

PANETTI v. QUARTERMAN: RAISING THE BAR AGAINST EXECUTING THE INCOMPETENT

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I. INTRODUCTION

The United States Supreme Court in *Panetti v. Quarterman*¹ held that the Constitution² forbids executing a mentally ill prisoner who cannot rationally understand the reason for the execution.³ In a decision hailed for better aligning law with medical science,⁴ the Court halted the execution of Scott Panetti, a severely ill Texas death row inmate who believes “that his imminent execution [is] part of a satanic conspiracy to prevent him from preaching the Gospel.”⁵ Notably, the Court in *Panetti* created an exception to the bar against second federal habeas corpus applications, raised the bar against executing the incompetent, and continued a trend narrowing the class of persons constitutionally eligible for execution.

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1. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

2. U.S. CONST. amend. VIII, XIV § 1.

3. *Panetti*, 127 S. Ct. at 2861–62.

4. See Todd J. Gillman and Diane Jennings, *Justices Block Execution of Texas Killer*, DALLAS MORNING NEWS, June 29, 2007, at 6A (quoting Ronald Honberg of the National Alliance on Mental Illness as stating that “[f]or once, law has caught up with medical science”). Several amicus briefs were filed on behalf of Panetti indicating the support of the medical establishment. See Brief for Amici Curiae American Psychological Association, American Psychiatric Association, and National Alliance on Mental Illness in Support of Petitioner, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407); Brief of Amicus Curiae in Support of Petitioner on Behalf of National Alliance for the Mentally Ill, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No.06-6407).

5. Brief for Petitioner at 18, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

II. A HISTORY OF MENTAL ILLNESS

The *Panetti v. Quarterman* opinion must be understood in the context of petitioner Scott Panetti's long history of severe mental illness, and the courts' failure to deal with him humanely or effectively. Panetti's counsel argued that the setting of an execution date exacerbated his already deeply-held paranoid belief in an "apocalyptic struggle with the devil."⁶ But these delusions did not emerge from a vacuum: "[e]vidence of incompetency runs like a fissure through every proceeding in this case."⁷

Panetti showed signs of mental illness as a teenager, and his condition worsened over the years, resulting in over a dozen hospitalizations.⁸ Once, Panetti's wife committed him after he performed "a ceremony to get rid of the devil during what he called the 'devil's birthday,'" burying the family's valuables in the yard and piling furnishings outside to cleanse them of the devil with water.⁹ After his wife separated from him, Panetti stopped taking antipsychotic medication. Shortly thereafter, he "shaved his head, dressed in camouflage combat fatigues, armed himself with a sawed-off shotgun and a deer rifle . . . and shot [his in-laws] at close range with the rifle in front of his wife and daughter."¹⁰

An absurd, tragic circus-trial ensued.¹¹ Seven months after being found competent to stand trial despite serious questions about his sanity,¹² Panetti experienced his "'April Fool's day revelation' that God had cured him of his schizophrenia," and he again quit taking medication and asked to represent himself at trial.¹³ Despite Panetti's obvious and serious illness, Judge Stephen B. Able granted Panetti's

6. *Id.* at 19.

7. *Id.* at 6.

8. *Id.* at 7 n.14 (noting Panetti was "hospitalized over a dozen times in numerous institutions for schizophrenia, schizoaffective disorder, bipolar disorder, depression, psychosis, auditory hallucinations, and delusions of persecution and grandiosity").

9. *Id.* at 20 n.13.

10. *Id.* at 7.

11. *See, e.g.*, Online Documentary: Executing the Insane: The Case of Scott Panetti (Texas Defender Service 2007), available at <http://www.texasdefender.org/TDSSStory.asp?ID=1> (providing first-hand accounts of the trial).

12. A second jury found Panetti competent after his first competency trial, reportedly at a 9-3 split in favor of finding incompetency, was declared a mistrial. Brief for Petitioner at 8 n.6, *Panetti*, 127 S. Ct. 2842 (2007) (No. 06-6407).

13. *Id.* at 10-11.

pro se representation request.¹⁴ Panetti pled not guilty by reason of insanity, telling the jury in his opening statement that only an insane person could prove insanity.¹⁵

Panetti's self-representation was disastrous. He subpoenaed John F. Kennedy, the Pope, and Jesus, along with 200 others.¹⁶ He dressed each day in a "Tom Mix" cowboy outfit complete with purple shirt, leather pants tucked into his cowboy boots, bandana around his neck, and a "big cowboy hat that hung on a string over his back."¹⁷ He consistently ignored Judge Able's orders, and incoherently fixated on irrelevant issues.¹⁸ Damningly, Panetti testified as "Sarge"—the militaristic persona who supposedly committed the murders.¹⁹ He engaged in an "often brutal cross-examination of his estranged wife, Sonja, forcing her to relive the murders in graphic detail." The jury convicted Panetti on September 21, 1995, and, primarily because they were "terrified" of his performance, sentenced him to death the next day.²⁰

Review of the trial verdict in Texas courts yielded no relief.²¹ In a federal habeas petition, Panetti, now represented by counsel, contested the reasonableness of the finding of competency to stand trial and the court's approval of pro se representation. In upholding the District Court affirmation of the trial verdict, the Fifth Circuit found that the state court's decision was not unreasonable.²² Using head-spinning logic, the court declared that because Panetti could "formulate a trial strategy" by pleading not guilty by reason of insanity, he was therefore sane and had a rational understanding of the proceedings.²³ So in this view, an insane pro se defendant finds

14. See Ralph Blumenthal, *Justices Block Execution of Delusional Texas Killer*, N.Y. TIMES, June 29, 2007, at A25.

15. Brief for Petitioner at 11, *Panetti*, 127 S. Ct. 2842 (2007) (No. 06-6407).

16. *Id.* at 11–12. Panetti later recanted the subpoena of Jesus because "Jesus Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that." *Id.*

17. *Id.* at 11 n.9.

18. During examination of a witness's opinion on belt buckles—the relevance of which Judge Able questioned—Panetti said that "it has to do with the difference between a rodeo hand and a buckaroo poet At rodeos cowboys make sure they look at your buckle without you looking at it." *Id.* at 13.

19. *Id.* at 14.

20. Brief for Petitioner at 11 n.9, *Panetti*, 127 S. Ct. 2842 (2007) (No. 06-6407).

21. In a harsh irony, just two months after being sentenced to death, Panetti was found incompetent to waive habeas counsel, and his request to waive direct appeal was rejected. *Id.* at 15 n.10.

22. *Panetti v. Cockrell*, 73 F. App'x 78, 2003 WL 21756365, at *4 (5th Cir. 2003).

23. *Id.* at *4.

himself in a Catch-22 that precludes insanity: if the defendant's claim is insanity, then he has a trial strategy and is therefore sane; but if the defendant does not raise an insanity defense, then that claim is obviously foreclosed.

III. PROCEDURAL HISTORY

Scott Panetti came within hours of lethal injection. With direct and collateral review complete on October 31, 2003, an execution date was set for February 5, 2004.²⁴ On December 10, 2003, counsel for Panetti filed a motion alleging incompetency to be executed under Texas state law, which was rejected by the trial court without a hearing.²⁵ As a result, Panetti's counsel requested a stay of execution in federal court and petitioned for writ of habeas corpus.²⁶ In light of evidence of Panetti's deteriorated mental condition,²⁷ the day before his scheduled lethal injection the District Court stayed Panetti's execution on February 4 pending further consideration in state court.²⁸

In what became key to Justice Kennedy's opinion in *Panetti v. Quarterman*, Judge Able behaved injudiciously when he reconsidered the competency finding. Panetti filed ten motions for Judge Able's consideration, including requesting funding for a mental health expert evaluation.²⁹ Judge Able denied two motions and said he would rule on the rest if two court-appointed experts found Panetti competent.³⁰ Counsel filed a motion to reconsider this decision.³¹ The judge not only failed to rule on this motion to reconsider, he also failed to rule—as explicitly promised—on the remaining motions after the state-appointed experts found Panetti competent.³² Without further explanation, the judge then concluded that Panetti had “to show, by a preponderance of the evidence, that he is incompetent to be

24. Brief for Petitioner at 2, *Panetti*, 127 S. Ct. 2842 (No. 06-6407).

25. *Id.* Under TEX. CODE CRIM. PROC. ANN. art. 46.05(a), “[a] person who is incompetent to be executed may not be executed.”

26. Brief for Petitioner at 2, *Panetti*, 127 S. Ct. 2842 (No. 06-6407).

27. Dr. Mark Cunningham, a clinical and forensic psychologist, and Law Professor David Dow, a post-conviction capital attorney, visited Panetti and concluded he suffered from schizophrenia or schizoaffective disorder. Brief for Petitioner at 19–20, *Panetti*, 127 S. Ct. 2842 (No. 06-6407).

28. Brief for Petitioner at 2, *Panetti*, 127 S. Ct. 2842 (No. 06-6407).

29. *Id.* at 2–3.

30. *Id.* at 3.

31. *Id.*

32. *Id.*

executed.”³³ Because state law precluded appeal of this decision, Panetti’s counsel pursued habeas relief in federal court.³⁴

The District Court applied the Fifth Circuit’s narrow interpretation of the *Ford v. Wainwright* standard to find Panetti competent to be executed.³⁵ In *Ford*, the Supreme Court held that the Eighth Amendment forbids executing the incompetent.³⁶ Applying the standard announced in *Ford*, the District Court noted that under circuit precedent “all we require is ‘that a person know the fact of his impending execution and the reason for it.’”³⁷ That is, so long as the condemned knows that he committed the crime, knows that the government is going to execute him, and knows that there is at least a pretext linking the two, he can be executed. As a result, delusions of the kind Panetti claims to experience, “even those which may result in a fundamental failure to appreciate the connection between the petitioner’s crime and his execution,” are irrelevant under the Fifth Circuit standard.³⁸ The Fifth Circuit upheld the district court’s decision, and the Supreme Court granted certiorari.³⁹

IV. LEGAL CONTEXT

A. *The Right Not To Be Executed While Incompetent*

The Supreme Court in *Ford v. Wainwright*⁴⁰ made two central holdings in blocking the execution of Alvin Ford. First, Justice Marshall writing for a majority held that the Eighth Amendment prohibits executing an insane prisoner. Second, Justice Powell in a controlling aspect of his concurrence held that under the Fourteenth

33. Brief for Petitioner at 4, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) (quoting JA at 99).

34. *Id.* at 4 n.2 (noting that Texas courts only review a finding of incompetence) (citing *Ex parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000)).

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

36. *Id.* at 409–10.

37. *Panetti v. Dretke*, 401 F.Supp.2d 702, 709 (W.D. Tex., 2004) (quoting *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) (citing *Barnard v. Collins*, 13 F.3d 871, 876 n.2 (5th Cir. 1994)).

38. *Id.* at 712.

39. *Panetti v. Dretke*, 448 F.3d 815, 821 (5th Cir. 2006) (holding that because the standard requires only awareness and not rational understanding, no inquiry beyond a finding of awareness is necessary), *cert. granted*, *Panetti v. Quarterman*, 127 S. Ct. 852 (mem.) (2007).

40. *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court found unconstitutional a competency determination made by the Governor of Florida, who had considered only the testimony of state-appointed psychiatrists. *Id.* at 403–04.

Amendment's Due Process Clause, a prisoner's interest in not being executed while insane cannot be deprived without a fair hearing.⁴¹

Writing for five Justices, Justice Marshall established the substantive right not to be executed while insane,⁴² firmly locating it in our common law heritage and the "natural abhorrence" felt towards executing the insane that "is evidently shared across this Nation."⁴³ Though he noted a number of justifications,⁴⁴ an essential reason was the lack of retributive value in "executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."⁴⁵

Though joining the majority's holding on the substantive right, Justice Powell wrote separately to define more narrowly the Due Process requirement for determining competency to be executed. Because his opinion is narrower on this point, it is controlling in this respect.⁴⁶ Justice Powell held generally that Due Process requires "fundamental fairness" that may differ with the circumstances.⁴⁷ In *Ford*, Alvin Ford had been deprived of at least 1) an "impartial" decision-maker⁴⁸ and 2) an "opportunity to be heard."⁴⁹ Justice Powell appeared particularly irked by the fact that the finding of competency was made "solely on the basis of the examinations performed by state-appointed psychiatrists," and that Ford had no chance to rebut this with his own expert testimony.⁵⁰

B. Federal Habeas Law

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in 28 U.S.C. § 2254, a federal court may grant

41. *Infra* note 46 and accompanying text.

42. Justice Marshall performed the three-part Eighth Amendment analysis. *Ford*, 477 U.S. at 405–06 (examining (1) original intent (citing *Solem v. Helm*, 463 U.S. 277, 28586 (1983)); (2) the "evolving standards that mark the progress of a maturing society," (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); and (3) "objective evidence of contemporary values," (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977))).

43. *Ford*, 477 U.S. at 401, 409 (citing twenty six states with statutes that bar executing the incompetent).

44. Justice Marshall noted that executing the insane "simply offends humanity;" that it serves no deterrent value; that insanity prevents a prisoner from assisting his defense; and that "madness is its own punishment." *Id.* at 407–09.

45. *Id.* at 409.

46. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

47. *Ford*, 477 U.S. at 424 (Powell, J., concurring).

48. *Id.* at 427.

49. *Id.* at 424 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

50. *Id.*

habeas relief regarding a state court's adjudication of a claim on the merits in two narrowly-defined situations."⁵¹ AEDPA generally limits petitioners to one bite at the apple, providing that "[a] claim presented in a second or successive habeas corpus application under § 2254 that was not presented in a prior application shall be dismissed," unless it meets one of two narrow exceptions.⁵² Yet the Court has not always literally applied this bar to "second or successive" applications.

Two cases reveal the Court's willingness to interpret § 2244 creatively in situations where it seems necessary. In *Stewart v. Martinez-Villareal*,⁵³ the Court held that a prisoner's previously dismissed *Ford* claim could be re-opened upon ripening at a later date. Though the *claim* was re-opened, the Court reasoned that there was still only one *application* for relief, thus keeping the decision within the language of § 2244.⁵⁴ Chief Justice Rehnquist noted that a contrary holding would create perverse implications because either state courts would be forced to rule on *Ford* claims prematurely or prisoners would be forced to foreclose their *Ford* claims.⁵⁵ The Court sought to avoid an interpretation of AEDPA that would result in no review of a prisoner's viable constitutional claim.⁵⁶ Through similar reasoning, in *Slack v. McDaniel*,⁵⁷ the Court held that a literal second § 2254 application is not "second or successive" when the petitioner's first application was dismissed for failure to exhaust state remedies.⁵⁸ Thus, in each instance the Court stretched the meaning of § 2244 without explicitly excepting to it.

V. HOLDING

In reversing the Fifth Circuit, Justice Kennedy, writing for the Court, made three central holdings in *Panetti v. Quarterman*.⁵⁹ First, the Court held it had jurisdiction over Panetti's claim because "[t]he

51. 28 U.S.C. § 2254(d)(1) (2008). These two situations are if it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*

52. 28 U.S.C. § 2244(b)(2) (2008).

53. *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

54. *Id.* at 643.

55. *Id.* at 644.

56. *Id.* at 645.

57. *Slack v. McDaniel*, 529 U.S. 473 (2000).

58. *Id.* at 486.

59. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2848 (2007) (opinion by Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, J.J. Dissenting opinion by Thomas, J., joined by Roberts, C.J., and Scalia and Alito, J.J.).

statutory bar on ‘second or successive’ applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe.”⁶⁰ Second, the Court held that the state court failed to provide Panetti even “rudimentary process” in determining his competency to be executed, in violation of Supreme Court law as annunciated in *Ford v. Wainwright*, so that no deference is due the state court finding of competency.⁶¹ Third, the Court held that the Fifth Circuit interpretation of *Ford* is “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.”⁶²

A. *Jurisdiction*

The first holding carved a novel exception into AEDPA’s bar against “second or successive” habeas applications.⁶³ Noting that “[t]he phrase ‘second or successive’ is not self-defining,” the Court discussed case-law, practicality, the interests of habeas petitioners, and AEDPA’s purposes in order to define it.⁶⁴ Though Justice Kennedy invoked the reasoning of *Stewart v. Martinez-Villareal* and *Slack v. McDaniel*, neither case addressed Panetti’s situation⁶⁵—and *Martinez-Villareal* explicitly denied that it covered a claim brought in a second application for the first time upon ripening.⁶⁶ Whereas in *Martinez-Villareal* a second application was allowed because it reopened a previously unripe claim, Panetti raised no *Ford* claim in his initial habeas application that could be reopened. So although those cases expanded the meaning of “second or successive,” Justice Kennedy here simply concluded that § 2244 was not meant to apply to Panetti’s *Ford* claim.

As in *Martinez-Villareal* and *Slack*, the Court recognized the need “to look to the ‘implications for habeas practice’ when interpreting § 2244.”⁶⁷ Practically, barring Panetti’s claim would require habeas petitioners to bring *Ford* claims in their initial habeas application,

60. *Id.* at 2855.

61. *Id.* at 2858.

62. *Id.* at 2860.

63. 28 U.S.C. § 2244(b)(2) (2008). Panetti’s application did not meet either of the explicit exceptions to this bar. See *id.*, § 2244(b)(2)(A-B).

64. *Panetti*, 127 S. Ct. at 2853.

65. See *Martinez-Villareal*, 523 U.S. at 645 (holding that re-opened *Ford* claim is not a “second or successive” application); *Slack*, 529 U.S. at 486 (holding a second application brought after dismissal for failure to exhaust state remedies is not “second or successive”).

66. *Martinez-Villareal*, 523 U.S. at 645 n* (noting the decision does not address the situation of a *Ford* claim brought for the first time in a second application).

67. *Panetti*, 127 S. Ct. at 2860 (quoting *Martinez-Villareal*, 523 U.S. at 644).

which could be years before an execution date is even set. These *Ford* claims would thus be ritually dismissed as unripe, only to be reopened under *Martinez-Villareal* if the claim ripened upon the setting of an execution date. But since a condemned inmate's mental state can deteriorate over time, every conscientious capital habeas attorney would have to file a *Ford* claim to plan for this contingency. Such an "empty formality . . . neither respects the limited legal resources available to the States, nor encourages the exhaustion of state remedies."⁶⁸

Thus, despite plain statutory language, the Court concluded that "Congress did not intend the . . . 'second or successive' [bar] to govern . . . a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."⁶⁹ Supporting this conclusion are the general purposes of AEDPA to "further the principles of comity, finality, and federalism."⁷⁰ Those purposes take on added salience when aligned with the interests of capital habeas petitioners, as in Panetti's case.⁷¹ The Court refused a procedurally and practically problematic interpretation of § 2244 that "would close [its] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress's intent."⁷²

B. *Due Process*

In the second holding, Justice Kennedy ruled that the state court's procedures for determining competency violated the Eighth and Fourteenth Amendments. Since Panetti met the threshold showing of incompetency, under *Ford* he was entitled to a fair hearing.⁷³ In applying Justice Powell's basic standard in *Ford*, the Court found that the "state court failed to provide petitioner with a constitutionally adequate opportunity to be heard."⁷⁴

Panetti's inability to rebut the testimony of court-appointed psychiatrists primarily led to this conclusion, but Justice Kennedy also seemed bothered by the conduct of the state judge. As in *Ford*, the

68. *Id.* at 2854.

69. *Id.* at 2853.

70. *Id.* at 2854 (quoting *Miller-El v. Cokerell*, 537 U.S. 322, 337 (2003) (internal citations omitted)).

71. *Id.*

72. *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 380–81 (2003)).

73. *Id.* at 2856 (quoting *Ford v. Wainwright*, 477 U.S. 399, 426 (1986)).

74. *Id.* at 2858.

finding of competency in Panetti's case was erroneously based solely on the testimony of court-appointed experts.⁷⁵ But Justice Kennedy noted a number of other failings,⁷⁶ including that Judge Able repeatedly "conveyed information to petitioner's counsel that turned out not to be true."⁷⁷ In other words, the judge lied to Panetti's counsel. Because these failings violated the clear mandate of *Ford*, the Court moved to the substantive claim at the heart of Panetti's petition.

C. *The Constitution Forbids Executing the Incompetent*

In the third holding, the Court held that the Fifth Circuit standard is "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."⁷⁸ Plentiful evidence indicates that Panetti suffers severe delusions that have "recast [his] execution as 'part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light.'"⁷⁹ In determining whether these delusions could render Panetti legally incompetent, Justice Kennedy turned to the established reasons not to execute the incompetent.

Though *Ford* enunciated no definitive standard for incompetency, Justice Kennedy applied the bar against executing the incompetent focused through the lens of *Ford's* reasoning that executing the insane lacks retributive value. Severe delusions may render a condemned prisoner unable to comprehend the personal and community-oriented retributive goals of his execution.⁸⁰ This calls into question whether the impending execution can induce the offender's recognition of his offense in order to generate vindication of the community's norms.⁸¹ The basic principle of retribution is thus put at risk by the Fifth Circuit test, which improperly forecloses inquiry into whether the condemned has the capacity for "rational understanding."⁸²

75. Although one major difference is that in *Ford* the Governor controlled the competency hearing. See *Ford*, 477 U.S. at 403–04.

76. These include failing to transcribe the proceedings, and potentially violating state law by not holding a competency hearing. *Panetti*, 127 S. Ct. at 2856–57 (citing TEX. CODE CRIM. PROC. ANN., art. 46.05(k)).

77. *Id.* at 2857.

78. *Id.* at 2860.

79. *Id.* at 2859.

80. *Id.* at 2861.

81. *Id.* at 2861–62.

82. *Id.*

In tentatively describing the margins of incompetence, Justice Kennedy made two implicit distinctions. First, he distinguished between the condemned's "awareness of the State's rationale" as opposed to a "rational understanding" of the reasons for execution.⁸³ The condemned must be aware not only of his crime and impending execution, but also that he is being executed as a retributive response to that crime. Second, he distinguished between unfounded delusions and those grounded in a diagnosable illness, emphasizing that the source of Panetti's delusions "is not a misanthropic personality or an amoral character. It is a psychotic disorder."⁸⁴ So a determination of incompetence should consider both whether the condemned lacks the capacity to rationally understand the retributive purpose of execution, and whether the source of that incapacity is a severe mental illness.

Yet, Justice Kennedy explicitly declined to create a standard governing competency or to determine Panetti's incompetence based on an incomplete record.⁸⁵ Instead, the Court remanded for exploration of the facts supporting Panetti's claim that were not considered under the erroneous Fifth Circuit standard.⁸⁶ In that regard, the Court recommended expert testimony to clarify the scope of the delusions.⁸⁷ The Court's recent Eighth Amendment jurisprudence should guide the lower court's inquiry.⁸⁸

VI. ANALYSIS AND IMPLICATIONS

In the view of one commentator, *Panetti v. Quarterman* is "a long opinion that says very little."⁸⁹ Though important and potentially far-reaching, the opinion skirts establishing any clearly defined standards. Consequently, *Panetti* offers fertile soil for capital litigation, and below I explore the meaning of each holding as a forecast of potential implications.

83. *Id.*

84. *Id.* at 2862.

85. *Id.*

86. *Id.* at 2863.

87. *Id.*

88. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 560–64 (2005) (holding executing juveniles unconstitutional), and *Atkins v. Virginia*, 536 U.S. 304, 311–14 (2002) (holding executing the mentally retarded unconstitutional)).

89. Professor Erwin Chemerinsky, in conversation with the author.

A. *Defining the Standard of Competency To Be Executed*

Panetti raises the bar against executing the incompetent. Justice Thomas's dissent in *Panetti* usefully clarifies this by noting that the majority opinion "can be understood only as holding for the first time that the Eighth Amendment requires 'rational understanding'" for competency to be executed.⁹⁰ Though Justice Kennedy omitted explicitly defining a standard for rational understanding, the conclusion that the Fifth Circuit erroneously precluded inquiry into whether *Panetti* had rational understanding only makes sense as positively requiring it for a prisoner to be found competent.⁹¹ The best reading of the opinion points toward a finding of incompetency if a petitioner lacks the capacity to rationally understand the reason for his execution, and if the source of that incapacity is a severe mental illness.

The contours of this standard will likely be fleshed out in several ways. First, on remand, the District Court will hold an evidentiary hearing regarding "whether and to what extent *Panetti*'s present mental state renders him incapable of understanding the reason for his punishment."⁹² This will mean defining and implementing a standard consistent with *Panetti*'s mandate. Second, left open is whether a condemned prisoner, once found incompetent under *Panetti*, may still be executed if competency is restored. One view holds that the death sentence of an incompetent prisoner should automatically default to the alternative sentence to execution, likely life without possibility of parole.⁹³

Third, *Panetti* begs the question whether forcibly medicating a condemned prisoner to render him competent is constitutional. The government may not forcibly medicate a defendant solely for the purpose of rendering him competent to stand trial, except in rare

90. *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting).

91. This reading of *Panetti* is supported by Justice Kennedy's view that a singular concept of competency should apply to each stage of criminal proceedings. See *Godinez v. Moran*, 509 U.S. 389, 403 (1993) (Kennedy, J., concurring) (discussing requirements of both a factual and rational understanding of the proceedings for competency to exist).

92. *Panetti v. Quarterman*, No. A-04-CA-042-SS (W.D. Tex. Aug. 31, 2007) (order scheduling evidentiary hearing for Feb. 5, 2008).

93. See ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (Sept.–Oct. 2006).

instances meeting a narrow standard.⁹⁴ Yet, the Court denied certiorari to an Eighth Circuit case permitting forcible medication to render a prisoner competent to be executed.⁹⁵ So left open is whether the high value placed on retribution in *Panetti* informs this discussion. In my opinion, it does. There is something paradoxical and unpalatable in propping up an otherwise incompetent prisoner solely to execute him under the semblance of competency.⁹⁶ For if, according to Justice Kennedy, retribution presupposes a theory of rational choice by which the condemned comes to “recognize at last the gravity of his crime,” then the use of medication to achieve this end undermines the penitential impact punishment ostensibly provokes.⁹⁷

B. Implications of Panetti Beyond Execution Competency

Panetti's reasoning precluding application of the death penalty when it would not serve retributive purposes applies to other post-conviction situations involving incompetency. The first involves a condemned prisoner who wishes to “volunteer” for execution by terminating post-conviction proceedings, when that prisoner would be incompetent under *Panetti*. The retributive importance of having the capacity to rationally understand the reasons for execution obviously extends to ensuring that the issue be raised. In this situation, next friend petitions, submitted by qualifying third parties on behalf of the condemned, should be permitted by courts.⁹⁸ Second, under a similar rationale, proceedings should be stayed or terminated against a prisoner who lacks the capacity to assist post-conviction defense adequately.⁹⁹

94. *Sell v. United States*, 539 U.S. 166, 179 (2003) (holding forcible medication allowable only if treatment is medically appropriate; is substantially unlikely to produce side-effects adversely affecting the trial; is not too intrusive; and is necessary to further important government interests).

95. *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003).

96. At least one state prohibits forcible medication drawing on retribution principles. *See State v. Perry*, 610 So.2d 746, 747 (La. 1992) (holding that forcible medication to produce competency “fails to measurably contribute to the social goals of capital punishment”).

97. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2861 (2007).

98. *See ABA Task Force on Mental Disability and the Death Penalty*, *supra* note 93, at 668.

99. *Id.*

C. Finding AEDPA Exceptions

On the jurisdictional holding, the Court's novel exception to AEDPA is enough to tingle legal realists and pragmatists, for the Court simply rejected plain language in favor of logical and practical coherence. There is a limit to how far a judge can stretch language with a straight face, and the Justices seemed unwilling to use the "silly fiction" of *Stewart v. Martinez-Villareal* either to eliminate Panetti's claim, or to expand the definition of "second or successive" any further.¹⁰⁰ Instead, they simply read an additional exception into § 2244.

At least two implications result. First and most obviously, capital habeas petitioners can raise a *Ford* claim in a completely separate application upon ripening with the setting of an execution date. Second, the logic of *Panetti* may lead habeas corpus attorneys to propose additional claims that ripen after a first petition. For instance, challenging execution methods may only ripen after setting an execution date, so a § 2254 claim that a particular execution technique violates the Eighth Amendment might also warrant an exception to the second or successive bar.¹⁰¹ Likewise, an inmate's claim that too long a tenure on death row violates the Constitution may only ripen after an extended time passes.¹⁰²

D. Injudicious Courts and Inadequate Process

The Court's holding that the state failed to provide adequate procedures in determining competency is primarily interesting in the context of what is best described as a Supreme Court smack-down of both Fifth Circuit and Texas state court death penalty decisions. The Court does invite litigation over whether the entitlement to rebut the

100. This is how Justice Souter described *Martinez-Villareal* at oral argument, responding to the government's argument that claims must be raised and reopened. Transcript of Oral Argument at 27-28, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) ("Yes, but that's a silly fiction. You're not reopening a claim. We can use any kind of language we want. The fact is when he first raised it he didn't have a claim which bore a close enough relationship to the time of execution.").

101. This presumes that clearly established law supports the claim sufficient to meet AEDPA. See, e.g., *Brown v. Ornoski*, 503 F.3d 1006, 1017 (9th Cir. 2007) (rejecting § 2254 claim because no clearly established Supreme Court law generally prohibits lethal injection).

102. There is some support for such a claim. See, e.g., *Lackey v. Texas*, 115 S. Ct. 1421, 1421 (1995) (Stevens, J., dissenting to denial of cert.); *Elledge v. Florida*, 119 S. Ct. 366, 366 (1998) (Breyer, J., dissenting to denial of cert. because petitioner's Eighth Amendment claim is "a serious one").

state's psychiatric evidence includes the right to state funds to hire an expert.¹⁰³ But beyond that, the *Ford* procedural standard as defined by Justice Powell is left intact as a dynamic test requiring fundamental fairness. So, more notable is the Court's apparent annoyance at the conduct of the Texas judiciary—even going so far as to imply that Texas Judge Stephen Able lied to Panetti's counsel.¹⁰⁴ Given four other reversals of Texas death penalty decisions in the past term alone, at least five members of the Court appear short on patience with judicial indiscretion and antagonism towards capital defendants and petitioners.¹⁰⁵

VII. CONCLUSION

Panetti v. Quarterman reinforces trends in capital jurisprudence. In line with decisions prohibiting the execution of juveniles and the mentally retarded,¹⁰⁶ it reveals the Court's willingness to individualize sentencing in the criminal process¹⁰⁷—to weigh in on *whom*, as opposed to *what*, we can punish with execution. More probingly, in focusing on the rational capacity of an individual condemned prisoner, *Panetti* invites reconsideration of whether one can ever sufficiently generalize his mental state. That is, examining the context of an individual's state of mind means considering its causes and consequences. Looking within and beyond the individual in this way contextualizes the concept of rational individual choice that is often imagined abstractly. This appeal to causation, combined with the epistemic impossibility of knowing if we judge rationality accurately—even for prisoners not diagnosed as mentally ill—casts doubt on the legitimacy of the ultimate punishment of death, if indeed

103. See *Panetti*, 127 S. Ct. at 2855 (noting that Panetti was entitled to “adequate *means* by which to submit expert psychiatric evidence” rebutting state's evidence) (emphasis added).

104. See *id.* at 2857.

105. See *Smith v. Texas*, 127 S. Ct. 1686 (2007) (holding that a Texas court's failure to allow jury to fully consider mitigating evidence was not harmless error, and remanding for new sentencing hearing); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (reversing 5th Circuit because the jury was not allowed to fully consider mitigating evidence as mandated by prior Court cases); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (reversing 5th Circuit because jury in Texas case was not allowed to fully consider mitigating evidence); *Chambers v. Quarterman*, 127 S. Ct. 2126 (2007) (remanded to the Fifth Circuit in light of *Brewer v. Quarterman*).

106. See *Roper v. Simmons*, 543 U.S. 551, 560–64 (2005) (holding executing juveniles unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 311–14 (2002) (holding executing the mentally retarded unconstitutional).

107. Professor Michael Tigar pointed this out in conversation with the author.

that legitimacy depends on finding that the condemned's mental state is objectively rational, and is his alone.