Saint Louis University Law Journal

Winter 2009

Article

*309 THE AFTERLIFE OF FORD AND PANETTI: EXECUTION COMPETENCE AND THE CAPACITY TO ASSIST COUNSEL

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The capacity to assist counsel and communicate a defense once held a central place in assessing competence for execution. Since Ford v. Wainwright, however, courts have discarded this measure, viewing Justice Powell's concurring opinion, which required only that a prisoner understand the execution as mortal punishment for a capital crime, as the Eighth Amendment rule. In a significant development, the Supreme Court's decision in Panetti v. Quarterman--its first interpreting Ford--sends notice that Powell's statements on the substantive standard are not Ford's rule, providing a long overdue opportunity to address whether executing prisoners with severe mental illness who lack the capacity to assist counsel contravenes evolving standards of decency. Current concerns with the execution of innocent prisoners and difficulties determining execution competence since Ford support reinstating the capacity to assist counsel in the Eighth Amendment test. This Article, urging future work in courts and scholarship, initiates a discussion about the proper scope of the Ford prohibition.

Introduction

The present competence of a defendant has always been a critical concern of the criminal justice system, from arrest to execution. Testing for a defendant's or prisoner's capacity to understand the legal proceedings and ability to appreciate the relationship of those proceedings to his or her own case has long protected the dignity of the defendant and the criminal justice system; and a defendant's or prisoner's capacity to reason sufficiently to identify relevant facts and thereby present a defense has provided, in turn, a firm measure of reliability. Together, these overlapping capacities form a construct that has carried from the common law to the present day in standards for competence to stand trial, to plead guilty, and to waive counsel.

***310** Since the United States Supreme Court's ruling in Ford v. Wainwright, [FN1] however, one of these traditional underpinnings of legal competence-- the capacity to assist counsel and communicate a defense--has not been considered part of the constitutional measure of competence for execution. As Ford declared an Eighth Amendment prohibition on executing the "insane," Justice Powell's concurring opinion, long viewed as articulating the substantive standard, dismissed the capacity to assist counsel as obsolete given procedural protections and collateral opportunities for appeal that now exist in capital cases. [FN2] Justice Powell recognized only a prisoner's ability to understand the impending execution and the relationship between that punishment and the prisoner's capital offense--measures of a prisoner's capacity to experience retribution--as meaningful contemporary rationales for not executing a person with severe mental illness. [FN3]

Several years later, the Court made passing reference to Ford, quoting Justice Powell's articulation of the substantive standard. [FN4] Ever since, the capacity to assist counsel has been viewed as a dispensable relic. Once incumbent in the common law heritage of the prohibition on executing the insane, it has been removed--in effect upon a single Justice's view that it lost its relevance--without ever receiving the attention of the full Court. This disappear-

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ance is remarkable, considering that the capacity to communicate a defense, with or without counsel, once played a central role in justifying the prohibition. Also, it is ironic that this common law measure of reliability has been shorn in the Eighth Amendment forum of "heightened reliability," where it should be most prized.

As this notion that Hale, Hawles, Blackstone, and Coke all identified as the touchstone for competence from arrest to execution has dwindled to a curiosity that jurisdictions need not entertain before killing a prisoner who has severe mental illness, so too have others that had previously held sway; courts have diminished the importance of the rationales that to execute an incompetent prisoner disrespects human dignity and violates the charitable character of religious faith as it denies the opportunity to spiritually prepare for death. [FN5] Given the apparent precedential force of Justice Powell's Ford concurrence, strong arguments that any rationale other than retribution is significant in the execution context have long fallen on deaf ears. The capacity to assist counsel presents an acute example. When, not long after Ford, Justice Marshall urged the entire Court to address whether the capacity to assist counsel should have any bearing on execution competence under the Eighth Amendment, his call ***311** was silenced by the seeming precedence of Powell's Ford concurrence. [FN6] In the few cases to entertain a defendant's assertion that the capacity to assist counsel is a prerequisite for execution, courts have denied the claims with slim reasoning, simply citing Powell in Ford or reiterating Powell's argument before summarily agreeing. [FN7] The landscape has become so bleak that some time has passed since diligent capital counsel raised the issue as a matter of course or with any hope of relief.

The Supreme Court's recent decision in Panetti v. Quarterman, [FN8] which is the Court's first interpretation of Ford and its first direct consideration of the substantive standard, [FN9] is no different in some respects. Panetti's counsel did not argue that the capacity to assist counsel should be part of the Ford inquiry. The Court never says that a prisoner need reason sufficiently to communicate a defense before an execution may proceed. This is so, even though Panetti, who was allowed to represent himself at trial despite a lengthy history of lapses and relapses into incompetence, [FN10] may have important information to add in ***312** his defense of the death penalty even as late in the process as execution. Panetti illustrates the extent to which the capacity to assist counsel and communicate a defense has vanished as an integral part of our society's prohibition on executing persons with severe mental illness.

And yet, the Court's decision in Panetti removes a barrier. Significantly, interpreting Ford for the first time, the Court explains that Justice Powell's statements on substance are merely alternative articulations of the general principles set forth in Justice Marshall's opinion for the Court--not Ford's rule. [FN11] "[O]ther rationales," [FN12] in addition to retribution, the Court recognizes, are offended by applications such as the "mere awareness" test that the Fifth Circuit applied to Panetti. [FN13] To say that the Court's decision invites lower courts to revisit the place of the capacity to assist counsel and other rationales in the Eighth Amendment standard may be an overstatement. But it is no small matter to recognize that Panetti permits such consideration, opening the floor to a discussion of common law rationales beyond an inmate's capacity to understand why he is being punished.

This Article proceeds in three parts. The first reviews the landscape of the prohibition on executing individuals with severe mental illness before and after Ford, with two points of focus: (1) the central place that communicating a defense held as a common law rationale for the prohibition and later as an element of related state substantive standards; and (2) the disappearance of this capacity from the Eighth Amendment analysis based on Justice Powell's (a) debatable and (b) unvetted conclusions in Ford.

The second part analyzes the Court's decision in Panetti. The structure of the Court's opinion, the language the Court chooses, and the manner in which the Court applies or does not apply legal doctrine all show that Justice Powell's concurrence did not make a rule. Powell's concurrence is best read, instead, as one Justice's argument for what the substantive standard should be, not as binding precedent.

The final part of this Article is a discussion for the future, focused on one rationale: the capacity to assist counsel. Following Panetti, the substantive Ford inquiry is open to a reassessment of what our society demands before we execute someone who has severe mental illness. Do our evolving standards of decency demand only that a prisoner

have the capacity to internalize society's vengeance before execution? Or must we demand more? Following Panetti, these questions are due meaningful attention by litigants and courts. Courts may consider, without restriction, whether rationales other than retribution play a meaningful contemporary role. After Ford but before Panetti, Justice Marshall called for the Supreme Court to properly determine whether ***313** executing prisoners with severe mental illness who lack the capacity to communicate a defense is cruel and unusual punishment. Thus, this final part revisits Marshall's arguments as well as similar arguments more recently raised and discusses advantages in reliability, consistency, and dignity to including the capacity to communicate a defense alongside the criteria approved by Justice Powell.

I. Ford Before Panetti

A common refrain in Ford commentary is that common law rationales for the prohibition on executing persons who have severe mental illness are many and the standard accordingly imprecise. [FN14] Consequently, the argument goes, formulation of a more precise substantive standard awaits clarification of the rule's rationale. [FN15] But perhaps this confuses the standard's generality with imprecision and overstates the ambiguity of the rationales, both as they stood in the common law history and on the eve of Ford. In 1986, only a handful of states had articulated a substantive standard, but among those states, a strong majority included the capacity to assist counsel as a requisite for competence. [FN16]

If the survey of states and common law on which Justice Powell's Ford concurrence relied for dismissing the capacity to assist counsel as a basis for the prohibition is debatable, then so are his arguments, barely vetted since. For one, as noted elsewhere, Powell's argument, which is rooted in modern procedural and collateral review protections, assumes a right to effective assistance of counsel and stays in post-conviction proceedings pending restoration of competence that do not exist in many jurisdictions. [FN17] This and other opposing lines of reasoning have long been dismissed without serious analysis because Powell's opinion has posed as Ford's precedent.

***314** A. The Common Law

No one disputes the existence of a prohibition on executing the insane at common law. And no one disputes that the capacity to communicate a defense was then a core rationale for the prohibition: "[a] central purpose of the common law ban on executing the mentally ill was to afford the defendant the opportunity to defend his life before the sentence was carried out." [FN18] The rationale was the same for Blackstone and Hale. [FN19] Hawles also identified a last opportunity for those imprisoned to prove innocence as the "true reason" for the prohibition. [FN20] Multiple reasons were given at common law for why ***315** executing the incompetent was undignified. [FN21] But only the requirement that the prisoner have the capacity to reason sufficiently to communicate a defense protected a judgment's reliability. [FN22]

There is one other point to make about the English common law. The English jurists and the old law dictionaries, justice of the peace manuals, and legal historians all agree that the "assessment of a defendant's fitness to be tried, convicted, or executed was broad-gauged, based on an estimation of his generalized 'understanding.'" [FN23] In assessing incompetence, "courts did not have the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry." [FN24] They simply focused, at trial and post-verdict, on the "commonly recognized and conspicuous manifestations of insanity" [FN25] without "seek[ing] to deconstruct the delusions of mentally ill defendants to determine ***316** whether some fragment was tethered to reality." [FN26] The law "did not bequeath definitive standards to determine competence for execution." [FN27]

Today, despite more developed processes for assessing mental impairment and capability, the test for competence to stand trial [FN28] remains open textured and retains the core concerns from the common law--that a defendant "(1) understand the charges and the basic elements of the adversary system . . ., (2) appreciate one's situation as a defendant in a criminal prosecution . . ., and (3) relate pertinent information to counsel concerning the facts of the

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case." [FN29] These overlapping but distinct capacities are a modern reflection of the generalized understanding required at common law for competence from arrest to execution. [FN30] And they serve the same social purposes. [FN31] The dignity of the ***317** criminal process is undermined, its retributive function severed, if a defendant lacks understanding of the proceeding; just as importantly, the reliability of a judgment is cast in doubt when a defendant cannot reason sufficiently to distinguish relevant from irrelevant facts and communicate in his defense. [FN32]

B. Incompetence for Execution Before Ford

The common law prohibition was adopted by nearly every state, and some codified it by statute, but constitutional law on competency for execution developed slowly. [FN33] The sluggishness was due in part to the infrequency with which execution incompetence is alleged. It may also have resulted from inattention in criminal law to the death penalty. [FN34] Tempered skepticism about ***318** frivolous claims and fears of protracted litigation, expressed in the Court's pre-Ford opinions, also explain why a constitutional ban on executing the severely mentally ill was long left alone. [FN35]

Whatever the reason, in 1986, on the eve of Ford, all states recognized the prohibition, but only a handful defined its substantive scope with more specificity than to preclude execution of the "insane." [FN36] Scholarly observers described the state standards as "varied" and "essentially incomprehensible," [FN37] ***319** showing "little consensus." [FN38] For some, the cause of what they perceived as great diversity among state standards was the lack of a clear rationale for the prohibition. [FN39]

But a close look at the collected statutes and case law shows more agreement than the commentators recognized. In 1986, of the eleven states defining the standard in more than a word ("mentally ill," "incompetent," "insane," or "mentally ill and in need of care"), a clear majority included the capacity to assist counsel, and all seven states interpreting the prohibition in case law demanded this capacity. [FN40] Against the background of the common ***320** law, what some saw as vague and varied standards may be better explained as adoptions of the common law in all its generality. [FN41] The state standards show a legal rule relatively unattended to, but to the extent accepted, accepted to measure all that the common law would have. [FN42] If a standard reflects its underlying rationale, it seems that nearly every state defining incompetency for execution accepted the capacity to assist counsel. Only Florida did not. [FN43]

C. Ford v. Wainwright

Justice Powell reached a different conclusion in his concurring opinion in Ford. The question before the Court was whether the Eighth Amendment permits a state to execute a prisoner who appears mentally incompetent without having first determined the prisoner's competence through a reliable and accurate fact-finding procedure. [FN44] The substantive question--if the Eighth ***321** Amendment applies, whom does it exclude?--implicitly remained. [FN45] Justice Marshall's opinion for the Court endorsed an Eighth Amendment prohibition after summarizing the common law roots and finding that every state prohibited execution of the "insane" in some manner. [FN46] Echoing Justice Frankfurter's dissent in Solesbee, Marshall recognized six common law rationales, quoting Blackstone for the rationale that "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." [FN47] Marshall also recognized the importance of the retributive rationale, noting that "today, no 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." [FN48] But his opinion, focused on the ways in which Florida's procedures failed the Constitution, did not define a substantive standard.

Justice Powell, in a concurring opinion, noted that if the Eighth Amendment bars a category of defendants from execution, "the bounds of that category are necessarily governed by federal constitutional law," and he went on to address "the meaning of insanity in this context." [FN49] Powell proposed to turn to the "common-law heritage and the modern practices of the States, which are indicative of our 'evolving standards of decency.'" [FN50] Citing

Florida's statute as an example of "[m]odern practice," he rejected the capacity to assist counsel as a contemporary rationale for the prohibition:

> Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review. Throughout this process, ***322** the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the effective assistance of counsel at trial and on appeal. These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free. [FN51]
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> [I]n cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defense is largely provided for. [FN52]
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> [A] standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false: we have made clear that States have a strong and legitimate interest in avoiding repetitive collateral review through procedural bars. [FN53] In sum, Powell's argument reduces to three reasons for rejecting the rationale: the existence of far more extensive procedural protections in capital cases (including a right to effective counsel throughout trial, direct appeal, and state and federal collateral review), the temporal separation of execution from trial, and state interests in finality.

Thus, for Justice Powell, only the retributive rationale, and to a lesser extent the religious justification that a prisoner should be able to prepare for death (which concerned dignity of the system and dignity of the prisoner, ***323** respectively) were still valid. Accordingly, Powell found Florida's standard, which asked only if a prisoner understood that he would be executed and the reason for it, sufficient. [FN54] States, he allowed, were free to adopt a more expansive view of sanity in this context, but need not. [FN55]

Justice Powell claimed to find objective support for his view in the statutes of two states (including Florida) and in the case precedent of another. [FN56] "A number of States have more rigorous standards," he noted, "but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it." [FN57] Powell distinguished those "more rigorous" standards--which demanded the capacity to assist counsel--in a footnote. [FN58] A long-time justification for the common law prohibition on executing the incompetent was thus shorn.

D. A Closer Look at Justice Powell's Opinion

When the Supreme Court addresses whether punishment "comports with the fundamental human dignity that the [Eighth] Amendment protects," it considers whether the punishment was "cruel and unusual at the time that the Bill of Rights was adopted" and also whether it offends "'evolving standards ***324** of decency that mark the progress of a maturing society.'" [FN59] This involves an objective survey of society's contemporary standards, reflected in part by legislative and judicial action, followed by the Court's own analytical interpretation. [FN60]

Justice Powell's analysis is more cursory. On the objective front, Powell's argument for limiting the constitutional minimum to retribution did not tell the whole story. If Powell had looked at all state laws, he would have found that a majority of the state courts and legislatures that had addressed the execution competency required the capacity to assist counsel. [FN61] In fact, one of the two law review articles Powell cited documented this. [FN62] Notably, the same author advocated including the capacity to assist counsel as part of the standard, [FN63] as did others studying the issue at that time. [FN64]

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The take-away point is not that Justice Powell was unjustified in finding that the Eighth Amendment prohibition's interest in dignity was best guided and measured by retribution, but rather that his justification for omitting the capacity to assist counsel was neither thoroughly investigated nor convincingly presented. State legislative determinations to keep the capacity to assist counsel should not have been taken so lightly. Justice Powell cursorily ***325** decided--in dicta, [FN65] without review by all members of the Court, and without taking counterarguments--that the age-old reliability interest of the competency determination at the time of execution was a moot point. Such a tenuous decision, particularly in the Eighth Amendment context demanding heightened reliability, and today as concerns about the execution of the innocent increase, ought to be followed cautiously, if at all.

E. Justice Marshall's Call

Nevertheless, Justice Powell's opinion has been followed. Two years after Ford, in determining whether the Eighth Amendment prohibited executing individuals who have mental retardation, the Court noted in passing that "under Ford v. Wainwright, someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." [FN66] Some lower courts took this as authority that Powell's opinion articulated the substantive standard of Ford. [FN67] Others viewed the Penry v. Lynaugh reference as dicta, but in lieu of a more formal ruling, deemed this a circumstance in which Supreme Court dicta controlled. [FN68] Since Penry, no court has seriously considered the idea that the Eighth Amendment requires something more than ***326** what Justice Powell prescribed. In the few cases where prisoners have argued for capacity to assist, courts have rejected it out of hand. [FN69]

One of the most dramatic cases in which the Penry reference effectively silenced counterarguments is that of Arkansas prisoner Ricky Rector. Several years after Ford, mental health examiners determined that Rector understood that he would be executed for his crime, but "would have considerable difficulty due to his organic deficits in being able to work in a collaborative, cooperative effort with an attorney." [FN70] They determined that Rector, while perhaps not incompetent under Justice Powell's test, "would not be able to recognize or understand facts which might be related to his case which might make his punishment unjust or unlawful." [FN71] The Eighth Circuit Court of Appeals denied Rector's Ford claim, and in doing so held that Rector's capacity to assist counsel was irrelevant. [FN72] Rector sought relief from the United States Supreme Court, and the Court denied his petition.

Dissenting from denial of certiorari, Justice Marshall objected that Ford had not decided whether the capacity to assist counsel was relevant under the Eighth Amendment, and emphasized that "lower courts clearly erred in viewing Ford as settling the issue"--"even Justice Powell recognized that the full court left the issue open." [FN73] Noting the prevalence and worsening of mental illness on death row, Marshall concluded the issue was "open" and ***327** "unsettled," "recurring and important." [FN74] Rebutting Powell's argument that the "advent of increased opportunities for direct and collateral review of criminal convictions had so reduced the possibility of undiscovered error as to render this conception obsolete," Marshall stressed that if a prisoner is incompetent during collateral review, the proceedings cannot assuredly root out trial error, nor can they reliably resolve issues of innocence that would support an application for executive clemency:

> This view strikes me not only as inconsistent with the established principle "that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," but also as somewhat question begging. For if a prisoner is incapable of recognizing or communicating facts that would facilitate collateral review, there is no reason to assume that collateral review in his case has rooted out all trial errors. In addition, Justice Powell's argument seems to miss at least half the point of the common law conception of incompetence. This definition focuses not only on the prisoner's capacity to recognize and communicate facts showing that his sentence is unlawful, but also on his capacity to recognize and communicate facts showing that his sentence is unjust. Absent this capacity, the prisoner is unable to participate in efforts to seek executive clemency, the appropriateness of which will not necessarily be disclosed in the course of direct or collateral review of the prisoner's conviction. Ultimately, then, the common law conception of incompetence em-

bodies the principle that it is inhumane to put a man to death when he has been rendered incapable of appealing to the mercy of the society that has condemned him. [FN75] Justice Marshall is not alone. After Ford, the American Bar Association, noting "concern for the integrity of the criminal justice system," endorsed an "understand and assist" standard. [FN76] The ABA has recently elaborated on circumstances in which concerns about a prisoner's mental competence should preclude execution. [FN77] Following Justice Marshall, Richard Bonnie argues that ***328** the proper scope of reference for considering a prisoner's ability to assist counsel is not merely the execution but the whole of post-conviction proceedings. Justice Powell, Bonnie points out, incorrectly "assum[ed] that prisoners on the threshold of execution have already taken advantage of these post-conviction opportunities, leaving little risk that some critically important fact has been obscured throughout these proceedings or that a previously unknown defect in the conviction or sentence could yet emerge." [FN78] In addition to noting that incompetence is often not seen as a basis for halting post-conviction proceedings, Bonnie also points out that Justice Powell's reliance on effective assistance of counsel does not comport with some jurisdictions' failure to recognize incompetence as a basis for halting collateral review. [FN79] Further, states are split on whether the capacity to assist counsel should play a role in competence determinations during post-conviction proceedings. [FN80]

***329** There are thus circumstances in which the competence of a prisoner who lacks the capacity to communicate a defense could go untested during collateral review, and in which constitutional claims, including those backed by evidence of innocence, will go unheard. If this state of affairs is inconsistent with Eighth Amendment concerns for reliability, it is even more troubling if "collateral review--and judicial oversight in general--have subsumed many of the functions formerly performed by executive clemency at the time of execution." [FN81] Justice Marshall and Professor Bonnie may have the better argument. [FN82] Regardless, the point to focus on, echoing Justice Marshall in Rector, is that there are reasonable points of debate that were not addressed in Ford and have not been since. Prior to Panetti v. Quarterman, with Justice Powell's concurrence firmly entrenched, arguments such as Justice Marshall's and Professor Bonnie's, however persuasive, held little currency.

II. Panetti v. Quarterman

Justice Powell's Ford standard left interpretative difficulties for courts. [FN83] A prominent "next question" was whether the standard required a "rational understanding" or mere "factual understanding" of the execution and its reason. [FN84] This was complicated by Ford's use of multiple terms (comprehend, understand, aware, know)--imperfect synonyms, themselves open to interpretation--to describe the applicable cognitive state. [FN85] Some courts, ***330** including the Fifth Circuit, responded by focusing on the term "aware" and requiring only factual understanding, or mere "awareness." [FN86]

In Panetti, the court applied this interpretation to a person who believed, delusionally and adamantly, that execution was his punishment for preaching the gospel. [FN87] Panetti saw his execution as a chapter in an age-old interplay between God and the devil. This was not a new development. In years prior, he engaged in paranoid acts designed to thwart what he perceived as the devil's efforts to kill him, and expressed similar fears while representing himself at trial. [FN88] None of the six psychiatric experts who examined Panetti's competence for execution disputed the fixed nature of Panetti's delusional belief that execution was a consequence of religious warfare, rather than criminal law. [FN89] To the Fifth Circuit, however, Panetti was competent simply because prison officials told him his execution was punishment for murdering his ex-wife's parents. The court dismissed the evidence of delusions as beside the point. [FN90]

***331** The Supreme Court of the United States granted certiorari to consider "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of 'the mental capacity to understand that [he] is being executed as a punishment for a crime.'" [FN91] Writing for a five-Justice majority, Justice Kennedy emphasized that no language in Ford, no rationale mentioned therein, and no common law history supported a standard like the Fifth Circuit's, which made evidence of a prisoner's severe delusions collateral to the competency determination. [FN92] Looking to Justice Marshall's opinion and Justice Powell's, the Court recognized that neither "indicate[s] that delusions are irrelevant to 'comprehen[sion]' or 'aware [ness]' if they so impair the prisoner's concept of reality

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that he cannot reach understanding of the reason for the execution." [FN93] "If anything," the Court noted, referring to Justice Marshall's opinion, "the Ford majority suggests the opposite." [FN94]

Noting that to ignore evidence of delusions "mistak[es] Ford's holding and its logic," the Court explained why delusions are relevant to assessing retribution, [FN95] and "under similar logic [to] the other rationales set forth by Ford" [FN96]:

> ***332** Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from Ford, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted. [FN97] Justice Kennedy's opinion views delusions as part of the inquiry into whether a prisoner has a "rational understanding." Accordingly, the Fifth Circuit's test--which stopped after asking if a prisoner is (1) aware of committing the underlying crime, (2) aware he will be executed, and (3) aware that the reason the state has given for the execution is the underlying crime [FN98]--was "improperly restrictive" and a "flawed interpretation of Ford." [FN99] Finding "much in the record to support the conclusion that [Panetti] suffers from severe delusions," [FN100] the Court reversed the judgment and remanded.

The following sections focus on the Court's interpretation of the two primary opinions in Ford, Justice Marshall's and Justice Powell's--and how the Court draws from both the meaning of the Eighth Amendment prohibition on executing individuals with the severe mental illness.

A. Revitalization of the Ford Plurality

On the substantive standard, Ford precedent has always stood in a curious posture, because the issue was not directly before the Court. True, the Court's one-line reference in Penry to Justice Powell's concurrence led many courts to anoint Powell's model and its reasoning. But Justice Kennedy's opinion for the Court in Panetti gives an unmistakably different meaning to Ford. For the Panetti majority, neither opinion in Ford offers a "strict test" of what constitutes incompetence to be executed. Both opinions broadly discuss the same territory. One opinion is more specific than the other on the substantive standard, but neither opinion presents a rule. Rather, the Ford opinions identify principles: "[T]he opinions in Ford did not set forth a precise standard"; and "the principles set forth in Ford are put at risk by [the Fifth Circuit's] rule." [FN101]

If Panetti grants prominence to any portion of Ford in setting forth these principles, it is arguably Justice Marshall's opinion for the Court--the "controlling portion" or "majority" portion of Marshall's opinion that Justice Powell joined. The Court twice quotes the "controlling portion" of Marshall's ***333** opinion. The first is Marshall's statement that "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." The second follows the Court's assertion that "the Ford opinions nowhere indicate that delusions are irrelevant to 'comprehen[sion]' or 'aware[ness].'" [FN102] "If anything," Justice Kennedy continues, "the Ford majority suggests the opposite." [FN103] The Court concludes that "Justice Marshall in the controlling portion of his opinion set forth various rationales," and that the Fifth Circuit test is not consistent with any of them. [FN104] Finally, attributing parity to the rationales as well as to Ford's dual opinions, the Court, after finding that the retributive purpose is "not necessarily overcome once the test set forth by the Court of Appeals is met," adds that "under a similar logic the other rationales set forth by Ford [also] fail to align with the distinctions drawn by the Court of Appeals." [FN105]

The focus in Panetti is on unity. Both Ford opinions endorse the same general standard--a prisoner must "rationally understand" he will be killed by the state as punishment for a crime. Both Ford opinions articulate Eighth Amendment principles and rationales for courts to follow. After Panetti, the retributive questions asked by Justice Powell are not necessarily--and ought no longer be presumptively--the only ones that matter. [FN106]

B. A Telling Application of the Marks Doctrine

Panetti's revitalization of Ford is foretold in the Court's application of the Marks doctrine. [FN107] The Marks doctrine, spurred in the late 1970s, in part by the development of Eighth Amendment capital jurisprudence and the divisiveness of the death penalty, [FN108] generally holds that in the event of a ***334** plurality opinion, the narrowest holding controls. [FN109] While the appropriate scope of the doctrine is disputed, [FN110] it is generally agreed that Marks works when separate opinions in the same case clearly agree on some "lowest common denominator" and clearly state a rule. [FN111] Since Ford, lower courts ***335** have applied Marks to enforce Justice Powell's Ford opinion as precedent on procedure and on the substantive standard for competence to be executed. [FN112] Panetti, however, does not apply Marks across the board. The Court relies on Marks when ruling on Ford's procedural requirements, but in marked contrast, the Court does not invoke Marks when it discusses Ford's substantive standard.

On procedure, Justice Kennedy applies Marks to hold that Justice Powell's opinion, which "offered a more limited holding," constitutes "clearly established federal law" and "sets the minimum procedures a State must provide to a prisoner raising a Ford-based competency claim." [FN113] Articulating Powell's position in detail, the Court notes that it demands, upon a "substantial threshold showing of insanity," a "fair hearing" inclusive of more than merely the "examinations performed by state-appointed psychiatrists." [FN114] The Ford majority, by contrast, is sidelined by the Marks rule. The Court mentions Justice Marshall's more general statements on procedure once at the outset, but not again.

Panetti's approach to the substantive standard is palpably different. Whereas the Court cements Powell's concurrence as controlling on procedure, the Court finds that Powell's opinion on substance is "more specific," but points out that both opinions were broad, and then emphasizes that Powell wrote alone: "The opinions in Ford, it must be acknowledged, did not set forth a precise standard for competency. The four-Justice plurality discussed the substantive standard at a high level of generality; and Justice Powell wrote only for himself when he articulated more specific criteria." [FN115] Throughout the discussion of the substantive standard, the Marks rule is never mentioned. Rather, having acknowledged early on that a "substantive federal baseline for competency [was] set down in Ford," the Court jointly cites to Justice Marshall's declaration that the Eighth Amendment prevents execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications" and to Justice Powell's assertion 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"--concluding, without choosing between the two articulations, that "[w]hether Ford's inquiry into competency is formulated as a question of the prisoner's ***336** ability to 'comprehen[d] the reasons' for his punishment or as a determination into whether he is 'unaware of . . . why [he is] to suffer it,"' the Fifth Circuit's approach "is inconsistent with Ford." [FN116]

The Court does not explain this polarity. It may be that the Court implicitly relies on a practical exception to the Marks rule: where the Court's statement on an issue is not clear, where there is no clear rule, the Marks doctrine is moot. [FN117] That only the procedural issue, not the substantive issue, was properly before the Court in Ford supports this interpretation. So does the fact that Justice Marshall's opinion for the Court performed an "evolving standards of decency" analysis with regard to the prohibition's existence, but not its scope. [FN118] Significantly, Panetti shows that Justice Powell's opinion does not preclude the Eighth Amendment review that Justice Marshall sought. After Panetti, it seems a court would be remiss to apply Justice Powell's opinion in Ford without taking into account Justice Marshall's as well, including its focus on multiple common law rationales for the prohibition. [FN119]

***337** C. Parting Words

Panetti ends with an oblique word of guidance. Urging courts adjudicating Ford claims to look to the opinions of physicians, psychiatrists, and other experts to "clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent," [FN120] the Court directs attention to its

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recent decisions in Roper v. Simmons and Atkins v. Virginia as "precedent to guide a court conducting Eighth Amendment analysis." [FN121] The different context of the former cases, which analyze the proportionality of capital punishment to a defendant's conduct and status at the time of the crime and at trial, makes this tough advice. [FN122] One interpretation is that the Court is leaving a broad definition of the exempt class for the states to apply as in Atkins, and before that in Ford. But it may also be that the Court's statement alludes to similarities between people with mental retardation (Atkins), juveniles (Simmons), and people with severe mental illness. In Atkins, as the Court exempted individuals with mental retardation from the death penalty, it identified--as a core reason--the inability of those individuals to "give meaningful assistance to their counsel." [FN123]

Panetti's parting advice, like the opinion's reasoning, suggests that it is time for courts to consider and determine whether "evolving standards of decency" demand that a prisoner have the capacity to assist counsel before the state carries out an execution. It is time to answer Justice Marshall's call and attend to this "open," "unsettled," "recurring," and "important" [FN124] issue.

III. Ford After Panetti

Today, most states--but not all--do limit the Ford inquiry to Powell's scope. [FN125] But as the previous section describes, this state of affairs is not ***338** entirely rooted in reasoned choice. For more than fifteen years, judicial and legislative decisions on execution competence have been made with the understanding that Justice Powell's articulation was a rule. Before meaningful objective analysis of the states' positions can occur, therefore, state courts and legislatures must have time to respond to Panetti, reconsider what Ford and the Eighth Amendment require, and adjust execution competence standards accordingly. [FN126]

Discussion of the substance of the matter, however, need not wait. In a forum where the operative reasons and rationales for demanding execution competence are open to discussion, two questions are likely to arise early in the conversation: (1) what rationales other than the retributive rationale should hold force?; and (2) why should they hold force? Asked differently, why the retributive rationale, and why are the two questions that Justice Powell assigned for the standard not enough?

The rationale I have chosen to focus on here, with Justice Marshall's dissent in Rector as a touchstone, is the capacity to assist counsel. This is not the only rationale given new life by Panetti: notably, respect for the dignity of the condemned has also lost its place, as has the rationale that a prisoner should be able to prepare spiritually for execution. [FN127] After Panetti, courts need to reconsider the importance of these factors to the constitutional standard.

The capacity to assist counsel is significant because it protects the dignity of the condemned and does so with additional purpose. The arguments that Justice Marshall set forth in Rector for reliability of judgments and legitimacy of clemency determinations appear even stronger today, as concerns with innocence increase--four Justices have already suggested a need for courts to look to matters of reliability under the Eighth Amendment with greater care. [FN128] ***339** Further, there is reason to question whether a merely retributive-based standard is effective. The difficulties courts have had applying Ford according to Powell's formulation are likely to continue after Panetti and yield additional reasons to reconsider a solely retributive approach. It may be that reinstating the capacity to assist counsel would protect the reliability of judgments and add more certainty (less arbitrariness) to a determination that, as courts and commentators have long recognized, is problematically moral.

A. The Same Hard Questions

Panetti unified, linguistically and conceptually, the hoard of terms that Ford left behind into one concept: "rational understanding." It put an end to competence assessments based on mere awareness and flushed out incompetence claims rooted in mere desire to thwart the state. [FN129] Yet interpretive problems remain. Hard questions still

attend a determination of whether a prisoner understands the nature and effect of the punishment and its reason. Which delusions matter and why? How do they matter and how much? [FN130]

One predicament also troubled the district court in Ford. The district court on remand in Ford applied the same Florida standard that Justice Powell said would exempt Ford from execution if his factual assertions proved true, but denied relief. [FN131] The court was troubled, not by the severity of Alvin Ford's symptoms, which were extreme, but by their ebb and flow--a defining feature ***340** of the delusions symptomatic of schizophrenia. [FN132] How to measure symptoms that come one day and go the next is a sensitive determination. [FN133] In Ford, the district court rejected the argument that it would be nearly impossible to fake the symptoms over a period of years, and found Ford competent. Before the court of appeals ruled on the issue, Ford died in prison. [FN134] More recently, the governor of Virginia addressed this problem by calling for an additional competence determination, and after the prisoner, Percy Walton, was found incompetent under Ford, waited eighteen months to see if he recovered. [FN135] When Walton did not, the governor commuted Walton's sentence to life. [FN136]

Thompson v. State [FN137] presents another challenge. There, courts tried to untangle a prisoner's delusional beliefs involving capital sentencing proceedings and the concept of mitigating evidence. [FN138] Three mental health experts reported that Gregory Thompson had schizophrenia and was incompetent to be executed; [FN139] the same experts, however, stated that Thompson was aware of his impending execution and that it was for murder. [FN140] This involved more than a discrepancy between factual awareness and rational understanding. Integrated in Thompson's delusions that he was a Navy lieutenant, a Grammy award winner, and the owner of a million dollars in gold bars was his belief in this "evidence" as powerful mitigation that would ***341** eventually lead to his exoneration before a military sentencing tribunal. [FN141] One might think this supports a finding of incompetence. [FN142] But to the district court, the delusions pertaining to mitigating factors, which Thompson hoped would result in a new trial, proved his competence because they showed that he understood the proceedings and the impending execution. [FN143] Substituting rational understanding for mere awareness does not untangle this knot, in which understanding the execution and its reason animates the delusional belief. [FN144]

B. Some Remedy

One goal for a constitutional standard for execution competence should be to ameliorate difficulties such as those identified in Ford and Thompson. Since Ford, some scholars have argued that a more definite articulation would make Ford determinations easier and more consistent. [FN145] Certainly, Panetti does not endorse this, and Justice Marshall reasoned against it in similar circumstances. Marshall wrote in Powell v. Texas that "formulating a constitutional rule [in insanity cases] would reduce if not eliminate that fruitful experimentation, and ***342** freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." [FN146] Such prudence accords with Ford and Panetti setting forth broad principles, but no rule.

The capacity to assist counsel is a better alternative, and one that could prove helpful in navigating the subtleties so problematic in a case like Thompson. This capacity, which carries with it the ability to reason sufficiently to consult with counsel and communicate relevant information, is part of what the competence standards in Dusky and Godinez mean by "rational understanding." [FN147] Competence in these contexts focuses on three overlapping capacities: a capacity to understand the proceedings, a capacity to appreciate the consequences, and a capacity to assist counsel and participate in the legal process or communicate a defense. [FN148] The latter is shown in the ability to "respond to counsel's inquiries in a manner that provides relevant information for defense." [FN149] By contrast, the retributive questions from Ford focus only on the capacities to understand the proceedings and appreciate the consequences, which translate in the execution context to whether a prisoner understands that he will die via the execution, because of his crime. Removing the capacity to assist counsel (and thus to communicate a defense) creates an artificial division between the overlapping capacities, one that needlessly dismisses information about the client's interaction that is elsewhere deemed instrumental to a valid competence assessment. [FN150]

***343** Both Thompson and Ford involved prisoners with severe mental illness who arguably had a rational un-

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derstanding of the execution and its reason, yet suffered from delusions serious enough for society to wonder whether any retributive function is served by executing them. No longer bound by the four corners of Justice Powell's concurrence, we can see it misses something that is integral to Dusky. It was said shortly before Ford that competence for execution may be "more insoluble" than trial competencies simply "because it forces us to confront directly the ultimately moral question of when the state may properly take life as punishment." [FN151] The capacity to assist counsel provides a well-known measure of mental acuity that, if not perfect, [FN152] nevertheless could help to promote consistency and reliability in Ford determinations.

C. Innocence and Reliability

An age-old concern with competence and executions is not only that the state might kill a prisoner who is mad beyond retributive effect or beyond the reach of religion--but also that the state might kill a prisoner who has severe mental illness yet is innocent and unable to identify exculpatory evidence and communicate the reasons why the evidence matters. Seen through a contemporary lens, the issue has an obvious connection with the finality of judgments: at some point, the criminal justice system must be satisfied that enough review has been done to solidify confidence in the verdict, once and ***344** for all. Finality drives Justice Powell's reasoning in Ford, which, decided in 1986, corresponded with limitations by the Supreme Court, in the name of finality and federalism, on the scope of federal habeas corpus review of state court judgments. [FN153]

Justice Powell argued that "a standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest [in finality]," [FN154] and noted that whereas at common law execution "followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself," [FN155] today there is far more collateral review, and more constitutional procedural rights are available to criminal defendants, including effective assistance of counsel at trial and on direct appeal. [FN156] By the time a death row prisoner faces imminent execution, the argument goes, we are sufficiently certain of guilt and death-worthiness. [FN157]

Despite advances in procedural protections for capital defendants during trial, appeal, and through state and federal habeas corpus proceedings in some jurisdictions, however, there is a crack in the framework through which some prisoners who are severely mentally ill but actually innocent or innocent of the death penalty will pass. If a prisoner is incompetent during collateral review, the proceedings cannot assuredly root out trial error, nor can they reliably uncover issues of innocence that would found an application for executive clemency. This was Justice Marshall's argument. Others, including the American Bar Association, take this position today, emphasizing that a reliability component of competence in the execution context is needed to ***345** protect actual innocence and "innocence of the death penalty." [FN158] This argument encompasses the circumstances in Panetti, where the defendant was permitted, despite strong indications of incompetence, to represent himself at trial. [FN159] Along the same lines, states that kept the "assistance" component after Ford did so because of its importance to clemency. [FN160]

In the twenty-plus years since Justice Powell dismissed this crack in the framework and in the fifteen-plus years since Rector, more than one hundred prisoners have been exonerated from death row. [FN161] As with wrongful convictions generally, only approximately twenty-five percent of these exonerations are based on DNA evidence, [FN162] so this is not merely a scientific matter on which a prisoner would have no meaningful input. [FN163] Indeed, the modern history of execution in this country is replete with last minute stays ***346** based on meaningful newly discovered evidence. [FN164] Whatever one's views on the likelihood that an innocent prisoner has already been executed, or the likelihood that the system will eventually execute someone demonstrably innocent, these are prevalent concerns in the administration of the death penalty [FN165] that doubts about the quality of capital post-conviction representation amplify. [FN166]

In addition to procedural protections, one might talk of procedural bars. What could a prisoner possibly say at the last minute that could overcome the extremely high standards for raising a belated, "successive" constitutional claim through innocence gateways? [FN167] The AEDPA's procedural hurdles may make such circumstances less

likely, but does unlikelihood render the reliability interest served by the capacity to assist counsel unnecessary or obsolete? Justice Marshall and Professor Bonnie, among others, provide a credible argument that it does not. [FN168]

Miller and Radelet said that drawing the line on the issue of whether a prisoner's mental illness precludes retributive internalization of the punishment may be a "godlike" decision, requiring such fine parsings that it is ultimately more a moral judgment than a legal one. [FN169] The decision of how far to protect reliability and avoid executing those with something meaningful to add in defense also has a moral dimension. In the Eighth Amendment context, where reliability is prized most highly, and the price of error at the execution stage is irreversibly high, sacrificing reliability where some doubt exists is a needless ***347** and unwise choice. In this "period of new empirical argument about how 'death is different,"' [FN170] a few cases in which prisoners with severe mental illness have something exculpatory to say, about actual innocence or innocence of the death penalty, provide reason enough to have this additional safeguard.

"In the face of evidence of the hazards of capital prosecution," [FN171] unless the Court discards Ford analysis altogether for a categorical exemption on executing individuals with severe mental illness, [FN172] courts must fully consider whether the capacity to assist counsel and to communicate a defense--indeed, the capacity to reason--is part of the Eighth Amendment framework for execution incompetence. The issue remains, as in Rector in 1991, "open," "unsettled," "recurring," and "important."

Conclusion

In one of the earliest law review articles to call for an Eighth Amendment bar against executing individuals with severe mental illness, the commentator noted that the Eighth Amendment's "concern with structured discretion, particularized consideration, and minimization of error demands a definition of insanity tailored to the need of this unique proceeding." [FN173] He envisioned a test that was "not a rigid psychiatric standard," but "broad enough to apply to other condemned prisoners if changing community standards or developing medical knowledge permits other prisoners to qualify for the exemption from execution." [FN174] It would require that the prisoner understand the nature of the proceedings, the purposes and extent of the punishment, and the fate that awaits, but "[m]oreover . . . possess sufficient understanding to be aware of any facts that may make his punishment unjust, and have the ability to convey ***348** such information to his attorney." [FN175] He concluded that such an assessment, both dignity and reliability-based, would satisfy the Eighth Amendment because it accords with the common law history and is "directed at the circumstances of the condemned prisoner." [FN176] The Supreme Court has never considered whether the capacity to assist counsel should be a part of the Eighth Amendment prohibition on executing people who have severe mental illness. In the years since Ford, ever fewer courts and counsel have. After Panetti, all should.

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[FN1]. 477 U.S. 399 (1986).

[FN2]. Id. at 418-29 (Powell, J., concurring).

[FN3]. Id.

[FN4]. Penry v. Lynaugh, 492 U.S. 302, 333 (1989).

[FN5]. Ford, 477 U.S. at 406-08.

[FN6]. See Rector v. Bryant, 501 U.S. 1239, 1240 (1991) (Marshall, J., dissenting from denial of certiorari).

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[FN7]. A few commentators have argued along the lines of Justice Marshall, and persuasively, that the capacity to assist counsel retains validity in the Ford context. See, e.g., Richard J. Bonnie, Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures, 54 Cath. U. L. Rev. 1169, 1177-78 (2005); Roberta M. Harding, "Endgame": Competency and the Execution of Condemned Inmates--A Proposal to Satisfy the Eighth Amendment's Prohibition Against Infliction of Cruel and Unusual Punishment, 14 St. Louis U. Pub. L. Rev. 105, 134-37 (1994). But many more have accepted Justice Powell's analysis, in effect dismissing the relevance of the capacity to assist counsel to the Ford inquiry as a foregone conclusion. See, e.g., Christopher Slobogin, Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty 92-93 (2006) ("With respect to the first rationale [that '[a]n incompetent person might be unable to provide counsel with last minute information leading to vacation of the sentence'], as Powell noted in his concurrence, the view that competency is required to assist the attorney 'has slight merit today,' because defendants are entitled to effective assistance of counsel at trial and appeal, as well as to multiple post-conviction reviews of the sentence."). Such adoption without analysis is exemplary of the easy approval Powell's concurrence has received. See, e.g., Walton v. Johnson, 440 F.3d 160, 172 (4th Cir. 2006); Coe v. Bell, 209 F.3d 815, 825-26 (6th Cir. 2000); cf. Rohan v. Woodford, 334 F.3d 803, 811 (9th Cir. 1993) (considering more thoroughly the assistance rationale, given current procedural protections in capital cases, in the context of competency to proceed in federal post-conviction proceedings).

[FN8]. 551 U.S. ___, 127 S. Ct. 2842 (2007).

[FN9]. See generally Richard J. Bonnie, Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity, 5 Ohio St. J. Crim. L. 257 (2007); Carol S. Steiker, Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?, 5 Ohio St. J. Crim. L. 285 (2007). The author assisted in drafting an amicus brief submitted in support of Scott Panetti by the National Alliance on Mental Illness. See Brief for National Alliance on Mental Illness (NAMI) as Amicus Curiae Supporting Petitioner, Panetti, 127 S. Ct. 2842 (2007) (No. 06-6407) [hereinafter NAMI Amicus Brief Supporting Petitioner].

[FN10]. See Bonnie, supra note 9, at 259-60.

[FN11]. Panetti, 127 S. Ct. at 2860.

[FN12]. Id. at 2861.

[FN13]. Id. at 2860-61.

[FN14]. Barbara A. Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 60-61 (1986); see Robert F. Schopp, Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement, 51 La. L. Rev. 995, 1008-09 (1991); Paul J. Larkin, Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 780-82 (1980); Note, Insanity of the Condemned, 88 Yale L.J. 533, 540-41 (1979).

[FN15]. Ward, supra note 14, at 59, 62-64 (discussing Henry Weihofen, A Question of Justice: Trial or Execution of an Insane Defendant, 37 A.B.A. J. 651, 652 (1951)); see Gray v. Lucas, 710 F.2d 1048, 1054 (5th Cir. 1983) (attributing lack of definition in part to the lack of clarity of the "underlying social reason for the general principle"); Geoffrey C. Hazard, Jr. & David W. Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 394-95 (1962); see also George G. Grover, Comment, Criminal Law--Constitutional Law--Execution of Insane Persons, 23 S. Cal. L. Rev. 246, 256 (1950) ("If the reason [for the prohibition] is that he should have an opportunity to suggest items in extenuation or make arguments for executive clemency, then the standard should probably involve intelligence factors as well as moral awareness.").

[FN16]. Ward, supra note 14, at 101-07.

[FN17]. See infra notes 78-79 and accompanying text.

[FN18]. Brief for Legal Historians as Amici Curiae Supporting Petitioner at 22, Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842 (2007) (No. 06-6407) [hereinafter Legal Historians] (presenting views of professors at Princeton University, University of Oxford, University of Michigan, Columbia University Law School, University of Michigan Law School, and Arizona State Law School).

[FN19]. Id. at 23. Hale recognized that:

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment.... And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.

Solesbee v. Balkcom, 339 U.S. 9, 18-19 (1950) (Frankfurter, J., dissenting) (quoting 1 Sir Matthew Hale, The History of Pleas of the Crown 34-35 (Sollum Emlyn ed., London, E. & R. Nutt & R. Gosling 1736)). This is echoed in Blackstone:

[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

William Blackstone, 4 Commentaries *24. "Another cause of regular reprieve is, if the offender become non compos ... if after judgment, he shall not be ordered for execution: for 'furiosus solo furore punitur,' and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings." Id. at *389 (emphasis added).

[FN20]. Sir John Hawles, Remarks on the Tryal of Charles Bateman, in 3 A Compleat Collection of State-Tryals and Proceedings upon Impeachments for High Treason and Other Misdemeanours 651, 652 (Thomas Salmon ed., London, Timothy Goodwin 1719). Hawles wrote:

[F]or nothing is more certain in Law, than that a Person who falls mad after a Crime suppos'd to be committed shall not be try'd for it; and if he fall mad after Judgment, he shall not be executed.... [T]he true reason for the Law I think to be this, a Person of non sana Memoria, and a Lunatick during his Lunacy, is by an Act of God ... disabled to make his just Defence, there may be circumstances lying in his private Knowledge, which would prove his Innocency, of which he can have no advantage, because not known to the Persons who shall take upon them his Defence.

Id.

[FN21]. See Ford v. Wainwright, 477 U.S. 399, 407 (1986). Other rationales for the prohibition included that to execute the incompetent offends humanity, that to do so serves as "no example to others," Edward Coke, The Third Part of the Institutes of the Laws of England Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 6 (6th ed., London, W. Rawlins 1680), that madness is its own punishment, and the faith-based reason that it is "uncharitable to dispatch ... [unfit] into another world," Ford, 477 U.S. at 407 (quoting Hawles, supra note 20, at 653) (internal quotation marks omitted).

[FN22]. Documenting the common law roots, Justice Frankfurter urged that the historical sources are not to be taken

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lightly, that "[t]he practical considerations are not less relevant today than they were when urged by Sir John Hawles and Hale and Hawkins and Blackstone in writings which nurtured so many founders of the Republic." Solesbee, 339 U.S. at 19 (Frankfurter, J., dissenting). The primary reason he gave was reliability:

If a man has gone insane, is he still himself? Is he still the man who was convicted? In any event 'were he of sound memory, he might allege somewhat' to save himself from doom. It is not an idle fancy that one under sentence of death ought not, by becoming non compos, be denied the means to 'allege somewhat' that might free him. Such an opportunity may save life, as the last minute applications to this Court from time to time and not always without success amply attest.

Id. Frankfurter, in Solesbee, cited three twentieth century cases in support; in each, a state recognized a standard for the prohibition grounded in assistance: People v. Geary, 131 N.E. 652, 655-56 (Ill. 1921); In re Grammer, 178 N.W. 624, 626 (Neb. 1920); In re Smith, 176 P. 819, 823 (N.M. 1918).

[FN23]. Legal Historians, supra note 18, at 4.

[FN24]. Id. at 16 (citing Joel Peter Eigen, Witnessing Insanity: Madness and Mad-Doctors in the English Court 58 (1995)).

[FN25]. Id. at 4; see id. at 16-18 (discussing Hale's distinctions of degrees between "perfect and partial insanity").

[FN26]. Id. at 19; see id. at 20 ("[T]he determination of fitness for trial or execution, occurred at a higher level of generality, taking into account the general understanding and actions of the defendants.").

[FN27]. Id. at 21. It has been argued that the capacity we often demarcate by the ability to assist counsel historically also reflected the capacity to plead for clemency. See Cooper v. Oklahoma, 517 U.S. 348, 354 (1996); Legal Historians, supra note 18, at 23 (citing James H. Langbein, The Origins of Adversary Criminal Trial 60-61, 324-25 (2003)). And it has been suggested that the "commentary on the common law available at the time of the Framing and before supports the notion that the bar to executing the mentally ill required a lesser showing of impairment than at earlier stages of the proceedings." Id. at 15-16 (discussing Blackstone, supra note 19, and Hawles, supra note 20). Whether or not one agrees, the commentary shows at least the seriousness and care with which the law took the prohibition on executing individuals with mental illness.

[FN28]. The test for competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Drope v. Missouri, 420 U.S. 162, 172 (1975); Dusky v. United States, 362 U.S. 402, 402 (1960); see Godinez v. Moran, 509 U.S. 389, 396 (1993) (applying the Dusky standard for competence to guilty pleas and waivers of counsel, requiring "rational as well as factual understanding of the proceedings").

[FN29]. Norman G. Poythress et al., Adjudicative Competence: The MacArthur Studies 46-47 (2002); see Richard J. Bonnie, The Competence of Criminal Defendants: Beyond Dusky and Drope, 47 U. Miami L. Rev. 539, 570-75 (1993).

[FN30]. Poythress et al., supra note 29, at 47 ("Although they probably overlap a great deal empirically, abundant clinical experience demonstrates that they are not congruent, and that the ability to perform one set of tasks does not necessarily predict ability to perform the other."). For example:

Some mentally disabled defendants who understand the process and their own situations are unable to assist counsel; and, conversely, a delusional defendant may be able to understand counsel's role and to relate relevant information but may believe that the criminal prosecution serves a benevolent divine plan and has no punitive purpose or effect.... Despite the conceptual and empirical divergence of these two groups of capacities, however, it is sensible to combine them in a single foundational construct because both of these rationales, dignity and reliability,

underlie the traditional bar against prosecution and conviction of incompetent defendants.

Id.; see id. at 102-04 (noting discreteness of categories and need for an assessment method to include all three measures).

[FN31]. The MacArthur Studies provide that historically three social purposes have been served by competence requirements: (1) dignity: "the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her"; (2) accuracy or reliability: which is "threatened if the defendant is unable to assist in the development and presentation of a defense"; and (3) autonomy: the criminal process is undermined if the defendant lacks the ability to make decisions, where that is called for. Poythress et al., supra note 29, at 43. The MacArthur Studies draw a theoretical distinction between "adjudicative competence" (corresponding to dignity and reliability interests) and "decisional competence" (corresponding to autonomy) that the Supreme Court (Godinez) does not. Id. at 47; Slobogin, supra note 7, at 192; see Bonnie, supra note 29, at 554-60.

[FN32]. Poythress et al., supra note 29, at 43. The Supreme Court has held that a defendant's interest in autonomy diminishes following conviction. See Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 (2000).

[FN33]. Before Ford v. Wainwright, the Court focused on procedures, but never directly addressed whether the prohibition on executing the incompetent was a constitutional requirement. See, e.g., Gray v. Lucas, 710 F.2d 1048, 1054 (5th Cir. 1983) ("[T]he Supreme Court has not held that the federal constitution bars the execution of presently insane persons."); Welch v. Beto, 355 F.2d 1016, 1019 (5th Cir. 1966) (noting that whether "due process ... bars the execution of an insane person ... is an open question which the Supreme Court of the United States has not decided in terms, [although] individual justices have expressed themselves to this effect"). The closest the Court came was to review prisoners' claims that state procedures allowing for competency determinations without judicial review (either by the governor, the warden, or ex parte) violated the Due Process Clause. In each, the Court declined to address the existence of a constitutional right. See Solesbee v. Balkcom, 339 U.S. 9, 10-12 (1950); Phyle v. Duffy, 334 U.S. 431, 443-44 (1948); Nobles v. Georgia, 168 U.S. 398, 404 (1897). In Caritativo v. California, the Court approved per curiam two judgments that accepted procedures leaving the sanity determination to the discretion of the prison warden. 357 U.S. 549, 550 (1958). Four Justices argued for a due process right. Id. at 556-59 (Frankfurter, J., dissenting); see id. at 549-50 (Harlan, J., concurring). The Court, however, did not address the constitutionality of executing the incompetent again until Ford, nearly thirty years later.

[FN34]. See generally Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 3-19 (1973) (discussing the NAACP Legal Defense Fund death penalty litigation leading to Furman v. Georgia). Before the Legal Defense Fund challenges to the death penalty in the late 1960s, imposition of capital punishment in the United States went largely unnoticed; capital punishment was a common law legacy, employed relatively rarely, and framed in standard criminal law. State laws provided summarily when and how the death penalty was to be imposed--the bottom line was that once a jury found a defendant guilty of whatever the state determined to be a death-eligible crime the jury in most jurisdictions had unbridled discretion to impose a death sentence or not, without guidance or explanation, as it saw fit. Consequently, the justification for imposition of the death sentence in any given case was largely unquestioned. See Furman v. Georgia, 408 U.S. 238, 335-40 (1972) (Marshall, J., concurring).

[FN35]. See Solesbee, 339 U.S. at 12-13 (rejecting a constitutional ban as absurd because a prisoner could postpone the punishment indefinitely at will, simply by alleging insanity and thereby provoking an inquiry); Nobles, 168 U.S. at 406-07 (same); see also Phyle v. Duffy, 208 P.2d 668, 675 (Cal. 1949) (Traynor, J., concurring) ("Taking refuge in insanity as a means of escaping execution is not a constitutional right, but a privilege that the state has conferred as an act of mercy or special dispensation."). Justice Frankfurter argued that fear of protracted litigation was "groundless," and "hardly comparable" to the "grim risk" of executing an incompetent prisoner. Solesbee, 339 U.S. at 25 (Frankfurter, J., dissenting) (noting risk derived from "treacherous uncertainties in the present state of psychiatric knowledge").

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[FN36]. See Ward, supra note 14, at 101-07 (cataloging state statutes); see also Gray, 710 F.2d at 1054 ("If indeed the federal constitution affords some right by which the execution upon state conviction of a presently insane person is barred (or, at least, barred in the absence of an evidentiary hearing prior to execution), the test for insanity of this nature has never been definitely established and varies between the respective states as well as in the common law."). The Gray court, unpersuaded by Gray's proffer under any standard, chose not to address the existence of a constitutional right. Id. at 1056. A number of courts, like Gray, sidestepped the issue. See, e.g., Goode v. Wainwright, 731 F.2d 1482, 1483-84 (11th Cir. 1984).

[FN37]. See, e.g., Ward, supra note 14, at 60-61. Ward inventoried state standards for competence for execution shortly before Ford. Ward, supra note 14, at 60-62. She reported that the standard for incompetence in twenty-two states (not all specific to the execution context) was simply that the prisoner must be "insane." Id. at 60 & n.146 (citing Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Tennessee, Texas, Washington, and Wyoming). She noted that four states had similarly limited descriptions: Delaware ("mentally ill"); Indiana ("mentally ill and in need of care and treatment by the department of mental health or in a mental facility"); Montana ("lacks mental fitness"); and South Carolina ("mentally ill or mentally retarded"). Id. In Florida, where the Ford case was litigated, the test was whether the prisoner understood the "nature and effect of the death penalty and why it is to be imposed upon him." Id. at 60 & n.148. Two states, she reported, required the prisoner to be able to "consult with his attorney." Id. at 60 (citing Georgia caselaw interpreting the state's one-word statute (Brown v. State, 113 S.E.2d 618, 620 (Ga. 1960)) and North Carolina's statute). She also cited Missouri, but did not count it as a third in the text discussion. Id. at 60 n.149. Ward described four states as employing:

> [a] broad standard that the inmate must have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for initially, the purpose of his punishment, and his impending fate; to know any facts which might make his punishment unjust or illegal; and to be able to convey that information to his attorney.

Id. at 60-61 & n.150 (citing People v. Geary, 131 N.E. 652, 655-56 (Ill. 1921); In re Smith, 176 P. 819, 823 (N.M. 1918); In re Keaton, 250 N.E.2d 901, 906 (Ohio Ct. App. 1969); Bingham v. State, 169 P.2d 311, 314-15 (Okla. Crim. App. 1946)). Yet "another broad test" she noted was that of Utah, which by statute defined a prisoner incompetent "if as a result of a mental disease or defect either he is unable to comprehend the nature of the proceedings against him or the punishment proscribed, or he is unable to assist his attorney in his defense." Id. at 61 & n.151 (emphasis added). One state had what Ward described as an "obtuse" standard, whether an "inmate's mental illness has 'so lessened his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care.'" Id. at 61 (quoting Commonwealth v. Moon, 117 A.2d 96, 102 (Pa. 1955)). And finally, again referencing Oklahoma, Ward concluded "one state may retain what amounts to a 'wild beast' standard, that is, 'a state of general insanity, the mental powers being wholly obliterated.'" Id. at 61 (quoting Bingham, 169 P.2d at 314).

[FN38]. Kirk S. Heilbrun, The Assessment of Competency for Execution: An Overview, 5 Behav. Sci. & L. 383, 387 (1987). The year after Ward's study, Heilbrun reassessed the state statutes and case law. Id. at 388-91. He identified two types of statutes--those requiring that a prisoner be able to "understand" and those requiring that a prisoner be able to "understand and assist [counsel]." Id. at 385 (emphasis added) (suggesting the Brief for Petitioner in Ford v. Wainwright advocated a third type, which he dubbed "understand, assist, and prepare"). He noted that two statutes required "understand" only, two statutes required "understand and assist," and four statutes followed the In re Smith standard, which he stated was "arguably a form of 'understand and assist.'" Id. at 386-87. Sixteen statutes, he reported, had only a bare one-word description ("insane," "incompetent," or "unfit"), as did ten of the fourteen common law prohibition states. Id. at 387. Of the remaining four common law states, two he characterized as "understand and assist" and two as following a standard "that might be described as 'mentally ill and in need of treatment.'" Id. Heilbrun concluded, like Ward, that the state laws showed "little consensus." Id.

[FN39]. See, e.g., Ward, supra note 14, at 62-63.

[FN40]. Only Georgia, Illinois, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylva-

nia, Utah, and Florida had more elaborate definitions. Heilbrun, supra note 38, at 388-91. Of those, all but Florida and Pennsylvania, which adhered to a unique test (whether an inmate's mental "illness so lessen[s] his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care"), required the capacity to assist counsel. Id. (alteration in original) (quoting Moon, 117 A.2d at 102). Illinois's statute did not explicitly require the capacity to assist counsel, but case law did, and the state supreme court had not yet interpreted the statute. Id. What Ward described as two states requiring an ability to consult with counsel, four following In re Smith (which required an ability to consult with counsel), and one "unique" statute (Utah, which employed a disjunctive test with one prong requiring ability to consult with counsel), tallies seven that required the capacity to assist counsel. Ward, supra note 14, at 60-62. Adding Missouri, which Ward mentioned only in a footnote, makes eight. Id. at 60 n.149. And the case law of two additional states, Mississippi and New Jersey, required the capacity to assist counsel. Id. at 60-62. These states endorsed a three-part notion of competency akin to the Dusky standard, which encompasses the general notion of competency at common law.

[FN41]. See Legal Historians, supra note 18, at 16 ("The common law appears to have painted insanity with a broad brush, undertaking an assessment of the manifestly delusional or irrational actions of a defendant.").

[FN42]. Generality adheres in judicial opinions prior to Ford as well. See, e.g., Ford v. Wainwright, 752 F.2d 526, 531 n.2 (11th Cir. 1985) (Clark, J., dissenting) (performing Eighth Amendment review of contemporary standards of decency on the prohibition on the execution of the "insane," but not defining "insane"). Judge Clark's Eighth Amendment review looked at the "insane" as a class and considered the retributive and deterrent value (the two accepted justifications for the death penalty) of execution. See id. at 531-32; see also Gregg v. Georgia, 428 U.S. 153 (1976).

[FN43]. Fla. Stat. § 922.07 (1985); see Ford, 752 F.2d at 527.

[FN44]. Ford v. Wainwright, 477 U.S. 399, 405 (1986). Ford was a natural successor to Furman v. Georgia, 408 U.S. 238 (1972), which applied the Eighth Amendment to capital punishment, and Solesbee v. Balkcom, 339 U.S. 9 (1950), in which the Court approved state procedures for determining competence for execution but sidestepped the constitutionality of those procedures under the Due Process Clause. See Ford, 477 U.S. at 405 ("Now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by a State to determine sanity, therefore, will depend upon an issue that this Court has never addressed: whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner."); see also Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment applies to the states through the Fourteenth Amendment).

[FN45]. Ford originally challenged three grounds--the existence of an Eighth Amendment right prohibiting execution of the insane, the implementation of fair and full procedures to establish incompetence in furtherance of that right, and inclusion in the substance of the right not only Florida's language but also the capacity to assist counsel. See Ward, supra note 14, at 64 ("Ford's attorneys argued to the United States Court of Appeals for the Eleventh Circuit that a consult-with-counsel element should be added to Florida's requirement that the inmate understand the nature and effect of the death penalty and why it is to be imposed upon him."). During federal habeas litigation, Ford dropped the substantive issue focused on the capacity to assist counsel. See Ford, 752 F.2d at 528 (Clark, J., dissenting) ("The only substantive difference between Ford's eighth amendment claim and the Florida statute is based on Frankfurter's contention in Solesbee that a defendant must be sufficiently competent to cooperate with his attorney in providing reasons why his execution should not be carried out. Since Ford has exhausted both his merits appeal and his collateral attacks, he concedes that this substantive distinction is not material in his case.").

[FN46]. Ford, 477 U.S. at 409-10. Parts I and II of the opinion were joined by Justice Powell. Justices O'Connor and Rehnquist filed separate dissenting opinions.

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[FN47]. Id. at 407 (quoting Blackstone, supra note 19, at *24-25).

[FN48]. Id. at 409.

[FN49]. Id. at 419 (Powell, J., concurring).

[FN50]. Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[FN51]. Ford, 477 U.S. at 420 (Powell, J., concurring) (citations omitted) (footnote omitted).

[FN52]. Id. at 420-21 (citing Drope v. Missouri, 420 U.S. 162 (1975)).

[FN53]. Id. at 421 n.2. Powell's view accords with that expressed by Justice Traynor of the California Supreme Court in Phyle v. Duffy:

The reason ordinarily advanced against executing a man who has become insane since judgment is that he might, if sane, recall something in stay of execution. Can this reason serve as a basis for a constitutional right not to be executed while insane? The possibility that a defendant, sane at the time of his trial, will recall some fact in stay of execution after a period of intervening insanity is remote. The reasoning that would establish a constitutional right to delay on this basis would also serve to postpone the execution of a sane man on the ground that a witness might conceivably be discovered thereafter whose testimony might save him. If the possibility of a subsequently refreshed memory were enough to prevent the execution of an insane man, it would also render unconstitutional any capital punishment, since it is possible to speculate endlessly about the possibilities that would rescue a condemned man from execution provided it were delayed long enough.

208 P.2d 668, 676 (1949) (Traynor, J., concurring) (citations omitted).

[FN54]. Justice Powell articulated the standard as follows:

If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly ... the Eighth Amendment forbids the execution only of those who are unaware of [1] the punishment they are about to suffer and [2] why they are to suffer it.

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

[FN55]. Id. at 422 n.3.

[FN56]. Id. at 421 (citing Fla. Stat. § 922.07 (1985 and Supp. 1986); Ill. Rev. Stat., ch. 38, para. 1005-2-3(a) (1985) ("A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence."); State v. Pastet, 363 A.2d 41, 49 (Conn. 1975) (asking "whether the defendant was able to understand the nature of the sentencing proceedings, i.e., why he was being punished and the nature of his punishment")).

[FN57]. Id. at 421-22.

[FN58]. Id. at 422 & n.3. Powell explained in the footnote:

A number of States have remained faithful to Blackstone's view that a defendant cannot be executed unless he is able to assist in his own defense [citing Missouri, Mississippi, and Utah]. The majority of States appear not to have addressed the issue in their statutes. Modern case authority on this question is sparse, and while some older cases favor the Blackstone view, those cases largely antedate the recent expansion of both the right to counsel and the availability of federal and state collateral review. Moreover, other cases suggest that the prevailing test is "whether the condemned man was aware of his conviction and the nature of his impending fate"--essentially the

same test stated by Florida's statute. Under these circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense.

Id. at 422 n.3 (citations omitted).

[FN59]. Ford, 477 U.S. at 405-06 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[FN60]. See id.; Roper v. Simmons, 543 U.S. 551, 560-78 (2005); Atkins v. Virginia, 536 U.S. 304, 311-21 (2002) (quoting Trop, 356 U.S. at 100-01).

[FN61]. See supra note 38.

[FN62]. Note, supra note 14, at 540 (citing Hazard & Louisell, supra note 15, at 394 & n.46). The note author recognized that of the "few states ... that have attempted to set a specific standard of insanity for this stage of the criminal justice process," "four states include in their case law standards of insanity uniquely applicable to these proceedings," id. at 541 & n.48 (New Mexico, Ohio, Oklahoma, and Pennsylvania), and "[f]our other states have included a test for insanity for this purpose in their statutes," id. (Florida, Illinois, Missouri, and New Jersey). Three of the case law states were "understand and assist," and Pennsylvania was neither. Id. at 541 n.49. Of the statutory states, two were "understand and assist" (Missouri and New Jersey). Id. at 541 n. 48. And in Illinois caselaw supported the common law rule. See supra notes 36-40.

[FN63]. Note, supra note 14, at 561-62. The authors of the other article Powell cited, finding ambiguity in the common law rationales, argued that the "appropriate test of insanity to be used [in the execution context] is one which is broad enough to allow maximum exemptions and yet narrow enough to prevent feigning of insanity." Hazard & Louisell, supra note 15, at 395. They settled on a standard even broader and less detailed than Dusky: "[S]imply whether the defendant's condition is such that, by ordinary standards, he would be involuntarily committable to an institution." Id.

[FN64]. See Larkin, supra note 14, at 794 ("Because executing the presently incompetent should be forbidden on the ground that it takes advantage of the prisoner's mental disorder to foreclose his right to challenge his sentence, the test for present competency should focus on the prisoner's competency to decide whether to exercise this right."); see id. at 794-96 (advocating Rees v. Peyton, 384 U.S. 312 (1966), as the correct test for execution incompetence).

[FN65]. Cf. Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2000 (discussing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.")); Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1255 (2006) ("[C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases.").

[FN66]. Penry v. Lynaugh, 492 U.S. 302, 333 (1989). Penry discussed the common law history of excluding the "insane" from execution, retracing the same history as the Ford plurality, and noted that "the common law prohibition against punishing 'idiots' for their crimes suggests that it may indeed be cruel and unusual punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions." Id. But the Court concluded that "[b]ecause of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment." Id. This reasoning was repudiated in Atkins v. Virginia, which declared individuals who have mental retardation exempt from the death penalty under the Eighth Amendment. 536 U.S. 304, 321 (2002).

[FN67]. See, e.g., Schornhorst v. Anderson, 77 F. Supp. 2d 944, 952 (S.D. Ind. 1999); Coe v. State, 17 S.W.3d 193, 209-10 (Tenn. 2000).

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[FN68]. See, e.g., Walton v. Johnson, 440 F.3d 160, 170 n.10 (4th Cir. 2006) (citing United States v. Fareed, 296 F.3d 243, 247 (4th Cir. 2002)); Baird v. State, 833 N.E.2d 28, 29 (Ind. 2005). But see id. at 34 (Boehm, J., dissenting) (finding language in Penry "is not ... in the category of square holdings that are entitled to complete deference as definitive rulings of the Supreme Court").

[FN69]. In so doing, courts have cited the doctrine from Marks v. United States, 430 U.S. 188, 193 (1977), which generally holds that in the event of a plurality opinion the narrowest holding rules. Courts have also cited Marks to support Justice Powell's opinion as precedent on Ford procedure. See, e.g., Coe v. Bell, 209 F.3d 815, 818 (6th Cir. 2000); Amaya-Ruiz v. Stewart, 136 F. Supp. 2d 1014, 1022 (D. Ariz. 2001); see also Melissa M. Berry, Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act, 54 Cath. U. L. Rev. 747, 814 (2005) (citing Coe's interpretation of Ford as an example of "a habeas court invoking the Marks doctrine to find clearly established federal law"); cf. State v. Ross, 863 A.2d 654, 669 n.13 (Conn. 2005) (noting that Ford's plurality opinion "does not necessarily represent the governing law" on Ford procedure and enforcing Powell's opinion as the substantive standard for determining incompetence to be executed).

[FN70]. Rector v. Bryant, 501 U.S. 1239, 1240 (1991) (Marshall, J., dissenting from denial of certiorari).

[FN71]. Id.

[FN72]. Rector v. Clark, 923 F.2d 570, 572-73 (8th Cir. 1991); see Rector v. Lockhart, 727 F. Supp. 1285, 1292 (E.D. Ark. 1990).

[FN73]. Rector, 501 U.S. at 1241 (Marshall, J., dissenting from denial of certiorari) ("The lower courts clearly erred in viewing Ford as settling the issue whether a prisoner can be deemed competent to be executed notwithstanding his inability to recognize or communicate facts showing his sentence to be unlawful or unjust. Although the Court in Ford did emphasize the injustice 'of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life,' the Court stressed that this was just one of many conditions that were treated as rendering a prisoner incompetent (or insane) at common law." (quoting Ford v. Wainwright, 477 U.S. 399, 409-10 (1986))).

[FN74]. Id. at 1243.

[FN75]. Id. at 1243 n.2 (citing Mo. Ann. Stat. § 552.060(1) (Supp. 1991); Ford, 477 U.S. at 420-21) (other citations omitted).

[FN76]. ABA Criminal Justice Mental Health Standards § 7-5.6(b) (1989) ("A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.").

[FN77]. 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, 673 (2006). Paragraph 3(c) states that "execution should be precluded when a prisoner lacks the capacity ... (ii) to assist counsel in post-conviction adjudication." Id.; accord Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115, 1116 (2005) [hereinafter Task Force Recommendations] ("If a court finds at any time that a prisoner under sentence of

death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.").

[FN78]. Bonnie, supra note 7, at 1178. In addition to advocating for including the capacity to assist in defense in the Ford standard, Bonnie argues that procedural bars should not apply where incompetence precipitated default, and that post-conviction proceedings should halt pending restoration of competence. Id. at 1178-80 ("A prisoner's inability to assist in post-conviction litigation must be addressed in a comprehensive manner, and not only as a possible element of the Eighth Amendment bar against execution of a presently incompetent person."). Professor Bonnie's position mirrors that proposed by the ABA-IRR Task Force. Id. at 1181. Claims in which the "prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence" include those that do not involve a record-based trial error, such as ineffective assistance of counsel and suppression issues. Id.

[FN79]. See id. at 1178 (asserting that a "prisoner's incompetence is not ordinarily recognized as a basis for suspending collateral litigation"). Bonnie suggests that with proper protections in place, Powell's assumption may be valid. Id. But without proper protections, "[t]he possibility, however slim, that incompetent individuals may not be able to assist counsel in reconstructing a viable factual or legal claim, requires that executions be barred" where a prisoner's incapacity to assist counsel warrants suspending collateral proceedings. Id. at 1181; accord Rohan v. Woodford, 334 F.3d 803, 811 (9th Cir. 2003) ("When collateral review is compromised by the petitioner's incompetence, however, this justification [of Justice Powell's] fails.").

[FN80]. Compare Reid v. State, 197 S.W.3d 694, 702 (Tenn. 2006) (rejecting competence standard that would require rational communication with counsel because post-conviction right does not guarantee effective assistance of counsel), with People v. Owens, 564 N.E.2d 1184, 1187 (Ill. 1990) (holding statutory right to post-conviction counsel not met when "appointed counsel cannot determine whether a post-conviction petitioner has any viable claims, because petitioner's mental disease or defect renders him incapable of communicating in a rational manner").

[FN81]. Rohan, 334 F.3d at 811.

[FN82]. James R. Acker & Charles S. Lanier, Unfit to Live, Unfit to Die: Incompetency for Execution Under Modern Death Penalty Legislation, 33 Crim. L. Bull. 107, 117 (1997).

[FN83]. Kent Miller & Michael Radelet, Executing the Mentally Ill: The Criminal Justice System and the Case of Alvin Ford 139 (1993). See generally L. Elizabeth Chamblee, Time For a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution, 31 Fla. St. U. L. Rev. 335 (2004) (addressing problems with the Florida standard that Justice Powell endorsed in Ford).

[FN84]. Slobogin, supra note 7, at 191. Other interpretative questions after Ford include: What "manifestations of mental illness are necessary and/or sufficient for a finding of incompetence for execution" ? What level of proof is required for a finding of incompetence? How should courts handle the prevalence of waxing and waning of a prisoner's competence? See Miller & Radelet, supra note 83, at 105-06; Chamblee, supra note 83, at 351.

[FN85]. See Chamblee, supra note 83, at 351; Michael Radelet, Ethics and the Psychiatric Determination of Competency to Be Executed, 14 Bull. Am. Acad. Psychiatry & L. 37, 38 (1986); see also Harding, supra note 7, at 130 (critiquing use of terms "incompetency" and "insanity" as "archaic" and "imprecise"); John L. Farringer, Note, The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Exe-

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cuted, 54 Vand. L. Rev. 2441, 2481 (2001).

[FN86]. The Fifth Circuit initially followed both Ford opinions, but by 1994 "ha[d] adopted the standard as enunciated by Justice Powell as the Ford standard." Barnard v. Collins, 13 F.3d 871, 876 n.2 (5th Cir. 1994); see Garrett v. Collins, 951 F.2d 57, 59 (5th Cir. 1992) (looking to both the majority and concurring opinions in Ford and finding, under both, that the prisoner's belief that he would be saved by his aunt prior to execution did not render him incompetent to be executed); Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1988). A likely reason for the court's switch was the reference to Powell's Ford opinion in Penry v. Lynaugh, 492 U.S. 302, 333 (1989).

[FN87]. See Brief for Petitioner at 18-28, Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842 (2007) (No. 06-6407). Firmly held delusions, often of grandeur or persecution such as those Panetti suffered, and other perceptual and thought disorders are core elements of the clinical definition of schizophrenia. See Nat'l Inst. of Mental Health, U.S. Dep't of Health & Human Servs., Schizophrenia 3 (NIH Publication No. 3517 2004) ("Delusions are false personal beliefs that are not part of the person's culture and do not change, even when other people present proof that the beliefs are not true and logical."); U.S. Dep't of Health & Human Servs., Mental Health: A Report of the Surgeon General (1999) ("Delusions are firmly held erroneous beliefs due to distortions or exaggerations of reasoning and/or misinterpretations of perceptions or experiences."); World Health Org., The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research 1187 (1993) (defining delusions as "false ideas that cannot be corrected by reasoning and that are idiosyncratic for the patient"); Robert Cancro & Heinz E. Lehmann, Schizophrenia: Clinical Features, in 1 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 1187-89 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000). For a discussion of the intersection between severe mental illness and capital punishment proceedings, see Ronald S. Honberg, The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses, 54 Cath. U. L. Rev. 1153, 1159-64 (2005) (focusing on Panetti).

[FN88]. See Panetti, 127 S. Ct. at 2848; Brief for Petitioner, supra note 87, at 8-18; Honberg, supra note 87, at 1163-64.

[FN89]. See Brief for Petitioner, supra note 87, at 18-28.

[FN90]. See Panetti v. Dretke, 448 F.3d 815, 819 (5th Cir. 2006).

[FN91]. Panetti, 127 S. Ct. at 2859 (quoting Brief for Petitioner, supra note 87, at 31). The Court's opinion in Panetti addressed two issues in addition to the substantive Ford standard. A jurisdictional issue concerned the propriety of the Court's review of the case under the AEDPA provision 28 U.S.C. § 2244, which bars federal review of "second or successive habeas corpus applications." Id. at 2865. Panetti had not raised a Ford claim in his first federal habeas petition. The State argued that § 2244 foreclosed the claim. Id. at 2852. Panetti responded that the claim was timely because it was promptly presented when ripe, after denial of certiorari by the United States Supreme Court on the first federal petition. The Court agreed: requiring prisoners to file unripe Ford claims, the Court reasoned, would be an "empty formality." Id. at 2854-55 (distinguishing Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)). The Court also addressed the procedures required by Ford and found that Panetti "made a 'substantial threshold showing of insanity,'" entitling him to a fair hearing and an opportunity to be heard. Id. at 2856 (quoting Ford v. Wainwright, 477 U.S. 399, 426 (1986)). At minimum, the Court held, this required an opportunity to rebut state expert opinion. Id. at 2858. The state court, failing to so provide, unreasonably applied law clearly established in Ford. Id. at 2855. The federal district court held, in addition, that the egregious procedural failures by the state court--made prominent by the diligent motion practice of Panetti's counsel throughout--fell short of what Ford requires. See Panetti v. Dretke, 401 F. Supp. 2d 702, 706 (W.D. Tex. 2004). See generally Panetti, 127 S. Ct. at 2859-62.

[FN92]. Panetti, 127 S. Ct. at 2862.

[FN93]. Id. at 2861 (second and third alterations in original); see id. at 2860 ("'[A]wareness' ... is not necessarily

synonymous with 'rational understanding.'").

[FN94]. Id. at 2861.

[FN95]. Id. ("The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question ... if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.").

[FN96]. Id.

[FN97]. Panetti, 127 S. Ct. at 2862.

[FN98]. See id. at 2860.

[FN99]. Id.

[FN100]. Id. at 2859-60.

[FN101]. Id. at 2861.

[FN102]. Panetti, 127 S. Ct. at 2861 (alterations in original).

[FN103]. Id.

[FN104]. Id.

[FN105]. Id.

[FN106]. Id. at 2861-62.

[FN107]. Marks v. United States, 430 U.S. 188 (1977).

[FN108]. Id. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" (quoting the response of the plurality opinion in Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), to the Court's splintered decision in Furman v. Georgia, 408 U.S. 238 (1972))). For a discussion of Marks in the context of federal capital habeas litigation under the AEDPA (as in Panetti), see Berry, supra note 69, at 813-14 (discussing (1) the Fourth Circuit's opinion in Richmond v. Polk, 375 F.3d 309 (4th Cir. 2004), which interprets as controlling precedent Justice O'Connor's concurring opinion in Simmons v. South Carolina, 512 U.S. 154, 175 (1994) and (2) the Sixth Circuit's interpretation of Justice Powell's Ford concurrence on the procedural issue in Coe v. Bell, 209 F.3d 815 (6th Cir. 2000)). See also United States v. Stitt, 250 F.3d 878, 890 n.11 (4th Cir. 2001) (applying Marks to find that Justice O'Connor's concurring opinion in Ramdass v. Angelone, 530 U.S. 156 (2000), governs the Supreme Court's interpretation of "parole eligibility" under Simmons); O'Dell v. Netherland, 95 F.3d 1214, 1224 (4th Cir. 1996) (applying Marks to find that Justice White's concurring opinion in Gardner v. Florida, 430 U.S. 349 (1977), which held that reliance on "secret" information in imposing a death sentence violates the Eighth Amendment, constitutes the holding), aff'd, 521 U.S. 151 (1997) (applying but not explicitly adopting Justice White's view).

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[FN109]. Consternation with the potential for paradoxical and irrational results in cases lacking a majority opinion has increased, along with plurality decisions, over the last half-century. See Ken Kimura, A Legitimacy Model for the Interpretation of Plurality Decisions, 77 Cornell L. Rev. 1593, 1593 n.3 (1992) (offering statistical evidence of the increase in plurality decisions during the twentieth century); Mark Alan Thurmon, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 Duke L.J. 419 (1992) [hereinafter When the Court Divides]; Mark Alan Thurmon, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127 (1981); see also John F. Davis & William L. Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 Duke L.J. 59; Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1 (1993); Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756 (1980); Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. Chi. L. Rev. 99 (1956).

[FN110]. Critics have argued that Marks is unworkable because it does not apply logically in all situations. An oft-cited criticism is that "in situations where the various opinions supporting the judgment are mutually exclusive, Marks will turn a single opinion that lacks majority support into national law." King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991); see United States v. Rodriguez-Preciado, 399 F.3d 1118, 1140 (9th Cir. 2005) ("Marks is workable ... only when one opinion is the logical subset of other, broader opinions."); see, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972) ("illegitimate plurality"). Another common criticism is that a "narrowest holding" rule offends the principle of majoritarianism. See Kimura, supra note 108, at 1604 ("The narrowest grounds model is inconsistent with the principle of majoritarianism."). Some commentators have urged, however, that Marks has a fundamental place in contemporary constitutional law, and would include it in the core curriculum or "canon." See Maxwell Stears, The Case for Including Marks v. United States in the Canon of Constitutional Law, 17 Const. Comment. 321 (2000); accord When the Court Divides, supra note 108, at 441-42 ("When the Supreme Court fails to follow the result predicted by the Marks rule, it overrules a precedent, at least from the perspective of the lower courts, which must attempt to follow all of the High Court's decisions, even its plurality decisions.").

[FN111]. See Nichols v. United States, 511 U.S. 738, 745-46 (1994). For example, in Kennedy v. Dugger, 933 F.2d 905, 915-16 & n.18 (11th Cir. 1991), the court, interpreting Walton v. Arizona, 497 U.S. 639 (1990), applied Marks to find that the plurality opinion, which approved of an Arizona statute requiring defendants to prove mitigating circumstances by a preponderance of the evidence, was narrower than Justice Scalia's opinion, which disapproved of the line of cases establishing the right to present mitigating circumstances, and is therefore controlling. Accord Joseph M. Cacace, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine After Rapanos v. United States, 41 Suffolk U. L. Rev. 97, 130 (2007).

[FN112]. See supra notes 65-69 and accompanying text.

[FN113]. Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. at 2842, 2856 (2007) ("Under this rule 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.") (interpreting 28 U.S.C. § 2254(d)(1)); cf. State v. Ross, 863 A.2d 654, 669 n.13 (Conn. 2005) (questioning the force of Powell's opinion on procedure under the Marks doctrine).

[FN114]. Panetti, 127 S. Ct. at 2856.

[FN115]. Id. at 2860.

[FN116]. Id. at 2848, 2861 (third and fourth alterations in original) (quoting Ford v. Wainwright, 407 U.S. 399, 417, 422 (1986)).

[FN117]. See, e.g., Nichols v. United States, 511 U.S. 738, 745-46 (1994). In Nichols, the Court chose not to apply

Marks in response to disagreement among lower court interpretations, evincing a lack of definitive statement in the precedent. Id. More recently in Grutter v. Bollinger, 539 U.S. 306 (2003), the Court took the same path, finding widespread disagreement among courts over whether Justice Powell's opinion's "diversity rationale" was binding under Marks. Grutter, 539 U.S. at 325. Citing Nichols, the Court avoided the issue, but endorsed Powell's view nevertheless. Id. at 325-26. Compare Nichols, 511 U.S. at 745-46 ("We think it not useful to pursue the Marks inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."), and Grutter, 539 U.S. at 325 (same), with Romano v. Oklahoma, 512 U.S. 1, 6, 9 (1994) (applying Marks to identify Justice O'Connor's concurring opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985), as controlling).

[FN118]. See Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

[FN119]. Justice Thomas's dissent in Panetti argues that Ford provides no precedent on the substantive standard because the case did not present the issue. The Ford plurality, he argues, "did not define insanity or create a substantive standard for determining competency." Panetti, 127 S. Ct. at 2873-74 (Thomas, J., dissenting). He suggests that "Justice Marshall's plurality opinion in Ford did not even go so far as to state that there should be a uniform substantive standard for insanity. It is thus an open question as to how much discretion the states have in setting the substantive standard for insanity." Id. at 2873 n.11. "Only Justice Powell's concurrence set[s] forth a standard," Thomas asserts. Yet even Justice Powell's standard does not apply to Panetti, according to Thomas, because Ford broached only the question of "actual knowledge." Id. at 2873 ("[N]othing in any of the Ford opinions addresses what to do when a prisoner knows the reason for his execution but does not 'rationally understand' it."). For Thomas, neither the plurality nor concurring opinions in Ford govern.

Justice Thomas correctly draws attention to an interpretation of Ford that is different from what most lower courts accept. But his assertion that Panetti is factually distinguishable from Ford because the latter concerns only "knowledge" is not accurate--Ford had been informed of his execution, but delusionally believed that the execution would not occur. Additionally, the suggestion that there is no need for a uniform substantive standard ignores the danger of arbitrary applications across jurisdictions and the Eighth Amendment basis of the Ford right.

[FN120]. Panetti, 127 S. Ct. at 2863; cf. Clark v. Arizona, 548 U.S. 735, 781 (2006) (Kennedy, J., dissenting).

[FN121]. Panetti, 127 S. Ct. at 2863 (citing Roper v. Simmons, 543 U.S. 551, 560-64 (2005); Atkins v. Virginia, 536 U.S. 304, 311-14 (2002); Ford, 477 U.S. at 406-10).

[FN122]. Bonnie, supra note 9, at 280.

[FN123]. See Atkins, 536 U.S. at 320-21 ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes .... Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

[FN124]. Rector v. Bryant, 501 U.S. 1239, 1243 (1991) (Marshall, J., dissenting from denial of certiorari).

[FN125]. Courts in two states have moved since Ford to require the capacity to assist counsel for execution competence. See Singleton v. State, 437 S.E.2d 53 (S.C. 1993); State v. Harris, 789 P.2d 60, 66 (Wash. 1990). And at least four other states continue to incorporate the capacity to assist counsel as an element of the determination by statute or common law. See Miss. Code Ann. § 99-19-57(2)(b) (2000); Mo. Rev. Stat. § 552.060(1) (2002); In re Smith, 176 P. 819, 819, 823-24 (N.M. 1918); Fisher v. State, 845 P.2d 1272, 1276 n.3 (Okla. Crim. App. 1992) (applying 22 Okla. Stat. Ann. § 1175.1 to execution context). Illinois, one of the states Justice Powell looked to in Ford, has since repealed and not yet replaced the statute Powell relied on. People v. Johnson, 730 N.E.2d 1107, 1115 (Ill. 2000) ("[730 Ill. Comp. Stat. Ann. 5/5-2-3 (West 1992)] governed hearings on a defendant's fitness to be executed .... Our legislature, however, has since repealed section 5-2-3 (see Pub. Act 88-350, eff. January 1, 1994), and has not adopt-

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ed a statutory provision delineating procedures for raising and determining fitness for execution, or for determining fitness for post-conviction proceedings.").

[FN126]. See Kennedy v. Louisiana, 554 U.S. ___, 128 S. Ct. 2641, 2675 (2008) (Alito, J., dissenting) ("State legislatures, for more than 30 years, have operated under the ominous shadows of the Coker dicta and thus have not been free to express their own understanding of our society's standards of decency."); see also Simmons, 543 U.S. at 551, 564-68 (discussing development in state law underlying the Court's "evolving standards of decency" assessment).

[FN127]. See Bonnie, supra note 9, at 276-81; see generally Richard J. Bonnie, The Dignity of the Condemned, 74 Va. L. Rev. 1363 (1988).

[FN128]. See Kansas v. Marsh, 548 U.S. 163, 207-11 (2006) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

[FN129]. The Court's opinion in Panetti responds to the fear, held by many, that death row prisoners fake insanity to avoid execution. The validity of such claims is questionable. See, e.g., Dorothy Otnow Lewis et al., Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 841 (1986) (finding that a strong majority of death row inmates minimized rather than exaggerated symptoms of mental illness). But concerns persist, as evidenced in Justice Thomas's dissent in Panetti, which reiterates those expressed twenty years before. See Ford v. Wainwright, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part); see also Thompson v. State, 134 S.W.3d 168, 176 (Tenn. 2004) (voicing similar concerns); Van Tran v. State, 6 S.W.3d 257, 269 (Tenn. 1999) (same). Panetti explains that a rational understanding-based standard monitors malingering by demanding that courts look at delusions: under Panetti, only a lack of rational understanding rooted in a "psychotic disorder" is relevant. Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842, 2862 (2007); see Bonnie, supra note 9, at 281-82 (doubting "significant risk of fabrication" or "exaggerated symptoms" under "rational understanding" test).

[FN130]. The Court cited lack of record development (due to the restrictiveness of the Fifth Circuit's test) as a reason for not articulating the standard in greater detail, noting hesitance to rule on Panetti's competence where lower courts had not addressed "the nature and severity of petitioner's alleged mental problems" "in a more definitive manner." Panetti, 127 S. Ct. at 2863.

[FN131]. See Ford, 477 U.S. at 422 (Powell, J., concurring). The Florida standard required a "rational understanding." See Provenzano v. State, 750 So.2d 597, 601-02 (Fla. 1999) (holding Fla. R. Crim. P. 3.811, which Florida adopted in 1986 after the Court's decision in Ford, requires "rational understanding"). But see Martin v. State, 515 So.2d 189, 189-90 (Fla. 1987) (implying statute does not require "rational understanding").

[FN132]. See generally Miller & Radelet, supra note 83, at 148-57 (discussing the district court hearing).

[FN133]. See, e.g., Coe v. State, 17 S.W.3d 193, 200-03 (Tenn. 2000). A psychiatrist who evaluated Coe four times found him incompetent the first time, competent the second, incompetent the third (this occurred on the morning after the second, and Coe did not remember the doctor's previous visit), and competent the fourth. Id. at 202. Noting that Coe's competence deviated from day to day, he diagnosed Coe as suffering from schizophrenia and multiple personality disorder. Id. The doctor stated that Coe lied to him, was manipulative, and had also lied to other mental health professionals in the past, but found Coe's symptoms genuine. Id.; see Provenzano v. State, 760 So.2d 137, 140 (Fla. 2000) ("Provenzano suffers from mental illness, but because he also exaggerates symptoms and utilizes deception, it is difficult to determine Provenzano's exact mental status.").

[FN134]. Miller & Radelet, supra note 83, at 155, 158.

[FN135]. Jerry Markon, Kaine Gives Murderer Life, Calls Inmate Mentally Unfit, Wash. Post, June 10, 2008, at B1.

[FN136]. Id.

[FN137]. 134 S.W.3d 168 (Tenn. 2004), aff'd sub nom., Thompson v. Bell, No. 1:04-CV-177, 2006 WL 1195892, at *1 (E.D. Tenn. May 4, 2006).

[FN138]. Id. at 180.

[FN139]. Id. at 180-83; Thompson, 2006 WL 1195892, at *7-8.

[FN140]. Thompson, 2006 WL 1195892, at *8-9. Prior to Panetti, Tennessee determined, like the Fifth Circuit, that "a prisoner need only be aware of the 'fact of his or her execution and the reason for it' to satisfy the competency required for execution of the death sentence." Thompson, 134 S.W.3d at 184 (citing Coe v. State, 17 S.W.3d 193, 220 (Tenn. 2000)); see Van Tran v. State, 6 S.W.3d 257, 265-66 (Tenn. 1999).

[FN141]. Thompson, 2006 WL 1195892, at *10, *24. In another twist, although Thompson acknowledged his involvement in the murder, he simultaneously believes the victim is still alive. Id. at *10-11, *13; see id. at *13 (recognizing Thompson's delusional belief that electrocution would not kill him and that there is a two-year window in which he would stay alive after execution).

[FN142]. See Bonnie, supra note 9, at 280 (stating Thompson's beliefs are attributable to severe mental illness, "not ... wishful thinking").

[FN143]. Thompson, 2006 WL 1195892, at *15-17 ("Thompson's delusions do not consist of a perception that he did not commit murder or that he did not receive the death sentence for the murder, but rather, his delusions pertain to circumstances he claims will result in him being awarded a new trial and sentencing hearing." (emphasis added)); accord Thompson, 134 S.W.3d at 183 (finding Thompson aware of the execution and its reason, "despite any delusions").

[FN144]. Panetti also fails to address what impact beliefs about the afterlife should have in assessing whether a prisoner understands that execution will result in his death. See, e.g., Walton v. Johnson, 440 F.3d 160, 176 n.19 (4th Cir. 2006) ("That a person believes that he will have an 'afterlife,' however strange his views of that 'afterlife' may be, necessarily suggests he believes his existing life will end."). The Walton decision comports with the idea that a prisoner who holds a rational understanding of execution and rational belief in the afterlife can experience the retributive impact of execution. See Bonnie, supra note 9, at 278-79 (discussing Walton).

[FN145]. See supra notes 14-15 and accompanying text. Some have argued for a categorical Ford exemption for a defined class of severely mentally ill. See, e.g., Harding, supra note 7, at 134 (seeking a "uniform standard" for deciding when a "severe mental impairment" triggers Ford's protection). One difficulty with identifying a diagnosis as the measure is the likelihood of overinclusion and underinclusion: for example, all patients diagnosed with schizophrenia may not lack the ability to understand their situation and assist counsel and some other prisoners may. Ronald Roesch & Stephen L. Golding, Competency to Stand Trial 20-21 (1980); see id. at 70 ("There is no compelling or empirical basis for establishing ... a relationship between formal psychiatric diagnosis and [legal] competency.").

[FN146]. Powell v. Texas, 392 U.S. 514, 536-37 (1968); see Note, supra note 14, at 562 n.169 ("The Supreme Court itself is unlikely to mandate a uniform test of insanity.").

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[FN147]. See supra notes 29-30 and accompanying text.

[FN148]. See Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments 84 (2d ed. 2003); Poythress et al., supra note 29, at 46-47.

[FN149]. Grisso, supra note 148, at 84.

[FN150]. See Poythress et al., supra note 29, at 47, 102-03 (discussing the need to include all three overlapping but incongruous capacities in the competence construct). The way a person interacts with society is part of what defines mental illness--the concept is as "cultural" as it is "scientific." Slobogin, supra note 7, at 5. Perceiving environment, viewing how a person interacts, attains objectivity that we can never have of a person's or patient's inner workings. See Grisso, supra note 148, at 34 ("[B]ehavior often is best understood as an interaction between personal consistencies in behavioral or cognitive functioning and characteristics of the settings in which a person functions."). Legal competence "focus[es] on person-context interactions." Id. at 23, 32 (citing six common features of all competency assessments: functional abilities (abilities relevant for the legal competency in question); context (situation in which competency must be demonstrated); causal inference (nature of the relationship between the observed deficits and the legal ability); interaction (between person's particular abilities and specific demands of the situation); judgment (determination by legal decision maker whether the person-situation incongruence is sufficient to warrant a finding of incompetency); and disposition (legal response to individual authorized by decision maker's finding)); see Heilbrun, supra note 38, at 386 (summarizing these questions in the execution context as "what 'functional abilities' are necessary to be competent for execution; what must the individual be able to do, know or feel").

[FN151]. Ward, supra note 14, at 100.

[FN152]. For general criticism of Dusky and Godinez, see Grisso, supra note 148, at 10-11 (listing critiques of Dusky test); Slobogin, supra note 7, at 188-92 (analyzing ambiguity in Godinez extension of Dusky). Tension continues between the need for an "open-textured" construct responsive to the context of a given case, see Grisso, supra note 148, at 22 ("[T]he law's definitions for legal competencies provide broad discretion in determining whether a set of case facts satisfies the criteria for competence or incompetence." (citing James Gordley, Legal Reasoning: An Introduction, 72 Cal. L. Rev. 138, 142 (1984))), and assessment instruments designed to make competence determinations more consistent across cases, see Bruce J. Winick, Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Reply to Professor Bonnie, 85 J. Crim. L. & Criminology 571, 619-20 (1995) ("[T]he assessment instruments, by listing a broad range of abilities, encourage clinical evaluators to apply a generalized, abstract standard of competency, rather than a more appropriate contextualized approach."); see also Poythress et al., supra note 29, at 2; Bonnie, supra note 29, at 550. For other recent critical analysis, see, for example, Grant H. Morris, Ansar M. Haroun & David Naimark, Competency to Stand Trial on Trial, 4 Hous. J. Health L. & Policy 193 (2004); Susan Stefan, Race, Competence Testing, and Disability Law: A Review of the MacArthur Competence Research, 2 Psychol. Pub. Pol'y & L. 31, 31 (1996) (urging MacArthur Studies to "focus more on race, gender, and class issues in the determination of incompetence"). For a critique from the perspective of counsel representing a capital client, see John T. Philipsborn, Searching for Uniformity in Adjudications of the Accused's Competence to Assist and Consult in Capital Cases, 10 Psychol. Pub. Pol'y & L. 417 (2004).

[FN153]. On the day the Court decided Ford, it also decided Kuhlmann v. Wilson, 477 U.S. 436 (1986), which established a strict factual innocence standard for meeting the miscarriage of justice exception to state procedural default, and Murray v. Carrier, 477 U.S. 478 (1986), which replaced the lenient "deliberate bypass" procedural default standard with the stricter "cause" and "prejudice" test.

[FN154]. Ford v. Wainwright, 477 U.S. 399, 421 n.2 (1986) (Powell, J., concurring).

[FN155]. Id. at 420-21 (citing Drope v. Missouri, 420 U.S. 162 (1975)).

[FN156]. Id. In Coe, the Sixth Circuit offered another argument against the capacity to assist counsel as a factor in Ford determinations, questioning "how a prisoner could assist his counsel, a mental health professional, or the trial judge in deciding on his competency when the prisoner's very competency is the matter at issue." Coe v. Bell, 209 F.3d 815, 826 (6th Cir. 2000). This reasoning misses the point, which is that the prisoner may recall facts--not necessarily relevant to a competency determination--that are exculpatory.

[FN157]. In Rohan v. Woodford the Ninth Circuit held that federal law declaring the right to counsel in collateral proceedings implies a right to competence rooted in communication with counsel. 334 F.3d 803, 812-13 (9th Cir. 2003); see also Reid v. State, 197 S.W.3d 694, 707 (Tenn. 2006) (Birch, J., concurring) (arguing that competence for post-conviction review needs an assistance component). Rohan, however, did not address execution competence and took the precedence of Powell's Ford opinion as given.

[FN158]. See Bonnie, supra note 29, at 552 n.51; see also Bonnie, supra note 9, at 282 (recognizing that the procedural protections in capital trials and appeal, though complex, do not protect against the risk that jurors regard mental illness as an aggravating, rather than a mitigating, factor); Bonnie, supra note 7, at 1169 (same).

[FN159]. Texas courts found Panetti competent to stand trial and to represent himself despite a history of schizophrenia, present evidence of incompetence, and previous findings of incompetence. See Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842, 2848-49 (2007). Panetti was found competent while taking anti-psychotic medication, which he stopped taking shortly prior to trial, and did not resume: Panetti represented himself in this unmedicated condition. Id. Because Panetti did not raise a claim of present incompetence during collateral appeals, the determination of competence to be executed was crucial--Panetti's entire trial and habeas proceedings may have been conducted while he lacked competence. See id. at 2849.

[FN160]. Mo. Rev. Stat. § 552.060(1) (1978); accord Miss. Code Ann. § 99-19-57(2)(b) (1985); N.C. Gen. Stat. § 15A-1001 (1983); Rector v. Bryant, 501 U.S. 1239, 1243 (1991) (Marshall, J., dissenting from denial of certiorari).

[FN161]. See Death Penalty Information Center, Exonerations by Year, http:// deathpenaltyinfo.org/innocence-and-death-penalty#inn-yr-rc (last visited Feb. 15, 2009); Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520 (2008) (Stevens, J., concurring) (weighing this fact in deciding that imposition of the death penalty is cruel and unusual punishment).

[FN162]. Innocence Project, Causes of Wrongful Conviction, http:// www.innocenceproject.org/understand (last visited Feb. 15, 2009) ("Those exonerated by DNA testing aren't the only people who have been wrongfully convicted in recent decades. For every case that involves DNA, there are thousands that do not."); Samuel Gross et al., Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & Criminology 523, 551 (2005) (finding that leading causes of exonerations for murder are eyewitness misidentification and false confessions, primarily by juveniles and individuals who have mental illness); accord Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891 (2004) (same); cf. Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55 (2008) (examining only DNA-based post-conviction exonerations).

[FN163]. Holmes v. Buss, 506 F.3d 576, 579-80 (7th Cir. 2007) ("Federal habeas corpus happens to be one of the most complex areas of American law. With respect to many of the issues that arise in habeas corpus cases, a lay person has nothing to contribute to his lawyer's strategy. But it can be different with respect to other issues, several presented in this case, notably prosecutorial misconduct at trial and ineffective assistance by trial counsel.").

[FN164]. See Chamblee, supra note 83, at 347 n.93. How, the commentator asks, can the process be deemed to work at the end stage when no one asks whether the prisoner is capable of assisting? See id. at 348. She rightly questions how it can be deemed full process if newly discovered information arrives at the last minute and courts do not consider the prisoner's input on the information, regardless of how many appeals were previously denied. Id. at 348-49.

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[FN165]. See Kansas v. Marsh, 548 U.S. 163, 184-99 (2006); id. at 207-11 (Souter, J., dissenting); see, e.g., D. Michael Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & Criminology 761 (2007) (assessing wrongful conviction rate of capital rape-murders in 1980s and arguing for systemic reform).

[FN166]. See generally Texas Defender Service, Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts (2002) (discussing cases in which proof of innocence, death-ineligibility, or diminished death-worthiness, never came to the attention of the court due to very poor post-conviction representation).

[FN167]. See 28 U.S.C. § 2244(b)(2)(B)(ii) (2000); Schlup v. Delo, 513 U.S. 298 (1995); Sawyer v. Whitley, 505 U.S. 333 (1992).

[FN168]. Before Justice Marshall, Justice Frankfurter argued fear of protracted litigation was "groundless" and "hardly comparable to the grim risk" of executing an incompetent prisoner. Solesbee v. Balcom, 339 U.S. 9, 25 (1950) (Frankfurter, J., dissenting).

[FN169]. Miller & Radelet, supra note 83, at xii, 107 ("The vagueness of the criteria makes the personal values of the examining experts extremely important."); see Bonnie, supra note 29, at 540 n.1 (stating that competency in any context "ultimately is a legal conclusion with inescapably moral dimensions").

[FN170]. Marsh, 548 U.S. at 208 (Souter, J., dissenting); see id. at 208-09 ("[T]he same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.").

[FN171]. Id. at 211.

[FN172]. See Task Force Recommendations, supra note 77; see also Christopher Slobogin, Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations, 54 Cath U. L. Rev. 1133 (2005); Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 N.M. L. Rev. 293 (2003). Some suggested after Ford that the generality of its language reflected societal ambiguity on the death penalty and foretold such an exemption. See Jonathan L. Entin, Psychiatry, Insanity, and the Death Penalty: A Note on Implementing Supreme Court Decisions, 79 J. Crim. L. & Criminology 218, 239 (1988) (suggesting Ford was a stopgap for a forthcoming categorical exemption on executing prisoners with severe mental illness, which future evolving standards of decency would help to define); The Supreme Court, 1985 Term--Leading Cases, 100 Harv. L. Rev. 100, 106-07 (1978) (suggesting that a society and Court divided on whether state killing is acceptable cannot agree on a substantive standard for executing the mentally incompetent).

[FN173]. Note, supra note 14, at 561.

[FN174]. Id. at 562 n.169.

[FN175]. Id. at 562.

[FN176]. Id.

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