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CASE NOTE

CRIMINAL LAW—Competency to Be Executed: *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

*Jodanna L. Haskins**

INTRODUCTION

On September 8, 1992, Scott L. Panetti dressed in camouflage, shaved his head, and made the trek with his rifle to the home of his in-laws, Joe and Amanda Alvarado.¹ He proceeded to shoot both Joe and Amanda, at close range, in front of his estranged wife, Sonya, and their young daughter.² Panetti then took both his wife and daughter hostage, though he eventually released both unharmed and surrendered to police.³ The State of Texas charged Panetti with the murder of his in-laws.⁴

Panetti suffered from a long, documented history of mental-illness including schizophrenia, depression, and delusions.⁵ Prior to shooting his in-laws, Panetti quit taking his anti-psychotic medication.⁶ Before his murder trial began, the judge ordered a psychiatric evaluation to determine Panetti's competence to stand trial.⁷ Although the psychiatrist noted Panetti suffered from a "fragmented personality, delusions, and hallucinations," the psychiatrist determined Panetti was competent to stand trial.⁸ A jury ultimately agreed with the psychiatrist, and found Panetti competent to stand trial at a competency hearing.⁹

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¹ Brief of Petitioner-Appellant at 7, *Panetti v. Quarterman*, 127 S. Ct. 2842, No. 06-6407 (Feb. 22, 2007).

² *Id.* at 7.

³ *Id.*

⁴ *Panetti v. Quarterman*, 127 U.S. 2842, 2848 (2007).

⁵ Brief of Petitioner-Appellant, *supra* note 1, at 7.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 8.

⁹ *Id.* at 10-11. Pursuant to Texas law, competency hearings occur before a jury. TEX. CODE CRIM. PROC. ANN. Art. 46B.051(a) (Vernon 2001). The first competency hearing resulted in a 9-3 vote and the judge declared a mistrial. *Id.* at 9. The second competency hearing, after a venue change, resulted in a finding of competence. *Id.*

Approximately seven months later, Panetti claimed he had a “revelation that God had cured his schizophrenia” and refused, once again, to take his antipsychotic medication.¹⁰ Despite knowing of this revelation, the trial court judge granted Panetti’s request to represent himself at trial over objections from both prosecuting and defending attorneys.¹¹ Panetti proceeded to put on a bizarre performance at trial, and on September 21, 1995, a jury found Panetti guilty of capital murder.¹² At the sentencing hearing, the jury sentenced Panetti to death.¹³

After Panetti’s state and federal habeas petitions were denied, the state trial court set Panetti’s execution date.¹⁴ Prior to the scheduled execution date, Panetti’s counsel filed a motion in state trial court pursuant to Texas statute asserting his incompetency to be executed, which had not been included in his previous habeas petition.¹⁵ The trial judge rejected the motion, holding Panetti had failed to raise substantial doubt of his competency to be executed.¹⁶

¹⁰ Brief of Petitioner-Appellant, *supra* note 1, at 10-11.

¹¹ *Id.* at 11.

¹² *Id.* at 15. Panetti assumed an alternate identity, referred to as “Sarge” when he testified at trial. *Id.* at 14.

Mr. Panetti made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries; exhibited sudden flights of ideas; asked questions that were incomprehensible or burdened with excessive and extraneous detail; rambled incessantly; perseverated; recited senseless, fragmented aphorisms and anecdotes; badgered the judge, the prosecuting attorney, and witnesses; and was unable to control his behavior despite the judge’s repeated efforts. *Id.*

In addition, Panetti proceeded to represent himself at the murder trial wearing cowboy attire and applied for over two-hundred subpoenas, including John F. Kennedy, Jesus, and the Pope. *Id.* at 10-11.

¹³ *Id.* Panetti then requested a waiver of his right to direct appeal. *Id.* The judge denied this request and appointed counsel to represent Panetti on direct appeal. *Id.*

¹⁴ *Panetti*, 127 S. Ct. at 2844. Panetti filed his first state habeas petition in 1999 and asserted fourteen grounds for relief, including incompetency to waive counsel and stand trial, but failed to allege his incompetency to be executed. *Panetti v. Dretke*, 401 F. Supp. 2d 702, 703 (W.D. Tex. 2004) [hereinafter *Dretke I*]. Panetti filed this petition pursuant to 28 U.S.C. § 2254 (1996). The petition was denied and Panetti then filed a federal habeas petition asserting the same fourteen grounds for relief. Brief of Respondent-Appellee at 5, *Panetti v. Quarterman*, 127 S. Ct. 2842, No. 06-6407 (Mar. 29, 2007). The federal district court, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court all rejected the petition. *Panetti*, 127 S. Ct. at 2844.

¹⁵ *Id.* Panetti referred to the Texas Code of Criminal Procedure Art. 46.05(h)(i), (ii), requiring a defendant claiming incompetency to be executed must not understand he/she is to be executed imminently, and the reason for that execution. Panetti’s attorney claimed he understood the State’s reason for execution, but believed that reason was a sham. Panetti believed he was being executed to prevent him from preaching the gospel. *Dretke I*, 401 F. Supp. 2d at 708.

¹⁶ *Dretke I*, 410 F. Supp. 2d at 703.

Despite these rejections, Panetti's counsel filed a second application for a federal writ of habeas corpus alleging Panetti's incompetence to be executed.¹⁷ The federal district court stayed Panetti's execution, and the state trial court appointed two mental health experts who filed a joint report declaring Panetti was aware of, and had the capacity to, understand the reason for his imminent execution.¹⁸ Based on these findings, Panetti's counsel requested an evidentiary hearing.¹⁹ The state court, however, refused and found Panetti competent to be executed.²⁰ Panetti then went back to the federal district court to challenge the court's refusal to hold an evidentiary hearing.²¹

Despite the district court's *de novo* review, the district court relied on the Fifth Circuit's competency-to-be-executed standard, which requires an individual to both know of his looming execution and the reason for it.²² While Panetti did not believe the State's purported reason for executing him, the court found him aware of his impending execution, thereby satisfying the requisite Fifth Circuit standard.²³

After the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision, Panetti sought an appeal from the United States Supreme Court, which reversed the Fifth Circuit in a five-to-four decision.²⁴ The

¹⁷ *Dretke I*, 401 F. Supp. 2d at 703. Panetti filed this second application on January 26, 2004. *Id.* A claim of incompetency to be executed refers specifically to the case *Ford v. Wainwright*, 477 U.S. 399 (1986). See *infra* notes 64–77 and accompanying text.

¹⁸ *Panetti*, 127 S. Ct. at 2844; *Panetti v. Dretke*, 448 F.3d 815, 816 (5th Cir. 2006), [hereinafter *Dretke II*].

¹⁹ *Dretke II*, 448 F.3d at 816.

²⁰ *Id.* The state court made its determination of competency based on the aforementioned report drafted by the state-appointed psychiatrists. *Id.*

²¹ *Id.* Panetti filed a federal habeas petition pursuant to 28 U.S.C. § 2254, and it is in the § 2254 petition that Panetti sought to resolve with the federal district court. *Panetti*, 127 S. Ct. at 2844.

²² *Dretke I*, 401 F. Supp. 2d at 709 (citing *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995)). The United States District Court for the Western District of Texas reviewed the case *de novo* since it found the state court's failure to hold a competency hearing constituted a violation of Texas criminal code. *Dretke I*, 401 F. Supp. 2d at 704. This decision was handed down on July 20, 2004. *Id.* Article 46.05 of the Texas criminal code, as referenced by the court, deals specifically with competency to be executed. TEX. CODE CRIM. PROC. ANN. ART. 46.05 (Vernon 2001). Article 46.05(f) requires that if a defendant can make a substantial showing of incompetency, the court must order psychiatric evaluations by at least two mental health experts. *Id.* In addition, 46.05(e) states if a defendant has been previously found competent, then a presumption of competency arises and the defendant is not entitled to a hearing unless the defendant can show there has been a substantial change in circumstances. *Id.*

²³ *Dretke I*, 401 F. Supp. 2d at 712.

²⁴ *Dretke II*, 448 F.3d at 821; *Panetti*, 127 S. Ct. at 2852.

Supreme Court determined the state court had erred when it failed to provide constitutionally required procedures to Panetti.²⁵ The Court also found the Fifth Circuit's standard, which requires an individual to both know of his looming execution and the reason for it, to be overly restrictive.²⁶

This case note evaluates the impact of *Panetti v. Quarterman*. First, the case note examines the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on the habeas corpus process, including, specifically, the requirements of filing second or successive petitions.²⁷ Next, it discusses the relationship between insanity and the death penalty.²⁸ Third, this note walks through the principal case and the rationale the Court used in determining the Fifth Circuit erred in its application of *Ford v. Wainwright*.²⁹ Finally, it analyzes the interpretation of the "second or successive" language in AEDPA, the standards for determining when a prisoner is incompetent to be executed, and whether the United States Supreme Court succeeded in providing a clearer standard for making this determination.³⁰ This note proposes that while the Court ultimately came to the right conclusion, efforts to identify a bright-line rule for defining the standards of AEDPA and determine competency are still unclear. The Court also failed to provide guidance to lower courts likely to deal with similar issues in the future.

BACKGROUND

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)— The Beginning

On April 24, 1996, President Clinton signed AEDPA into law.³¹ Among other things, AEDPA meant to restrict a prisoner's ability to seek relief through a writ of habeas corpus.³² This Act drew both passionate support and harsh criticism.³³ Proponents of habeas reform argued the bill was essential in rectifying prisoners' continued abuse of the writ system by preventing the filing of numerous and frivolous claims.³⁴ Conversely, opponents of reform contended many poor

²⁵ *Panetti*, 127 S. Ct. at 2848.

²⁶ *Id.*

²⁷ Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, PL 104-132 (1996). See *infra* notes 31–60 and accompanying text.

²⁸ See *infra* notes 61–80 and accompanying text.

²⁹ See *infra* notes 81–123 and accompanying text.

³⁰ See *infra* notes 124–195 and accompanying text.

³¹ *Felker v. Turpin*, 518 U.S. 651, 656 (1996). Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, PL 104-132 (1996) [hereinafter AEDPA].

³² Lisa M. Seghetti & Nathan James, *Federal Habeas Corpus Relief: Background, Legislation, and Issues*, CRS Report for Congress (RL 33259), 1 (Feb. 1, 2006).

³³ *Id.* at 2.

³⁴ *Id.*

defendants failed to receive adequate representation and the writ of habeas corpus allowed those defendants the opportunity to obtain justice.³⁵ These opponents argued the proposed restrictions would disproportionately affect offenders who could not afford adequate representation, resulting in injustice.³⁶

AEDPA made significant changes to American habeas corpus law.³⁷ The Act contains numerous procedural provisions related to federal habeas corpus.³⁸ The most significant changes, however, dealt with the procedures for filing a second or successive petition for habeas relief.³⁹

“Second or Successive” Petitions under AEDPA

AEDPA’s passage in 1996 stripped the courts of discretionary power to hear “second or successive” petitions.⁴⁰ According to AEDPA, a court must dismiss a “second or successive petition” unless it falls under one of two narrow exceptions.⁴¹ Under the first exception, the claim must rely on a new constitutional standard; under the second exception, there must be a showing the facts underlying the claim could not have been discovered prior and those facts would establish that the defendant would not have been found guilty of the crime.⁴² In addition, a defendant must now seek, and obtain, authorization from the appropriate appellate court before he or she may file a “second or successive” petition in district court.⁴³

Shortly after AEDPA’s passage, the United States Supreme Court heard *Felker v. Turpin*.⁴⁴ *Felker* became the first case decided by the Supreme Court addressing

³⁵ *Id.*

³⁶ *Id.*

³⁷ James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001).

³⁸ Seghetti, *supra* note 32, at 5. AEDPA made some significant changes to the previous law. *Id.*

³⁹ David P. Saybolt, Jo-Ellyn Sakowitz Klein, Matthew Umhofer, & Amanda Amann, *Habeas Relief for State Prisoners*, 85 GEO. L.J. 1507, 1510-11, 1531 (April 1997).

⁴⁰ Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1122 (1998); *see infra* notes 41–43 and accompanying text.

⁴¹ *Id.* at 1122-23.

⁴² *Id.*

⁴³ Saybolt, *supra* note 39, at 1531.

⁴⁴ *Felker v. Turpin*, 518 U.S. 651, 651 (1996). The petitioner, Ellis Felker, received the death penalty after his conviction of a waitress’s rape and murder in 1981. *Id.* at 655. The Georgia Supreme Court affirmed both the conviction and execution, and the United States Supreme Court denied certiorari. *Id.* Felker then filed a petition for a writ of habeas corpus, but the federal district

the new “second or successive” restrictions.⁴⁵ The Court held AEDPA prohibited the Court from adjudicating claims such as this because AEDPA contained no reference to the Court’s authority to undertake habeas petitions originally filed in the Supreme Court.⁴⁶ In addition to the holding, the Court indicated the newly adopted restrictions on “second or successive” petitions resulted in a modified rule aimed at preventing “abuse of the writ.”⁴⁷

Two years later, the United States Supreme Court again interpreted AEDPA in the context of “second or successive” petitions in *Stewart v. Martinez-Villareal*.⁴⁸ In his federal habeas petition, the defendant asserted his incompetency to be executed under *Ford v. Wainwright*.⁴⁹ The district court dismissed the defendant’s claim as premature because execution was not yet imminent.⁵⁰ The United States Supreme Court determined that while the defendant had requested that the courts rule on his *Ford* claim on two separate occasions, these did not qualify as two separate applications because at the time each claim ripened, the claim had been adjudicated.⁵¹ The Court found the implications of defining Martinez-Villareal’s claim as a “second or successive” application too overreaching, and found such

court denied the petition. *Id.* at 656. The United States Court of Appeals for the Eleventh Circuit affirmed, and the United States Supreme Court denied certiorari. *Id.*; *Felker v. Zant*, 502 U.S. 1064, *cert. denied*. On April 24, 1996, President Clinton signed AEDPA into law, containing numerous changes to federal habeas corpus law. *Felker*, 518 U.S. at 656. On May 2, 1996, *Felker* filed a motion for a stay of execution and a motion for permission to file a second or successive habeas petition. *Id.* at 657. *Felker* made this motion pursuant to 28 U.S.C. § 2254 (1996). *Id.* The Eleventh Circuit denied both motions and held that because *Felker* raised claims in the second application which he neglected to raise in the first, he failed to meet the standards set forth by AEDPA. *Id.* at 658; 28 U.S.C. § 2244(b)(2) (1996).

⁴⁵ Stahlkopf, *supra* note 40, at 1125.

⁴⁶ *Felker*, 518 U.S. at 661.

⁴⁷ *Id.* at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467 (1991)).

⁴⁸ *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). The jury convicted Martinez-Villareal, the defendant, on two counts of first-degree murder and sentenced him to death. *Id.* at 639.

⁴⁹ *Id.*; *Ford v. Wainwright*, 477 U.S. 399 (1986). Martinez-Villareal unsuccessfully appealed his conviction and sentence, and proceeded to file a series of habeas petitions in state court. *Stewart*, 523 U.S. at 640. The court denied all of the petitions. *Id.* Martinez-Villareal also filed three petitions in federal court which were also dismissed because he failed to exhaust available state remedies. *Id.* Not until his fourth petition for federal habeas relief did Martinez-Villareal raise his *Ford* claim of incompetency to be executed. *Id.* In *Ford v. Wainwright*, a jury found Ford guilty of murder and sentenced him to death. *Ford*, 477 U.S. at 399. Ford failed to raise a claim on incompetence to be executed at trial or sentencing, but began displaying behavioral changes indicating a mental disorder. *Id.* After an evaluation by court-appointed psychiatrists, the governor signed the death warrant. *Id.* The Supreme Court granted certiorari and found the State’s procedures for determining sanity to be lacking and reversed the decision of the lower court. *Id.* at 417-18.

⁵⁰ *Stewart*, 523 U.S. at 640, 644; Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 747 (2002).

⁵¹ *Stewart*, 523 U.S. at 643.

an interpretation would prevent Martinez-Villareal from attaining federal habeas review.⁵² Therefore, the Court determined the subsequent application did not fall under the prohibition on “second or successive” petitions.⁵³

While *Stewart v. Martinez-Villareal* appears to find a way around the “second or successive” requirement, the holding itself is narrow.⁵⁴ The Court limited its opinion to the specific and unique facts of the case.⁵⁵ Martinez-Villareal was only able to circumvent these seemingly clear requirements because he raised his *Ford* claim initially, and the district court had dismissed the claim due to its premature nature.⁵⁶ The Court’s interpretation was not broadly applicable.⁵⁷

Despite the Court’s consideration of several cases involving “second or successive” habeas petitions, no clear interpretation has emerged to aid lower courts in determining what qualifies as a “second or successive” claim under AEDPA.⁵⁸ The Court continues to evaluate whether a claim is “second or successive” on a case-by-case basis.⁵⁹ The Court weighs the judicial efficacy against the infringement on the individual’s rights guaranteed by the Constitution or established Supreme Court precedent.⁶⁰

The Eighth Amendment, Insanity, and the Death Penalty

The Supreme Court’s death penalty jurisprudence is extensive, particularly in regard to the death penalty as it relates to insanity. Common law recognized executing an insane person would not satisfy the goals of deterrence or retribution.⁶¹ In addition, the Court has consistently recognized the execution of the insane

⁵² *Id.* at 645.

⁵³ *Id.*

⁵⁴ Stahlkopf, *supra* note 40, at 1133.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Panetti*, 127 S. Ct. at 2855.

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ Eric M. Kniskern, *Does Ford v. Wainwright’s Denial of Executions of the Insane Prohibit the State From Carrying Out its Criminal Justice System?*, 26 S.U. L. REV. 171, 171 (1999). Sir Edward Coke, often referenced in relation to the value of executing a person deemed insane, stated, “[b]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream humanity and cruelty, and can be no example to others.” *Ford*, 477 U.S. at 407 (quoting Sir Edward Coke, 3 E. Coke, Institutes 6 (6th ed. 1680)).

offends the conscience.⁶² The Court developed such policies on sanity and its relationship to the death penalty through cases spread out over the course of a century. Despite the Court's long history in considering death penalty cases, *Gregg v. Georgia*, decided in 1976, became one of the first cases addressing the Eighth Amendment as it related to the death penalty and held the imposition of the death penalty for the crime of murder does not, under any circumstances, violate the Eighth or Fourteenth Amendments of the Constitution.⁶³

The Court again took on the issue of the death penalty's constitutionality in 1986 in *Ford v. Wainwright*.⁶⁴ In 1974, Ford's murder conviction led to a sentence of death for his crimes.⁶⁵ Ford failed to raise claims of incompetence at the time of the murder, the trial, or the sentencing; shortly thereafter, Ford began to display behavioral changes indicative of a mental disorder.⁶⁶ The governor, who had the ultimate authority to determine competency, signed the death warrant and the state court denied Ford's request for a new competency hearing.⁶⁷ The United States Supreme Court determined Ford was entitled to an evidentiary hearing on the question of his competency.⁶⁸ Referring to the repugnant practice of executing an insane prisoner numerous times throughout the opinion, the Supreme Court found Florida's procedures for determining sanity to be lacking and reversed and remanded the decision.⁶⁹ In addition, the Court clearly indicated the repulsive nature of imposing the death penalty on one who, because of his mental illness, cannot understand the reasons for, or the implications of, his death sentence.⁷⁰

⁶² *Ford*, 477 U.S. at 409. "[N]o less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.*

⁶³ *Gregg v. Georgia*, 428 U.S. 153, 153-54 (1976); Anthony A. Avey, *Criminal Law—Cruel and Unusual Punishments—Use of Excessive Physical Force Against An Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury*, 24 ST. MARY'S L.J. 539, 545 (1993). In *Gregg*, the defendant, sentenced to death after a jury conviction on two counts of robbery and two counts of murder, challenged the constitutionality of the death sentence. *Gregg*, 428 U.S. at 153. *Gregg* argued the death penalty violated the Eighth Amendment. *Id.* at 153-54.

⁶⁴ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁶⁵ *Id.* at 399.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 400.

⁶⁹ *Ford*, 477 U.S. at 417-18.

⁷⁰ *Id.* at 417.

Ford continues as the principal case in the execution of the insane.⁷¹ Although a landmark decision, the Court failed to issue a majority opinion in *Ford*; instead, there existed only a four-Justice plurality.⁷² Perhaps the most oft-referenced portion of *Ford* is the concurrence submitted by Justice Powell.⁷³ Justice Powell specifically spoke to the death penalty's retributive value.⁷⁴ He wrote the value of the death penalty lies in the defendant's awareness and understanding of its existence and purpose.⁷⁵ Justice Powell's concurrence offers a more limited holding of the standard for an execution.⁷⁶

[O]nly if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold 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.⁷⁷

While *Ford* continues as the foremost opinion on the execution of the insane, the evolution of court cases involving this issue did not end with the *Ford* decision. For instance, in 1992, the Supreme Court of Louisiana heard *State v. Perry*.⁷⁸ The central issue in that case focused on whether a State can forcefully medicate a prisoner deemed incompetent in order to constitutionally carry out a death sentence.⁷⁹ The Supreme Court of Louisiana held that forcibly medicating

⁷¹ Rhonda K. Jenkins, *Fit To Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 157 (1995). Justice Powell stated the following test that both state and federal courts have continued to adhere: "[T]he 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." *Id.* (quoting *Ford*, 477 U.S. at 422 (Powell, J. concurring)).

⁷² See *Panetti*, 127 S. Ct. at 2856.

⁷³ *Id.* at 2855-56. The Court acknowledged there was only a four-Justice plurality in *Ford*. *Id.* at 2855. Justice Powell's concurrence offered a more "limited holding." *Id.* at 2856. Therefore the Court reasoned "[w]hen there is no majority opinion, the narrower holding controls." *Id.* (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

⁷⁴ *Ford*, 477 U.S. at 421 (Powell, J., concurring).

⁷⁵ *Id.* (Powell, J., concurring).

⁷⁶ *Panetti*, 127 S. Ct. at 2856. "Justice Powell's opinion constitutes 'clearly established' law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim." *Id.*

⁷⁷ *Ford*, 477 U.S. at 422 (Powell, J., concurring).

⁷⁸ *State v. Perry*, 610 So. 2d 746 (La. 1992).

⁷⁹ *Id.* at 747. Michael Perry, the defendant, convicted of murdering his mother, father, nephew and two of his cousins in 1983, received a death sentence in 1985. *Id.* at 748. The court summoned medical experts to evaluate Perry's competency to be executed and determined without the aid of antipsychotic medication, Perry could not understand the connection between his crimes and the ordered punishment. *Id.* The trial court ordered Perry continue to be given this medication, forcibly if necessary, to carry out the death penalty. *Id.* Perry appealed to the United States Supreme Court, who proceeded to vacate the decision of the trial court. *Id.* However, upon remand the trial court once again ordered that forcible medication continue. *Perry*, 610 So. 2d at 748. Perry then appealed again and the Supreme Court of Louisiana granted a writ to review. *Id.*

the defendant to avoid the constitutional prohibition on execution of the insane violated the defendant's constitutional rights.⁸⁰ It remains significant that cases involving the execution of the insane have continued to evolve beyond the rules set forth in *Ford v. Wainwright* and have comported with the prominent policy justifications of punishment.

PRINCIPAL CASE

Panetti v. Quarterman affirmed the *Ford* decision and went a step further in reiterating not only is executing a mentally-ill prisoner constitutionally prohibited, but the procedures afforded those prisoners must be adhered to, given the finality of the death penalty.⁸¹ The United States Supreme Court first concluded Panetti's claim of incompetence to be executed, addressed in the second habeas petition, was not barred under the provisions of AEDPA.⁸² In addition, the Court determined the State failed to afford Panetti the procedures granted to him by the United States Constitution.⁸³ Finally, the Court held Panetti's documented delusions should have been a factor in determining his competency to be executed.⁸⁴

Majority Opinion (Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer)

The Court began by addressing the jurisdictional issue.⁸⁵ This issue centered on AEDPA's required dismissal of second or successive habeas corpus applications.⁸⁶ The Court acknowledged Panetti had previously filed two habeas corpus applications in federal court.⁸⁷ But, the Court indicated the label of "second or successive" was not necessarily self-defining.⁸⁸ The Court concluded Congress did not intend AEDPA's "second or successive" language to apply in this unique circumstance.⁸⁹

⁸⁰ *Id.*

⁸¹ *Panetti*, 127 S. Ct. at 2861-62.

⁸² *Id.* at 2855.

⁸³ *Id.* at 2858.

⁸⁴ *Id.* at 2860.

⁸⁵ *Id.* at 2852.

⁸⁶ *Panetti*, 127 S. Ct. at 2852; 28 U.S.C. § 2254(b)(2) (1996).

⁸⁷ *Panetti*, 127 S. Ct. at 2852. The State maintained the full adjudication of Panetti's first application despite Panetti's failure to raise a *Ford* claim in the first application. *Id.* Although the second application raised a new *Ford* claim, 28 U.S.C. § 2254 required dismissal of second or successive claims. *Id.* The State, therefore, concluded the claim should be dismissed. *Id.*

⁸⁸ *Id.* at 2853.

⁸⁹ *Id.* The Court stated Congress did not intend AEDPA to apply to a situation such as Panetti's, in which a prisoner filed a *Ford*-based incompetency claim filed as soon as it became ripe. *Id.*

Congress designed AEDPA, in part, to promote judicial efficiency, but, according to the Court, interpreting the statutory language in self-defining terms counters this goal.⁹⁰ The State's proffered interpretation, asserted the Court, effectively requires prisoners to file premature claims or lose them altogether.⁹¹ The Court declared *Ford*-based incompetency claims may not become ripe until after the time to file a federal habeas petition has elapsed.⁹² An execution may not be imminent until after that time.⁹³ Furthermore, the mental conditions of prisoners often deteriorate over time.⁹⁴ Specifically, competency-to-be-executed claims are unripe at the beginning stages of the trial and, therefore, it is appropriate for such prisoners to wait for the claim to ripen before initiating the petition.⁹⁵

While the Court opined as to when a *Ford*-based claim may become ripe and how that correlates with the "second or successive" language of AEDPA, it failed to provide a clear interpretation of "second or successive."⁹⁶ Instead, the Court argued for the existence of exceptions, and held the bar on "second or successive" applications did not apply to a *Ford*-based claim brought for the first time once it became ripe, despite the fact a prisoner may have already filed a previous federal habeas corpus petition.⁹⁷ According to the Court, such an interpretation would have the practical effect of stripping prisoners of their right to have unexhausted claims reviewed by federal courts.⁹⁸

The Court next addressed whether the state court properly provided Panetti with the procedures outlined in the Eighth and Fourteenth Amendments.⁹⁹ The Court determined the state court's failure to properly apply those procedures required under *Ford* resulted in an erroneous application of established law.¹⁰⁰ The Court referred directly to *Ford's* four-Justice plurality indicating if a question arises concerning a prisoner's sanity and execution, then courts must investigate and resolve this fact with the utmost regard for discovering the truth.¹⁰¹ The

⁹⁰ *Id.* at 2854.

⁹¹ *Id.*

⁹² *Panetti*, 127 S. Ct. at 2852.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2855.

⁹⁶ *Id.*

⁹⁷ *Panetti*, 127 S. Ct. at 2855.

⁹⁸ *Id.* at 2854.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2855-56 (quoting *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986)).

[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.

state court failed to provide the proper procedures to Panetti when it determined Panetti's competency based strictly on the court-appointed psychiatrists' report, and then, again, failed to provide Panetti with the opportunity to respond by cross-examining the psychiatrists.¹⁰²

The Court then turned briefly to the issue of deference to the lower court's determination of sanity.¹⁰³ Despite the aforementioned failures of the lower courts, the Court interpreted AEDPA to allow a federal court to grant habeas relief if the state court's decision resulted in an unreasonable application of the law.¹⁰⁴ If such an unreasonable application occurs, the federal court must evaluate the claim without deference to the state court.¹⁰⁵ Thus, in this situation, the state court's competency determination, based on the report of the court-appointed psychiatrists, becomes irrelevant, and the federal court evaluates the claim *de novo*.¹⁰⁶

The Court then addressed the question of whether the Eighth Amendment permits the execution of an inmate who cannot understand the reason for his execution.¹⁰⁷ The United States Court of Appeals for the Fifth Circuit indicated the competency standard rests on the prisoner's awareness of the pending execution and the reason the execution is being carried out.¹⁰⁸ The competency standard, as interpreted by the Fifth Circuit, required Panetti only to be aware of his execution and the State's purported reason for that execution.¹⁰⁹ The Court found the Fifth Circuit's standard too restrictive, and thus a violation of the Eighth Amendment.¹¹⁰ This interpretation, suggested the Court, put the principles of *Ford* at risk.¹¹¹ Accordingly, the Fifth Circuit should have considered Panetti's contention that he could not comprehend the reasoning behind his pending execution.¹¹²

Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. *Id.*

¹⁰² *Panetti*, 127 S. Ct. at 2857

¹⁰³ *Id.* at 2858-59.

¹⁰⁴ *Id.* at 2858; *see also* 28 U.S.C. § 2254(d)(1).

¹⁰⁵ *Panetti*, 127 S. Ct. at 2858; *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

¹⁰⁶ *Panetti*, 127 S. Ct. at 2859.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2860 (citing *Barnard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994)).

¹⁰⁹ *Id.* at 2860.

¹¹⁰ *Id.*

¹¹¹ *Panetti*, 127 S. Ct. at 2861. The Court determined the interpretation that "deems delusions relevant only with respect to the State's announced reason for a punishment of the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate" put the principles set forth in *Ford* at risk. *Id.*

¹¹² *Id.* at 2862.

While the Court rejected the standard articulated by the Fifth Circuit, it declined to declare a bright-line rule applicable to all competency determinations.¹¹³ It reversed and remanded the case to provide the district court with an opportunity to further evaluate Panetti's incompetency claims.¹¹⁴

Dissenting Opinion (Justice Thomas, with Chief Justice Roberts and Justices Scalia and Alito joining)

The dissenters argued AEDPA required the dismissal of Panetti's claim because he did not raise his *Ford*-based claim until his second habeas application.¹¹⁵ Specifically, the dissent directed attention to the provision of AEDPA that requires permission from a court of appeals before an applicant may file a second or successive federal habeas application.¹¹⁶ Panetti admitted he neither sought nor received permission from the court of appeals to file the application.¹¹⁷ The dissenters asserted there was no way around seeing Panetti's second federal habeas application as anything but a violation of AEDPA and the Court should adopt the plain meaning of "second or successive."¹¹⁸

The dissent further asserted the Court lacked jurisdiction under AEDPA to even consider Panetti's claim.¹¹⁹ The dissent reasoned that even if such jurisdiction did exist, the state court did not unreasonably apply federal law.¹²⁰ In *Ford*, the dissent articulated, the issue was the existence of actual knowledge, and not the existence of a rational understanding.¹²¹ Therefore, the dissent chose not to address the accuracy of the Fifth Circuit's standard.¹²² The dissent concluded the Court misinterpreted AEDPA, refused to defer to the state court, and rejected the Fifth Circuit's interpretation without further constitutional analysis, and, therefore, decided the case incorrectly.¹²³

¹¹³ *Id.*

¹¹⁴ *Id.* at 2863.

¹¹⁵ *Id.* at 2864 (Thomas, J., dissenting); 28 U.S.C. § 2244(b)(2) (1996).

¹¹⁶ *Panetti*, 127 S. Ct. 2864 (Thomas, J., dissenting) (citing 28 U.S.C. § 2244(b)(3)).

¹¹⁷ *Id.* at 2864 (Thomas, J., dissenting).

¹¹⁸ *Id.* at 2867 (Thomas, J., dissenting).

¹¹⁹ *Id.* at 2873 (Thomas, J., dissenting). The dissenters indicated that because this was a second or successive petition, dismissal was required, and therefore the Court lacked jurisdiction. *Id.*

¹²⁰ *Id.* (Thomas, J., dissenting).

¹²¹ *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

¹²² *Id.* (Thomas, J., dissenting).

¹²³ *Id.* at 2874 (Thomas, J., dissenting).

ANALYSIS

This case does not revolve around whether or not it is permissible to execute a prisoner found insane.¹²⁴ Executing a legally insane individual has never been acceptable at common law, and is constitutionally prohibited by the Eighth Amendment.¹²⁵ Rather, the issues in this case center on the requisite competency standard to execute, preserving the death penalty's integrity, and reaffirming the judicial system's adherence to procedure.¹²⁶

This case note analyzes two topics the Court addressed in *Panetti*: second or successive petitions under AEDPA and the requisite competency standard to be executed.¹²⁷ This note also briefly addresses the Court's missed opportunity to provide the lower courts with a bright-line rule to determine competency.¹²⁸ In addition, the analysis offers that implicit in the Court's opinion in *Panetti v. Quarterman* was a message directed at lower courts regarding the importance of adherence to proper procedure in capital cases.¹²⁹ The analysis argues that while the Court ultimately came to the right conclusions, the Court failed in its efforts to provide lower courts with guidance in the form of any bright-line rules.

"Second or Successive" Habeas Petitions

Due to the changes made to habeas corpus law after the passage of AEDPA in 1996, as well as subsequent litigation in courts across the country, including the United States Supreme Court, many could foresee the problems that would eventually arise in the context of incompetency-to-be-executed claims.¹³⁰ Specifically, the problem involved the question of when a petitioner had to file such a claim.¹³¹ In order to guarantee the opportunity to raise a *Ford*-based claim, a prisoner had to preserve that claim in the first habeas petition, regardless of the claim's ripeness.¹³² Such a requirement struck many as unreasonable for years before the Court ever granted certiorari in *Panetti v. Quarterman*.¹³³

¹²⁴ *Id.* at 2848. The Court in *Panetti* quoted *Ford* and made clear that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 2848 (quoting *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)).

¹²⁵ *Id.*; Anthony Bishop, *Ford v. Wainwright: Insanity of the Death Row Inmate—A Second Chance*, 11 AM. TRIAL ADVOC. 311, 318-19 (1988).

¹²⁶ *Panetti*, 127 S. Ct. at 2847-48.

¹²⁷ See *infra* notes 129-186 and accompanying text.

¹²⁸ See *infra* notes 187-190 and accompanying text.

¹²⁹ See *infra* notes 191-195 and accompanying text.

¹³⁰ Stevenson, *supra* note 50, at 750.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

The *Panetti* Court's interpretation allows prisoners the right to exhaust their resources without clogging the court dockets with unripe and frivolous claims.¹³⁴ Prisoners should file claims ripe for adjudication in the first habeas application.¹³⁵ But the Court noted defense attorneys should not be expected to foresee the future deterioration of their clients' mental states so as to preserve a *Ford*-based claim.¹³⁶

Ultimately, the *Panetti* Court interpreted the statute in a reasonable manner.¹³⁷ In the context of this particular case, potential abuse of the writ on the part of Panetti was never an issue.¹³⁸ Thus, because Panetti filed his claim when it became ripe, the Court deemed Congress did not intend to bar a claim of this nature.¹³⁹ The State's interpretation of the statute, on the other hand, leads to unreasonable results, and, furthermore, to results that the Court rightly held Congress never intended.¹⁴⁰ In fact, the legislative history of AEDPA reveals Congress intended for prisoners to be provided with one full and fair opportunity to have their constitutional claims heard by the federal courts.¹⁴¹ It follows, then, that a prisoner should have that opportunity to fully and fairly present their claims, even if that claim arises in the second petition.¹⁴² Adopting the State's interpretation would force the defendant into a senseless decision by requiring the defendant to look into the future and assume his or her mental state would deteriorate over the course of time.¹⁴³ This would ultimately leave a defendant in a position to either lose the opportunity to raise his *Ford* claim, or, as predicted, file it in the first habeas petition and, therefore, risk having the claim dismissed as premature.¹⁴⁴

Given the purpose of AEDPA, judicial efficiency is certainly not promoted by requiring prisoners seeking habeas relief to simply throw in a *Ford* claim as a "placeholder" so as to preserve the claim on the off-chance the petitioner decides to pursue it at a later date.¹⁴⁵ In fact, doing so would not guarantee that the petitioner

¹³⁴ *Panetti*, 127 S. Ct. at 2855.

¹³⁵ *Id.*

¹³⁶ *Id.* at 2852.

¹³⁷ Michael Mello, *Executing the Mentally Ill: When is Someone Sane Enough to Die?* 22 FALL CRIM. JUST., 30, 40 (2007).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* The State's interpretation effectively requires defendants to file *Ford*-based claims prematurely, so as to preserve that claim on the off-chance that it may become applicable down the road. *Panetti*, 127 S. Ct. at 2854. If a prisoner failed to preserve this claim, it would be lost. *Id.*

¹⁴¹ Stevenson, *supra* note 50, at 772.

¹⁴² *Id.*

¹⁴³ *Id.* at 750.

¹⁴⁴ Mello, *supra* note 137, at 40.

¹⁴⁵ Stevenson, *supra* note 50, at 750.

would be able to revive that claim in a later habeas petition.¹⁴⁶ Habeas corpus rules provide the State with the opportunity to motion for summary judgment if claims within a habeas petition are not supported by adequate facts.¹⁴⁷ Thus, if a petitioner files a *Ford*-based claim simply for the purpose of preserving the claim for a later date, despite that claim not being ripe, the State will likely move for summary judgment.¹⁴⁸ The initial habeas petition, then, will have been denied on the merits, and the provisions of AEDPA would then preclude the petitioner from raising that claim in a “second or successive” petition.¹⁴⁹ Therefore, despite having preserved that claim at an unripe stage, it would be lost.¹⁵⁰

The dissent, which advocated that the Court did not have jurisdiction to adjudicate Panetti’s claim due to the “second or successive” restrictions of AEDPA, is disturbing.¹⁵¹ This disturbance lies in the dissent’s practical application regarding those prisoners seeking to raise *Ford* claims.¹⁵² It simply makes little sense to require prisoners to raise unripe claims in a first habeas petition for the sake of preserving the claims.¹⁵³ In addition, the dissent seems to overlook the fact counsel will likely be unaware of the fact they must raise these unripe claims, which will then result in the loss of valid and ripe incompetency-to-be-executed claims.¹⁵⁴ The Court’s conclusion that the insertion of a pro forma *Ford* claim is unreasonable ultimately preserves the purpose of AEDPA and the opportunity for a prisoner to bring such a claim when it becomes ripe.¹⁵⁵

In regard to the qualification of a habeas petition as “second or successive,” the Court’s decision in *Stewart v. Martinez-Villareal* is enlightening. In *Stewart*, the Court held, the defendant’s habeas petition did not fall under the purview of “second or successive” because the *Ford* claim had been raised in the first habeas

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 750-51; see 28 U.S.C. § 2244(b)(1) (1996).

¹⁴⁸ Stevenson, *supra* note 50, at 751.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 751.

¹⁵¹ Panetti, 127 S. Ct. at 2864 (Thomas, J., dissenting); Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 264 (2007) [hereinafter Bonnie I].

¹⁵² Bonnie I, *supra* note 151, at 263-64.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 264.

¹⁵⁵ Kyle P. Reynolds, “*Second or Successive*” *Habeas Petitions and Late-Ripening Claims After Panetti v. Quarterman*, 74 U. CHI. L. REV. 1475, 1493-94 (2007); Bonnie I, *supra* note 151, at 263. The Court identifies this purpose as furthering the “principles of comity, finality, and federalism.” Panetti, 127 S. Ct. at 2854 (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).

petition, and then simply renewed in a second petition.¹⁵⁶ Therefore, the renewed petition was really only a continuation of the first, and did not require dismissal.¹⁵⁷ Despite the difference in the filing order of the *Ford* claim, the Court's decisions in both *Stewart* and *Panetti* addressed the impractical consequences of interpreting the language of "second or successive" to constitute a non-negotiable ban on a habeas petition filed secondly or successively.¹⁵⁸ The cases are not identical, but the decision in *Panetti* is consistent with the decision in *Stewart*. The Court in *Stewart* did not consider what to do when a prisoner raises a *Ford* claim for the first time in a second habeas petition, having already had the initial petition adjudicated on the merits.¹⁵⁹ However, in *Stewart*, the Court found it unreasonable to prohibit courts from ruling on a *Ford* claim once it becomes ripe, despite the dismissal of a previous habeas petition on a technicality.¹⁶⁰ Given this ruling, it does not make sense to then permit a court to refuse to rule on a *Ford* claim simply because the prisoner opted not to raise that unripe claim in his first petition.¹⁶¹ The Court, in *Panetti*, agreed.¹⁶²

Despite the dissent's assertions, arguing that a plain language reading of "second or successive" is required, many lower courts have addressed the issue of what kind of habeas petition falls within the purview of "second or successive."¹⁶³ While a consensus among the lower courts appears absent, the majority of lower courts that have undertaken the "second or successive" issue have interpreted AEDPA in a permissive manner.¹⁶⁴ The Court, in *Panetti*, followed the trend of the various courts of appeal and also interpreted AEDPA permissively—*Panetti*'s *Ford* claim, raised for the first time in a second petition, does not violate AEDPA's provisions because the claim was not ripe at the time of the first habeas application.¹⁶⁵ Furthermore, Congress did not intend for the restrictions on "second or successive" applications to apply to *Ford*-based claims.¹⁶⁶ Despite the fact the Court reached the right result, this rule is narrow and not widely applicable to the

¹⁵⁶ Jordan T. Stanley, "Deference Does Not Imply Abandonment or Abdication of Judicial Review": *The Evolution of Habeas Jurisprudence Under AEDPA and the Rehnquist Court*, 72 UMKC L. REV. 739, 748 (2004); *Stewart*, 523 U.S. at 645. The Court dismissed the initial claim as unripe. *Id.* at 645.

¹⁵⁷ *Stewart*, 523 U.S. at 645.

¹⁵⁸ *Id.* at 644; *Panetti*, 127 U.S. at 2852.

¹⁵⁹ Sarah A. Sulkowski, *The AEDPA and the Incompetent Death-Row Prisoner: Why Ford Claims Should Be Exempt From the One-Year and One-Bite Rules*, 6 LOY. J. PUB. INT. L. 57, 78 (2004).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Panetti*, 127 S. Ct. 2852.

¹⁶³ Reynolds, *supra* note 155, at 1487.

¹⁶⁴ *Id.*

¹⁶⁵ *Panetti*, 127 S. Ct. at 2855.

¹⁶⁶ Reynolds, *supra* note 155, at 1496.

various situations under which the “second or successive” requirement applies.¹⁶⁷ In fact, *Panetti* is not at all relevant to claims that fall outside of *Ford*.¹⁶⁸

Claims involving incompetency to be executed, in the context of AEDPA provisions, are not new.¹⁶⁹ In fact, as the drastic changes in habeas corpus law brought on by the passage of AEDPA in 1996 began to play out in the court system, it became clear what problems would arise in the future.¹⁷⁰ The lower courts have certainly not been uniform in their interpretation of AEDPA’s “second or successive” language.¹⁷¹ However, while the Court ultimately came to the right conclusion in allowing Panetti’s second habeas petition to move forward, the rule is narrow.¹⁷²

The Court’s Standard—Competency to be Executed

The Court arrives at the issue of competency to be executed toward the end of the opinion.¹⁷³ While the Court did make it clear Justice Powell’s concurrence remains controlling law, the Court conceded *Ford* failed to provide a patent threshold for competency.¹⁷⁴ Despite the lack of a comprehensible standard, the Court struck down the Fifth Circuit’s restrictive standard and asserted both that delusions were relevant, and that simple awareness of impending execution and the reason for that execution is insufficient.¹⁷⁵

The Court addressed the question of whether the Eighth Amendment allows the execution of a mentally ill individual incapable of understanding the reason for his execution.¹⁷⁶ The Court correctly ruled the Fifth Circuit’s standard too restrictive, and inconsistent with *Ford*.¹⁷⁷ The Fifth Circuit effectively ignored Panetti’s delusions because Panetti ultimately knew, though did not believe, that he was being executed for his crimes.¹⁷⁸ Ignoring this aspect of a prisoner’s competency, as the Court asserted in *Ford*, puts the penological goals of the death

¹⁶⁷ *See id.* at 1492.

¹⁶⁸ Reynolds, *supra* note 155, at 1496.

¹⁶⁹ Stevenson, *supra* note 50, at 741.

¹⁷⁰ *Id.* at 750.

¹⁷¹ *Id.* at 748-49.

¹⁷² Reynolds, *supra* note 155, at 1496.

¹⁷³ *Panetti*, 127 S. Ct. at 2859.

¹⁷⁴ *Eighth Amendment—Death Penalty—Execution of the Presently Incompetent*, 121 HAR. L. REV. 204, 209-10 (2007).

¹⁷⁵ *Id.* at 208-09.

¹⁷⁶ *Panetti*, 127 S. Ct. at 2859.

¹⁷⁷ *Eighth Amendment*, *supra* note 174, at 209; *Panetti*, 127 S. Ct. at 2860.

¹⁷⁸ *Panetti*, 127 S. Ct. at 2861.

penalty at risk—especially the goal of retribution.¹⁷⁹ Furthermore, the standard advocated by the Fifth Circuit is too restrictive because even those who are severely mentally ill may still be capable of understanding they will die for the crime(s) they committed.¹⁸⁰ This standard is insufficient.¹⁸¹

The dissent concentrated its attention on the procedural aspect of AEDPA, and whether the Supreme Court had the jurisdiction to undertake Panetti's claim, but failed to discuss the competency standard.¹⁸² The dissent opted, instead, to simply reject the Court's analysis on this constitutional issue.¹⁸³ The dissent does not, however, reject the logistical framework of *Ford*, which speaks volumes about the *Panetti* Court's conclusion.¹⁸⁴ *Ford* held that executing a prisoner who cannot comprehend why he is being put to death undermines the retributive goal of the death penalty.¹⁸⁵ If the *Panetti* Court continues with this logic, which it does, it would then follow that no penological purpose is served in executing an individual who cannot understand the ultimate reason for his imminent execution.¹⁸⁶ Relying on this framework, executing Panetti in his current mental capacity would undermine the purpose of the death penalty.

The Court Missed the Opportunity to Provide a Bright-Line Rule

The Court's adherence to procedure in this case is admirable, but, ultimately, *Panetti v. Quarterman*, as did *Ford v. Wainwright*, has left lower courts with little guidance as to a standard for determining incompetence.¹⁸⁷ The Court has, once again, passed on an opportunity to provide lower courts with a workable and substantive test for determining competency to be executed.¹⁸⁸ This is significant, at the very least, because of the pervasiveness of mental illness on death row, and the likelihood that a prisoner's mental state will deteriorate over time.¹⁸⁹ This case

¹⁷⁹ *Eighth Amendment*, *supra* note 174, at 210.

¹⁸⁰ Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution For A Better, More Compassionate Society*, 36 U.S.F. L. REV. 823, 824 (2002).

¹⁸¹ *Id.*

¹⁸² *Eighth Amendment*, *supra* note 174, at 209; *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

¹⁸³ *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

¹⁸⁴ *Eighth Amendment*, *supra* note 174, at 210.

¹⁸⁵ Gordon L. Moore, III, *Ford v. Wainwright: A Coda in the Executioner's Song*, 72 IOWA L. REV. 1461, 1477 (1987); *Ford*, 477 U.S. at 409.

¹⁸⁶ *Eighth Amendment*, *supra* note 174, at 210.

¹⁸⁷ Richard J. Bonnie, *Mentally Ill Prisoners On Death Row: Unsolved Puzzles For Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1171 (2005) [hereinafter Bonnie II]; *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹⁸⁸ Bonnie I, *supra* note 151, at 270.

¹⁸⁹ Bonnie II, *supra* note 187, at 1192. The percentage of death row prisoners suffering from mental illness could be as high as five to ten percent. *Id.*

appears to be a victory for the defendant only because the case was remanded to afford Panetti with the proper procedures; but, in fact, the only hard-and-fast rule the Court seems to commit to is that it cannot commit to a hard-and-fast rule.¹⁹⁰ Given the lack of a clear rule, there is still the chance Panetti will ultimately be executed.

A Message to the Lower Courts

Panetti v. Quarterman did not redefine the competency standard, nor did it unnecessarily expand the universe of what would be acceptable when inmates file second or successive habeas petitions.¹⁹¹ This case did, however, contain significant language on the procedural inadequacies afforded Panetti by the lower courts.¹⁹² Indeed, throughout the entirety of the *Panetti* litigation, the Texas courts and the Fifth Circuit demonstrated their “unwillingness” to afford Panetti the procedures due to him under the Constitution.¹⁹³ It appears to be more of a message to lower courts regarding similar death penalty cases.¹⁹⁴ The Court discussed the lackluster effort by the lower courts to adequately afford Panetti the processes due him as required by established United States Supreme Court law on several occasions throughout the opinion.¹⁹⁵

CONCLUSION

The United States Supreme Court came to the right conclusion. *Panetti* reaffirms the Court’s desire to provide those prisoners sentenced to death with every opportunity to defend themselves when their lives are on the line.¹⁹⁶ Death

¹⁹⁰ *Panetti*, 127 S. Ct. at 2862. “Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations.” *Id.*

¹⁹¹ *Id.* at 2853. The Court clearly indicates that the meaning of “second or successive” has evolved through case law, even cases that pre-dated the AEDPA. *Id.* The Court states that “[t]he statutory bar on ‘second or successive’ applications does not apply to a *Ford* claim brought in an application filed when the claims is first ripe.” *Id.* at 2855. In addition, the Court refers to Justice Powell’s concurring opinion in *Ford* and cites the relevant standard as “[o]nce a prisoner seeking a stay of execution has made a ‘substantial threshold showing of insanity,’ the protection afforded by procedural due process includes a ‘fair hearing’ in accord with fundamental fairness.” *Panetti*, 127 S. Ct. at 2856 (citing *Ford*, 477 U.S. at 426, 424). The Court did not reverse this standard, but asserted the Fifth Circuit’s application was too restrictive. *Id.* at 2860.

¹⁹² Karl Keys, *Panetti v. Quarterman: The Latest Installment of Goldilocks & Kennedy’s Capital Jurisprudence*, *Capital Defense Weekly* (Jun. 28, 2007) available at <http://capitaldefenseweekly.com/blog/2007/06/28/panetti-v-quarterman-the-latest-installment-of-goldilocks-kennedys-capital-jurisprudence/>.

¹⁹³ Bonnie I, *supra* note 151, at 258.

¹⁹⁴ Keys, *supra* note 192, at ¶ 1.

¹⁹⁵ *Panetti*, 127 S. Ct. at 2858, 2862.

¹⁹⁶ Bishop, *supra* note 125, at 335.

is irreversible, and while walking through the steps the system requires is often mind-numbing, these steps are necessary if one wishes to preserve the purpose for which the death penalty stands.

The narrow rule invoked by the Court regarding “second or successive” applications is not particularly useful to claims not involving incompetency to be executed. The lower courts in the United States would have been better guided had the Court articulated a more broadly applicable definition of “second or successive” claims. Instead, lower courts are left with a narrow interpretation applicable to a limited group of cases.

In addition, while the Supreme Court has effectively reiterated its position that inmates will be afforded their rights established by the Supreme Court law, the competency-to-be-executed standard remains unnecessarily vague. The Court indicated a rational understanding, rather than just awareness, is necessary, but failed to go any further. *Panetti* simply will not be remembered as a case articulating a clear and useful test for determining a prisoner’s competence to be executed.¹⁹⁷

Scott Panetti deserves to be punished for his crimes. But, if Panetti is incompetent to be executed, he should be afforded every opportunity the system allows to prove that. The Supreme Court correctly decided that the lower court’s expedited procedures were not good enough. Both the district court and the Fifth Circuit were too quick to cast aside Panetti’s claims of incompetence. Only once Panetti is afforded the procedures due to him can he, in good conscience, be executed for his crimes. Furthermore, only once those procedures are satisfied can the penological goals of the death penalty be preserved. *Panetti* is a reaffirmation of the Court’s loyalty to procedure, but only a ‘baby step’ toward developing a clear competency standard.

¹⁹⁷ Bonnie I, *supra* note 151, at 283.