

Competence to be Executed

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Eighth Amendment and Mere “Awareness” Rather than “Rational Understanding” of Reason for Execution

In *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), the Fifth Circuit Court of Appeals considered whether the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the state’s reason for the execution.

Facts of the Case

Scott Panetti was convicted in Texas state court of murdering his wife’s parents and was sentenced to death. Before his scheduled execution, he petitioned the state court for a determination of his competency to be executed. The state *habeas* court appointed Dr. Mary Anderson, a psychiatrist, and Dr. George Parker, a clinical psychologist. They filed a joint report in which they concluded that Mr. Panetti knew that he would be executed and that he had the ability to understand the reason he would be executed. Based on this report, but without actually holding a competency hearing, the state court held that Mr. Panetti was competent to be executed.

Mr. Panetti then petitioned for a writ of *habeas corpus* in federal court. The district court held that the state court’s failure to hold a competency hearing at which Mr. Panetti could present evidence was contrary to *Ford v. Wainwright*, 477 U.S. 399 (1986). The district court therefore held an evidentiary hearing regarding Mr. Panetti’s competency. Mr. Panetti presented the testimony of four expert witnesses: two clinical and forensic psychologists, one clinical psychologist, and one psychiatrist. The State presented Dr. Parker’s and Dr. Anderson’s expert testimonies, as well as three fact witnesses who had observed Mr. Panetti during his period of incarceration.

The district court found that Mr. Panetti had “some form of mental illness” (*Panetti v. Dretke*, 401 F.Supp.2d 702, 707 (W.D. Tex. 2004)), diagnosed by some of the doctors as schizoaffective disorder. The court found that he had the “cognitive functionality to communicate coherently much of the time” (p 708), but noted that he showed “grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs” (p 707). In particular, Mr. Panetti told the doctors who interviewed him that he believed the state is “in league with the forces of evil to prevent him from preaching the Gospel” (p 709). Despite this comment, the district court found based on the testimony of the experts that Panetti was aware that he would be executed, that he had committed the murders for which he was convicted and sentenced to death, and that the state’s reason for executing him was that he had committed two murders. On this basis, the district court held that Mr. Panetti was competent to be executed. He appealed the district court decision to the 5th Circuit Court of Appeals.

Ruling and Reasoning

Mr. Panetti argued that the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the state’s reason for the execution. He contended that this understanding was lacking in his case because he believed that the state’s real motivation for the execution, as opposed to punishment for past crimes, was to punish him for preaching the Gospel. He argued that his contention was dictated by the *Ford* decision.

In *Ford*, the Supreme Court’s majority held that the Eighth Amendment bars the execution of the insane and that Florida’s *ex parte* proceeding for the determination of competency had violated due process. The standard employed under Florida’s statute was whether the defendant had “the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him” (*Ford*, 477 U.S. pp 403–4). A psychiatrist who had interviewed Ford testified that he had “no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed seriously believed that he would not be executed because he owned the prisons and could control the Governor through his mind waves” (*Ford*, p 403).

A four-member plurality opined that “[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications” (*Ford*, p 417). The plurality based its statement on their conceptualization of the lack of retributive value if a person is executed without any comprehension of why, and on the “natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity” (*Ford*, p 409). The majority opinion, however, did not address what competence standard the Eighth Amendment requires.

In a concurring opinion in *Ford*, Justice Powell attempted to articulate an appropriate standard by which to determine a defendant’s competency as follows: “If the defendant perceives the connection between the crime and his punishment, the retributive goal of the criminal law is satisfied.” Powell then wrote the following sentence, which is at the center of this discussion: “I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it” (*Ford*, pp 421–2).

The Fifth Circuit Court of Appeals noted that it has had several opportunities to develop its jurisprudence in this area and adopted Justice Powell’s concurrence as the correct standard in *Lowenfield v. Butler*, 843 F.2d 183 (5th Cir. 1988).

In *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), the defendant had paranoid delusions (much like Mr. Panetti had) that his execution was the result of a conspiracy against him and not his crimes. As the court noted: “Barnard comprehends the nature, pendency, and purpose of his execution. . . . [Barnard’s] experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system. . . .” (*Barnard*, p 876).

Mr. Panetti argued on appeal that *Barnard* was inconsistent with three prior Fifth Circuit decisions in *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987), *Lowenfield v. Butler*, 843 F.2d 183 (5th Cir. 1988), and *Garrett v. Collins*, 951 F.2d 57 (5th Cir. 1992), and with Justice Powell’s concurrence in *Ford*. The court stated that *Barnard* is consistent with Justice Powell’s concurrence in *Ford* because “Justice Powell did not state that a prisoner must ‘rationally understand’ the reason for his execution, only that he must

be ‘aware’ of it.” The court then attempted to distinguish those three cases from the present case.

First, the court concluded that *Johnson* was inapplicable to the present case because it did not involve the constitutional standard for competency to be executed. Rather, the court in *Johnson* found that the failure to hold a full, trial-like hearing on his *Ford* claim did not violate due process. Second, the court stated that *Lowenfield* was not dispositive of the present case, because that defendant’s evidence consisted of only a psychologist’s opinion that he had a diagnosis of paranoid schizophrenia, and mere evidence of schizophrenia would not establish that a prisoner was incompetent. Thus, *Lowenfield* did not address or resolve whether competency requires a rational understanding of the reason for the execution.

Third, in *Garrett*, the defendant contended that he was incompetent because he believed that his deceased aunt would protect him from the effects of the agents used during lethal injection. However, Mr. Garrett’s expert witness testified that Mr. Garrett knew it was possible for him to die as a result of the state’s efforts. The court opined that Garrett’s having some “hope” that he would be saved from death by his aunt did not render him incompetent. The court observed that Mr. Garrett argued that he lacked an understanding of the nature of the death penalty. He did not contend and the court did not decide what it means for a prisoner to be unaware of the punishment or the reason for it.

The 5th Circuit Court of Appeals held that the conclusion reached in the instant case was not inconsistent with decisions in three of its prior cases or with Justice Powell’s concurrence. The court noted that the term “awareness,” as used in *Ford*, is not necessarily synonymous with “rational understanding,” as argued by Mr. Panetti. The court thus concluded that the district court’s findings were sufficient to find Mr. Panetti competent to be executed.

Discussion

The Fifth Circuit Court of Appeals in *Panetti* has concluded that the Eighth Amendment requires only “awareness” rather than a “rational understanding” of the reason for a defendant’s execution. Under the analysis set forth in its decision, this conclusion is consistent both with Justice Powell’s concurring opinion in the *Ford* case and its own developing jurisprudence over the past 20 years.

This decision and its real-world consequences have caused concern among mental health and legal organizations. Mr. Panetti filed a petition for a writ of *certiorari* to the Supreme Court of the United States, which was granted, and oral arguments were heard on April 18, 2006. Before the proceedings, in a combined effort, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness (NAMI; formerly known as the National Alliance for the Mentally Ill) filed a joint *amicus curiae* brief in support of Mr. Panetti's petition. In addition, over the past year, the American Psychiatric Association, the American Psychological Association, and the American Bar Association all had adopted resolutions or position statements that reject the notion of executing prisoners who have severe mental illness.

The jointly filed *amicus curiae* brief centers around particular concerns, including that persons with delusions characteristic of schizophrenia commonly demonstrate fixed, idiosyncratic, non-reality-based beliefs that could directly affect the person's ability to internalize the finality of their execution and the actual reason for it, despite logical evidence explaining the reality of the situation. The brief argues that the Fifth Circuit's interpretation of *Ford* fails to take these significant impairments into consideration, especially as applied to Mr. Panetti, and the retributive value of the punishment is lost when the defendant cannot fully integrate the reason for the execution. The organizations contend in the brief that the distinction that the Fifth Circuit draws between "rational understanding" and "awareness" is an unduly narrow interpretation that does not take into account the nature of symptoms that may be seen in an individual who has delusional beliefs. The brief articulates concern over the Fifth Circuit's interpretation of the *Ford* standard, arguing that not only should an offender be aware of the nature and purpose of punishment, but should also be able to appreciate how it applies to his or her individual case. The American Psychiatric Association, the American Psychological Association, and NAMI agree that to be competent, a prisoner must have the ability to reflect on the execution as punishment for the crime committed and internalize the execution as payback to society.

This case appears to give the Supreme Court a unique opportunity to address an important question that has been unresolved since its *Ford* decision in 1986. In addition, the Court may use this oppor-

tunity to propound a standard in this area of law that is more consistent with the factual/rational distinction that it enunciated regarding determinations of competence to stand trial in *Dusky v. United States*, 362 U.S. 402 (1960).

Postscript

In addition to the substantive question about the appropriate standard for competency to be executed, the case has an important procedural aspect that may preempt the substantive question. In 1996, Congress passed the Anti-terrorism and Effective Death Penalty Act (AEDEA) which in part prohibits defendants sentenced to death in a state court from applying for a writ of *habeas corpus* (to determine the legality of their imprisonment) unless the court's findings are unreasonable or contrary to federal law. The state of Texas claims that the Supreme Court should not consider the case at all, because the factual findings of the state court that Mr. Panetti was competent to be executed are entitled to deference on federal *habeas corpus* review. In a potentially concerning sign to those people and organizations who hoped that the Supreme Court would enunciate a clearer competency standard, the week before the hearing was scheduled to be heard in the Supreme Court on April 18, 2007, the Court took the unusual step of asking the respective parties to file additional briefs before the hearing specifically addressing the AEDEA question.

Addendum

On June 28, 2007, the United States Supreme Court handed down a five-to-four decision in the *Panetti* case. Three major concerns were identified. First, the Court addressed the procedural matter raised under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires the moving party to raise all outstanding issues in the original *habeas corpus* application. In his first *habeas* application, Mr. Panetti did not argue that mental illness rendered him incompetent to be executed. After a series of adverse rulings on other matters, Mr. Panetti raised this question for the first time in a second federal *habeas* application. The state argued that Mr. Panetti's failure to raise a *Ford*-based incompetency claim in his first application deprived the federal courts of jurisdiction to hear the claim. The Court concluded that the state's interpretation would either force a defendant to forgo the opportunity to raise such a *Ford* claim in federal court if it were not included in the first application or to raise the claim in a first *habeas corpus* application, even though it is premature. Such a restrictive interpretation would be likely to cause defendants to file unripe and potentially meritless *Ford* claims in every application, increasing the burden on the courts and litigants. The Court stated that a *Ford*-based incompetency claim should be filed as soon as a defendant's competence is questioned, which may occur after

the initial application. Consequently, the Court concluded that it had the statutory authority to adjudicate the claims of competence to be executed in the second application.

Second, the Court found that the state court had failed to provide the procedures to which Mr. Panetti was entitled under the Constitution (e.g., a fair hearing and an opportunity to submit psychiatric evidence that may differ from the state's psychiatric evidence). Third, the Court ruled that the Fifth Circuit employed an improperly restrictive test when it considered Mr. Panetti's claims on the merits. The Court noted that although the *Ford* opinions did not set forth a precise competency standard, the *Ford* Court did reach the expressed conclusion that the Constitution restricts the right of the state to execute an incompetent prisoner, because such execution serves no retributive purpose. The Court held:

We likewise find no support. . .for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter [551 U.S. ____, 2007, p. 27, Bench Opinion].

Although the Court rejected the Fifth Circuit's competency standard, it did not attempt to set down a rule governing all competency determinations, because the record before the court was developed by the district court under the now-rejected Fifth Circuit standard. The court reversed and remanded the case back to the district court to develop an evidentiary record and resolve the petitioner's constitutional claim.

The Prisoner's Right to Treatment

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Requiring Prisoners Who Are Undergoing Interferon Treatment to Submit to Psychological Evaluation and Treatment Is a Reasonable Inclusion in a Hepatitis C Drug Treatment Protocol

In *Iseley v. Beard*, 200 Fed. Appx. 137 (3rd Cir. 2006), the plaintiff, a prisoner in the Pennsylvania Department of Corrections (DOC), brought suit related to numerous matters against employees of the Commonwealth of Pennsylvania and employees of the provider of medical services at the prison. A cen-

tral problem was the plaintiff's opposition to the DOC's requiring psychological evaluation and treatment as part of an interferon treatment protocol for hepatitis C virus (HCV). Mr. Iseley claimed that the defendants' failure to treat his HCV after he refused psychological treatment constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The defendants filed a motion for summary judgment arguing that the DOC policy covering HCV did not constitute cruel and unusual punishment. The United States District Court for the Western District of Pennsylvania agreed and granted summary judgment to the defendants. On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's ruling.

Facts of the Case

In 1983, Charles Iseley was convicted of several robbery and assault charges and was incarcerated. He had numerous medical problems, including hepatitis C, chronic fatigue syndrome, fibromyalgia, and rheumatoid arthritis. He had brought several earlier suits against prison officials around the question of treatment for HCV and other conditions.

In October 2002, while incarcerated at State Correctional Institute at Greene (SCI-Greene), he again brought suit against DOC and SCI-Greene employees and the medical provider at SCI-Greene and its employees. He filed the case *pro se* as a civil rights action in the United States District Court for the Western District of Pennsylvania. (The medical provider at SCI-Greene and its employees were referred to as "the Medical Defendants," and the DOC and SCI-Greene employees were the "Commonwealth Defendants" in this case.) His complaint listed numerous claims: the failure of the prison authorities and doctors to treat his HCV and other conditions constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments; the Medical Defendants' release of information regarding his HCV status violated his right to privacy; the denial of medical treatment was in violation of the Americans with Disabilities Act (ADA); the refusal to treat his HCV was retaliation for his failure to consent to psychological treatment and disclosure of his medical information; and the violation of various state laws.

The Medical Defendants filed a motion for summary judgment on the grounds that Mr. Iseley had