

safety of the individual and the public (*E.C.*, p 730). The court’s decision affirmed the authority of the hospital to file petitions according to its judgment of a patient’s risk, rather than be forced to discharge an individual as soon as criminal charges were dismissed.

Even though *E.C.* asserted that there was a gap in the statute, a plain face reading of the statute did not suggest this conclusion. It would be prudent for hospital administrators faced with a similar situation to examine what guidance their own state statutes give about responding to such situations.

## Competency to Be Executed and the Dynamic Nature of Mental Status in Psychotic Illness

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**The Fifth Circuit Court of Appeals Reviewed the District Court’s Ruling That a Prisoner Who Had Not Been Evaluated in Seven Years for Competency to Be Executed Did Not Require Funds for Experts to Conduct a New Evaluation**

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In *Panetti v. Davis*, 863 F.3d 366 (5th Cir. 2017), the U.S. Court of Appeals for the Fifth Circuit, in reversing and remanding for fact-finding the 2014 decision of the U.S. District Court for the Western District of Texas, ruled that Scott Panetti was denied due process in that he was not afforded an opportunity to refute the state’s position and evidence against him regarding his competency to be executed. The Fifth Circuit Court of Appeals ruled that the failure to provide Mr. Panetti and his counsel the same notice of his execution date that the state received, as well as the failure to provide funds for the appointment of paid counsel and experts, denied him a timely and fair opportunity to present his case and

oppose his execution. Without the funds to hire a mental health expert to evaluate his mental status and competency to be executed, Mr. Panetti could not satisfy the legal requirements for establishing a lack of this competency.

### Facts of the Case

In 1992, Mr. Panetti was charged with capital murder for killing his wife’s parents in front of his wife and three-year-old daughter. He had a lengthy history of schizophrenia and multiple hospitalizations. Mr. Panetti insisted on representing himself at trial and ultimately received the death penalty. In 1999, he filed his first *habeas* petition, claiming that he had been incompetent to waive counsel and stand trial. The district court rejected those claims, and his execution was set for February 4, 2004. In December 2003, Mr. Panetti filed a claim in state court asserting for the first time that he was incompetent to be executed. He cited Tex. Code Crim. Proc. Ann. art. 46.05 (2003), which provides “a person who is incompetent to be executed may not be executed.” The motion was denied without a hearing. He filed a second *habeas* petition in state court on January 2004 under *Ford v. Wainwright*, 477 U.S. 399 (1986), which ruled that carrying out a death sentence on a prisoner who is insane is prohibited by the Eight Amendment. The state hired two experts, received their reports, and denied relief without conducting an evidentiary hearing. The federal district court found that the state court’s failure to afford Mr. Panetti a hearing denied due process under *Ford*. The district court held an evidentiary hearing and concluded that Mr. Panetti understood the reason for his execution and found him competent to be executed. The U.S. Supreme Court granted *certiorari* and reversed the district court’s decision. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court concluded it is not enough that a prisoner has a factual understanding of the state’s reasons for execution but must also possess a rational understanding. It did not, however, establish specific competency criteria, acknowledging that “rational understanding” is often difficult to define. Mr. Panetti was eventually found competent to be executed by the standard established in *Panetti v. Quarterman*. Mr. Panetti’s claims in subsequent years were all denied.

By chance, Mr. Panetti’s counsel learned his execution date was set for December 3, 2014, when he read it in the newspaper, as no notice was required to

be provided to capital defendants or their counsel (the law in Texas has since changed). His counsel had 10 days to file an Article 46.05 motion challenging execution competence between learning about the execution date and the filing deadline; otherwise Mr. Panetti would lose all rights to appeal. At this point, Mr. Panetti's competency had not been evaluated in seven years. Counsel received *pro bono* assistance from Dr. Diane Mosnik, a psychologist who, with a preliminary review of Mr. Panetti's records, reported that he had "exhibited worsening signs of acute psychosis in the year prior" (*Panetti*, p 372). The court denied a motion to provide funds to retain Dr. Mosnik's services. Meanwhile, the state secured the services of a psychiatrist, Dr. Joseph Penn (Director of Mental Health Services in the Correctional Managed Care division of the University of Texas Medical Branch). He signed an affidavit describing Mr. Panetti's prison medical records. Neither Dr. Mosnik nor Dr. Penn had personally evaluated Mr. Panetti. The state appellate court affirmed the denial of Mr. Panetti's motions on November 25, 2014, in a 5–4 opinion. That same day, Mr. Panetti filed a motion for stay of execution and appointment of counsel in federal district court, under 18 U.S.C. § 3599 (2009). The next day, the state filed an opposition to Mr. Panetti's motion for stay of execution. The court denied Mr. Panetti's motion, concluding he had "failed to show that his mental health had substantially changed since the court's detailed inquiry seven years earlier" (*Panetti*, p 373). Mr. Panetti then appealed to the Fifth Circuit Court of Appeals.

#### Ruling and Reasoning

The Fifth Circuit Court of Appeals ruled that the state's application of Article 46.05 denied Mr. Panetti due process. The court found there was no dispute that Mr. Panetti was mentally ill long before the crime took place, that there was no justification for denying him funding for experts and other investigative resources, and that due process is breached when "affected parties" are prevented from bringing their own evidence. Considering the fact that Mr. Panetti's last psychiatric evaluation and determination that he was competent to be executed occurred 10 years prior, the court could not assume any new evidence would merely be "supplemental." The appeals court vacated the district court's findings of fact regarding competency to be executed. In a dissent, Justice Owen argued that Mr. Panetti did not offer any new

evidence from what had been "exhaustively examined" by the district court in two previous hearings on his competency. She opined that the majority wrongly used a *de novo* standard of review, when the proper standard was abuse of discretion.

#### Discussion

This case raises several important questions about how a defendant's mental state is perceived by the legal system, including the significance and timeliness of mental health evaluations. The issue raised before the Fifth Circuit Court of Appeals was not whether Mr. Panetti was mentally ill, but whether he was competent to be executed, which hinged upon whether his illness had changed since his last evaluation nearly a decade ago. Two mental health experts, a psychologist and psychiatrist, gave differing opinions on this question, based on separate reviews of his case files.

When considering the prolonged legal question of whether a psychiatric evaluation of Mr. Panetti was warranted, it is important to recognize the potential variability of mental status in individuals diagnosed with a psychotic illness. Individuals with untreated or inadequately treated psychosis are particularly susceptible to fluctuations in mental status, and acute declines in functioning can often rise to the level of a psychiatric emergency (Saddock B: Synopsis of Psychiatry, Philadelphia: Lippincott, Williams and Wilkins, 2014). In addition, research shows a relationship between the increased duration of untreated psychosis and more severe symptoms and cognitive impairment (Oliver, D. *et al.*, Can we reduce the duration of untreated psychosis? . . . Schiz. Bull. sbx166, Jan. 24, 2018). Considering what we know about the nature of untreated psychosis and the eight or more years during which Mr. Panetti was unmedicated in this appeals process, it cannot be taken for granted that Mr. Panetti's mental status remained unchanged over the course of this time.

It is also noteworthy that Mr. Panetti had been in solitary confinement for nearly a decade. Solitary confinement of the mentally ill is a systemic problem which can cause or lead to the exacerbation of symptoms (American Psychiatric Association: Position Statement on Segregation of Prisoners with Mental Illness, 2012), including higher incidences of suicide and self-injury (Kapoor R: Taking the solitary confinement debate out of isolation. J Am Acad Psychiatry Law 42:2–6, 2014).

This case also highlights the limitations of evaluations conducted by record review alone, although such review is routine for several types of forensic evaluations, including malpractice claims and the assessment of testamentary capacity. At the same time, guidelines published by both the American Academy of Psychiatry and the Law and the American Psychological Association reflect a strong preference for in-person examinations whenever feasible. These guidelines are in place to protect those being evaluated because contemporaneous data, including behavioral, speech, and tonal observations, as well as the ability of the individual to participate in the evaluation, are believed to provide the most accurate information, particularly in situations in which mental state is variable. While perhaps not always feasible, in-person evaluation is particularly relevant in situations involving a legal threat to a person's life and liberty interests when the issue of psychosis is also raised, given the dynamic nature of mental state in these cases.

In conclusion, Mr. Panetti's competency to be executed requires a thorough, contemporaneous, preferably in-person mental health evaluation at the time that the court is considering the question of his competency to be executed. His long history of severe and persistent mental illness, coupled with 10 years in solitary confinement, make this timely evaluation all the more necessary to protect Mr. Panetti's due process rights.

## Deliberate Indifference to Prisoners' Psychiatric Needs

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**Dismissal of an Inmate's Allegation That He Was Denied Psychiatric Care Is Reversed Because His Needs Were Determined to Be Serious**

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In *DePaola v. Clarke*, 884 F. 3d 481 (4th Cir. 2018), the Fourth Circuit Court of Appeals partially reversed a Virginia district court's decision to dismiss

Eric DePaola's lawsuit alleging deliberate indifference by 15 officials at the Red Onion State Prison. Mr. DePaola alleged that he was denied treatment for serious mental and physical needs while being housed in solitary confinement. The appeals court reversed the district court's finding that Mr. DePaola had failed to provide sufficient evidence to suggest that certain prison officials knew about his mental health needs and repeatedly failed to provide care.

### Facts of the Case

Mr. DePaola entered the Virginia Department of Corrections (VDOC) in 2004 when he was 17 years old. He alleged that, from the time he was six years old, he received in- and outpatient mental health care, including medications for symptoms of attention-deficit hyperactivity disorder (ADHD), depression, hallucinations, and psychomotor agitation. A court-ordered psychological evaluation completed during Mr. DePaola's criminal case concluded that he had a major mental illness ("incipient bipolar disorder") and recommended that he receive "ongoing mental health treatment" (*DePaola*, p 484). In 2007, Mr. DePaola was transferred to Red Onion State Prison and was held in solitary confinement continuously after that time. Mr. DePaola alleged that he experienced significant psychiatric problems, including depression, at Red Onion but was repeatedly denied access to mental health care. For example, he attempted suicide in 2010 and was held in five-point restraints for approximately 24 hours. Soon thereafter, he became suicidal again and refused to eat. Mr. DePaola alleged that, ultimately, he was not permitted to speak with a mental health professional at all while incarcerated at Red Onion. In addition, he stated that he developed physical health problems, including irritable bowel syndrome and a rash that resulted in scarring on his genitals, for which he did not receive adequate treatment.

In July 2015, Mr. DePaola filed a *pro se* complaint under 42 U.S.C. § 1983 (2008) against 15 VDOC officials, alleging that his Eighth Amendment rights were violated by the prison's deliberate indifference to his mental and physical health problems. The VDOC officials filed multiple motions to dismiss Mr. DePaola's suit. The district court granted these motions, finding that Virginia's two-year statute of limitations for personal injury claims had expired. In addition, the district court concluded that Mr. DePaola failed to sufficiently allege that the named