

concerns about bolstering the remorse strategy, his decision to avoid a mental health defense was a reasonable one. In addition, the circuit court held that the state supreme court was not objectively unreasonable in dismissing claims of ineffective counsel, agreeing that counsel's pursuit of a "remorse defense" was a "reasonable strategic decision" (*Elmore*, p 1171).

Concurring (in part), Judge Hurwitz agreed with the majority opinion upholding Mr. Elmore's conviction and death sentence. His concurrence acknowledges, as did the majority opinion, the strictures placed on the federal courts by the AEDA and *Strickland*; the substantial deference afforded to final state court decisions; and the substantial deference *Strickland* affords trial counsel's strategy choices.

#### Discussion

The *Elmore* decision illustrates concerns related to the expanding role of mental health and behavior science evidence in trial counsels' strategies. The concurring opinion emphasized that use of expert testimony is especially relevant to sentencing in capital cases. Neuroscience has grown in importance as is illustrated by recent Supreme Court decisions barring the death penalty for persons who have an intellectual disability and those who commit murder when less than 18 years of age (*Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005)). In *Elmore*, the majority and concurring opinions clearly attend to questions of mental illness and brain damage and affirm the obligation that defense counsel has to fully conduct an investigation of these two possible areas of defense. Indeed, the majority opinion gently chided the state supreme court (and by implication, trial lawyers), saying that it "at times conflated the mental health and brain damage defenses" (*Elmore*, p 1171). The concurrence went further, noting past cases illustrating counsels' obligation in a capital case to thoroughly investigate mental health claims (*Wiggins v. Smith*, 539 U.S. 510 (2003)).

*Elmore* illustrates some of the challenges intrinsic to the expanding role of behavior science and mental health experts in capital cases. The defense counsel's expressed concern with introducing dueling experts to the court could be justified based on the predictable wide-ranging and contradictory views of the testifying experts participating in the case. Expert testimony regarding the extent to which heightened emotional arousal or extreme emotional disturbance translate to a meaningful lack of capacity to direct

and control one's behavior suggests the subjective nature of such opinions; objective judgments are beyond our current state of knowledge. *Elmore* also demonstrates that, even as behavior science expert testimony is increasingly recognized as playing an important role in such cases, reliance on it remains only one of several types of trial strategies that counsel can look to in seeking sentencing mitigation.

Finally, the case illustrates the importance of the laws and Supreme Court precedents that limit the scope of federal court review of state court decisions. To obtain a finding of ineffective counsel, Mr. Elmore had to prove both prongs of the *Strickland* test and to do so against the deferential lens of the AEDPA's mandate that state court opinions be given the benefit of the doubt. This obstacle proved to be insurmountable.

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## Claims of Incompetency in Death Penalty Proceedings

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### Defendant Found Competent to Be Executed and a Stay of Execution Overturned After State Court's Application of Federal Law Is Deemed Reasonable

Andre Cole was sentenced to death in Missouri. He filed a petition for a writ of *habeas corpus* in the Missouri Supreme Court claiming that he was incompetent to be executed. The court denied the petition and motion for stay of execution, and Mr. Cole appealed to the federal district court. The U.S. District Court for the Eastern District of Missouri concluded that the Missouri Supreme Court incorrectly and unreasonably applied federal law and granted the motion for a stay of execution. In *Cole v. Roper*, 783 F.3d 707 (8th Cir. 2015), the Eighth Circuit reversed the district court's ruling. The issue before the Eighth Circuit was whether the state supreme court had made an incorrect and unreasonable application of federal law when reviewing Mr. Cole's incompetency claim.

## Facts of the Case

Mr. Cole and his wife divorced in 1995. Subsequently, Mr. Cole periodically failed to pay child support for their two children. They had disputes about visitation, and on August 21, 1998, upset about his lack of visitation with the children, he forcibly entered his ex-wife's home, where he confronted and fatally stabbed Anthony Curtis, who was visiting her.

Before his trial, Mr. Cole underwent a competency to stand trial evaluation and was found competent to stand trial. He was convicted of multiple charges, including first-degree murder. He was sentenced to death. On appeal, the Missouri Supreme Court upheld Mr. Cole's conviction (*State v. Cole*, 71 S.W.3d 163 (Mo. 2002) (Cole I)).

Mr. Cole was scheduled to be executed on April 14, 2015. On March 23, 2015, he filed in the Missouri Supreme Court a petition for a writ of *habeas corpus* claiming he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). In his petition, he submitted a report by a forensic psychiatrist, William Logan, who indicated that Mr. Cole's mental state impaired his competence to be executed. Mr. Cole also submitted affidavits from his past and present counsels speaking to his deteriorated mental state. The state submitted records from a prison-employed psychologist, Alwyn Whitehead. Dr. Whitehead performed a brief (15-minute) wellness check and reported that Mr. Cole denied and did not exhibit any significant psychiatric complaints. The state submitted recordings and transcripts from prison telephone calls made by Mr. Cole wherein he discussed various topics including his pre-execution status, the status of execution in other states, and the execution drugs. Mr. Cole filed a supplemental report from Dr. Logan in response to the state's submissions.

The Missouri Supreme Court served as fact-finder in Mr. Cole's incompetency claim. On review of the evidence, the court found that Mr. Cole understood his death sentence and the rationale for it and declined to grant him a hearing on his competency. Mr. Cole then filed a supplemental petition of *habeas corpus* and a motion for stay of execution in federal district court. The district court held that the Missouri Supreme Court unreasonably applied *Ford* and *Panetti* and granted his petition. The state appealed to the Eighth Circuit.

## Ruling and Reasoning

In a split decision, the majority held that the Missouri Supreme Court's adjudication of Mr. Cole's competency claim was not contrary to, or an unreasonable determination of, the United States Supreme Court's precedent. Thus, the district court's ruling was reversed, and the stay of execution was vacated.

The Eighth Circuit based its decision on federal law, which mandates that a federal court cannot grant *habeas* relief unless a state court's decision is both incorrect and unreasonable (28 U.S.C. § 2254; *Williams v. Taylor*, 529 U.S. 362 (2000)). Citing specifically *Ford* and *Panetti*, the Eighth Circuit quoted *Panetti* that, "a constitutionally acceptable procedure may be far less formal than a trial," (quoting *Ford*, p 427). The Eighth Circuit concluded that the "basic requirements" of due process were met when Mr. Cole had the opportunity to submit expert evidence and to provide rebuttal expert evidence. The court distinguished this situation from *Panetti* wherein the petitioner was not provided the opportunity to submit expert evidence, and from *Ford*, in which determinations on sanity were based on state-appointed expert witnesses.

The Eighth Circuit also reviewed procedural differences between *Cole* and the *Ford* and *Panetti* cases. In *Cole*, the state court functioned as both fact-finder and adjudicator under Missouri's *habeas* laws. Therefore, the Eighth Circuit found that the state court's determination constituted all of the hearing or process required, unlike specific procedural deficiencies noted in *Ford* and *Panetti*.

The Eighth Circuit noted that factual determinations made by state courts are presumed correct and that the petitioner bears the burden of proof to show otherwise (*Nicklasson v. Roper*, 491 F.3d 830 (8th Cir. 2007)). In light of the state's evidence submitted to the state court, the Eighth Circuit found that the state court did not make an unreasonable determination of the facts.

## Dissent

The dissent argued that Mr. Cole was deprived of his right to a hearing after he brought forth substantial threshold evidence to question his competency and that the process by which the Missouri Supreme Court acted by "merging the sequential steps" (*Cole*, p 716) for both threshold determination for a competency hearing and adjudication of competency was "egregious" (*Cole*, p. 716). The dissent spoke to numerous limitations in the available evidence, noting that Mr. Cole had no opportunity to provide all of his expert evidence, since he was not afforded a fair hearing, that the state court dismissed an expert witness

based upon negative perceptions from a prior proceeding, and that the state inappropriately considered and put weight on Mr. Cole's prior adjudication of competency.

*Discussion*

Writ of *habeas corpus* petitions in death penalty cases are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limits both the procedural and substantive scope of the writ. Specifically, the law bans successive petitions by the same person and allows claims to succeed only when convictions are contrary to federal law and if there is an unreasonable determination of the facts in light of the evidence. In *Cole*, the majority frequently justifies its conclusions by finding that the state court decision was not based upon both unreasonable application and unreasonable determination of facts, a requirement of 28 U.S.C. § 2254.

When considering the case specifics of *Cole*, it is prudent to understand the implications of *Ford* and *Panetti*. In *Ford*, the majority opined that the Eighth Amendment prohibits infliction of the death penalty on an insane prisoner and that an evidentiary hearing should be held when the question of competence to be executed is raised.

In *Panetti*, general principles from *Ford* are recounted, but there are additional, albeit vaguely articulated, considerations. *Panetti* noted that the execution of a person with mental illness is cruel and unusual punishment. In addition, the Court held that after a substantial threshold showing for insanity is met, the defendant is afforded procedural due process. Further, the Court found that it is improper to adjudicate a petitioner's competency to be executed on factual understanding alone; competency to be executed also requires rational understanding, implying some degree of acceptance. For this reason, the *Panetti* Court found that an improperly restrictive competency test is an Eighth Amendment violation.

*Cole* is a progeny of *Ford* and *Panetti*. The United States Supreme Court decisions have clearly defined the right to be competent when executed, including a rational understanding of the reason for execution. The AEDPA, however, sets stringent requirements that federal courts must meet to overturn a state court's decision to sentence a person to death. The Eighth Circuit majority did not find that any determinations of the Missouri Supreme Court were both incorrect and unreasonable. The dissent argued that the determination that Mr. Cole had been found competent to stand trial al-

most 15 years earlier was minimally relevant and that the question at hand was whether Mr. Cole was entitled to a full hearing to determine his competency, not whether he was competent. Citing primarily *Ford v. Wainwright*, the dissent concentrated on the procedural shortcomings of the state court, evidenced by the rapid, and arguably incomplete, review of evidence without a formal hearing in an action *sua sponte*.

An evidentiary hearing would have been helpful in assessing Mr. Cole's incompetency claims, in light of the compelling arguments of the dissent. In this matter, the efficiency of the AEDPA goes against the due diligence suggested by *Ford* and *Panetti*. Given the irreversible nature of an adjudication of competency to be executed, a standardized formal review of incompetency claims and a mandatory evidentiary hearing for those who meet the "substantial threshold showing" of incompetency may be prudent. In *Cole* a highly complex legal determination was adjudicated without thorough examination of available evidence or consideration of the necessity of additional evidence and review.

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## Analyzing Whether Mental Abnormality Negates a Culpable State of Mind at the Time of the Crime

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### The Supreme Judicial Court of Maine Ruled that the Trial Court Correctly Analyzed Whether Evidence of Defendant's Mental Abnormality Negated His Requisite Culpable State of Mind

*State v. Graham*, 113 A.3d 1102 (Me. 2015), reviewed the decision of a trial court case in Maine in which James Graham was convicted of attempted kidnapping and assault. At trial, Mr. Graham presented evidence suggesting that he had a mental abnormality at the time of the offense that caused him to lack the requisite intent that was a key element of