

The Undiscovered Country: Execution Competency & Comprehending Death

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The day, the night, brought him alternations of hope and fear; and so things went until the evening when he felt, or understood, that the inevitable death would come three days later, at sunrise.

He had never thought of death; for him it had no shape. But now he felt plainly that it had entered his cell, and was groping about in search of him. To escape it he began to run.

LEONID ANDREYEV²

INTRODUCTION

A large percentage of condemned inmates, as well as other prison and jail inmates, have mental disabilities.³ In the case of people on death row, those disabilities may be aggravated by the contemplation of an impending death,⁴ and, in such situations, issues about competency to be executed may arise.⁵ Despite a ban on executing insane inmates that has a pedigree that

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² LEONID ANDREYEV, *THE SEVEN THAT WERE HANGED* 24 (1918).

³ See, e.g., ELIZABETH KANDEL ENGLANDER, *UNDERSTANDING VIOLENCE* 95 (1997) (stating that “very violent and recidivistic individuals frequently have a multitude of handicaps, including neurological and medical disorders, profound psychological disorders, and intellectual and familial dysfunction”); Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 *AM. J. PSYCHIATRY* 838, 841-42 (1986) (finding that a large number of condemned individuals likely have unrecognized severe psychiatric, neurological, and cognitive disorders); DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* 165 (2006) (concluding that 56% of state prisoners, 45% of federal prisoners, and 64% of local jail inmates have mental health problems).

⁴ “In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.” *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting), *abrogated by* *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); see also Jeffrey L. Kirchmeier, *Our Existential Death Penalty: Judges, Jurors, and Terror Management*, 32 *LAW & PSYCHOL. REV.* 55, 93-96 (2008) (discussing the psychological effects of impending death on death row inmates).

⁵ The terms “insanity/sanity” and “incompetence/competence” have both been used through history regarding the execution standard, so both terms appear throughout this

goes back centuries, courts today are still struggling with the reasons for the ban and with how to define when one is incompetent to be executed.

The two United States Supreme Court decisions addressing the standard for execution competency have not defined a clear standard. In *Ford v. Wainwright*,⁶ decided in 1986, a divided Court left lower courts to speculate on the meaning of the various opinions in the case. In the 2007 decision of *Panetti v. Quarterman*,⁷ the Court added further insight into the competency standard but left many unanswered questions.⁸ In a dissenting opinion by Justice Thomas that was joined by three other members of the Court, he argued that what emerged from the majority opinion was “a half-baked holding that leaves the details of the insanity standard for the [d]istrict [c]ourt to work out.”⁹

One issue regarding the standard left open by the Court is the question of to what extent a mentally-ill capital defendant must understand the concept of death, i.e., to be competent must a defendant understand that execution means the end of her or his physical life? Lower courts are beginning to struggle with this issue, as a divided U.S. Court of Appeals for the Fourth Circuit did prior to the *Panetti* decision in *Walton v. Johnson*.¹⁰

The ban on executing the insane has been passed down through English common law so that the Supreme Court basically accepted it as a given. The Court has not settled on a clear policy for the ban, but the Justices have considered the historical rationales, such as the argument that it is inhumane to execute the insane when they cannot prepare to meet

Article. The American Bar Association (ABA) and others often use the “competency” terminology rather than the “sanity” terminology because of confusion that might arise between insanity in the execution context and insanity as a criminal defense. See Kimberly S. Ackerson, Stanley L. Brodsky & Patricia A. Zapf, *Judges’ and Psychologists’ Assessments of Legal and Clinical Factors in Competence for Execution*, 11 PSYCHOL. PUB. POL’Y & L. 164, 169 (2005).

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

7 *Panetti v. Quarterman*, 551 U.S. 930 (2007).

8 See, e.g., Lauren E. Perry, *Hiding Behind Precedent: Why Panetti v. Quarterman Will Create Confusion for Incompetent Death Row Inmates*, 86 N.C. L. REV. 1068, 1078 (2008) (noting that the Court’s failure to define “rational understanding” in *Panetti* “leaves the lower courts in the awkward position of having to define an abstract concept”).

9 *Panetti*, 551 U.S. at 978 (Thomas, J., dissenting); see, e.g., Chris Koepke, Note, *Panetti v. Quarterman: Exploring the Unsettled and Unsettling*, 45 HOUS. L. REV. 1383, 1404 (2008) (noting that “*Panetti* leaves a tremendous number of issues for lower courts to resolve”); Robert A. Stark, Note, *There May or May Not Be Blood: Why the Eighth Amendment Prohibition Against Executing the Insane Requires a Definitive Standard*, 41 CREIGHTON L. REV. 763, 786-89 (2008) (arguing that the *Panetti* Court’s failure to articulate a clear standard leads to arbitrary application of the death penalty).

10 *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006). In a dissenting opinion, Fourth Circuit Chief Judge Wilkins argued that “an individual’s understanding of the fact of execution must include at least a rudimentary comprehension that execution will mean his death, defined as the end of his physical life.” *Id.* at 183 (Wilkins, C.J., dissenting).

their Maker.¹¹ Which policy one embraces for the execution ban, however, may affect the standard for determining competency. Considering the policy goals behind the ban, there should be a requirement that a mentally ill defendant can contemplate death. But even discussing the standard reveals some absurdities about the death penalty and about the execution competency requirement.

This Article addresses the issue of to what extent the Eighth Amendment competency standard should require mentally ill defendants to know about the significance of their deaths. More specifically, this Article answers the question of whether a defendant who does not fully appreciate the concept of death can be found to be competent to be executed. Part I discusses the history and the policy behind the ban on the execution of the insane. Part II discusses the key Supreme Court decisions regarding the standard for determining competency to be executed. Part III considers statutory definitions of competency and examines how lower courts have dealt with mentally ill defendants who argue they do not understand that they are going to their deaths. In Part IV, the Article proposes a standard that is consistent with the historical underpinnings of the ban on executing the insane and that is consistent with Supreme Court precedent.

I. HISTORY & POLICY BEHIND THE BAN ON THE EXECUTION OF THE INSANE

The ban on executing the insane has a heritage spanning centuries, and the historical background provides the foundation for recent Supreme Court decisions addressing the ban. Therefore, anyone seeking the correct standard to determine execution competency must begin with the history behind the ban and the historical justifications used for prohibiting the execution of the insane.

A. *History Behind the Ban on the Execution of the Insane*

The Anglo-American common-law ban on executing the insane dates back centuries to the medieval period.¹² Commentators find the origins

¹¹ See *Ford*, 477 U.S. at 407 (citing Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 How. St. Tr. 474, 477 (1685)).

¹² KENT S. MILLER & MICHAEL L. RADELET, *EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD I* (1993) (citing *Solesbee v. Balkcom*, 339 U.S. 9 (1950)); 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND 2* (1968); Note, *Insanity of the Condemned*, 88 YALE L.J. 533, 535 (1979); Paul J. Larkin, Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 778 (1980)). In England, “[t]he record of the late Middle Ages reveals a reasonable measure of compassion and skepticism. . . . [A]lthough in homicide cases resulting in acquittal insanity might not have been accepted as a defense, offenders thought to be mentally deranged generally enjoyed pardons and custodial care.” DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 72-73 (1996).

of the ban somewhere between the eleventh century¹³ and the thirteenth century.¹⁴ As Justice Frankfurter explained, “[t]his limitation on the power of the State to take life has been part of our law for centuries, recognized during periods of English history when feelings were more barbarous and men recoiled less from brutal action than we like to think is true of our time.”¹⁵ Interestingly, around the same time as this humane ban developed, England switched execution methods, substituting hanging for “mutilation as the standard punishment for all serious crimes.”¹⁶

After the ban developed, it continued to be applied in England. In the 1600’s, Sir Edward Coke interpreted the common law of England as banning the execution of the insane,¹⁷ and in the eighteenth century William Blackstone wrote about the ban.¹⁸ By the middle of the eighteenth century, the ban was “a matter of rote and respectful recitation” in England.¹⁹

In the United States, cases and commentary from the nineteenth century and later endorsed the common-law ban on executing the incompetent.²⁰ In 1950, Justice Frankfurter noted that no state allowed the execution of

13 See Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate’s Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 32 (2001). “[I]t has been a cardinal principle of Anglo-American jurisprudence since the medieval period that the presently incompetent should not be executed.” Larkin, *supra* note 12, at 778.

14 See Roberta M. Harding, “Endgame”: *Competency and the Execution of Condemned Inmates – A Proposal to Satisfy the Eighth Amendment’s Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 109 (1994) (stating, “[i]n approximately the 13th century, the unlawfulness of executing the ‘insane’ or ‘mad’ was established”).

15 *Solesbee*, 339 U.S. at 16-17 (Frankfurter, J., dissenting), *abrogated by Ford*, 477 U.S. at 405.

16 JAMES B. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS: THE BRITISH MOVEMENT TO ABOLISH THE DEATH PENALTY 1945-57 13 (1962). This switch occurred during the thirteenth century. *Id.*

17 See SIR EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 6 (6th ed., London, W. Rawlins 1680).

18 See 4 WILLIAM BLACKSTONE, COMMENTARIES *24-25.

19 Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 OKLA. L. REV. 1, 11 (2002). During King Henry VIII’s reign, however, the king attempted to lift the ban on executing the insane for cases of high treason. See *id.* at 12 (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 6 (photo. reprint 1985) (London, W. Clarke 1817) (1644)). King Henry VIII’s law allowing such executions did not last long and was repealed because it was against the common law. *Ford*, 477 U.S. at 408 n.1.

20 See Larkin, *supra* note 12, at 779; see, e.g., *State v. Vann*, 84 N.C. 722 (1881); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 525 (Philadelphia, Isaac Riley 1819); 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 89 (8th ed., Philadelphia, Kay and Brother 1880); see also *People v. Scott*, 157 N.E. 247, 258 (Ill. 1927); *Howie v. State*, 83 So. 158, 159-60 (Miss. 1919); *In re Smith*, 176 P. 819, 822 (N.M. 1918).

the insane.²¹ By the time the Supreme Court decided *Ford v. Wainwright*²² in 1986, the Court could reflect that “[f]or centuries no jurisdiction has countenanced the execution of the insane.”²³ Today, in the United States, every state bans the execution of the insane and, as discussed in the next section, that ban has a constitutional basis. In most death penalty states, however, the execution of the prisoner may take place if the prisoner regains sanity.²⁴

The ban on executing the insane is accepted in many countries around the world as well as in international law.²⁵ International bodies such as the United Nations Commission on Human Rights²⁶ and United Nations Economic and Social Council²⁷ condone the ban on the execution of the

21 *Solesbee v. Balkcom*, 339 U.S. 9, 20 (1950) (Frankfurter, J., dissenting), *abrogated by Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

22 *Ford*, 477 U.S. 399.

23 *Id.* at 401.

24 *See* ALA. CODE § 15-16-23 (LexisNexis 1995); ARIZ. REV. STAT. ANN. § 13-4021 (2001); CAL. PEN. CODE § 3704 (West 2009); CONN. GEN. STAT. ANN. § 54-101 (West 2009); DEL. CODE ANN. tit. 11, § 406 (2007); FLA. STAT. ANN. § 922.07 (West 2001); GA. CODE ANN. § 17-10-61 (2008); KAN. STAT. ANN. § 22-4006 (2007); KY. REV. STAT. ANN. § 431.2135 (West 2006); MASS. ANN. LAWS ch. 279, § 62 (LexisNexis 2002); MISS. CODE ANN. § 99-19-57 (West 2008); MO. ANN. STAT. § 552.060 (West 2002); MONT. CODE ANN. § 46-14-202 (2007); NEB. REV. STAT. § 29-2537 (2008); NEV. REV. STAT. § 176.425 (2007); N.C. GEN. STAT. § 15A-1001 (2007); OHIO REV. CODE ANN. 2949.28 (2006); S.D. CODIFIED LAWS § 23A-27A-24 (1998); UTAH CODE ANN. § 77-19-202 (2007); VA. CODE ANN. § 19.2-177.1 (2008); *see also* *State v. Allen*, 204 La. 513, 517 (1943).

25 *See, e.g.*, LEBANESE PENAL CODE, ch. 3, art. 231 (stating that a person who is insane should not be punished by death). The Japanese Criminal Code provides for a stay of execution if the condemned is in a “condition of mental derangement,” even though the country does not ban the execution of persons with mental retardation. KEISOHO art. 479; *see* Simon H. Fisherow, *Follow the Leader?: Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of Atkins v. Virginia*, 14 PAC. RIM L. & POL’Y J. 455, 463 (2005) (noting that “only two countries, Japan and Kyrgyzstan, currently do not formally proscribe executions of persons suffering from mental retardation”); *see also* WILLIAM A. SCHABAS, *WAR CRIMES AND HUMAN RIGHTS: ESSAYS ON THE DEATH PENALTY, JUSTICE AND ACCOUNTABILITY* 20 (2008) (stating that “[v]irtually all societies refuse to execute an insane person”); Amnesty International, *Death Penalty and Mental Illness*, <http://www.amnestyusa.org/death-penalty-facts/death-penalty-and-mental-illness/page.do?id=1101090&n1=3&n2=28&n3=99> (last visited Nov. 5, 2009).

Similarly, many countries embrace the insanity defense. *See, e.g.*, WEI LOU, *THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA* 38, art. 18, (William S. Hein & Co., Inc. 1998) (“A mentally ill person who causes dangerous consequences at a time when he is unable to recognize or control his own conduct shall not bear criminal responsibility if his mental illness is verified through certain legal procedures . . .”).

26 U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report to the Econ. & Soc. Council on the Fifty-Ninth Session*, ¶ 32, U.N. Doc. E/CN.4/2003/L.11/Add.6 (Apr. 25, 2003) (*prepared by* Branko Socanac) (urging states that maintain the death penalty not to use the punishment “on a person suffering from any form of mental disorder or to execute any such person”).

27 ESCOR Res. 1984/50 ¶ 33, U.N. ESCOR, 1st Sess., Supp. No. 1, U.N. Doc. E/RES/1984/50 (May 25, 1984) (adopted by the U.N. Economic and Social Council in 1984 and stating “nor shall the death sentence be carried out . . . on persons who have become

insane and mentally ill.²⁸ Although at least as recently as the 1980s a number of countries—including Kuwait, Morocco, Syria, Czechoslovakia and Madagascar—did not have an official ban on executing the insane, there was “no empirical evidence that any state actually executes the insane.”²⁹ In the international arena, there is a strong argument that “the prohibition on execution of the insane is a customary norm of international human rights law.”³⁰

B. Policy Behind the Ban on Executing the Insane

The ban on executing the insane has been around so long that some of the original reasons for the ban may be lost to history. Part of the rationale for the ban on executing the insane is blurred with the historical development of the insanity defense to all crimes.³¹ One reason for the blurring is that the insanity defense and other competency claims share some of the same policy goals as the insanity execution ban. For example, when the time of execution was close to trial, courts prohibited the execution of the insane because the insane would not be able to make arguments on their own behalf at trial.³² Thus, the reasons for the ban on executing the insane overlapped with the requirement that one be competent to stand trial.

Common-law sources provide at least five possible justifications for the

insane”); see also ESCOR Res. 1989/64 ¶ 51, U.N. ESCOR, 1st Sess., Supp. No. 1, U.N. Doc. E/RES/1989/50 (May 24, 1989) (recommending that UN member states eliminate the death penalty “for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on Extrajudicial, Summary or Arbitrary Executions*, ¶ 30, U.N. Doc. E/CN.4/1997/60 (Dec. 24, 1996) (*prepared by Mr. Bacre Waly Ndiaye*) (stating that governments that retain the death penalty “with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards”).

²⁸ Commentators have noted, “By the law of all common law jurisdictions, and, as far as we know, the law of all civilized nations, a person who is insane cannot be punished.” Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 381 (1962).

²⁹ William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 CRIM. L.F. 95, 112-13 (1993).

³⁰ *Id.* at 114.

³¹ See Ebert, *supra* note 13, at 32 (noting that the competency to be executed requirement “is also associated with the insanity defense in its historical background, although it is distinct in modern practice”).

³² *Ford v. Wainwright*, 477 U.S. 399, 419 (1986) (Powell, J., concurring) (citing 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (London, E.&R. Nutt 1736)). Insanity as a general defense was used even before the *McNaghten* standard developed in 1843. See V.A.C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868 554-55 (1994) (discussing a successful use of the insanity defense in 1822 for a horse thief named Matthew Verney, even though “in the 1820s the defense was rarely pleaded or accepted at the Old Bailey”).

ban. The first two of the justifications often used for the ban are based on two policies behind criminal punishment: deterrence and retribution.

First, the punishment goal of deterrence is not served by the execution of the insane because the execution of an insane person does not set much of an example.³³ It will not deter other insane people, and, if there is any deterrence value to the death penalty, sane people will be deterred adequately by the execution of the sane. In the early 1600s, Sir Edward Coke explained that the execution of the insane is such “‘a miserable spectacle . . . of extream inhumanity and cruelty’ that it ‘can be no example to others.’”³⁴

Second, the punishment goal of retribution is not served by the execution of the insane for several reasons that relate to the quality and quantity of retribution. Some argue that retribution is not served because the “moral quality” of executing an insane person is less than that of the crime.³⁵ Another way that retribution is not served, especially in situations where the condemned became insane after the crime, is that executing an insane person is not punishing the sane person who actually committed the crime.³⁶ Phrased another way, Justice Frankfurter asked, “If a man has gone insane, is he still himself? Is he still the man who was convicted?”³⁷ Further, some argue that execution is unnecessary to achieve the goal of retribution because the insane person already suffers. As William Blackstone explained, “a madman is punished by his madness alone.”³⁸

The third and fourth justifications for the ban are based on humanitarian grounds. The third justification for the ban is that the execution of the insane “offends humanity.”³⁹ The fourth, a similar justification, has a religious foundation: the condemned should not be executed while unable to prepare for the afterlife.⁴⁰ These two points were made by Sir

33 *Ford*, 477 U.S. at 407.

34 SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 6 (London, E. & R. Brooke 1797), *quoted in Ford*, 477 U.S. at 419 (Powell, J., concurring); *see generally* SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (2d ed., London, John More 1629) (1628).

35 *Ford*, 477 U.S. at 408 (citing Hazard & Louisell, *supra* note 27, at 387).

36 “If the natural death of the body of one condemned may stay the hand of the executioner, it must follow in reason and justice that the death of the mind should have like effect. For it may well be questioned whether the petitioner is the same as he who was convicted.” *Musselwhite v. State*, 60 So. 2d 807, 811 (Miss. 1952).

37 *Solesbee v. Balkcom*, 339 U.S. 9, 19 (1950) (Frankfurter, J., dissenting), *abrogated by Ford*, 477 U.S. at 405.

38 4 BLACKSTONE, *supra* note 18, at *24. Blackstone actually wrote of this principle applying the insanity defense to all punishments, but the same reasoning applies to the ban on executing the insane. *See id.*

39 *Ford*, 339 U.S. at 407 (citing COKE, *supra* note 17, at 6).

40 *Id.* at 419-20 (Powell, J., concurring) (citing Hawles, *supra* note 11, at 477). One attorney has argued that the theological basis for this argument is supported by the works of Saint Thomas Aquinas; it is “rebutted by Archbishop William Temple, who dismissed the view that

John Hawles, Solicitor-General to the Courts of King William III, when he argued, “[I]t is inconsistent with humanity to make Examples of them; it is inconsistent with Religion, as being against Christian charity, to send a great Offender quick, as it is stiled, into another World, when he is not of a capacity to fit himself for it.”⁴¹

The fifth justification for the ban on executing the insane is based on procedural concerns—it helps ensure a fair and accurate process.⁴² For example, historically when the time of execution was close to trial, courts prohibited the execution of the insane because the insane would not be able to make arguments on their own behalf at trial.⁴³ Regarding this last point, even though today there is a longer period of time between trial and execution, similar reasoning applies. Today, an insane person would not be able to assist counsel in the post-conviction and appellate process.

Concerning this last justification, in the 1700s Blackstone discussed the concerns about punishing the insane in terms of fairness of the legal process and the risk of executing one who does not deserve to be executed: “[I]f, after judgment, [a person] 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.”⁴⁴

‘eternal destiny depends in any degree on the frame of mind you were in at the particular moment of death rather than on the general tenor of the life.’” Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 51 (1986) (citing Hazard & Louisell, *supra* note 28, at 388 (quoting SIR ERNEST A. GOWERS, A LIFE FOR A LIFE? THE PROBLEM OF CAPITAL PUNISHMENT 113 (1956))).

41 JOHN HAWLES, REMARKS UPON THE TRYALS 102 (London, Jacob Tonfon 1689), *quoted in* Dupler, *supra* note 19, at 12.

42 See 4 BLACKSTONE, *supra* note 18, at *24-25 (explaining that in situations where an insane prisoner is executed, “had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution”).

43 *Ford*, 477 U.S. at 419 (Powell, J., concurring) (citing HALE, *supra* note 32, at 35).

44 4 BLACKSTONE, *supra* note 18, at *24-25.

[A] case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that “*furiosus furore solum punitur.*” In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities 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

More recent commentators have expanded upon this fair and accurate process justification. These commentators note that the ban on executing the insane acts as an insurance measure or “double check” for other mental health claims that may not have been properly evaluated earlier in the process.⁴⁵ For example, an inmate may be found incompetent to be executed when that person should have earlier been found incompetent to stand trial, mentally retarded, or incapable of forming the mens rea for the crime.⁴⁶

Although the ban has been around for centuries, courts still struggle with establishing a clear definition for determining whether or not one is competent to be executed.⁴⁷ In the early English common law, courts had to operate without modern medicine and psychiatry, so determinations

the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (footnote omitted). Indeed, in the bloody reign of Henry the eighth, a statute was made (footnote omitted), which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. “For, as is observed by Sir Edward Coke (footnote omitted), the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat*: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.” But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency (footnote omitted). Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king’s subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses (footnote omitted), without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts (footnote omitted), a method is chalked out for imprisoning, chaining, and sending them to their proper homes.

Id.; see also *Solesbee v. Balkcom*, 339 U.S. 9, 19–20 (1950) (Frankfurter, J., dissenting) (stating that were an insane person instead of sound memory, the person might be able to raise a claim “to save himself from doom”), *abrogated by Ford*, 477 U.S. at 405.

⁴⁵ MILLER & RADELET, *supra* note 12, at 4.

⁴⁶ *Id.*

⁴⁷ The Supreme Court has also had to resolve when the claim may be raised in federal habeas corpus proceedings. See *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (concluding that execution competency claims do not have to be raised in initial habeas corpus petitions to preserve any possible claims); see also *Stewart v. Martinez-Villareal*, 523 U.S. 637, 639 (1998).

of competency to be executed were based on general principles without definitive standards.⁴⁸ By the late seventeenth century and the time of the British jurist Sir Matthew Hale, British courts “provided procedural safeguards for those judged to have been insane at the time of their offenses or to have become insane thereafter.”⁴⁹ Yet, “neither Hale nor his contemporaries found it necessary to include provision for medical specialists to inform or otherwise guide jurors.”⁵⁰ Even today, with a better understanding of psychiatry and medicine, modern courts continue to work on refining the definition for when one is incompetent to be executed.

II. THE SUPREME COURT AND EXECUTION COMPETENCY

In a number of cases, the Court has addressed issues related to the competency of criminal defendants, such as issues about insanity at the time of the crime as a defense⁵¹ and whether the Eighth Amendment bans the execution of those who are mentally retarded.⁵² The Court, however, first considered an issue regarding competency to be executed in 1897 in *Nobles v. Georgia*,⁵³ where the Court held that an inmate on death row did not have a federal constitutional right to a jury trial on the issue of whether the inmate was incompetent to be executed.⁵⁴

Although the Court considered due process claims regarding competency procedures in earlier cases, the Court did not directly address the standard for competency to be executed until relatively recently. In

48 See Christopher Seeds, *The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309, 314-17 (2009).

49 ROBINSON, *supra* note 12, at 121.

50 *Id.* Hale “was more forward-looking than Coke and certainly more concerned to work out the subtler aspects of insanity in relation to law.” *Id.* at 117. Although Hale’s writings on insanity were progressive for the times, in other capacities, Hale still was influenced by the views of his time. See *id.* at 117-18. For example, as a judge in 1665, he presided over a trial of two widows accused of witchcraft, instructing the jury to consider the authority of both Parliament and Scripture regarding the existence of witches. *Id.* The two women were found guilty and executed, with Hale’s position eventually being influential on the Salem witch trials. *Id.* at 118.

51 See *Penry v. Lynaugh*, 492 U.S. 302, 331-34 (1989) (discussing the common-law history of the insanity defense), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 314-21 (2002).

52 See, e.g., *Atkins*, 536 U.S. at 321 (overruling *Penry*, 492 U.S. at 302, and holding that it violates the Eighth Amendment to execute one who is mentally retarded). Another related area involves the issue of whether a capital defendant who wishes to volunteer for execution is competent to waive post-conviction review. See, e.g., Paula Shapiro, Comment, *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look at Various States’ Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567, 567-72 (2008).

53 *Nobles v. Georgia*, 168 U.S. 398 (1897).

54 *Id.* at 409.

one early case considering whether state procedures violated due process, Justice Frankfurter, in a dissenting opinion in *Solesbee v. Balkcom*,⁵⁵ cited state court decisions to suggest that the standard for competency to be executed is as follows:

[W]hether the prisoner has not “from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.”⁵⁶

This standard was not adopted by the Court, but there are two more recent significant decisions by the United States Supreme Court regarding the standard for execution competency under the Eighth Amendment.⁵⁷

A. Ford v. Wainwright: *Constitutionalizing the Ban*

In 1986, the United States Supreme Court first considered the application of the Eighth Amendment to a claim of incompetency to be executed in *Ford v. Wainwright*.⁵⁸ Justice Marshall began the majority opinion by noting, “For centuries no jurisdiction has countenanced the

⁵⁵ *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting), *abrogated by Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

⁵⁶ *Id.* at 20 n.3 (Frankfurter, J., dissenting) (quoting *In re Smith*, 176 P. 819, 823 (N.M. 1918)).

⁵⁷ The Court had considered execution competency in earlier cases. In *Solesbee*, the Supreme Court held that Georgia’s procedures to determine sanity did not violate due process in the context of the state’s own ban on executing the insane. *Solesbee*, 339 U.S. at 13–14, *abrogated by Ford*, 477 U.S. at 405. At the time of *Solesbee*, however, the Court had not yet applied the Eighth Amendment to the states. *See Ford*, 477 U.S. at 405. Dissenting in *Solesbee*, Justice Frankfurter stated that “[a]fter sentence of death, the test of insanity is whether the prisoner [can] understand [*inter alia*] the impending fate which awaits him.” *Solesbee*, 339 U.S. at 20 n.3 (internal quotation marks omitted), *abrogated by Ford*, 477 U.S. at 405; *see also Caritativo v. California*, 357 U.S. 549, 550 (1958) (per curiam) (upholding a California procedure that allowed only the prison warden to initiate competency proceedings); *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 569–71 (1953) (holding that the state court’s hearing on the insanity defense did not violate due process while Justice Frankfurter’s dissent also discusses some principles regarding competency to be executed); *Phyle v. Duffy*, 334 U.S. 431, 444 (1948) (finding lack of jurisdiction to address issue of whether the Due Process Clause of the Fourteenth Amendment bars the execution of the insane); *Nobles*, 168 U.S. at 409 (holding that a condemned inmate does not have a constitutional right to jury trial on the issue of insanity arising after trial and before execution and that it is up to states to determine the competency standard).

⁵⁸ *Ford*, 477 U.S. at 405.

execution of the insane, yet this Court has never decided whether the Constitution forbids the practice.”⁵⁹

When Alvin Ford was sentenced to death in 1974, his attorney did not raise any competency issues.⁶⁰ But eight years later while Ford was serving time on death row, his behavior began to change and he was evaluated by psychiatrists who found that he had a major mental disorder. Ford had delusions that relatives were being tortured in the prison, that he was “Pope John Paul, III,” that he “appointed nine new justices to the Florida Supreme Court,” and that he could not be executed.⁶¹ One psychiatrist found that Ford had “a severe, uncontrollable, mental disease which closely resembles ‘Paranoid Schizophrenia With Suicide Potential,’”⁶² and another doctor found that Ford had “no understanding of why he was being executed.”⁶³

Ford’s attorneys followed Florida’s legal procedures regarding competency, resulting in the Florida Governor appointing a panel of three psychiatrists who all concluded that Ford was sane.⁶⁴ After the governor signed a warrant for Ford’s execution, Ford’s attorneys unsuccessfully sought a new state court hearing on competency.⁶⁵ Following the denial of Ford’s petition for a writ of habeas corpus by the federal district court and the court of appeals, the Supreme Court granted the petition for certiorari to decide the two issues of “whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the [d]istrict [c]ourt should have held a hearing on petitioner’s claim.”⁶⁶

Justice Marshall wrote the majority opinion concluding that the Eighth Amendment bans the execution of an insane prisoner.⁶⁷ Although he noted that the interpretation of the Eighth Amendment requires consideration of “evolving standards of decency that mark the progress of a maturing

⁵⁹ *Id.* at 401.

⁶⁰ *Id.* Prior to the murder in the case, Ford had been a prison guard with no violent criminal record. MILLER & RADELET, *supra* note 12, at 159. “The murder had not been especially heinous or premeditated – Ford had panicked during a botched robbery attempt. His years in prison were marked by misery and madness.” *Id.* at 159-60.

⁶¹ *Ford*, 477 U.S. at 402-03.

⁶² *Id.*

⁶³ *Id.* at 403.

⁶⁴ “[T]he Governor of Florida appointed a panel of three psychiatrists to evaluate whether . . . Ford had ‘the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him.’” *Id.* at 403-04. The three psychiatrists each reached a different diagnosis, but they all concluded he was sane under state law. *Id.* at 404.

⁶⁵ *Id.*

⁶⁶ *Id.* at 404-05.

⁶⁷ *Id.* at 409-10. Although Justice Marshall’s *Ford* opinion was the majority opinion regarding the issue of whether the Eighth Amendment bans the execution of an insane person, the portion of his opinion addressing Florida’s statutory procedures for determining a prisoner’s sanity was a plurality opinion. *Id.* at 399-400.

society,”⁶⁸ Justice Marshall began his analysis with the common law because, at a minimum, the ban on cruel and unusual punishment prohibits “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”⁶⁹

After noting that “the bar against executing a prisoner who has lost his sanity bears impressive historical credentials,”⁷⁰ Justice Marshall discussed works by William Blackstone and Sir Edward Coke, who both wrote about the common-law ban on executing the insane.⁷¹ Justice Marshall noted that the historical reasons for the ban were somewhat vague.⁷²

Then Justice Marshall listed several explanations that have been used to justify the ban.⁷³ First, he noted that Coke had provided the justification that executing the insane “offends humanity.”⁷⁴ Second, execution of the insane does not set an example for others and does not serve “whatever deterrence value is intended to be served by capital punishment.”⁷⁵ Third, Justice Marshall cited Sir John Hawles’ religious justification in that “it is uncharitable to dispatch an offender ‘into another world, when he is not of a capacity to fit himself for it.’”⁷⁶ Fourth, Blackstone had considered that execution was unnecessary because insanity was its own punishment: “*furiosus solo furore punitur*.”⁷⁷ Fifth, Justice Marshall noted that more recent commentators had concluded that retribution is not served by executing the insane because the “moral quality” of executing an insane offender is less than that of the crime.⁷⁸ A sixth reason appears in a Blackstone quote used by Justice Marshall: an insane prisoner is unable to assist counsel arguing for a stay of judgment or execution.⁷⁹

Despite the lack of a uniform justification, Justice Marshall stressed the

68 *Id.* at 406 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

69 *Id.* at 405.

70 *Id.* at 406.

71 *Id.* at 406-07.

72 *Id.* at 407 (citing OLIVER W. HOLMES, *THE COMMON LAW* 5 (Boston, Little, Brown, and Company 1881) (“As is often true of common-law principles . . . the reasons for the rule are less sure and less uniform than the rule itself . . .”).

73 The justifications listed by Justice Marshall reflect the same ones discussed in Part I.B. See *supra* Part I.B. In Part I.B., Justice Marshall’s fourth justification of insanity being its own punishment is categorized as part of the retribution rationale. See *supra* pp. at 269.

74 *Ford*, 477 U.S. at 407 (citing COKE, *supra* note 17, at 6).

75 *Id.* (citing COKE, *supra* note 17, at 6).

76 *Id.* (citing Hawles, *supra* note 11, at 477).

77 *Id.* at 407-08 (citing 4 BLACKSTONE, *supra* note 18, at *24-25). Blackstone actually wrote of this principle applying the insanity defense to all punishments, but Justice Marshall was correct that the same reasoning would apply to the ban on executing the insane. *Id.* This policy argument is similar to the argument that retributive goals are not served by executing the insane, thus it is categorized under retribution in Part I.B of this Article. See *supra* p. 269.

78 *Ford*, 477 U.S. at 408 (citing Hazard & Louisell, *supra* note 28, at 387).

79 *Id.* at 406-07 (quoting 4 BLACKSTONE, *supra* note 18, at *24-25).

“impressive historical credentials”⁸⁰ of the ban, which carried over from England into early America and through the time of the *Ford* decision, when “no State in the Union permit[ted] the execution of the insane.”⁸¹ Justice Marshall reasoned that the arguments against executing the insane were still sound. He noted that there is questionable retributive value in “executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”⁸² He stressed the “intuition” that the execution of the insane “offends humanity,”⁸³ and that it is uncivilized to kill “one who has no capacity to come to grips with his own conscience or deity.”⁸⁴ Thus, he concluded that the Eighth Amendment prohibits the execution of the insane “[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”⁸⁵

After determining that the insane may not be executed, the Justices considered the definition of insanity and the necessary procedures for determining insanity. In a part of his opinion that was only joined by three other Justices, Justice Marshall concluded that the district court should have held an evidentiary hearing to determine Ford’s competence to be executed and that the state court procedures were inadequate.⁸⁶ Although he discussed several reasons why the state procedures were insufficient, he did not provide a legal test or standard for determining competency to be executed.⁸⁷

The standard from *Ford* that lower courts ultimately would follow was in the concurring opinion by Justice Powell.⁸⁸ He noted that the standard

⁸⁰ *Id.* at 406.

⁸¹ *Id.* at 408. Under Eighth Amendment jurisprudence, the fact that no state allows the execution of the insane would illustrate that there is a national consensus against the execution of the insane under “evolving standards of decency.” *Id.* at 406; *see, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 314-17 (2002) (finding a national consensus against the execution of individuals who are mentally retarded).

⁸² *Ford*, 477 U.S. at 409 (citing *Larkin*, *supra* note 12, at 477 n.58).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 410.

⁸⁶ *Id.*

⁸⁷ *See id.* at 426-27 (the opinions by Justice Marshall and by Justice Powell contemplate that the burden of proving incompetency to be executed may be placed upon the prisoner).

⁸⁸ This test has been cited with approval by the Supreme Court and followed elsewhere. *See Penry v. Lynaugh*, 492 U.S. 302, 333 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 314-21 (2002). *See also* 18 U.S.C. § 3596(c) (2006) (“A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.”); *Scott v. Mitchell*, 250 F.3d 1011, 1014 (6th Cir. 2001); *Massie v. Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir. 2001); *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995); *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991); *Walton v. Johnson*, 440 F.3d 160, 171 (4th Cir. 2006) (noting that “all four federal cir-

used in Florida “appropriately defin[ed] the kind of mental deficiency that should trigger the Eighth Amendment prohibition.”⁸⁹ The standard prohibits the execution of individuals who “do not have the mental capacity to understand [1] the nature of the death penalty and [2] why it was imposed’ on them.”⁹⁰

In supporting this standard, Justice Powell began with a consideration of the various justifications for the ban on executing the insane. He found the retributive justification and humanity justification legitimate concerns, but he downplayed the fair and accurate process justification.⁹¹ Regarding the latter, he reasoned that the procedural concerns have “slight merit today” because of modern development.⁹²

Justice Powell’s standard—requiring capacity to understand the nature of the punishment and why it was imposed—was based upon the humanity and retribution justifications.⁹³ He noted that the humanity concerns about executing the insane are valid, and that it is true “that most men and women value the opportunity to prepare, mentally and spiritually, for their death.”⁹⁴ He also focused on the retributive goal in fashioning a standard that required understanding the nature of the death penalty and the reason for its imposition.⁹⁵ He concluded that the retributive goal of the death penalty is only achieved if the defendant is aware “of the penalty’s existence and purpose.”⁹⁶

In a dissenting opinion joined by Chief Justice Burger, Justice Rehnquist rejected the conclusion that the Eighth Amendment prohibits the

cuit courts that have addressed competency to be executed have recognized Justice Powell’s proffered test as the appropriate standard by which to determine competence”). In *Panetti v. Quarterman*, the Supreme Court noted that “Justice Powell’s opinion [in *Ford*] constitutes ‘clearly established’ law for purposes of [habeas corpus claims] and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.” *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

⁸⁹ *Ford*, 477 U.S. at 422.

⁹⁰ *Id.* at 421 (quoting FLA. STAT. ANN. § 922.07 (West 2001)).

⁹¹ *Id.* at 419–22. Justice Powell noted that a common-law justification for the ban on the execution of the insane was to ensure that capital defendants could present arguments on their own behalf; yet, he concluded that such a justification did not apply in modern times because of changes in rights and procedures, such as the right to counsel and the fact that a defendant must be competent to stand trial. *Id.* at 419–21.

⁹² *Id.* at 420.

⁹³ Justice Powell noted that his Eighth Amendment standard served these two legitimate justifications for the ban on executing the insane: “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.” *Id.* at 422.

⁹⁴ *Id.* at 421.

⁹⁵ *Id.* at 422–23.

⁹⁶ *Id.* at 422.

execution of the insane.⁹⁷ He attacked the majority's reliance on common law by noting that at common law it was up to the executive to determine whether or not a condemned person was insane.⁹⁸ He also noted that the Supreme Court in *Solesbee v. Balkcom*⁹⁹ had focused on the executive role in addressing claims of incompetence to be executed.¹⁰⁰ Justice Rehnquist, however, did not attack the reasoning for the ban on executing the insane. He only concluded that it was unnecessary for the Court to create a new constitutional right when every state already prohibited the execution of the insane.¹⁰¹

The decision in *Ford* left open many questions about the legal standard.¹⁰² For Alvin Ford, it sent his case back to district court for an evidentiary hearing.¹⁰³ In district court, the majority of experts testified that Ford was psychotic or seriously disturbed, but the judge agreed with experts who claimed that Ford was malingering and not mentally ill.¹⁰⁴ The case was appealed to the U.S. Court of Appeals for the Eleventh Circuit, and in 1990 a three judge panel heard oral arguments on the case.¹⁰⁵ One of the arguments in the case focused on the issue of what to do if an inmate cycled in and out of a psychotic state, alternating between competency and incompetency depending on the day.¹⁰⁶ Before the court could rule on the case, however, Alvin Ford fell ill in prison and then died two days later in the hospital on February 28, 1991.¹⁰⁷ Thus, the competency litigation and his untimely death kept Alvin Ford from being executed, but the question of his competency was never resolved.

B. *Panetti v. Quarterman: Rational Understanding and Trying to Clarify the Standard with a "[H]alf-[B]aked [H]olding"*¹⁰⁸

The other major Supreme Court case addressing the execution of the

97 *Id.* at 431-33 (Rehnquist, J., dissenting).

98 *Id.* at 431 (citing 1 WALKER, *supra* note 12, at 194-203).

99 *Solesbee v. Balkcom*, 339 U.S. 9, 11-12 (1950), *abrogated by Ford*, 477 U.S. at 405.

100 *Ford*, 477 U.S. at 432 (Rehnquist, J., dissenting).

101 *Id.* at 435.

102 *See, e.g., Rector v. Bryant*, 501 U.S. 1239, 1241 (1991) (Marshall, J., dissenting) (disagreeing with denial of petition for writ of certiorari and asserting that the *Ford* Court did not create a test for execution competency).

103 *Ford*, 477 U.S. at 418.

104 MILLER & RADELET, *supra* note 12, at 155.

105 *Id.* at 158.

106 *Id.*

107 *Id.* at 158-59 ("[Ford's] autopsy report listed 'acute respiratory distress syndrome associated with fulminant acute pancreatitis' as the cause of death.").

108 *Panetti v. Quarterman*, 551 U.S. 930, 978 (2007) (Thomas, J., dissenting).

insane is *Panetti v. Quarterman*.¹⁰⁹ Among the issues in the case was the standard for determining competency to be executed and, in particular, whether one is incompetent if “mental illness obstructs a rational understanding of the State’s reason for his execution.”¹¹⁰

Scott Panetti, who had a long history of mental illness, was convicted of murder and sentenced to death in Texas.¹¹¹ Prior to killing his estranged wife’s mother and father and kidnapping his wife and daughter, Panetti had been hospitalized numerous times for disorders that included a fragmented personality, delusions, and hallucinations.¹¹² Later, district court experts concluded that Panetti had delusions, with one expert finding that while Panetti said he understood the State’s claim that it was executing him for the murders, Panetti believed that the reason was “a ‘sham’ and that the State in truth wanted to execute him ‘to stop him from preaching.’”¹¹³ Thus, Panetti understood what the State *said* were the reasons for his punishment, but, because of mental illness, he did not believe the State.

After the trial court set an execution date, Panetti “made a substantial showing” of incompetency to be executed but the state court rejected the claim.¹¹⁴ After Panetti filed a petition for a writ of habeas corpus and lost in the lower federal courts, the case went to the Supreme Court.¹¹⁵ In evaluating the proper standard for determining competency to be executed, the Court focused on Panetti’s belief that the State was going to execute him to stop him from preaching, even though he understood that the State claimed to be executing him for his murders.¹¹⁶

The Court held in an opinion by Justice Kennedy that the state court failed to provide the procedures required by the Constitution and that the federal appellate court used an overly restrictive test to determine competency.¹¹⁷ The court of appeals had applied a standard that

¹⁰⁹ *Id.* at 934-35.

¹¹⁰ *Id.* at 956-57.

¹¹¹ *Id.* at 935-36. On the afternoon of the killings, Panetti told the police that “Sarge” did the killings. Jordan Smith, *Is Scott Panetti Sane Enough to Die?*, THE AUSTIN CHRONICLE, Sept. 17, 2004, at 24, *available at* <http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A229342>. “Sarge” was later identified as Panetti’s recurring auditory hallucination. *Id.* At the time of Panetti’s trial, Panetti, who had stopped taking his medication, represented himself, appeared in court in a purple cowboy outfit, and tried to subpoena close to 200 witnesses such as Jesus Christ and John F. Kennedy. *Id.* For a detailed discussion of Scott Panetti’s background and mental illness, see AMNESTY INT’L, “WHERE IS THE COMPASSION?” THE IMMINENT EXECUTION OF SCOTT PANETTI, MENTALLY ILL OFFENDER 1-3(2004), *available at* <http://www.amnesty.org/en/library/info/AMR51/011/2004>.

¹¹² *Panetti*, 551 U.S. at 935-36.

¹¹³ *Id.* at 954-55 (citation omitted).

¹¹⁴ *Id.* at 935.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 954-55.

¹¹⁷ *Id.* at 935. Regarding the issue of proper procedures, the Supreme Court, applying

concluded that a prisoner is competent if the prisoner is aware (1) that she or he is going to be executed and (2) why she or he is going to be executed.¹¹⁸ Applying that standard, the court of appeals held that Panetti was competent because he was aware: that he committed the murders; that he will be executed; and that the state's reason for executing him was the murders.¹¹⁹ Panetti's attorneys, however, argued that Panetti did not have a rational understanding of why the State was executing him because due to his mental illness, he believed the State was executing him to stop him from preaching.¹²⁰

The Supreme Court held that the court of appeals standard was incorrect because *Ford v. Wainright* requires an inquiry into whether a prisoner has a rational understanding of the State's reasons for execution.¹²¹ In reaching this conclusion, the Court noted language from the *Ford* plurality that prohibited the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications."¹²² The Court also pointed to language in Justice Powell's concurring opinion in *Ford* 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.'"¹²³

In requiring a rational understanding, the Court also considered the reasoning behind the Eighth Amendment ban on executing the incompetent. Although it pointed out the various reasons mentioned in Justice Marshall's

a habeas standard of review that limits the Court to "clearly established" law, relied upon Justice Powell's *Ford* concurrence for the procedural requirements because there was no majority opinion and his holding on that issue was the most narrow. *Id.* at 949 (quoting 28 U.S.C. § 2254 (2006)). Applying that standard, the Court concluded that once Panetti had made a "substantial threshold showing of insanity," he was entitled to a "fair hearing" in accord with fundamental fairness." *Id.* (quoting *Ford v. Wainright*, 477 U.S. 399, 426, 424 (1986) (citations omitted)). Such a hearing requires that the condemned be given an opportunity to be heard and be afforded basic due process requirements such as an opportunity for defense counsel to submit evidence. *Id.* at 949-50.

118 *Id.* at 956 (citing *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006)).

119 *Id.* (citing *Dretke*, 448 F.3d at 817).

120 *Id.* at 954-55.

121 *Id.* at 959-60.

122 *Id.* at 957 (quoting *Ford*, 477 U.S. at 417). Some have argued that, although previous courts assumed Justice Powell's *Ford* concurring opinion was the standard, *Panetti* returned the focus to the majority opinion in *Ford*. See, e.g., *Overstreet v. State*, 877 N.E.2d 144, 172 (Ind. 2007) (stating that in *Panetti* the "Court departed from the Justice Powell formulation and expanded upon the Eighth Amendment's reach for persons with mental illness").

123 *Panetti*, 551 U.S. at 957 (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

Ford opinion,¹²⁴ the Court focused on the retribution rationale.¹²⁵ In order for retribution to be served, the offender must recognize the severity of the crimes and the goals of “community vindication.”¹²⁶ If a prisoner’s mental illness distorts comprehension of the connection between crime, punishment, and the community’s understanding of those concepts, then retribution is not served.¹²⁷

The Court concluded that the lower court decisions did not properly consider whether Panetti had a rational understanding of the connection between his crime and punishment. But it refused to “attempt to set down a rule governing all competency determinations.”¹²⁸

Justice Thomas wrote a dissenting opinion joined by three other Justices that attacked several holdings by the majority.¹²⁹ Regarding the competency standard, Justice Thomas did not address whether or not the court of appeals’ standard was correct, but he did criticize Justice Kennedy’s

¹²⁴ See *supra* p. 275. The *Panetti* Court’s emphasis on Justice Marshall’s *Ford* opinion for the rationale, instead of on Justice Powell’s concurring opinion, arguably indicates the Court’s willingness to consider a broader range of justifications for the ban in its analysis. See Seeds, *supra* note 48, at 332-39.

¹²⁵ *Panetti*, 551 U.S. at 958-60.

¹²⁶ *Id.* at 958. Considering retribution, the Court stated as follows:

[I]t might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.

Id.

¹²⁷ *Id.* at 958-59. The Court explained as follows:

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.

Id.

¹²⁸ *Id.* at 960-61. Similarly, in *Indiana v. Edwards*, the Court recently declined to adopt a specific standard for when courts may withhold the right to self-representation from mentally ill defendants found competent to stand trial. *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008).

¹²⁹ The dissenters were Justice Thomas, Chief Justice Roberts, Justice Scalia and Justice Alito. *Panetti*, 551 U.S. at 962 (Thomas, J., dissenting). One of the arguments made by the dissenters was that because this competency issue first arose in Panetti’s second habeas corpus petition, it should not be heard under the Anti-Terrorism and Effective Death Penalty Act of 1996. *Id.* at 963-64 (Thomas, J., dissenting) (citing 28 U.S.C. § 2244(b) (2006)). Justice Thomas also disagreed with the majority’s conclusion finding constitutional violations in the procedures used to determine Panetti’s competency. *Id.* at 972-74 (Thomas, J., dissenting).

opinion for relying on the “muddled” *Ford* opinion to address an issue that was not presented in that case.¹³⁰ He concluded, “[W]hat emerges [from the majority opinion] is a half-baked holding that leaves the details of the insanity standard for the [d]istrict [c]ourt to work out.”¹³¹

On remand, the district court did work out the details of the insanity standard, and it found Panetti to be competent to be executed.¹³² District Court Judge Sam Sparks read the Supreme Court’s opinion to clearly require a baseline definition of insanity: “[T]he test for competence to be executed involves not only a prisoner’s factual awareness of the crime, the impending execution, and the state’s reason for executing the prisoner, but also some degree of ‘rational understanding’ of the connection between the crime and punishment.”¹³³ Applying the standard, Judge Sparks found that Panetti is “seriously mentally ill,”¹³⁴ but that “his delusions do not prevent his rational understanding of the causal connection between [the] murders and his death sentence, and he in fact has such an understanding.”¹³⁵ Scott Panetti is still on death row in Texas.¹³⁶

III. STATUTORY DEFINITIONS OF EXECUTION COMPETENCY AND LOWER COURT DECISIONS REGARDING DEATH COMPREHENSION

Even though in recent years the Supreme Court has come nearer to establishing a standard for execution competency, one issue that is now arising in lower courts is whether the standard requires a prisoner to have a rational understanding of death itself. In other words, if a defendant, due to a mental disease or defect, does not understand the full implications of the meaning of death, is the defendant competent to be executed? This issue may arise in situations where, due to a mental impairment, a capital defendant believes she or he will survive execution or somehow believes

¹³⁰ *Id.* at 978-81 (Thomas, J., dissenting). Justice Thomas emphasized that the majority focused upon the word “aware” in *Ford*, even though that case did not define the term or address the issue presented in *Panetti*. *Id.*

¹³¹ *Id.* at 978 (Thomas, J., dissenting). Justice Thomas also criticized the majority for merely focusing on the language of *Ford* and for not considering evolving “standards of decency” as it does in other Eighth Amendment cases. *Id.* at 980 (Thomas, J., dissenting) (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

¹³² *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at *37 (W.D. Tex. March 26, 2008).

¹³³ *Id.* at *31 (quoting *Panetti*, 551 U.S. at 958).

¹³⁴ *Id.* at *36.

¹³⁵ *Id.* Judge Sparks concluded, “Therefore, if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti.” *Id.* at *37.

¹³⁶ Deborah Fins, NAACP Legal Def. and Educ. Fund, Inc., *Death Row USA Winter 2009*, at 64 (2009), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf; TEX. DEP’T OF CRIMINAL JUSTICE, OFFENDERS ON DEATH ROW, <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited Oct. 27, 2009).

the execution will not result in physical death.

A. *Statutory Definitions of Competency to Be Executed*

Although every state bans the execution of an insane prisoner, many state statutes provide little guidance regarding the standard for competency. Many state statutes on execution competency do not define competency at all.¹³⁷

States that do have statutory definitions for execution competency require an understanding or awareness of the crime and corresponding punishment.¹³⁸ Additionally, some jurisdictions add to this cognitive prong

¹³⁷ See *Panetti*, 2008 WL 2338498, at *30 (noting a number of states that do not define competency to be executed); see e.g., ALA. CODE § 15-16-23 (LexisNexis 1995); CAL. PENAL CODE § 3701 (West 2000); CONN. GEN. STAT. ANN. § 54-101 (West 2009); DEL. CODE ANN. tit. 11, § 406 (2007); IND. CODE ANN. § 11-10-4-2 (LexisNexis 2003); KAN. STAT. ANN. § 22-4006 (2007); MASS. ANN. LAWS ch. 279, § 62 (LexisNexis 2002); NEB. REV. STAT. § 29-2537 (2008); NEV. REV. STAT. § 176.425 (2007); S.C. CODE ANN. § 44-23-220 (2002); S.D. CODIFIED LAWS § 23A-27A-22 (2008); VA. CODE ANN. § 19.2-177.1 (2008); see also *State v. Allen*, 15 So. 2d 870, 871-72 (La. 1943) (explaining the procedure for determining if one is not competent to be executed, but failing to define competency); cf. *Clark v. Arizona*, 548 U.S. 735, 752-53 (2006) (noting that in the context of the Due Process Clause, no single definition of insanity has developed).

¹³⁸ See *Panetti*, 2008 WL 2338498, at *30; see ARIZ. REV. STAT. ANN. § 13-4021 (2001) (stating that “‘mentally incompetent to be executed’ means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death”); FLA. STAT. ANN. § 922.07 (West 2001) (requiring a determination of “whether he or she understands the nature and effect of the death penalty and why it is to be imposed upon him or her”); GA. CODE ANN. § 17-10-60 (2008) (“‘[M]entally incompetent to be executed’ means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment.”); KY. REV. STAT. ANN. § 431.213(2) (West 2006) (“‘[I]nsane’ means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed.”); MISS. CODE ANN. § 99-19-57 (West 2006 & Supp. 2008) (requiring a finding “that the offender does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, and a sufficient understanding to know any fact that might exist that would make his punishment unjust or unlawful and the intelligence requisite to convey that information to his attorneys or the court”); MO. ANN. STAT. § 552.060 (West 2002) (forbidding execution “if as a result of mental disease or defect [the offender] lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out”); MONT. CODE ANN. § 46-14-101 (2) (2007) (“‘[M]ental disease or defect’ means an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that the person requires care, treatment, and rehabilitation.”); N.C. GEN. STAT. § 15A-1001 (2007) (forbidding punishment “when by reason of mental illness or defect [the offender] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner”); OHIO REV. CODE ANN. § 2949.28 (LexisNexis 2006 & Supp. 2009) (“‘[I]nsane’ means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the con-

and also require an assistance prong, i.e., that in order to be competent a defendant must be able to assist counsel.¹³⁹ The American Bar Association standard for incompetency includes both a cognitive/awareness prong and an assistance prong.¹⁴⁰ A 2005 Position Statement of the Board of Trustees of the American Psychiatric Association also advocates for a similar two-pronged analysis.¹⁴¹ In his concurring opinion in *Ford v. Wainwright*, however, Justice Powell rejected the argument that the Constitution requires an assistance prong in the standard for competency to be executed.¹⁴² Although

vict”); UTAH CODE ANN. § 77-19-201 (2007) (“[I]ncompetent to be executed’ means that, due to mental condition, an inmate is unaware of either the punishment he is about to suffer or why he is to suffer it.”); WYO. STAT. ANN. § 7-13-901(a)(v) (2009) (requiring “the ability to understand the nature of the death penalty and the reasons it was imposed”).

¹³⁹ See, e.g., N.C. GEN. STAT. § 15A-1001 (2007) (forbidding punishment “when by reason of mental illness or defect [the offender] is unable . . . to assist in his defense in a rational or reasonable manner”); Singleton v. State, 437 S.E.2d 53, 57 (S.C. 1993) (explaining that the assistance prong originated from Justice Frankfurter’s dissent in *Solesbee v. Balkcom*); see also John E. Theuman, Annotation, *Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals*, 111 A.L.R.5th 491, 509-12 (2003) (discussing cases using an assistance prong as part of the standard).

¹⁴⁰ The ABA standard states:

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 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 the court.

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6, at 290 (1989).

¹⁴¹ The Position Statement provides:

Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner’s participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.

AM. PSYCHIATRIC ASS’N, MENTALLY ILL PRISONERS ON DEATH, POSITION STATEMENT (2005), <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200505.aspx>; see also Seeds, *supra* note 48, at 338-48 (arguing for the assistance prong); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1177-80 (2005) (arguing for the assistance prong); Harding, *supra* note 14, at 135-37 (arguing for the assistance prong).

¹⁴² *Ford v. Wainwright*, 477 U.S. 399, 422 n.3 (1986) (Powell, J., concurring) (stating, “I

courts have relied upon Justice Powell's opinion in finding that the Eighth Amendment does not require an assistance prong, some have argued that analysis should be reconsidered.¹⁴³

While the state statutes that define competency do contain requirements that defendants be aware of the nature of the punishment, they do not define those awareness requirements. Thus, the statutes provide little guidance on the issue of whether there exists a widespread requirement that a defendant have an understanding of death.¹⁴⁴ For example, many statutes are similar to the federal statute, which states: "A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person."¹⁴⁵ An unaddressed issue, however, is whether or not one "understands the death penalty" if one does not understand death.

B. Lower Court Decisions Regarding Death Comprehension

Lower court decisions have not provided much guidance for determining execution competency beyond the Supreme Court's vague formulations in *Ford v. Wainwright* and *Panetti v. Quarterman*. As one commentator has noted, instead of lower courts embracing the opportunity to experiment with state standards that might be more precise and protective of defendants' rights under state law and state constitutions, courts have generally focused on interpreting Justice Powell's language from *Ford* narrowly.¹⁴⁶

The issue of whether a mentally ill defendant needs to be able to comprehend death to be competent is just beginning to be considered by lower courts. In *Walton v. Johnson*,¹⁴⁷ the en banc U.S. Court of Appeals

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"). *But cf. Singleton*, 437 S.E.2d at 56-58 (providing significant historical support for the proposition that assistance is constitutionally mandated). As discussed earlier though, the requirement of an assistance prong is consistent with one of the justifications for the ban on executing incompetent inmates because one historical justification for the ban was that insane defendants could not assist their attorneys. *See supra* pp. 270-72.

¹⁴³ *See, e.g.,* Seeds, *supra* note 48, at 332-39; *cf. Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (noting that Justice Powell's opinion in *Ford* "constitutes 'clearly established' law for purposes of [habeas corpus claims] and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim").

¹⁴⁴ *Cf. Peggy M. Tobolowsky, To Panetti and Beyond—Defining and Identifying Capital Offenders Who are Too "Insane" to be Executed*, 34 AM. J. CRIM. L. 369, 430-31 (2007) (containing appendix of state statutes and court decisions pertaining to the ban on executing insane or incompetent offenders).

¹⁴⁵ 18 U.S.C. § 3596(c) (2006).

¹⁴⁶ *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1156, 1162-63 (2008).

¹⁴⁷ *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006).

for the Fourth Circuit addressed the issue of death comprehension in the context of the competency to be executed standard.¹⁴⁸ The court found the condemned competent to be executed, but the divided court in a 7-6 decision raised questions about the correct standard for determining competency to be executed.¹⁴⁹

In the aforementioned case, Percy Walton pleaded guilty to murdering three people in two separate incidents and was sentenced to death in Virginia state court.¹⁵⁰ Prior to the pleas, Walton was evaluated by two psychiatrists who found that he understood the nature of the legal proceedings and that he was competent.¹⁵¹ One of the psychiatrists did note that Walton exhibited strange behavior at that time, and Walton was reported to have stated that after his execution “he would be able to return to life immediately and resurrect other dead family members.”¹⁵²

Years later, during Walton’s federal habeas corpus proceedings, Walton’s attorneys argued that Walton was incompetent to be executed.¹⁵³ At a district court hearing, two defense experts claimed that Walton suffers “from schizophrenia and has borderline delusional ideas about his ability to come back to life after his execution.”¹⁵⁴ The state’s expert disagreed.¹⁵⁵ The district court denied habeas relief and concluded, “Walton both understands that he is to be executed and that his execution is punishment for his conviction for murder.”¹⁵⁶

The en banc court of appeals upheld the district court finding of competency, stating that the correct test from Justice Powell’s *Ford* opinion is 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.”¹⁵⁷ The court stressed that this two-part test—of (1) awareness of the punishment and (2) the reasons for the punishment—is followed in all four federal circuit courts that have addressed the issue and in a federal

¹⁴⁸ *Id.* at 170-73.

¹⁴⁹ *Id.* at 178, 183.

¹⁵⁰ *Id.* at 162; *see, e.g.*, *Walton v. Angelone*, 321 F.3d 442, 449-50 (4th Cir. 2003).

¹⁵¹ *Walton v. Johnson*, 440 F.3d at 163.

¹⁵² *Walton v. Angelone*, 321 F.3d at 454.

¹⁵³ *Walton v. Johnson*, 440 F.3d at 163-64. They also argued that he was “mentally retarded.” *Id.* at 163.

¹⁵⁴ *Id.* at 164. Among other statements, Walton told one doctor that after his execution “he would ‘come back as a better person’ and would ‘get a Burger King.’” *Id.* (citation omitted).

¹⁵⁵ *Id.* at 166. A neutral expert also found Walton competent, although he concluded that Walton’s answers about death were “childlike” and that Walton is not “a person who is going to prepare for his death.” *Id.* at 166-67.

¹⁵⁶ *Id.* at 168 (quoting *Walton v. Johnson*, 306 F. Supp. 2d 597, 598 (W.D. Va. 2004)).

¹⁵⁷ *Id.* at 170 (quoting *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring)).

statute.¹⁵⁸ The court rejected the argument that there is any requirement “that an inmate must be able to assist in his defense throughout the competency determination process.”¹⁵⁹

The court also rejected the argument that an inmate must also understand that to be executed means one’s “physical life” will end.¹⁶⁰ The court reasoned that one must only understand that one will die by execution, and that the district court had made such a finding and that finding was not “plainly wrong.”¹⁶¹

Chief Judge Wilkins, in a dissent joined by five other judges, disagreed with the majority’s formulation of the standard. He argued “that an individual’s understanding of the fact of execution [the first prong] must include at least a rudimentary comprehension that execution will mean his death, defined as the end of his physical life.”¹⁶² Chief Judge Wilkins reasoned that the *Ford* inquiry required that the condemned understand what “to die” means.¹⁶³

Chief Judge Wilkins considered that Justice Powell in *Ford* emphasized the retributive goal of the death penalty and that this goal is only accomplished if a defendant realizes that she or he is facing the end of physical life.¹⁶⁴ He also quoted language from other federal and state court opinions that required an understanding of the nature of the death penalty and required awareness that the punishment for murder is death.¹⁶⁵

Chief Judge Wilkins stressed that his standard did not implicate one’s religious beliefs, but merely required that the condemned understand that the execution will mean an end to the physical life that one is currently

¹⁵⁸ *Id.* at 171 (citing 18 U.S.C. § 3596(c) (2006)).

¹⁵⁹ *Id.* at 172. *But see* Christine I. Betzing, *Walton v. Johnson: Failing to Recognize the Importance of an Assistance Requirement to Adequately Protect Mentally Ill Prisoners on Death Row*, 66 Md. L. REV. 1304, 1322-27 (2007) (arguing that the court in *Walton* should have required an assistance prong to determine competency).

¹⁶⁰ *Walton v. Johnson*, 440 F.3d at 175.

¹⁶¹ *Id.* at 175-76 (quoting *Jimenez v. Mary Washington College*, 57 F.3d 369, 379 (4th Cir. 1995)). Although the majority rejected the dissent’s test, it concluded that even if it were to apply the dissent’s test, the record revealed that *Walton* did understand that his execution would mean the end of his physical life. *Id.* at 175 n.17.

¹⁶² *Id.* at 183 (Wilkins, C.J., dissenting).

¹⁶³ *Id.* (Wilkins, C.J., dissenting).

¹⁶⁴ *Id.* at 184 (Wilkins, C.J., dissenting) (citing *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring)).

¹⁶⁵ *Id.* at 184-85 (Wilkins, C.J., dissenting); *see, e.g.*, *Scott v. Mitchell*, 250 F.3d 1011, 1014 (6th Cir. 2001) (quoting OHIO REV. CODE ANN. § 2949.28(A) (LexisNexis 2002) (requiring “the mental capacity to understand the nature of the death penalty”)); *Barnard v. Collins*, 13 F.3d 871, 876-77 (5th Cir. 1994) (referring to standard that a condemned “comprehends the nature . . . of his execution”) (footnote omitted); *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014, 1018 (D. Ariz. 2001) (requiring awareness that the punishment for murder is death); *State v. Scott*, 748 N.E.2d 11, 13 (Ohio 2001) (quoting OHIO REV. CODE ANN. § 2949.28(A) (LexisNexis 2002)).

living.¹⁶⁶ Applying that standard, he reasoned that there was evidence the district court should consider in determining whether Walton merely viewed death as “a brief interruption of his current physical life.”¹⁶⁷ Therefore, he concluded that the court should remand the case to the district court.¹⁶⁸

In a detailed concurring opinion, Judge Williams attacked the dissent’s test.¹⁶⁹ Judge Williams reasoned that Justice Powell’s test from *Ford* does not require that the condemned understand that execution is the end of physical life.¹⁷⁰ He noted that the *Ford* test only requires awareness of the punishment and the reasons for the punishment.¹⁷¹ Further, he criticized the dissent’s death comprehension test on practical grounds because it “both (1) fails to account for the fact that many understand death on non-scientific terms and (2) requires courts to evaluate the meaning of such non-scientific understandings.”¹⁷² As an example, Judge Williams asked about a Solipsist who believes “that all things, including his own body, are merely illusions.”¹⁷³ He asked whether such a person would be insane under the dissent’s test.¹⁷⁴ Thus, Judge Williams agreed with the majority in rejecting the death comprehension test.

Soon after the court of appeals decision in Percy Walton’s case, Walton’s execution was set for June 2006.¹⁷⁵ Although the courts did not find Walton incompetent to be executed, Virginia Governor Timothy M. Kaine considered more recent evidence that Walton’s mental state was such that “there was more than a minimal chance that Walton no longer knew why he was to be executed or was even aware of the final punishment he was about to receive.”¹⁷⁶ After initially staying Walton’s execution for eighteen months “[b]ecause one could not reasonably conclude that Walton was fully

¹⁶⁶ *Walton v. Johnson*, 440 F.3d at 187 (Wilkins, C.J., dissenting).

¹⁶⁷ *Id.* (Wilkins, C.J., dissenting).

¹⁶⁸ *Id.* at 191 (Wilkins, C.J., dissenting). Chief Justice Wilkins also argued that the case should be remanded based on Walton’s mental retardation claim. *Id.* at 191 n.5 (Wilkins, C.J., dissenting) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)).

¹⁶⁹ There were two concurring opinions in the case. In one of them, Judge Wilkinson concluded that the Eighth Amendment does not require “metaphysical inquiries” into whether a defendant understands the end of life. *Id.* at 179 (Wilkinson, J., concurring).

¹⁷⁰ *Id.* at 179-80 (Williams, J., concurring).

¹⁷¹ *Id.* at 180 (Williams, J., concurring) (citing *Ford v. Wainwright*, 477 U.S. 390, 422 (1986) (Powell, J., concurring); *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989)).

¹⁷² *Walton v. Johnson*, 440 F.3d at 180 (Williams, J., concurring).

¹⁷³ *Id.* (Williams, J., concurring).

¹⁷⁴ *Id.* (Williams, J., concurring). The answer is that such a person would not be insane under the dissent’s test because it requires that the lack of awareness to be caused by mental disease or illness.

¹⁷⁵ Tom Jackman, *Mental State Still at Issue in Va. Death Penalty Case*, WASH. POST, June 10, 2006, at B01.

¹⁷⁶ Press Release, Gov. Timothy M. Kaine, Statement of Governor Kaine on the Scheduled Execution of Percy Levar Walton (June 9, 2008), <http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=680>.

aware of the punishment he was about to suffer and why he was to suffer it,” Governor Kaine commuted Percy Walton’s sentence to life imprisonment without the possibility of parole on June 9, 2008.¹⁷⁷

Although the outcome of Percy Walton’s case has been resolved, the question of whether death comprehension is required to establish competency to be executed is still unsettled. The issue has not been addressed often, but similar to *Walton*, some other courts have implied that a defendant need not have an understanding that they were going to die in order to be competent.¹⁷⁸ Although the U.S. Court of Appeals for the Fifth Circuit based its decision to vacate a defendant’s stay in *Garrett v. Collins*¹⁷⁹ on several alternative grounds, the court also found that the defendant’s belief that his aunt would protect him from dying would not make him incompetent to be executed.¹⁸⁰

On the other hand, some courts have implied that the competency standard should require an understanding of death.¹⁸¹ One study of 280

177 *Id.* Governor Kaine described Walton’s current state in 2008 as follows:

Walton differs in fundamental ways from other death row offenders. He lives in a self-imposed state of isolation that includes virtually no interest in receiving or understanding information. Walton communicates only infrequently, almost invariably in response to direct questions, and those responses are minimal in nature. He has nothing in his cell other than a mattress, a pillow and a blanket. He shows no interest in contact with the outside world and has no television, radio, magazines, books or stationery. He has no personal effects of any kind. This minimal existence has been in evidence for the past five years.

Id. In considering other factors that were less relevant to the grant of clemency, Governor Kaine noted that Walton committed the murders less than two months after turning eighteen and that there were indications of his mental retardation. *Id.*

178 *See, e.g.,* *Garrett v. Collins*, 951 F.2d 57, 58-59 (5th Cir. 1992).

179 *Id.* at 59.

180 *Id.* The court reasoned that even if the defendant had such a belief, it would “not prevent him from preparing for his passing.” *Id.* In *Garrett*, however, the defendant’s attorney argued only that the defendant believed he would be rescued, not that he did not understand death. *Id.* at 58. Arguably, then, the case does not address the comprehension of death issue at all.

181 *See* *Musselwhite v. State*, 60 So. 2d 807, 809 (Miss. 1952) (noting that the defendant was incompetent to be executed where “if he were taken to the electric chair, he would not quail or take account of its significance”); *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993) (holding that the first prong of the test includes the question of whether the defendant understands “the nature of the punishment”); *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990) (focusing on the ability to assist prong of the incompetence test but noting that the other prong requires that condemned be “capable of properly appreciating his peril”).

At least some of the other parts of the standard developed in *Singleton* were not based upon the U.S. Constitution. *Singleton*, 437 S.E.2d at 58. Also, the judges in *Walton v. Johnson* debated whether the language in *Singleton* and *Musselwhite* actually addressed the issue of death comprehension. *See* *Walton v. Johnson*, 440 F.3d 160, 185-86 (4th Cir. 2006) (Williams, J., concurring) (citing *Singleton*, 437 S.E.2d at 58; *Musselwhite*, 60 So.2d at 809); *Thompson v. Bell*,

state judges, all from death penalty states, asked the judges to rate various factors and whether those factors affect determinations of competency.¹⁸² The judges rated the factor “[t]he inmate understands that death is an end of life as we know it (i.e., a permanent cessation of all vital functions)”¹⁸³ as a moderately important factor among seventeen factors.¹⁸⁴ This inconsistency leaves to be resolved whether an offender must comprehend death in order to be considered competent to be executed.

IV. THE CONSTITUTION REQUIRES A DEATH COMPREHENSION STANDARD

In considering the proper standard for the insanity execution ban, one needs to begin with the policies behind the death penalty and behind the ban itself. As discussed below, the policies behind the insanity execution ban have questionable merit. But despite those questions, the ban and the rationales behind it have a long, historical pedigree. Accepting those rationales, they overwhelmingly support a death comprehension standard that only finds competency if a mentally-ill defendant is able to comprehend the meaning of death. Therefore, if due to mental illness a defendant does not comprehend that the execution will mean the end of the condemned’s physical life, that person should be found incompetent to be executed.

A. *Critique of the Rationale for the Ban on Executing the Insane*

Before turning to the legal standard, it is worth noting that the rationale for not executing the insane rests on shaky reasoning.¹⁸⁵ As discussed above, several reasons are often listed to justify the ban, but there seems to be no agreement on one solid justification.

For example, the deterrent justification for the ban may be questioned. One might argue that executing the insane, just like executing anyone, may serve a general deterrent purpose by deterring others from committing murder.¹⁸⁶ Assuming the death penalty has any deterrent value, just because an execution of an insane person does not deter other insane persons does

580 F.3d 423, 436 (6th Cir. 2009) (noting that for a determination of execution competency, it is significant that the defendant believed that execution would not “eliminate his life”).

¹⁸² See Ackerson et al., *supra* note 5, at 172-73.

¹⁸³ *Id.* app. A, at 190.

¹⁸⁴ *Id.* at 174 tbl.1.

¹⁸⁵ See Jonathan L. Entin, *Psychiatry, Insanity, and the Death Penalty: A Note on Implementing Supreme Court Decisions*, 79 J. CRIM. L. & CRIMINOLOGY 218, 233-37 (1988) (discussing problems with the various rationales for the ban on executing the insane). Professor Entin concluded that the reason the ban persists, despite a lack of rational justification, is because it has “symbolic significance” in reducing the class of the condemned who are subject to execution. *Id.* at 239.

¹⁸⁶ *Id.* at 234-35.

not mean it would not deter anyone;¹⁸⁷ sane persons would be deterred by executions of both sane and insane persons.¹⁸⁸

One might also attack the retribution justification for the ban. The retribution justification focuses on the requirement that the condemned appreciate that she or he is being punished. But not all retributive theorists agree.¹⁸⁹ Based upon some views of retribution principles, one deserves punishment whether or not the person understands it. A retributivist view that focuses on society's obligation to impose a deserved punishment would support the view that the retribution justification is served whether or not the defendant appreciates the punishment.¹⁹⁰ Thus, such a retributivist theory would not support banning the execution of the insane.

A retributivist view that retribution is only served if a defendant appreciates the punishment does support a ban on executing the insane.¹⁹¹ But even a justification based on a retributivist view that focuses on a

187 It is questionable whether the death penalty has any more deterrent effect than a sentence of life in prison. *See, e.g.,* Ring v. Arizona, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (stating that “[s]tudies of deterrence are, at most, inconclusive”); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (evaluating studies claiming that the death penalty deters more than life imprisonment and concluding there is “profound uncertainty” whether the death penalty has any deterrent effect); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8 (1996) (finding consensus among criminologists that research does not show that the death penalty deters). *But cf.* Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) (finding that “capital punishment has a strong deterrent effect; each execution results, on average, in eighteen or fewer murders-with a margin of error of plus or minus ten”).

188 *See, e.g.,* Koepke, *supra* note 9, at 1401.

189 There are different strains of retribution theory—including societal retaliation (also described as assaultive retribution or public vengeance), protective retribution, and victim vindication. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17-18 (4th ed. 2006) (citations omitted). Views of retribution that focus upon society's obligation to punish the criminal, whether because society wants to hurt wrongdoers or “as a means of securing a moral balance in society,” do not require that the offender understand the punishment. *See id.* at 18.

190 For example, Immanuel Kant noted the requirement that civil society must execute murderers “so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment.” *See* MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 160 (1990) (quoting IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797)).

191 *See* Panetti v. Quarterman, 551 U.S. 930, 958 (2007) (noting that capital punishment “has the potential to make the offender recognize at last the gravity of his crime”). The Court in *Panetti* went on to state:

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.

defendant's appreciation of the punishment has faults. A retributivist view that requires the individual's appreciation of the punishment could lead to an argument that an incompetent defendant who does not appreciate the punishment should not be punished at all.¹⁹²

The procedural justification, which is based on the fact that the insane are unable to assist their counsel, also provides some support for the ban on executing the insane. Yet, some argue that this justification is less relevant to the modern legal system where the time of execution is far from the time of trial and other competency standards, such as competency to stand trial, help address this concern.¹⁹³

The humanitarian justification for banning the execution of the insane also rests on shaky ground. After the Supreme Court agreed to hear *Ford v. Wainwright*, John Horwood, a Washington correspondent for the *St. Petersburg Times*, wrote: "I must confess to some reservations about the idea that it is especially cruel to execute the insane. Perhaps I'm savage and inhuman[], but it seems to me to be, if anything, somewhat *less* cruel than electrocuting a sane man who can grasp the horror of his fate."¹⁹⁴ Judge Roger Traynor of the California Supreme Court once questioned the rationale in asking, "Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?"¹⁹⁵

One of the other arguments for the ban—that a condemned person needs to be sane to prepare for death and to meet one's Maker—is another odd justification. One might argue that, as part of retribution, society should not care about the condemned's eternal soul, assuming one exists, or that the Maker might be forgiving of one who cannot prepare for death. Either way, it is odd to base a penological justification upon whether or not a Maker exists and to speculate how such Maker would treat the dead, insane person.

Thus, the justifications for banning the execution of the insane provide a shaky foundation for the ban. The reason for a lack of a single solid justification may be because the absurdity of the ban on executing the insane

Id. at 958-59.

¹⁹² See Entin, *supra* note 185, at 236.

¹⁹³ As noted earlier in Part III.A., there are several arguments for the Court to reconsider the importance of an assistance prong to a constitutional standard for determining competency to be executed. See *supra* pp. 283-85; see also Christopher Seeds, *supra* note 48, at 337-48.

¹⁹⁴ MILLER & RADELET, *supra* note 12, at 138 (quoting John Horwood, *Opposing the Death Penalty*, ST. PETERSBURG TIMES, Apr. 20, 1986, at 4D).

¹⁹⁵ *Phyle v. Duffy*, 208 P.2d 668, 676-77 (Cal. 1949) (Traynor, J., concurring), *overruled in part by Caritativo v. Teets*, 303 P.2d 339, 341 (Cal. 1956).

is a reflection of absurd aspects of the death penalty itself.¹⁹⁶ Discussions of the best way to kill human beings contrast with the invocation of human decency for guidance.

Overall, the retribution justification is the strongest justification for the ban on executing the insane. There are various theories of retribution, and one might reasonably argue that retribution is only served if the offender can appreciate the punishment. Acceptance of this justification, however, means that society desires that executions maintain a certain level of cruelty to serve the purposes of the death penalty.¹⁹⁷

The procedural protection justification for the ban on executing the insane also has some merit. Although it is true that today our legal system provides other competency determinations that protect the procedural rights of incompetent defendants at some legal stages—such as competency to stand trial—the ban on executing the insane can still provide procedural protections to defendants who are further along in the legal process, such as in post-conviction or clemency proceedings.¹⁹⁸

Despite criticisms of the justifications for the ban, it is here to stay as both a practical matter and as a constitutional matter as long as the death penalty is used. The ban has existed too long historically for courts and legislatures to change it.¹⁹⁹ Therefore, courts must struggle with coming up with a standard that best serves the justifications that underlie the ban.

B. Fashioning an Execution Competency Standard from the Court's Reasoning for the Ban on Executing the Insane

The Eighth Amendment ban on executing the insane is based on

196 See, e.g., Hazard & Louisell, *supra* note 28, at 389 (noting, “[i]t seems evident that the uneasiness manifested in applying the insanity exemption is uneasiness over the death penalty”).

197 Some commentators have argued, however, that retribution should not play a significant role in criminal law. Roscoe Pound argued, “[I]n order to deal with crime in an intelligent and practical manner we must give up the retributive theory.” Roscoe Pound, *Criminal Justice in the American City—A Summary*, in *CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO* 559, 586-87 (Roscoe Pound & Felix Frankfurter eds., 1922); see also Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 *OR. L. REV.* 631, 722-26 (2004) (arguing that the criminal justice system should focus on policies other than retribution).

198 See Seeds, *supra* note 48, at 344 (stating, “[i]f 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”).

199 See *Solesbee v. Balkcom*, 339 U.S. 9, 16-17 (1950) (Frankfurter, J., dissenting), *abrogated by* *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). Justice Frankfurter argued, “We should not be less humane than were Englishmen in the centuries that preceded this Republic.” *Id.* at 19 (Frankfurter, J., dissenting).

policy concerns different from other issues of legal competency,²⁰⁰ so the standard for execution competency must be well-grounded in the unique policy reasons behind the ban. The Supreme Court in *Panetti v. Quarterman* stressed that the execution competency standard should be connected to the purposes of the punishment, stating that the standard must not put the defendant's awareness "in a context so far removed from reality that the punishment can serve no proper purpose."²⁰¹ Thus, one must look to the purposes of the punishment in crafting the constitutional standard for determining competency to be executed.

As discussed earlier, there are five general rationales that have been used to justify the ban on executing the insane.²⁰² The main reasons used for our current constitutional ban on executing the insane are: (1) executing the insane does not serve the punishment goal of deterrence;²⁰³ (2) executing the insane does not serve the punishment goal of retribution;²⁰⁴ (3) insane persons are unable to adequately assist in their legal defense, so the ban ensures a fair and accurate process;²⁰⁵ (4) executing the insane "offends humanity;"²⁰⁶ and (5) a person who is insane cannot prepare for death and the afterlife.²⁰⁷ As discussed earlier, the retribution rationale is the strongest justification for the ban.

All of the justifications for the ban support a death comprehension insanity standard that requires a defendant to be aware that her or his physical life is ending. This standard is consistent with the one proposed by Chief Judge Wilkins in *Walton v. Johnson*.²⁰⁸ It also reflects the formulation proposed by Justice Frankfurter in 1950 in *Solesbee v. Balkcom* requiring that a defendant understand "the impending fate which awaits him."²⁰⁹

First, the goal of deterrence is not served by the execution of one without death comprehension. If the purpose of using the severe punishment of death is to give extra deterrence to the punishment, people without an understanding of death will not be deterred. On the other hand, if a state

200 For example, the Supreme Court stressed in *Iowa v. Tovar* that a defendant who waives counsel need not completely appreciate the consequences resulting from such waiver; however, that case involved different policy concerns regarding the Sixth Amendment than the punishment principles surrounding the Eighth Amendment ban on executing the insane. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004).

201 *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007).

202 *See supra* pp. 268-72.

203 *Ford v. Wainwright*, 477 U.S. 399, 419 (1986) (Powell, J., concurring) (quoting COKE, *supra* note 34, at 6).

204 *Id.* at 408 (plurality opinion) (citing Hazard & Louisell, *supra* note 28, at 387).

205 *Id.* at 406-07 (plurality opinion) (quoting 4 BLACKSTONE, *supra* note 18, at *24-25).

206 *Id.* at 407 (plurality opinion) (citing COKE, *supra* note 17, at 6).

207 *Id.* at 419-20 (Powell, J., concurring) (citing Hawles, *supra* note 11, at 477).

208 *Walton v. Johnson*, 440 F.3d 160, 184-85 (4th Cir. 2006) (Wilkins, C.J., dissenting).

209 *Solesbee v. Balkcom*, 339 U.S. 9, 20 n.3 (1950) (Frankfurter, J., dissenting) (quoting *In re Smith*, 176 P. 819, 823 (N.M. 1918)), *abrogated by Ford*, 477 U.S. at 405.

executes one without death comprehension, it would still deter other people who are not insane. But, even accepting the questionable premise that the death penalty deters murder,²¹⁰ such deterrence of potential sane offenders would be at most minimal beyond any existing deterrence from executing sane condemned inmates.

Second, the goal of retribution is not fully served by executing one who does not understand death. As discussed earlier, the retribution justification for the ban on executing the insane is based on the rationale that the death penalty does not make the insane suffer enough to serve the goal of retribution.²¹¹ For example, if because of a mental illness one did not understand she or he were going to be executed, then the condemned would not suffer as much as a sane person and therefore the goal of retribution would not be served. The retribution justification reasons that only the sane suffer enough because, to quote Abraham Lincoln, they can “live in constant dread of [death]” and therefore “die over and over again.”²¹² Similarly, if because of a mental illness one believed that her or his physical life will not end when executed, that person cannot appreciate the punishment enough to serve the goal of retribution.²¹³

Under the Court’s Eighth Amendment analysis, it is significant that the retribution rationale strongly supports a standard requiring that the defendant understands that execution will result in the end of her or his life. In *Panetti*, the Supreme Court relied upon the retribution rationale in evaluating the competency standard to be applied in that case.²¹⁴ Thus, the Supreme Court’s consideration of the death comprehension issue would

210 See, e.g., Matthew B. Robinson, *The Real Death Penalty: Capital Punishment According to the Experts*, 45 CRIM. L. BULL. 3 (2009) (concluding that “only a small fraction of death penalty experts . . . indicated that they thought capital punishment achieves deterrence”); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005); Donohue & Wolfers, *supra* note 187, at 792-94.

211 See *supra* p. 269.

212 2 JOHN T. MORSE, JR., *ABRAHAM LINCOLN* 345 (Cambridge, Mass., The Riverside Press 1893). Lincoln stated, “If I am killed, I can die but once; but to live in constant dread of it, is to die over and over again.” *Id.*

213 See *Musselwhite v. State*, 60 So. 2d 807, 809 (Miss. 1952) (noting that the defendant was incompetent to be executed where “if he were taken to the electric chair, he would not quail or take account of its significance”).

214 *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007). Considering retribution, the Court stated:

[I]t might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.

Id.

likely hinge on the retribution policy.²¹⁵

Regarding the policy for the ban that an insane person is unable to adequately assist in her or his legal defense, this justification is less relevant to the execution competency standard under the Eighth Amendment because the Supreme Court has arguably rejected a constitutional standard that requires a defendant to be able to assist counsel.²¹⁶ Although Justice Powell's *Ford* concurring opinion did not adopt an assistance prong to the competency test,²¹⁷ Justice Marshall's plurality opinion in *Ford* included a quotation from Blackstone that listed this justification for the ban.²¹⁸ At least one commentator has argued that Justice Kennedy's majority opinion in *Panetti* revived the significance of Justice Marshall's *Ford* opinion, meaning that the assistance justification for the ban on executing the insane should be reconsidered.²¹⁹ Assuming the assistance justification still has some constitutional foundation, it, too, would support a standard that requires a prisoner to know that an execution will end physical life. A condemned prisoner who believes that the execution will not result in the end of life may not have adequate motivation or comprehension to fully assist counsel.

The fourth justification, that the execution of the insane offends humanity, also applies to situations where the condemned does not know that execution will terminate physical life. Although the question of whether humanity is offended is a somewhat subjective determination, if courts believe that humanity is offended by the execution of the insane, it is reasonable to believe that the group of "insane" would include those with mental illness who are unable to comprehend death.²²⁰

Finally, the last reason for the ban on execution of the insane is that the condemned should be able to prepare for death and the afterlife. If one does not recognize that execution will bring about the end of physical life, that person cannot prepare for death or the afterlife. Therefore, this justification also supports a death comprehension standard.

If mental incompetency is dictating one's beliefs, that person cannot

215 Throughout the Court's Eighth Amendment jurisprudence, the Court has often relied upon the retribution justification for the death penalty. See Kirchmeier, *supra* note 197, at 641-42; see also *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (addressing the constitutionality of capital punishment and noting that retribution justification could justify the use of the death penalty).

216 See *Singleton v. State*, 437 S.E.2d 53, 56 (S.C. 1993).

217 *Ford v. Wainwright*, 477 U.S. 399, 422 n.3 (1986) (Powell, J., concurring) (stating, "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").

218 *Id.* at 406-07 (plurality opinion) (quoting 4 BLACKSTONE, *supra* note 18, at *24-25).

219 See *Seeds*, *supra* note 48, at 332-39.

220 A counterargument, however, is that it would be more humane to execute someone who cannot comprehend the terror of death. See *supra* notes 194 and 196 and accompanying text.

adequately prepare for his or her death. If there actually is an afterlife, it is cruel to prevent one from preparing for it by killing the person when she or he is insane. Of course, if there is no afterlife, then it does not matter. But we do not know whether or not there is an afterlife, so what matters is our perception of the possibilities. If we take an existentialist perspective and recognize that we do not really know what happens after death and that each individual creates her or his own belief system,²²¹ it is unjust to execute one who is insane and incapable of preparing for death.

On the other hand, one argument against a standard that requires one to comprehend death would be that the law should not get into questioning one's beliefs about the afterlife. It is difficult to argue that Percy Walton's belief that he will come back to life after execution shows he is incompetent while a Christian's belief that she or he will go to heaven is different. I once worked on a case where a mentally ill capital defendant believed that after his execution he would go to another planet and live with the girlfriend he had murdered, that she would be an elf, and that together they would rule the planet.²²² It sounds insane because nobody else believes that, but should the standard be that one is insane if they create a unique belief, while one is sane if the person believes the same belief as millions of others?

Still, there is a difference. In discussing the standards to determine incompetency, courts all begin with the premise that these beliefs originate with the prisoner's mental illness.²²³ The proposed standard does not ban the execution of someone who follows a certain religion or has a certain faith. It bans the execution of someone who does not recognize the concept of death *because* of mental disease, mental illness, or lack of mental capacity to comprehend death.²²⁴

Also, as Chief Judge Wilkins pointed out in *Walton*, the requirement "is *not* about anyone's religious or philosophical views about the afterlife or

221 See e.g., JEAN-PAUL SARTRE, EXISTENTIALISM (Bernard Frechtman trans., 1947), reprinted in BASIC WRITINGS OF EXISTENTIALISM, at 345 (Gordon Marino ed., 2004) (explaining that "existence precedes essence," meaning that "man exists, turns up, appears on the scene, and only afterwards, defines himself"). See ERNEST BECKER, THE DENIAL OF DEATH 13-15, 27 (1973) (discussing the impacts of humans' knowledge of their mortality).

222 See *Brewer v. Lewis*, 997 F.2d 550, 554 (9th Cir. 1993) (Reinhardt, J., dissenting) (explaining that the condemned believed that after his execution he would rejoin his murdered girlfriend, who had been the incarnation of the deity man-elf, "Fro," on the planet "Terracia" after his execution).

223 For example, Justice Powell's standard from *Ford* requires that to be found incompetent to be executed, one must "not have the mental capacity to understand the nature of the death penalty" and the reason the punishment was imposed upon the person. *Ford*, 477 U.S. at 421 (Powell, J., concurring) (quoting FLA. STAT. ANN. § 922.07 (West 2001)).

224 See *Panetti v. Quarterman*, 551 U.S. 930, 959-60 (2007).

absence thereof.”²²⁵ The condemned must merely understand that it is the end of the physical life he or she is currently living.²²⁶

CONCLUSION

[T]he dread of something after death,
The undiscovered country from whose bourn.
No traveller returns, puzzles the will,
And makes us rather bear those ills we have
Than fly to others that we know not of?
Thus conscience does make cowards of us all

WILLIAM SHAKESPEARE²²⁷

If due to a mental defect or mental illness, a condemned inmate cannot appreciate that the walk to the execution gurney or death chamber will mean the end of physical life, that person should not be executed. Under the historical policies behind the ban on executing the insane and more recent Supreme Court precedent, the U.S. Constitution demands a death comprehension standard for competency to be executed.²²⁸

The justifications for the common law and Eighth Amendment ban on executing the insane require a test that finds a condemned person incompetent if the person does not understand death. Otherwise, the penological goals of the death penalty are not served. Those who do not comprehend death are not as a category a group of people who will be deterred by the death penalty more than life in prison, and such persons will not be able to appreciate the moral condemnation designed to be delivered by the death penalty. Additionally, they will not be able to prepare for death. Thus, the Supreme Court should hold that a capital defendant is incompetent to be executed when, because of a mental disease or defect, the person does not understand that she or he is going to die. In other words, to be competent, the condemned must realize she or he is facing the end of physical life as she or he knows it.

Finally, outside of the courts' application of the standard required under historical and constitutional precedent, legislatures should clarify their standards for execution competence. In doing so, they should recognize that they may give broader protections than the Eighth Amendment and consider the policies for the insanity ban that support a death comprehension standard, as discussed throughout this Article.

²²⁵ *Walton v. Johnson*, 440 F.3d 160, 187 (4th Cir. 2006) (Wilkins, C.J., dissenting).

²²⁶ *Id.* (Wilkins, C.J., dissenting).

²²⁷ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

²²⁸ *See supra* pp. 293-98.

Legislatures should consider another underlying justification for the ban on executing the insane that was briefly referenced by Justice Marshall in *Ford v. Wainwright*.²²⁹ Perhaps the real reason society frowns upon the execution of the insane has less to do with the person condemned and more to do with the condemners. Despite the efforts to fashion rational reasons for the ban, the ban on executing the insane may come down to one concept: humans are repulsed by the idea of killing the insane.²³⁰ Humans do not wish to believe they are cruel, and there is something cruel about killing people who cannot appreciate the reasons why they are being killed—or even appreciate that they are being killed.²³¹

If the reason for the ban is our own repulsion of executing someone who is insane, then whether or not a state adopts a death comprehension standard for competency may hinge on something besides deterrence and retribution. The answer may depend upon our own moral judgment about whether it is cruel to execute one who, due to a mental disease or defect, cannot appreciate that life is ending. Until the Supreme Court resolves the issue, each state is left to consider whether it is cruel to kill someone who cannot competently consider the question of what it means “not to be.”²³² And so the resolution of the issue may ultimately depend less on the question of who we are killing and more on the question of who we are.

229 He noted that the Eighth Amendment prohibits the execution of the insane “[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance.” *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

230 *See, e.g.*, Schabas, *supra* note 29, at 112-13 (discussing international norms against executing the insane).

231 Such a rationale is related to one of the common-law justifications for the insanity defense in that insanity is punishment by itself. *See Ford*, 477 U.S. at 407-08 (citing 4 BLACKSTONE, *supra* note 18, at *395-96).

Just as some people are more upset about the killing of the insane than the killing of the sane, many people are more upset to read about a dog being killed than reading about a sane murderer being executed. *Compare* Eric S. Page, *Dog Dies ‘Horrific’ Death*, NBC SAN DIEGO NEWS, April 1, 2009, <http://www.nbcsandiego.com/news/local/Dog-Dies-Horrific-Death.html> (noting local residents “are outraged about what happened to a dog after it was hit by a car”), *with World: Americas Cheers and Prayers Greet Tucker’s Death*, BBC NEWS, Feb. 4, 1998, <http://news.bbc.co.uk/1/hi/world/americas/53295.stm> (noting that once it appeared that the execution of Karla Faye Tucker would take place “a large cheer went up from those who had wanted Tucker to pay for her crimes”).

232 WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.