (overruling the trial court's conclusion that the defendant was competent to be tried and executed in light of the fact that he suffered from brain damage and mental illnesses, which made consulting him worthless for his lawyer and further made him " 'incapable of making rational decisions about his life, his defense or in any significant and rational way understanding the trial proceedings or his role in them' " (quoting Affidavit of Dr. Horacek ¶15)), *vacated on other grounds*, Noland v. Dixon, 53 F.3d 328 (4th Cir. 1995).

77. Guy Tobias LeGrande was convicted of first-degree murder and sentenced to death in North Carolina in April of 1996. His execution is still pending. *See* State v. LeGrande, 346 N.C. 718, 730, 487 S.E.2d 727, 733 (1997); *see also* Andrea Weigl, *Condemned Man Gets 2-Month Break*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 28, 2006, at A1 (noting that three psychiatrists have been appointed to determine whether Guy LeGrande is incompetent to be executed despite his refusal to speak to them).

78. ACLU, MENTAL ILLNESS AND THE DEATH PENALTY IN NORTH CAROLINA: A DIAGNOSTIC APPROACH 33 (2007), http://www.aclu.org/pdfs/capital/nc_mental_illness_report2007.pdf.

manner that demonstrated that he understood the nature of the proceedings, comprehended the serious nature of his situation, and was prepared to proceed with his defense in a rational or reasonable manner."[79] Thus, the investigation into the defendant's "rational understanding" was limited to an inquiry into his ability to assist in his defense and was not extended to the connection he was able to make between crime and punishment. Further, while his *Ford* claim is currently pending in federal court, an earlier decision in his case suggests that Guy LeGrande would have to "demonstrate a change from his current mental condition," a mental condition which was assessed without discussion of his ability to rationally connect his criminal conduct to his possible punishment.[80] Given the fact that LeGrande is unwilling to cooperate with mental health experts, a showing of a heightened level of mental illness may be impossible and an inquiry into "rational understanding" precluded outright.[81]

The likelihood that such a complex standard, handed down with such little guidance, will be applied uniformly is dubious at best. Lower courts will be forced to interpret and analyze each defendant's "rational understanding," a standard upon which even experts have trouble agreeing.[82] Indeed, North Carolina prosecutors are still seeking the death penalty in the case of Tommy Lee Holiday, a defendant who is depressed, hears voices, and refuses medical treatment from the prison staff, despite the obvious possibility that, were he to receive the death penalty, his rational understanding would be in question.[83] As this decision illustrates, application of this new standard will be further complicated by the likely increase in the amount of petitions that will be filed under the new standard. The decision in *Panetti* created a new threshold for competency to be executed, but it left the task of defining this standard to the lower

79. *See LeGrande*, 346 N.C. at 724, 487 S.E.2d at 730.

80. *See* LeGrande v. Lee, No. 1:99CV00314, 2005 WL 1869223, at *13 (M.D.N.C. Aug. 5, 2005) (finding that petitioner's *Ford* claim was not ripe since his execution was not yet pending, but that once his execution was pending, he could file the claim and show a change in mental condition).

81. *See* ACLU, *supra* note 78, at 33. Furthermore, North Carolina has often permitted mentally ill defendants "to refuse psychological evaluations." *Id.* at 21. For instance, in the 1979 capital murder trial of James Hutchins, his refusal to cooperate with the retained psychiatrist did not bar his conviction or execution, despite his eventual diagnosis of a "severe mental disorder characterized by paranoid delusions, disturbed judgment, and hallucinations." *Id.* at 22.

82. *See* Honberg, *supra* note 56, at 1162.

83. *See* Eric Klamut, *Prosecutors To Seek Death Penalty in Kornegay Case*, ROCKY MOUNT TELEGRAM (Rocky Mount, N.C.), Oct. 24, 2007, http://www.rockymount telegram.com/biz/content/news/stories/2007/10/24/death.html.

courts, putting them in a position that is even more precarious than the Court disclosed. The change in threshold will increase the amount of *Ford* petitions which are filed, while simultaneously increasing the costs of hearing these petitions.

The Court's requirement of "rational understanding," as previously mentioned, will replace the test that is currently used in most jurisdictions with a new, vague standard. In other words, the *Panetti* decision rendered the standard for competency less clear. Furthermore, it lowered a defendant's necessary showing to prove incompetency to be executed. Consequently, more defendants will attempt to meet the burden because the standard is more vague, and more defendants will actually meet their burdens because the threshold is lower.[84] Thus, even though the Court in *Panetti* rested its decision to hear the *Ford* petition on judicial economy,[85] the result will not decrease the number of *Ford* claims which will reach the courts; in fact, the number will increase. This increase in petitions, then, will invariably put extra pressure on the courts to assess "rational understanding."

In addition to increased petitions, the decision will also adversely affect judicial economy because of the procedures now mandated by the Court in assessing an inmate's claim of incompetency to be executed. The Supreme Court held that the Texas court did not give Scott Panetti a fair hearing and concluded that the defendant should have been allowed to present his own expert evidence.[86] Allowing both sides to admit expert evidence will increase the time and resources needed to adjudicate a *Ford* claim. Furthermore, the malleable standard leaves room for varying opinions, even among experts, as to whether rational understanding exists. Thus, courts will be forced to analyze more evidence, hear more expert testimony, and spend more time considering whether a particular defendant manifests a "rational understanding."

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84. *See* Bonnie, *supra* note 49, at 282 (noting the possibility that "the 'rational understanding' test, admittedly less determinate than a 'formal understanding' test, will invite more claims and will lead to exemption in 'too many' cases").

85. *See supra* notes 19–21 and accompanying text.

86. *See* Panetti v. Quarterman, 551 U.S. __, __, 127 S. Ct. 2842, 2858 (2007). While the Court determined that Scott Panetti should have been allowed to present his own expert testimony, this expert would have been paid for by the government, thus increasing the cost of such a hearing. *See* 18 U.S.C.A. § 3006A(e)(1) (2004) ("[C]ounsel for a person who is financially unable to obtain . . . expert[s] . . . necessary for adequate representation may request them in an ex parte application. Upon finding . . . that services are necessary and that the person is financially unable to attain them, the court . . . shall authorize counsel to obtain the services.").

The combination of more petitions and lengthier hearings with expert presentations on both sides will likely lead to longer wait times for death row inmates. This, then, will perpetuate the cycle of an increased number of claims, as the death row phenomenon indicates that longer times on death row lead to declining mental health.[87] Thus, the new standard and its variable application will have severe negative effects on judicial economy, as well as the health and well-being of the inmates.

Another possible consequence of the vague new standard is the risk that death row inmates will exaggerate their symptoms.[88] While the claims likely to "receive a hard look will be offenders similar to Panetti—those with a history of severe mental disorder[s], whose diagnoses are uncontested, and who manifest acute symptoms of cognitive disorganization, hallucinations, or delusions," there is "some risk of exaggerated symptoms" in some circumstances.[89] This risk could potentially increase the number of petitions filed and adjudicated.

Like the risk of exaggeration of symptoms, there is also the problem of negative incentives. The new lower standard for incompetency could create incentives for defense attorneys to leave mental illness untreated or, worse yet, to advise defendants to refuse treatment.[90] Were this to occur, more petitions would undoubtedly be filed and more litigation would result, not to mention that the lack of treatment would also negatively affect the mental health of death row inmates.[91] For the aforementioned reasons, the new standard will have serious ramifications on judicial economy despite the stated intentions of the Court.

Through the *Panetti* decision, the Court changed the standard for competency and created more problems than it solved: Scott Panetti faces another hearing on his competency; the lower courts must grapple with establishing a new definition and test; there is a serious possibility of disparate application among lower courts; and there almost certainly will be negative ramifications on judicial economy.

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87. *See* Hudson, *supra* note 61, at 835.

88. *See* Bonnie *supra* note 49, at 281–82 (doubting that there would be much fabrication under the *Panetti* precedent but admitting that it was a concern expressed by the Court).

89. *See id.* at 282.

90. *See* Bonnie, *supra* note 70, at 1176 (acknowledging that "condemned prisoners and their lawyers would have powerful incentives to allow mental illness to remain untreated," especially if *Ford* claims were allowed before execution was imminent).

91. *See supra* note 87 and accompanying text.

The solution, then, is to reassess this decision and to create a bright-line test.

While there are other solutions, such as improving mental heath facilities and establishing higher standards for competency to stand trial, these are beyond the scope of this Recent Development. Rather, this Recent Development contends that the Court should join the suggestions of the amici,[92] who suggest that there is no meaningful way to define "rational understanding" and, therefore, that there should be certain severe mental illnesses which would categorically exclude a defendant from capital punishment.[93] Such a rule would likely be overinclusive, but it would rectify some of the problems that a vague standard creates. While it would grant certain defendants a stay of execution despite their ability to rationally understand, it would not be underinclusive, and, thus, there would be no uncorrectable mistakes.[94] Furthermore, application would be much easier, and petitions would only be filed in situations where a positive diagnosis has already been made and documented. While a bright-line rule may create incentives to "expert shop" in order to secure a per se diagnosis for incompetency, this type of negative consequence would still create more consistency across jurisdictions. Likewise, experts are more likely to differ on a rational understanding test than on a concrete diagnosis. Thus, the Supreme Court's current system of hearing cases and refusing to define the level of insanity that makes execution unconstitutional will lead to more difficult cases like that of Scott Panetti. Defendants will sit on death row, hours away from execution, before being granted last-minute stays and vast, complex, and costly hearings. The solution is a bright-line rule, which will be easily applied and will provide each mentally ill defendant with an equal chance to present evidence of his incompetency regardless of jurisdiction.

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92. The parties that filed briefs as amici curiae in support of the petitioner include the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Health. *See* Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, Panetti v. Quarterman, 551 U.S. __, 127 S. Ct. 2848 (2007) (No. 06-6407).

93. *See id.* at 3 (noting that "scientific knowledge about schizophrenia and schizoaffective disorder supports the conclusion that persons in Panetti's condition cannot rationally understand the reasons for their execution" and that rational understanding is essential to competency).

94. This Recent Development would also suggest that if the defendant met a bright-line test, the prosecution could rebut the presumption of incompetency with evidence proving competency. This would limit the underinclusion but would keep incompetent defendants from facing execution under a malleable standard.

The decision the *Panetti* Court made will create more confusion, more petitions and unequal application. Furthermore, it is unlikely that the new standard will last long before the Court must again determine the capacity required to be executed. The Court hides behind the *Ford* decision in determining that Scott Panetti's competency was not assessed correctly.[95] This "punt" most likely reflects the difficulty of the task facing the Court: trying to preserve the death penalty, while at the same time recognizing the injustice of executing the mentally ill. The decision, however, raises other issues from which the Court appears to be hiding. For example, the Court does not address the fact that mentally incompetent individuals must have a rational understanding to be executed, but that no such understanding is required for incarceration. Nor does the Court explain why a person who shows no increased incompetency can be deemed incompetent to be executed, but competent to stand trial and, moreover, to do so pro se. The Court avoids these questions by shirking its responsibility to shed light on the breadth of the Eighth Amendment, placing the burden on the lower courts instead. Considering the profound impact this will have on the lower courts, the Court will no doubt be forced to revisit this decision. When it does, it would be wise to announce a bright-line rule, one which provides mentally ill defendants with a fair and equal chance at proving their incompetency.

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95. *See supra* notes 42–43 and accompanying text (discussing the *Panetti* dissent's critique of the majority's manipulation of *Ford*).