

NOTE

PANETTI V. QUARTERMAN: EXPLORING THE UNSETTLED AND UNSETTLING*

TABLE OF CONTENTS

- I. INTRODUCTION 1384
- II. CASE RECITATION 1386
 - A. *Factual and Procedural History* 1386
 - B. *The Court’s Reasoning* 1389
- III. ANALYSIS 1394
 - A. *The Key Failings of Panetti* 1394
 - 1. *The Court Misconstrues Ford v. Wainwright* 1396
 - 2. *The Court Relies on Flawed Policy Analysis* 1400
 - 3. *The Court Fails to Conduct the Requisite Constitutional Analysis* 1402
 - B. *The Difficult Road Ahead: Defining a Standard for Assessing Competency After Panetti* 1404
 - 1. *The Constitution May Require No More Than the Rejected Test Already Guaranteed* 1405
 - 2. *Incorporating a Rational Understanding Requirement Is a Daunting Task*. 1407
 - 3. *More Protection Requires Departing from the Court’s Guidance* 1411
- IV. CONCLUSION 1412

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I. INTRODUCTION

The practice of sparing the insane from execution has been in place for centuries,¹ but a clear test for the requisite competency to be executed still does not exist.² In *Ford v. Wainwright*, the U.S. Supreme Court first recognized that executing the insane was prohibited by the Constitution—even if the prisoner was sane while committing the murder, at trial, and during sentencing.³ The plurality opinion, however, did not attempt to fashion a constitutionally acceptable test for the requisite competency to be executed.⁴ Only Justice Powell, writing for himself, attempted to define the contours of such a test.⁵ The test employed by the Fifth Circuit Court of Appeals seemed to follow the substantive guidelines set out by Justice Powell by requiring the prisoner to possess a factual understanding of impending execution and the reasons for it.⁶ However, in *Panetti v. Quarterman*, the Supreme Court struck down this test for competency as too restrictive, but declined to devise an appropriate standard to replace it.⁷

Although the Court left much unresolved, its holding in *Panetti* clearly indicates that a prisoner must have a deeper understanding of the reasons for his pending execution than the factual understanding required by the Fifth Circuit.⁸ The Court described the desired awareness as a “rational understanding,” acknowledged the difficulty in defining this standard, and instructed lower courts to conduct their own Eighth Amendment analyses to determine the proper test.⁹

Some fear the decision in *Panetti* subverts the proper purposes of capital punishment.¹⁰ After *Panetti*, prisoners

1. See *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

2. See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007) (rejecting the Fifth Circuit’s test for competency, but declining to replace it with a constitutionally acceptable test to determine the required competency to be executed).

3. *Ford*, 477 U.S. at 41.

4. See *id.* at 418 (Powell, J., concurring) (discussing the Court’s failure to address the meaning of insanity and the need to fashion a standard).

5. *Id.* at 418–27.

6. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) (criticizing the Court’s holding because the Fifth Circuit’s test was based on the actual language in *Ford*, but yet it was struck down because it is “somehow inconsistent with the spirit of *Ford*”).

7. *Id.* at 2862 (majority opinion).

8. *Id.* at 2860–61.

9. *Id.* at 2862–63.

10. See Brief for Respondent at 46–48, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) (arguing that a more expansive definition of insanity in the context of competence to be executed would dissuade the goals of capital punishment); see also Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent at 5–13, *Panetti*, 127 S.

sentenced to die can pursue direct appeal of their sentence and conviction, as well as state and federal habeas corpus review of their sentences and convictions.¹¹ Even after the resolution of these claims, *Panetti* allows prisoners to bring new claims that they lack the requisite competency to be executed upon making a substantial showing of insanity.¹² Some argue the strong deterrent effect of capital punishment is eroded by the added delay, as well as the possibility of avoiding execution, especially because the substantial showing of insanity seems quite low,¹³ and the requisite competency to be executed is largely undefined.¹⁴

Others argue the *Panetti* decision is essential to preserve human decency and to prevent senseless executions.¹⁵ They question the retributive value of executing someone who suffers from delusions that prevent a deeper understanding of the reasons for their impending execution¹⁶ and argue deterrence cannot be served by executing someone without a rational understanding of their predicament as well as the reasons for it.¹⁷ In addition, many consider the execution of such prisoners to be “uniquely cruel and inhuman.”¹⁸

The effect *Panetti* will have on competency determinations remains unclear. Although the Court held the Fifth Circuit’s test for mental competency was too narrow because it prevented

Ct. 2842 (No. 06-6407) [hereinafter Brief for the Criminal Justice Legal Foundation] (arguing that a “broad, vague constitutional standard for competence” undermines both the deterrent and retributive effect of capital punishment).

11. See generally *Panetti*, 127 S. Ct. at 2863–64 (Thomas, J., dissenting) (noting that Mr. Panetti’s insanity defense was rejected by a jury and that his attempts to challenge his sentence on grounds that he was incompetent to stand trial and represent himself repeatedly failed).

12. *Id.* at 2855 (majority opinion).

13. See *id.* at 2870 (Thomas, J., dissenting) (describing the quantum of proof the Court considered to constitute a substantial showing of insanity as “paltry and unpersuasive”).

14. See *id.* at 2873 (lamenting the Court’s failure to provide guidance to lower courts assessing *Ford* claims and asserting the decision would add further confusion to “already muddled *Ford* determinations”).

15. See Brief for Petitioner at 40–49, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) (arguing that the Eighth Amendment demands greater protections than afforded under the Fifth Circuit’s test for competency).

16. See *Panetti*, 127 S. Ct. at 2860–61 (examining the need for executions to serve some important societal interest, such as retribution, in order to be constitutionally permissible); see also *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (questioning the retributive value of executing those without any understanding of why they have been sentenced to die).

17. See *Ford*, 477 U.S. at 419 (Powell, J., concurring) (“[E]xecution was intended to be an ‘example’ to the living, but . . . the execution of ‘a mad man’ . . . ‘can be no example to others.’”).

18. Brief for Petitioner, *supra* note 15, at 48.

courts from considering whether the prisoner could rationally understand the reasons for his execution, the holding in *Panetti* is unlikely to result in greater substantive protections of the mentally ill. Most glaringly, the Eighth Amendment analysis urged by the Court may reveal that no greater protection of the mentally ill is constitutionally required. The *Panetti* Court also misconstrued policies and precedent in order to reach its result, further making it difficult for lower courts to find a basis for incorporating heightened protections in competency assessments. Hence, it is very likely that *Panetti* will do little more than add language to *Ford* determinations.

This Note is organized in four parts. Part II discusses the Court's opinion, including the facts of the case, the Court's analysis, and the dissenting opinion. Part III begins by exploring the shortcomings of the Court's analysis in support of the third element of the Court's holding in which it rejects the Fifth Circuit's test for competency. Part III then argues *Panetti* is unlikely to change the substantive nature of competency determinations and explains how a more inclusive test for insanity can be achieved. Finally, Part IV concludes this Note.

II. CASE RECITATION

A. *Factual and Procedural History*

On September 8, 1992, Scott Panetti murdered his estranged wife's mother and father, Joe and Amanda Alvarado.¹⁹ Mr. Panetti's second wife, Sonja, had recently left him because of his drinking and threatening behavior. She and their three-year-old daughter had moved in with Sonja's parents. Prior to the incident, Mr. Panetti had threatened to kill Sonja and her parents, prompting her to obtain a protective order.²⁰

On the morning of the murders, Mr. Panetti rose before dawn, shaved his head, dressed in camouflage, and proceeded to his wife's parents' house armed with a rifle, shotgun, and several knives.²¹ Mr. Panetti broke into the house and shot and killed Sonja's parents in front of Sonja and their daughter,²² "spraying [them] with blood."²³ He held his wife and daughter hostage

19. *Panetti*, 127 S. Ct. at 2848.

20. Brief for Respondent, *supra* note 10, at 1.

21. *Id.* at 2.

22. *Panetti*, 127 S. Ct. at 2848.

23. Brief for Respondent, *supra* note 10, at 2.

2008]

PANETTI V. QUARTERMAN

1387

throughout the night before finally releasing them and surrendering to police.²⁴

Mr. Panetti had a long history of mental illness. Prior to the offense, he had been hospitalized for “schizophrenia, schizoaffective disorder, bipolar disorder, depression, psychosis, auditory hallucinations, and delusions of persecution and grandiosity.”²⁵ In “one psychotic episode” predating the offense, Mr. Panetti “had become convinced the devil had possessed [the home he and his wife shared] and . . . in an effort to cleanse their surroundings, [he] had buried a number of valuables next to the house and engaged in other rituals.”²⁶ Despite his long and well-documented history of mental illness, Mr. Panetti was found to possess the requisite competency to stand trial and to represent himself.²⁷

Mr. Panetti’s behavior at trial was described as “truly a judicial farce, and a mockery of self-representation.”²⁸ Clad in a purple cowboy outfit, Mr. Panetti argued he was not guilty for reasons of insanity.²⁹ His behavior was described as “bizarre, scary, and trance-like.”³⁰ His comments were often unintelligible.³¹ For example, when discussing the relevance of asking a witness about a belt buckle, Mr. Panetti explained:

It has to do with jailhouse religion. It has to do with what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It has to do with my whole outlook and this will come up, God forbid, in the punishment stage. Before religion, when you got religion, prior religion, church member, I’m going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.³²

24. *Panetti*, 127 S. Ct. at 2848.

25. Brief for Petitioner, *supra* note 15, at 7; *see also Panetti*, 127 S. Ct. at 2848.

26. *Panetti*, 127 S. Ct. at 2848.

27. *Id.*

28. *Id.* at 2849 (quoting Mr. Panetti’s standby counsel) (internal quotation marks omitted).

29. Brief for Petitioner, *supra* note 15, at 11.

30. *Panetti*, 127 S. Ct. at 2849 (quoting Mr. Panetti’s standby counsel) (internal quotation marks omitted); *see also* Brief for Petitioner, *supra* note 15, at 11–15 (noting Mr. Panetti often engaged in incoherent rants during trial and had attempted to subpoena John F. Kennedy, the Pope, and Jesus Christ).

31. Brief for Petitioner, *supra* note 15, at 12–14.

32. *Id.* at 13 (quoting the reporter’s record from Mr. Panetti’s trial).

Additionally, when testifying about the crime, Mr. Panetti assumed another personality he called “Sarge.”³³ Although Mr. Panetti had been taking antipsychotic medication when found competent to stand trial, evidence indicates that by the time the trial began, Mr. Panetti, against the advice of his physicians, had not taken his medication for five months.³⁴

Despite Mr. Panetti’s bizarre behavior at trial and well-documented history of mental illness, a jury rejected his insanity defense, convicted him of capital murder, and sentenced him to death. Mr. Panetti unsuccessfully challenged his sentence and conviction on direct appeal and through state habeas corpus proceedings.³⁵ The Supreme Court denied two petitions for certiorari.³⁶ Mr. Panetti filed a writ of habeas corpus under 28 U.S.C. § 2254,³⁷ and he was subsequently denied relief by the U.S. District Court for the Western District of Texas, the Fifth Circuit Court of Appeals, and the U.S. Supreme Court.³⁸

Shortly after Mr. Panetti’s execution date was scheduled, his counsel argued for the first time that Mr. Panetti lacked the requisite competency to be executed. The judge presiding over the Judicial District Court in Gillespie County, Texas denied relief without holding a hearing to assess Mr. Panetti’s competency, and the Texas Court of Criminal Appeals dismissed the subsequent appeal for lack of jurisdiction absent a finding of incompetence by the trial court.³⁹

Mr. Panetti filed another petition for writ of habeas corpus under 28 U.S.C. § 2254 and a motion to stay execution in federal court.⁴⁰ The stay was granted by the district court to allow the state court to evaluate Mr. Panetti’s current mental state in response to his Renewed Motion to Determine Competency to be Executed. Attached to Mr. Panetti’s motion “were a letter and declaration from . . . a psychologist and a law professor” indicating Mr. Panetti had no comprehension of the reasons for his impending execution.⁴¹

33. *Id.* at 14 (internal quotation marks omitted).

34. *Panetti*, 127 S. Ct. at 2849; Brief for Petitioner, *supra* note 15, at 16–17.

35. *Panetti*, 127 S. Ct. at 2849.

36. *Panetti v. Dretke*, 540 U.S. 1052 (2003) (mem.); *Panetti v. Texas*, 525 U.S. 848 (1998) (mem.).

37. *See* 28 U.S.C. § 2254 (2006) (describing the requirements a prisoner must meet before federal courts may entertain a petition for habeas corpus).

38. *Panetti*, 127 S. Ct. at 2849.

39. *Id.*

40. *Id.*

41. *Id.* at 2850.

The state trial court appointed two mental health experts to aid in its assessment of Mr. Panetti's Renewed Motion to Determine Competency to be Executed.⁴² The experts concluded that Mr. Panetti "knows that he is to be executed, and that his execution will result in his death' and, moreover, that 'he has the ability to understand the reason he is to be executed.'"⁴³ His strange behavior, they explained, was the result of a calculated effort to deceive.⁴⁴ In response to these conclusions, Mr. Panetti's counsel filed a motion challenging the methods and findings of the court-appointed experts and requesting funding for mental health experts of their own. The court responded by closing the case.⁴⁵

Counsel for Mr. Panetti pursued resolution of its § 2254 petition in federal district court.⁴⁶ Finding the state competency determination constitutionally inadequate, the district court conducted its own fact-finding with regard to Mr. Panetti's competency.⁴⁷ Ultimately, however, the court denied Mr. Panetti relief.⁴⁸ The court found him competent to be executed based on evidence that he knew: (1) the fact of his impending execution; and (2) the factual predicate for it.⁴⁹ The court refused to give weight to evidence that Mr. Panetti suffered from a delusional belief that the state's true reason for executing him was to prevent him from preaching the Gospel.⁵⁰ The Fifth Circuit affirmed.⁵¹

B. *The Court's Reasoning*

In a 5–4 decision, the Supreme Court ruled in favor of Mr. Panetti in a three-part holding.⁵² First, the Court determined it had jurisdiction to hear Mr. Panetti's second petition for writ of habeas corpus under 28 U.S.C. § 2254.⁵³ Second, the Court held

42. *Id.*

43. *Id.* at 2851 (internal citations omitted).

44. *Id.* According to the experts, "Mr. Panetti deliberately and persistently chose to control and manipulate our interview . . . [He] could answer questions about relevant legal issues . . . if he were willing to do so." *Id.*

45. *Id.* at 2851.

46. *Panetti v. Dretke*, 401 F. Supp. 2d 702, 703 (W.D. Tex. 2004).

47. *Id.* at 712.

48. *Id.* at 711–12.

49. *Id.* at 711.

50. *Id.* at 712.

51. *Panetti v. Dretke*, 448 F.3d 815, 821 (5th Cir. 2006).

52. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847–48 (2007).

53. *Id.* at 2855; *see also* 28 U.S.C. § 2254(d)(1) (2006) (prohibiting federal courts from granting relief unless state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law");

the procedures employed by the state court to determine Mr. Panetti's competency were constitutionally inadequate.⁵⁴ Third, the Court rejected as too restrictive the Fifth Circuit's test for determining the competency to be executed because it failed to take into account evidence of delusional beliefs that might prevent a prisoner from having a "rational understanding" of the state's reasons for seeking to impose the death penalty.⁵⁵

In deciding that the lower court's jurisdiction over Mr. Panetti's second petition for habeas corpus was proper, the Court relied on the policy underpinnings of the Antiterrorism and Effective Death Penalty Act (AEDPA),⁵⁶ which limits federal courts' ability to grant relief in response to habeas petitions by prohibiting courts from hearing "claim[s] presented in a second or successive . . . [§ 2254] application . . . that w[ere] not presented in a prior application."⁵⁷ Barring *Ford* claims of incompetence to be executed if brought in second or successive habeas petitions would, in essence, require defense counsel to file unripe claims in every § 2254 habeas application.⁵⁸ This, the Court reasoned, would conflict with the Court's construction of the AEDPA's goals, which include promoting "judicial efficiency and conservation of judicial resources."⁵⁹

Relying on Justice Powell's concurrence in *Ford*, the Court held the procedures employed by the state to determine mental competency fell short of constitutional protections afforded by the Eighth Amendment.⁶⁰ Under *Ford*, once a prisoner has made a substantial showing of insanity, a prisoner is entitled to a hearing as well as an opportunity to present "expert psychiatric evidence that may differ from the State's own psychiatric examination."⁶¹ At the time the state court closed the case, the court had not ruled on Mr. Panetti's motion seeking, among other things, funding for mental health experts of his own, despite representations that it would. Counsel for Mr. Panetti, the Court

28 U.S.C. § 2244(b)(2) (2006) (prohibiting federal courts from granting relief for new claims appearing for the first time in "second or successive" petitions except in circumstances not implicated by this case).

54. *Panetti*, 127 S. Ct. at 2858.

55. *Id.* at 2861–62.

56. *Id.* at 2853–54.

57. 28 U.S.C. § 2244(b)(2)(A)–(B) (2006).

58. *Panetti*, 127 S. Ct. at 2854 (reasoning that requiring lawyers to file unripe *Ford* claims would be an "empty formality" that wastes judicial resources).

59. *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 205–06 (2006)) (internal quotation marks omitted).

60. *Id.* at 2861–62.

61. *Id.* at 2846 (quoting *Ford v. Wainwright*, 477 U.S. 399, 427 (1986)) (internal quotation marks omitted).

2008]

PANETTI V. QUARTERMAN

1391

reasoned, refrained from presenting evidence to counter that provided by the state because they were reasonably awaiting resolution of the motions and were thereby deprived the minimum process required under *Ford*.⁶²

The AEDPA prohibits federal courts from granting habeas relief unless a state court's decision "involved an unreasonable application of clearly established Federal law."⁶³ Because the state's failure to hold a hearing and to provide Mr. Panetti with the opportunity to provide his own expert analysis was an unreasonable application of the law, the Court held habeas relief was appropriate and the state court's findings were not owed the strong deference generally applicable under the AEDPA.⁶⁴

Moreover, the Court held the test used by the Fifth Circuit to determine the requisite competency to be executed was too restrictive to provide the requisite protections afforded by the Eighth Amendment.⁶⁵ The Court grounded its reasoning in its decision in *Ford*, in which it held the Eighth Amendment prohibits the execution of the insane.⁶⁶ The Court explained that a prisoner must have a rational understanding of the reasons for his execution in order for the execution to serve the proper purposes of capital punishment and to align with societal standards of decency.⁶⁷ Thus, the delusions allegedly affecting Mr. Panetti, which could have inhibited such an understanding, should have been considered. The Court, however, declined to craft an appropriate standard to replace the rejected Fifth Circuit test.⁶⁸

Justice Thomas penned a dissenting opinion in which the Chief Justice, Justice Scalia, and Justice Alito joined.⁶⁹ The dissent argued: (1) the Court has no jurisdiction to hear Mr. Panetti's claims brought for the first time in his second petition under § 2254 based on language plainly limiting jurisdiction over such petitions in § 2244 of the AEDPA;⁷⁰ (2) Justice Powell's *Ford* concurrence was not clearly established law, and thus, according to the dictates of § 2244, the Court was unable to grant relief;⁷¹ (3) even if Justice Powell's *Ford* concurrence was clearly

62. *Id.* at 2857.

63. 28 U.S.C. § 2254(d)(1) (2006) (internal punctuation omitted).

64. *Panetti*, 127 S. Ct. at 2858–59.

65. *Id.* at 2860.

66. *Id.* at 2860–63.

67. *Id.* at 2861–62.

68. *Id.* at 2862.

69. *Id.* at 2863–74 (Thomas, J., dissenting).

70. *Id.* at 2865–67.

71. *Id.* at 2867–68.

established law, the procedures employed by the state court to determine competency did not represent an unreasonable application of the law;⁷² and (4) because *Ford* does not require a more stringent test than that employed by the Fifth Circuit, the Court should have conducted a constitutional analysis to determine whether the Eighth Amendment requires greater protection than required by *Ford*.⁷³

The dissent argued the plain language of the AEDPA barred the Court from granting relief.⁷⁴ The AEDPA expressly prohibits federal courts from hearing claims brought for the first time in “second or successive” petitions, subject to exceptions inapplicable to the present case.⁷⁵ Criticizing the majority’s reliance on cases predating the enactment of the AEDPA, the dissent argued there was no support for the Court’s circumvention of the statute’s plain meaning.⁷⁶ Even the Court’s reliance on policy, the dissent argued, was misplaced because unripe claims brought in initial habeas petitions could be dismissed and brought again should they ripen.⁷⁷ The initial filing of the unripe claim would serve the beneficial purpose of putting the state on notice of intent to pursue the initial *Ford* claim should it ever ripen.⁷⁸ The dissent also asserted the Court’s holding conflicts with precedent preventing prisoners from

72. *Id.* at 2869–70.

73. *Id.* at 2873–74.

74. *Id.* at 2864.

75. 28 U.S.C. § 2244(b)(2) (2006). The relevant provision states:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

76. *Panetti*, 127 S. Ct. at 2864–65 (Thomas, J., dissenting).

77. *Id.* at 2865–67. Justice Thomas noted the holding in *Stewart v. Martinez-Villareal*, in which the Court allowed the petitioner to bring a *Ford* claim that was raised in an initial § 2254 petition once it had ripened. *Id.* at 2866; see also *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–44 (1993) (holding the reconsideration of a *Ford* claim that was dismissed as premature did not constitute a “second or successive application”).

78. *Panetti*, 127 S. Ct. at 2867 (Thomas, J., dissenting).

2008]

PANETTI V. QUARTERMAN

1393

raising claims in subsequent habeas petitions simply because the claims were unripe at the time the initial habeas petition was filed.⁷⁹

Rejecting the Court's conclusion that the state's procedures for determining competency represented an unreasonable application of clearly established federal law, the dissent first criticized the quantum of proof that the Court held comprised the requisite substantial threshold showing of insanity required in order for the protections described in *Ford* to apply.⁸⁰ The evidence included a psychologist's one-page letter that was a "preliminary evaluation" that reflected findings from an 85-minute meeting and added no new medical evidence indicative of a lack of competency to be executed. The law professor who had attended the evaluation also failed to provide a diagnosis. This evidence alone, the dissent argued, should not have been adequate to trigger the procedural protections described in *Ford*.⁸¹

Shifting focus to the procedures employed, the dissent argued the procedures utilized by the state court aligned with constitutional mandates and Court precedent.⁸² The Court ruled that Mr. Panetti was deprived an opportunity to submit evidence in response to the evidence provided by the court-appointed experts because the state court had not ruled on Mr. Panetti's motions before closing the case, thereby depriving him of notice that there would be no evidentiary hearing.⁸³ The dissent contended, however, that Mr. Panetti had ample opportunity to present evidence but failed to do so because the court refused to fund "his pursuit of more evidence."⁸⁴ Because Mr. Panetti enjoyed no right to funds for experts in habeas proceedings and it was unlikely, in the estimation of the dissent, that he would have presented any more evidence absent additional funding for

79. *Id.* at 2866–67 (emphasizing the Court's holding in *Burton v. Stewart*, 127 S. Ct. 793 (2007) (per curiam), in which the Court denied relief to a petitioner who attempted to raise a claim related to a sentence that was under review in a second § 2254 petition that was unripe when the first § 2254 petition was filed).

80. *Id.* at 2867–70 (describing the proof offered in support of Mr. Panetti's contention that he lacked the sufficient competency to be executed as "paltry and unpersuasive").

81. *Id.* at 2868.

82. *Id.* at 2868–70.

83. *Id.* at 2857–58 (majority opinion).

84. *Id.* at 2871–72 (Thomas, J., dissenting) (describing Panetti's "track record of submitting no new evidence in his first Article 46.05 motion . . . and only two insubstantial exhibits in his second").

expert witnesses, his rights had not been violated by the procedures employed.⁸⁵

Having concluded the Court lacked jurisdiction to hear Mr. Panetti's claims, the dissent declined to assess the substantive adequacy of the Fifth Circuit's test for mental competency.⁸⁶ The dissent did, however, fault the Court's methodology rejecting the Fifth Circuit's test.⁸⁷ Arguing *Ford* did not require a more searching inquiry into the competency of prisoners awaiting execution, the dissent criticized the Court for failing to conduct an analysis under the Eighth Amendment to support the substantive limitations being imposed for the first time.⁸⁸

III. ANALYSIS

There is a long tradition of sparing the insane from execution, and in its 1986 decision in *Ford*, the Court first recognized the Eighth Amendment's ban on cruel and unusual punishment contained such a protection.⁸⁹ However, even (perhaps especially) after the 2007 decision in *Panetti*, a constitutionally adequate test for the requisite competency to be executed has yet to emerge.⁹⁰ The following sections discuss the difficult task faced by courts in making such determinations following *Panetti*.

A. *The Key Failings of Panetti*

By suggesting the Eighth Amendment requires a prisoner condemned to death to possess a rational understanding of the reason for the pending execution,⁹¹ the Supreme Court has vitiated a clear and workable standard⁹² and has begun to replace it with a problematic framework for assessing the mental

85. *Id.*

86. *Id.* at 2873.

87. *Id.* (arguing the Court's failure to conduct an Eighth Amendment analysis produced a "half-baked holding" that "thrust[s] already muddled *Ford* determinations into . . . disarray").

88. *Id.* at 2873–74.

89. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

90. *See Panetti*, 127 S. Ct. at 2862.

91. *Id.* at 2861 ("Yet the *Ford* opinions nowhere indicate that delusions are irrelevant . . . if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.").

92. The Fifth Circuit's test found a prisoner competent to be executed if he "(1) understands the nature of the proceedings against him and (2) understands that the state is seeking to execute him and the reasons the state seeks this penalty . . ." *Panetti v. Dretke*, 448 F.3d 815, 821 (5th Cir. 2006) (quoting *Garrett v. Collins*, 951 F.2d 57, 58 (5th Cir. 1992)).

competency to be executed.⁹³ Not only does the Court's holding leave much unresolved,⁹⁴ the guidance it does provide creates substantial difficulty for the lower courts, both because of its vagueness⁹⁵ as well as the difficult and contentious concepts involved.⁹⁶ Further complicating the lower courts' analysis is the high likelihood that the expert opinion calling for a more stringent test is not supported by the requisite consensus to afford greater protections under the Court's Eighth Amendment jurisprudence.⁹⁷ Without a basis for greater substantive protections in policy, precedent, or accepted modes of analysis, lower courts will be unable to incorporate any meaningful protections when defining the contours of the rational understanding requirement.⁹⁸

Although the greater protections *Panetti* attempts to afford those facing execution may be socially desirable, the Court's analysis is flawed in several key respects. First, the Court inappropriately grounds its holding in precedent that does not support its conclusions. Second, in concluding the execution of those without a rational understanding of the reasons for their punishment does not serve the proper purposes of capital punishment, the Court misconstrues the policies supporting the imposition of the death penalty. Third, in expanding the protections offered under the Eighth Amendment, the Court should have conducted a thorough constitutional analysis to ensure a social consensus supported substantive restrictions on the state's ability to carry out its laws.

93. See *Panetti*, 127 S. Ct. at 2862 (declining to define the standard for competency).

94. See *id.* (declining to set a standard for assessing competency); see also *id.* at 2873 (Thomas, J., dissenting) (“[W]hat emerges is a half-baked holding that leaves the details of the insanity standard for the District Court to work out.”).

95. See Aimee Logan, Note, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 220 (2008) (arguing that for constitutional protections to take effect, the Court must define scientific terms carefully).

96. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 335–36 (3d ed. 2001) (describing the battle ground that erupts when law and psychiatry collide).

97. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) (arguing no support for greater protections under the Eight Amendment is cited in the majority opinion because none exists). Among mental health experts, there is considerable support for a test that would find more prisoners lack the requisite competency to be executed. However, it is likely the public would not support such a test. See *infra* note 183 and accompanying text; see also *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1165–66 (2008) [hereinafter *Law of Mental Illness*] (arguing consensus is unlikely to support greater protections for the mentally ill and faulting lack of access to legislatures for this phenomenon).

98. See *Law of Mental Illness*, *supra* note 97, at 1161–62 (arguing the Court's failure to provide substantive guidelines does very little to increase protection of the mentally ill).

It remains to be seen whether *Panetti* will, or even should, provide any real additional protection to prisoners raising questions about mental competency to be executed. Because the Court offers no clear test for assessing competency in *Panetti*, it is possible lower courts will adopt narrow interpretations of the Court's holding, perhaps depriving it of any real force.⁹⁹ Should there be the requisite support for a more inclusive class of prisoners lacking the competency to be executed, it should manifest, at least initially, in the legislature.¹⁰⁰ Until legislatures afford greater protections, however, courts are likely to provide the narrowest protections to prisoners¹⁰¹ or to rely on potentially unsatisfactory case-by-case determinations.¹⁰²

1. *The Court Misconstrues Ford v. Wainwright.* In *Ford*, the Court held the Eighth Amendment prevents the execution of the insane.¹⁰³ Although Mr. Ford showed no signs of incompetence while committing the murder, during the trial, or at sentencing, Mr. Ford's mental state deteriorated significantly while awaiting execution.¹⁰⁴ Expert opinion related that Mr. Ford was unaware of his impending execution, believing instead that the death penalty could no longer validly be applied.¹⁰⁵ The plurality opinion addressed whether the Eighth Amendment permits the execution of the insane as well as the adequacy of the procedures Florida law afforded to a prisoner challenging his execution on the basis of incompetence.¹⁰⁶

99. See *id.* at 1162 (arguing that minimal protections result in the absence of clear substantive guidance).

100. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (indicating legislatures provide the "clearest and most reliable" evidence of contemporary values).

101. The respondent's brief notes a uniform history of narrow construction of the Court's language in this area prior to *Panetti*. Brief for Respondent, *supra* note 10, at 12–13.

102. In *Roper v. Simmons*, the Court rejected a case-by-case approach to determining the culpability of juvenile offenders because of the "unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower any mitigating arguments." *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005). Although many issues in *Roper* differ from those in *Panetti*, similar concerns arise in sparing the condemned from death on the grounds of mental incompetence. See *supra* Part III.A.

103. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

104. *Id.* at 401–02. Mr. Ford developed an obsession with the Ku Klux Klan after reading about a rally held nearby. As time progressed, he began to suffer from numerous delusions involving plots to cause him to commit suicide, torture of his female relatives somewhere on prison grounds, and a hostage crisis. In interviews, Mr. Ford spoke in nearly incomprehensible code, and he referred to himself as "Pope John Paul, III." A psychiatrist determined Mr. Ford's mental problems were genuine. *Id.* at 402–03.

105. *Id.* at 422 (Powell, J., concurring).

106. *Id.* at 405 (majority opinion).

The substantive guidance the *Ford* plurality offers for determining the competency to be executed indicates the Fifth Circuit's test guarantees the minimal constitutional protections afforded by the Eighth Amendment.¹⁰⁷ In *Ford*, the Court did not criticize the terms of the statute describing the requisite mental competency for execution,¹⁰⁸ which contained demands similar to those in both the Fifth Circuit's test for competency as well as the Texas statute at issue in *Panetti*.¹⁰⁹ Furthermore, the Court "seriously question[ed] the retributive value of executing a person who has *no comprehension* of why he has been singled out and stripped of his fundamental right to life."¹¹⁰ Similarly, the Court acknowledged the "abhorrence civilized societies feel at killing one who has *no capacity* to come to grips with his own conscience or deity."¹¹¹ The Court appropriately addressed the issue of competency in terms of absolutes.¹¹² A psychiatric examination concluded Mr. Ford had no ability to comprehend his coming execution; and, thus, if correct, would indicate he was necessarily unable to make the connection between his punishment and his crime.¹¹³ Mr. Panetti, however, was not completely devoid of understanding.¹¹⁴ Indeed, the district court found he had a factual understanding of his crimes, his impending execution, and the state's reason for executing him.¹¹⁵ This factual understanding alone is enough to place Mr. Panetti's situation beyond the scope of the Court's holding in *Ford*, in which the Court addressed the complete absence of understanding.¹¹⁶

107. *See id.* at 421–22 (Powell, J., concurring) (limiting its analysis to situations in which the prisoner does not even have a factual understanding of the reasons for his pending execution).

108. *See id.* (failing to indicate that the statute was inadequate).

109. The statute at issue in *Ford* "require[d] the Governor to stay the executions of those who 'd[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed' on them." *Id.* at 421 (quoting FLA. STAT. § 922.07 (1985 & Supp. 1986)). Similarly, the Texas statute controlling in *Panetti* provided, "A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed." TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (Vernon 2006); *see also supra* note 92 (describing the Fifth Circuit's test).

110. *Ford*, 477 U.S. at 409 (emphasis added).

111. *Id.* (emphasis added).

112. *See id.* (speaking in terms of "no comprehension" and "no capacity").

113. *Id.* at 422–23 (Powell, J., concurring).

114. *See Panetti v. Dretke*, 401 F. Supp. 2d 702, 711–12 (W.D. Tex. 2004) (finding Mr. Panetti had the factual understanding required to satisfy the Fifth Circuit's test for competency).

115. *Id.*

116. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2873 (2007) (Thomas, J., dissenting) (arguing that *Panetti* presents issues not raised in *Ford*).

Justice Powell's concurrence, which provides a more searching look at the substantive requirements for competency under the Eighth Amendment, also indicates the Fifth Circuit's test for competency assures the minimal protections guaranteed by the Eighth Amendment.¹¹⁷ According to Justice Powell:

A number of States have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it. Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. . . . Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.¹¹⁸

A rational understanding requirement had been expressly called for in other contexts, such as the requisite competency to stand trial.¹¹⁹ Justice Powell's choice of words is far from a call for a requirement of a deep or rational understanding.¹²⁰ "Perception]" and "aware[ness]" indicate detection alone is enough to satisfy the constitutional minimum as he envisioned it.¹²¹

Perhaps most tellingly, Justice Powell rejected a broad interpretation of insanity.¹²² The interval of time between trial and execution at common law led to a link between the competence required to stand trial and the competence required

117. *Id.* at 2874 (arguing that the Fifth Circuit test reasonably interprets *Ford*); *Ford*, 477 U.S. at 422 (Powell, J., concurring).

118. *Ford*, 477 U.S. at 421–22 (Powell, J., concurring).

119. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 172 (1975) (noting the Court's test to determine whether a defendant is incompetent to stand trial "seeks to ascertain whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'" (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960))).

120. *See Ford*, 477 U.S. at 422 (Powell, J., concurring) (discussing the constitutional protections that apply when a prisoner is completely unaware of the reasons for his execution); *see also* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1385 n.52 (2006) (noting the standard for competency to be executed established by *Ford* is far lower than that required to stand trial).

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

122. *Id.* at 422 n.3 (expressly declining to hold that the Constitution requires that a prisoner facing execution must have the level of awareness needed to assist counsel at trial but noting that states are free to do so).

to be executed.¹²³ Although some states made both determinations using the same standard, which required the defendant to be able to assist in his own defense, Justice Powell noted the modern trend was to require a lesser showing of competence to be executed.¹²⁴ Notably, Justice Powell expressly refused to impose the rational understanding that is required to assist counsel at trial proceedings as a constitutional minimum for competency to be executed.¹²⁵ In fact, had the Court in *Panetti* defined its “rational understanding” requirement, the notion of a sentence as the product of trial proceedings aligns best with the concept of a rational understanding emerging from *Panetti*. Among the concepts related to the reasons for imposing the death penalty, trial proceedings best lend themselves to rational understanding. A sentence, at least on a superficial level, can be thought of as the result when facts are applied to rules. A person could conceivably look at the rules and facts and formulate a rational understanding of why a death sentence was imposed. However, were this the meaning of a “rational understanding,” the standard rejected in *Ford* and endorsed by *Panetti* would be impermissibly similar because a deeper understanding of the state’s reasons for imposing the death penalty could mean little else than the rational understanding of the trial proceedings required by *Drope v. Missouri*.¹²⁶

In addition, the Court in *Panetti* seems aware of the tenuous connection between its holding and the holding in *Ford*.¹²⁷ The Court stated, “[T]he *Ford* opinions nowhere indicate that delusions are irrelevant to ‘comprehension’ or ‘awareness’ if they so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution. *If anything*, the *Ford* majority suggests the opposite.”¹²⁸ Thus, rather than *demanding* a more rigorous inquiry, *Ford might suggest* a more stringent standard is appropriate. Having seemingly acknowledged the lack of any concrete language in *Ford* to support a rational understanding requirement, the Court looked to the policies cited in *Ford* in order to demonstrate

123. *Id.* at 420–21 (noting that at common law, executions often swiftly followed trials, thereby linking competency at trial and execution).

124. *See id.* at 422 n.3 (suggesting the “prevailing test” requires awareness of the conviction and impending execution).

125. *Id.* at 421 n.2.

126. *See id.* (noting precedent rejects the requirement that the prisoner have the ability to assist in his own defense in order to be executed).

127. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2861 (2007).

128. *Id.* (emphasis added).

conflict with the Fifth Circuit test.¹²⁹ Nonetheless, even the language in the majority's opinion in *Panetti* seems to acknowledge that grounding the broad construction of insanity in *Ford* requires a strained interpretation of precedent.¹³⁰

2. *The Court Relies on Flawed Policy Analysis.* According to the Court, the death penalty is imposed to serve two goals: retribution and deterrence.¹³¹ Unless an execution would serve at least one of these goals, it is considered purposeless and cruel.¹³² Indeed, the majority in *Panetti* indicated the execution of one afflicted by a delusional belief system was improper, in part, because it served neither goal of capital punishment.¹³³ In reaching its conclusion, however, the Court relied on interpretations that are inconsistent with past treatments of retribution and deterrence; thus, creating substantial obstacles for lower courts tasked with crafting standards consistent with the logic of *Panetti*.¹³⁴

i. The Court is far too quick to dismiss the deterrent effect of executing those whose mental state has deteriorated into insanity while awaiting punishment. Within the course of a sentence, the Court announced that deterrence is not served by executing the insane, even if their mental illness developed after conviction.¹³⁵ Indeed, the argument that punishment lacks a deterrent effect is quite strong in the context of defendants who

129. See *id.* (finding discord between the "logic" and "rationales" of *Ford* and the Fifth Circuit's test for determining competency); see also *id.* at 2874 (Thomas, J., dissenting) ("[T]he Court cobbles together stray language from *Ford's* multiple opinions and asserts that the Court of Appeals' test is somehow inconsistent with the spirit of *Ford.*").

130. See *id.* at 2861 (majority opinion) (relying on implications radiating from *Ford* rather than its concrete mandates).

131. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

132. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (White, J., plurality opinion) ("[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering . . .").

133. *Panetti*, 127 S. Ct. at 2861–62 (rejecting the Fifth Circuit's test for competency because it allows executions that do not serve a proper purpose).

134. See *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV L. REV. 185, 210 (2007) (arguing the Court's inconsistent treatment of the policy underpinnings of capital punishment could, if followed logically to its end, result in the conclusion that all executions are prohibited by the Eighth Amendment).

135. The Court in *Panetti* doesn't even mention deterrence directly, but it does quote language from the *Ford* opinion that hastily dismisses the deterrent effect. *Panetti*, 127 S. Ct. at 2861 (stating execution of the insane has no deterrent effect because it is "no example to others" (quoting *Ford v. Wainwright*, 477 U.S. 399, 407 (1986))).

were insane at the time of committing the offense.¹³⁶ As a subset of actors, the insane are sufficiently incapable of reasoning that they cannot be deterred by the prospect of punishment.¹³⁷ However, *Ford* and *Panetti* both dealt with defendants who were sane at the time they committed their crimes.¹³⁸ Among sane actors, it would seem that any prospect of being spared execution would lessen the deterrent force execution provides.¹³⁹ Because the death penalty is generally imposed as punishment for killing a human being, there is a concern that lives will be lost when the deterrent effect is lessened.¹⁴⁰

ii. Retribution is served by executing a prisoner who was sane at the time of committing murder in all but the most extreme cases. In *Panetti*, the Court rejected the Fifth Circuit's test for the requisite competency to be executed, in part because it would permit executions that would not serve retributive goals.¹⁴¹

[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 . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the

136. See *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (indicating "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" subverts the deterrent effect of capital punishment); see also Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 480 (2007) (arguing the threat of punishment will not deter the mentally ill from committing serious crimes).

137. See *Gregg v. Georgia*, 428 U.S. 153, 185–86 (1976) (indicating the deterrent effect of the death penalty is significant when the decision to kill is the product of calculation).

138. *Panetti*, 127 S. Ct. at 2848–49 (recounting the fact that the jury convicted Mr. Panetti and sentenced him to death despite Mr. Panetti's argument that he was insane); *Ford*, 477 U.S. at 401–02 ("There is no suggestion that [Mr. Ford] was incompetent at the time of his offense, at trial, or at sentencing.").

139. See Brief for the Criminal Justice Legal Foundation, *supra* note 10, at 10–11 (highlighting that extensive research indicates the death penalty has a powerful deterrent effect). But see Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 774 (2005) (arguing the justice system can have the desired deterrent effect without the use of capital punishment).

140. See Brief for the Criminal Justice Legal Foundation, *supra* note 10, at 12–13 ("The last thing we need is a new frontier for last-minute litigation under a broad and vague standard. There is strong reason to believe that the delays caused by such a standard would kill many innocent people.").

141. *Panetti*, 127 S. Ct. at 2860–61.

objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by 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.¹⁴²

The Court determined the Fifth Circuit's test requiring factual understanding of an impending execution and the stated reason for it was insufficient to assure the requisite awareness to satisfy *Ford*.¹⁴³

The Court's argument in *Panetti* pertaining to the lack of retributive effect is both unreasonable and inconsistent.¹⁴⁴ Retribution looks retrospectively at the act as well as the actor at the time of commission.¹⁴⁵ The mental state of a prisoner prior to execution is largely irrelevant to a retributivist's calculations in all but the most extreme cases.¹⁴⁶ In addition, the *Panetti* Court indicated a psychopath may not understand the reasons for his execution but may nonetheless deserve to be executed.¹⁴⁷ If the condemned must share society's understanding of the reasons for execution to satisfy the death penalty's retributive aim, it is perhaps impossible to reconcile the disparate treatment of the insane and those with psychopathic personalities because both classes hold worldviews that diverge from those held by society.¹⁴⁸

3. *The Court Fails to Conduct the Requisite Constitutional Analysis.* Although *Ford* does not require the expanded limitations

142. *Id.* at 2861.

143. *Id.* at 2860–62.

144. See Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 274–76 (2007) (noting the prisoner's mental state as he awaits execution is unrelated to the execution's retributive force because the theory of retribution looks backward to the crime and the offender while committing the crime).

145. See *id.* (highlighting the divorce between common understandings of retribution and the Court's interpretation of retribution in *Panetti*); see also Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 78 (2007) (discussing retribution and the notion of proportionality with the offender's culpability at the time of committing the crime).

146. See Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 54 (1986) (arguing execution of the mentally ill may not serve retributivist aims because the prisoner's mental illness prevents the prisoner from suffering enough to restore the moral balance he has upset); see also Brief for the Criminal Justice Legal Foundation, *supra* note 10, at 10 (arguing the change in awareness negating retributive force must be such that the offender can no longer be considered the same person).

147. *Panetti*, 127 S. Ct. at 2862.

148. See Brief for the Criminal Justice Legal Foundation, *supra* note 10, at 10 (describing the absurd result if the retributive aims of capital punishment depended on a defendant's acceptance that the punishment was just).

imposed by *Panetti* and the Fifth Circuit's rejected test for competency is sufficient to ensure the goals of capital punishment are served, there are strong arguments consistent with the Court's Eighth Amendment jurisprudence that the Fifth Circuit's test is too narrow. The Court has tied its analysis under the Eighth Amendment to both "evolving standards of decency that mark the progress of a maturing society"¹⁴⁹ as well as the "dignity of all persons."¹⁵⁰ Indeed, many have expressed their displeasure with the proposed execution of Mr. Panetti.¹⁵¹ The Court, however, fails to conduct an Eighth Amendment analysis, leaving unexplored what might be its most compelling arguments.¹⁵²

The Court's failure to conduct an Eighth Amendment analysis also represents a significant departure from recent jurisprudence affecting states' rights to conduct executions.¹⁵³ In *Roper v. Simmons*, the Court held the Eighth Amendment prohibited the execution of juvenile offenders.¹⁵⁴ In reaching its conclusion, the Court conducted an analysis of "objective indicia of consensus," exploring the legislation and practices of the states.¹⁵⁵ Similarly, in *Atkins v. Virginia*, the Court recognized substantive restrictions under the Eighth Amendment preventing the execution of mentally retarded offenders.¹⁵⁶ The Court grounded its holding in a consensus among "the American public, legislators, scholars, and judges."¹⁵⁷ In *Panetti*, the Court

149. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

150. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

151. See Brief Amicus Curiae of the American Bar Association in Support of the Petitioner at 8, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) (arguing Mr. Panetti should be spared); Brief for Amici Curiae American Psychological Association et al. in Support of Petitioner at 3, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) ("Where the prisoner cannot appreciate the reason, his execution cannot further the retributive purpose of the death penalty . . ."); Brief of Amicus Curiae in Support of Petitioner on Behalf of National Alliance for the Mentally Ill (NAMI) at 3–4, *Panetti*, 127 S. Ct. 2842 (No. 06-6407) (arguing severe mental illness prevents prisoners from understanding the nature of their punishment); The International Justice Project, Case File for Scott Panetti, <http://www.internationaljusticeproject.org/illnessSpanetti.cfm> (last visited Sept. 23, 2008) (detailing the history of Mr. Panetti's case and psychological troubles as well as asking concerned citizens to request clemency on Mr. Panetti's behalf from Governor Rick Perry and the Texas Chairperson of the Texas Board of Pardons and Paroles).

152. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) (arguing the Court has added new protections under the Eighth Amendment without examining what the Eighth Amendment actually requires).

153. See *id.* (faulting the Court for failing to conduct an Eighth Amendment analysis).

154. *Roper*, 543 U.S. at 575.

155. *Id.* at 564.

156. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

157. *Id.* at 307.

undertook no such analysis.¹⁵⁸ The Court instead directed lower courts to explore the precedent in *Atkins* and *Roper* in defining the contours of the standard.¹⁵⁹ The failure to conduct an Eighth Amendment analysis leaves the holding in *Panetti* to rest on exceedingly sparse support.¹⁶⁰

Thus, the Court's reasoning in *Panetti* rests on precedent and policies that do not support its conclusions. There may be support for the Court's holding, but the decision leaves the existence of a consensus sufficient to afford protections under the Eighth Amendment unexamined.¹⁶¹ The Court also leaves the standard for competency undefined.¹⁶² It is clear that a more stringent test to assess competency is required. However, crafting such a test may prove exceedingly difficult.

B. The Difficult Road Ahead: Defining a Standard for Assessing Competency After Panetti

Panetti leaves a tremendous number of issues for lower courts to resolve. Although the Court rejected the Fifth Circuit's test for competency, it did not attempt to replace it with a constitutionally appropriate standard, indicating insufficient findings of fact by the lower court prevented it from doing so.¹⁶³ However, Justice Thomas noted in dissent that a standard does not depend on facts, but instead requires "relatively academic, abstract analysis."¹⁶⁴ Whether or not the Court's reasons for declining to set a standard are valid, the fact remains that much in the realm of competency determinations remains undefined.

Lower courts will face a difficult task when crafting tests for the requisite competency for execution because it is unclear whether the Eighth Amendment requires a more stringent test for competency than the one rejected in *Panetti*. Also, the rational understanding requirement may prove particularly

158. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting); see also Carol S. Steiker, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 297 (2007) ("*Panetti* represents an uneasy departure from the Court's recent precedents in its failure either to note early common law practice or to canvas current consensus before invalidating the competency standard adopted by the Fifth Circuit.").

159. *Panetti*, 127 S. Ct. at 2863.

160. *Id.* at 2873–74 (Thomas, J., dissenting) (criticizing the result reached by the majority because it rests on an inappropriately expansive and unsupported interpretation of "awareness," "stray language from *Ford's* multiple opinions," and the "spirit of *Ford*").

161. See *id.* at 2874.

162. *Id.* at 2862 (majority opinion).

163. *Id.* at 2862–63.

164. *Id.* at 2874 n.13 (Thomas, J., dissenting).

troublesome to include in competency determinations. Retributivism seems to be the key policy underpinning supporting the imposition of capital punishment, and a state's retributivist aims, as described by the Court in *Panetti* and *Ford*, do not readily lend themselves to rational understanding.¹⁶⁵ Thus, in addition to leaving much unresolved, the Court may have created a puzzle that cannot be solved.

1. *The Constitution May Require No More Than the Rejected Test Already Guaranteed.* Because the Court did not conduct an analysis under the Eighth Amendment, it remains unclear whether the Fifth Circuit's rejected test is indeed too restrictive to fit within the bounds of Court's established Eighth Amendment jurisprudence.¹⁶⁶ The Eighth Amendment prevents "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted"¹⁶⁷ as well as punishment deemed cruel and unusual in light of "evolving standards of decency that mark the progress of a maturing society."¹⁶⁸ This creates a significant problem for lower courts because the *Panetti* Court reached the conclusion that the Constitution demands a more searching inquiry than the Fifth Circuit test allowed—but it did so without determining what the Constitution actually demands.¹⁶⁹ The Court tasked lower courts with crafting a standard based on their own Eighth Amendment analyses, but it is entirely possible that there is no support for a higher standard.¹⁷⁰ If this is indeed the case, *Panetti* will only function to add hollow language to competency determinations and ultimately will not otherwise affect courts' analyses.

165. See HARRY HENDERSON, CAPITAL PUNISHMENT 16–17 (3d ed. 2006) (arguing rehabilitation might be the most rational aim of the criminal justice system because the condemned may one day be able to do something good for society); see also O. Carter Snead, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1269–70 (2007) (describing retribution as "the root cause of the brutality and inhumanity of the American criminal justice system"); *infra* Part III.B.2 (describing retribution as a product of agreement rather than reason).

166. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) (speculating the Court failed to conduct an Eighth Amendment analysis because it would reveal that consensus weighs against the Court's holding in *Panetti*).

167. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

168. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

169. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) ("The Court likely avoided undertaking this analysis because there is no evidence to support its position. The [Fifth Circuit] at least took an approach based on what *Ford* actually says, an approach that was far from frivolous or unreasonable. By contrast, the Court's approach today—settling upon a preferred outcome without resort to the law—is foreign to the judicial role as I know it." (internal citations omitted)).

170. *Id.*

The common law does not provide any guidance to lower courts in shaping a standard for the requisite competency to be executed.¹⁷¹ Although the *Ford* Court gleaned from the common law that the execution of the insane is cruel and unusual, the Court was unable to discern any substantive standard governing determinations of competency.¹⁷² In fact, Justice Powell indicated procedural protections of criminal defendants have evolved to such an extent that much of the reasoning supporting a ban on executing the insane was no longer valid.¹⁷³ The substantive standard emerging from Justice Powell's concurrence, as well as the Court in *Panetti*, focuses instead on modern justifications.¹⁷⁴

Modern standards may be equally unsupportive of the Court's holding in *Panetti*. Legislatures provide the most persuasive indicia of modern standards.¹⁷⁵ The Court, however, failed to point to any legislative support for the expansive reading of *Ford* adopted in *Panetti*.¹⁷⁶ The Court has also previously given weight to the activities of other courts when seeking to establish a consensus.¹⁷⁷ However, courts addressing *Ford* claims generally have not required anything greater than a factual understanding.¹⁷⁸ Perhaps the most similar example to the present case is *Barnard v. Collins*, in which a prisoner with a delusional belief system was found competent because he had a factual understanding of his impending demise and the reasons for it.¹⁷⁹ Indeed, the Fifth Circuit relied on *Barnard v. Collins* in rejecting Mr. Panetti's *Ford* claim.¹⁸⁰

171. See *Ford*, 477 U.S. at 419 (Powell, J., concurring) (describing the divergent levels of awareness that would be required to allay concerns embodied by prohibiting the execution of the insane).

172. *Id.* at 418.

173. *Id.* at 419–20 (describing the concern of reliability as having “slight merit today”).

174. See *Panetti*, 127 S. Ct. at 2861 (citing the modern policy concerns highlighted in *Ford*); see also *Ford*, 477 U.S. at 421 (Powell, J., concurring) (focusing on rationales for prohibiting execution that remain “true today”).

175. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

176. See *Panetti*, 127 S. Ct. at 2874 (Thomas, J., dissenting) (highlighting the importance of legislative enactments as evidence of consensus and speculating the Court failed to explore the requisite consensus because none exists); see also Brief for Respondent, *supra* note 10, at 29–30 (arguing there is no national consensus because (1) half of the thirty-eight states permitting capital punishment have no statutory definition of the requisite competency for execution; and (2) the states with statutory definitions employ different tests).

177. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

178. See Brief for Respondent, *supra* note 10, at 12–13 (noting the trend of narrow interpretation of *Ford* among courts deciding *Ford* claims).

179. *Barnard v. Collins*, 13 F.3d 871, 876 (5th Cir. 1994) (upholding the death sentence of a prisoner whose “perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia”).

180. *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006).

The *Panetti* Court also indicated the opinion of experts should guide the lower courts' analysis of competency claims following *Panetti*.¹⁸¹ Expert opinion is certainly a sensible source of information about mental health, which is often poorly understood outside the realm of mental health professionals.¹⁸² Among mental health experts, there is much support for a more expansive definition of insanity for the purposes of determining competency to be executed.¹⁸³ However, whether the opinions of experts align with the consensus necessary for expansive protections under the Eighth Amendment remains to be seen.

Certainly, there are many who desire a test for competency that would deem more convicted prisoners incompetent to be executed.¹⁸⁴ Many also oppose the death penalty in any form, yet capital punishment is still strongly supported in many jurisdictions.¹⁸⁵ The indicia carrying the most weight in the Court's Eighth Amendment analysis seem to indicate the requisite consensus for rejecting the Fifth Circuit's test is absent.¹⁸⁶

2. *Incorporating a Rational Understanding Requirement Is a Daunting Task.*

[The judge] then asked the prosecutor if he had any questions to put to the witness, and the prosecutor exclaimed, "Oh no, that is quite sufficient!" with such glee and with such a triumphant look in my direction that for the first time in years I had this stupid urge to cry, because I could feel how much all these people hated me.¹⁸⁷

Although the *Panetti* Court does little to define the contours of a proper test for the requisite competency to be executed, lower courts will face a very difficult task in attempting to construct a

181. *Panetti*, 127 S. Ct. at 2863.

182. *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring) (highlighting the importance of expert testimony in resolving competency disputes).

183. *See, e.g.*, Brief for Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 151, at 4–7, 14–16 (arguing that the Fifth Circuit's test is too narrow to include all those whose mental illness prevents their execution from serving a proper purpose).

184. *See supra* note 151 (listing examples of support for sparing those with Mr. Panetti's level of awareness from capital sentences).

185. *See* Brief for Respondent, *supra* note 10, at 29 (noting that 38 states allow the imposition of capital punishment).

186. *See* *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

187. ALBERT CAMUS, *THE STRANGER* 89–90 (Matthew Ward trans., Vintage Books 1988) (1942).

test that encompasses the undefined rational understanding requirement emerging from the opinion.¹⁸⁸ Exploration of the possible meanings of a rational understanding of the state's reasons for imposing the death penalty reveals: (1) a rational understanding of the death sentence as a product of adjudicatory proceedings is difficult to align with the precedent upon which the Court relied in *Panetti*; and (2) the retributive underpinnings of the death penalty reflect value judgments made by society and do not seem to lend themselves to anything deeper than a factual understanding.

A rational understanding of the state's reasons for seeking to execute a prisoner might require the prisoner to appreciate that the execution is the product of a conviction at trial and failure to overturn that conviction on appeal. The Court's rejection of the Fifth Circuit's test in *Panetti*, however, reveals that more than a superficial understanding of the process is required.¹⁸⁹ Thus, the constitutional minimum would require something deeper than a factual understanding of the murder, the conviction, and the link between the conviction and sentence.¹⁹⁰

Basing the rational understanding requirement on a deeper understanding of the execution as a product of criminal proceedings creates problems. The Court in *Panetti* grounded its rejection of the Fifth Circuit's test on the Court's decision in *Ford*.¹⁹¹ But Justice Powell's concurrence in *Ford* explicitly declined to require the rational understanding that would be necessary for a defendant to assist his attorney in mounting a defense.¹⁹² Thus, the only way to reconcile the holdings in *Ford* and *Panetti* would be to create a zone of understanding of trial proceedings somewhere between the lower requirement rejected in *Panetti* and the higher threshold Justice Powell rejected in *Ford*.¹⁹³ Given the imprecise nature of competency

188. See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2874 (2007) (Thomas, J., dissenting) (criticizing the Court for introducing the rational understanding requirement without defining its contours).

189. *Id.* at 2848 (majority opinion) (describing the Fifth Circuit's test as "improperly restrictive").

190. *Id.* at 2852.

191. *Id.* at 2861–62 (discussing the ways in which the Fifth Circuit's test falls short of providing the protections mandated by the Court in *Ford*).

192. *Ford v. Wainwright*, 477 U.S. 399, 422 & n.3 (1986) (Powell, J., concurring); see also *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (describing the level of understanding required to assist counsel at trial).

193. See *Panetti*, 127 S. Ct. at 2852 (describing the test rejected in that case as requiring nothing more than knowledge of "the fact of his impending execution and the factual predicate for the execution"); *Ford*, 477 U.S. at 422 & n. 3 (Powell, J., concurring) (showing Justice Powell declined to include a requirement of rational understanding in

determinations, it may be impossible to make such distinctions in a reliable manner.¹⁹⁴

Another possible meaning of a rational understanding of the state's motivation for seeking the death penalty could be an appreciation of the policies the state seeks to further through imposition of the death penalty. The death penalty is imposed to serve both deterrence and retribution.¹⁹⁵ Close examination of these concepts in light of the Court's reasoning in *Panetti* does little to give shape to the standard for competency to be executed.

Although the deterrent effect of the death penalty could potentially be rationally understood, it is unlikely that such understanding will satisfy the rational understanding requirement.¹⁹⁶ Deterrence focuses on the pool of potential offenders.¹⁹⁷ The Court's concerns about competency determinations, in contrast, focus directly on the prisoner himself.¹⁹⁸ The prisoner's ability or inability to appreciate the gravity of his crime lies at the heart of determinations of competency to be executed.¹⁹⁹

It is quite likely that competency to be executed hinges on a prisoner's ability to appreciate the retributive goals the state seeks to effectuate through capital punishment.²⁰⁰ Close examination of the concept of retribution, however, reveals it is ill-suited for anything deeper than factual understanding. The *Ford* plurality describes retribution as "the need to offset a criminal act by a punishment of equivalent 'moral quality.'"²⁰¹ Retribution is often tied to the concept of offenders getting their

his Eighth Amendment test).

194. See *Ford*, 477 U.S. at 416–17 (describing the "evidence" involved at competency hearings as inherently imprecise); see also *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate diagnosis to be attached to given behavior and symptoms . . . [T]here often is no single, accurate psychiatric conclusion on legal insanity in a given case . . .").

195. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

196. See *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) (noting courts' focus on the retributive aims of capital punishment).

197. See *Gregg*, 428 U.S. at 183 (describing a goal of capital punishment as "deterrence of capital crimes by prospective offenders").

198. See *Panetti*, 127 S. Ct. at 2859–63 (analyzing the impact of a prisoner's ability to understand the impending execution and reasons for it).

199. See *id.* at 2861 (linking the rejection of the Fifth Circuit's test to its inability to assure the fulfillment of retributivist aims).

200. See *Spaziano*, 468 U.S. at 461 (indicating retribution is the chief reason for imposing capital punishment).

201. *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (quoting Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)).

just desserts.²⁰² Retribution has also been explained as a way to quench society's thirst for vengeance in order to prevent individuals from seeking revenge.²⁰³ Retribution is sometimes tied to hate, retaliation, and righteous anger.²⁰⁴ Whether retribution aims to restore a moral balance, to dole out what is "deserved," or to unleash righteous anger, the concepts at work are the products of value judgments and societal consensus rather than anything necessarily grounded in reason.²⁰⁵

Similarly, many other reasons cited for foregoing the death penalty lack a basis in reason. The *Ford* plurality indicated that a person should be allowed "to come to grips with his own conscience and deity."²⁰⁶ In *Ford*, Justice Powell also noted the belief that one should not be sent to the afterlife unless he can prepare for his departure.²⁰⁷ The weight one assigns to these ideas, however important and widely held they may be, depends on subjective value judgments. Consensus is at the heart of the conceptual underpinnings of retribution²⁰⁸ as well as the Court's Eighth Amendment jurisprudence.²⁰⁹ Because of the *Panetti* Court's failure to identify a consensus supporting its holding as well as the likelihood that no such consensus exists, the Court's holding is unlikely to add substantive protections in future mental competency determinations.²¹⁰

202. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); see also Brief for the Criminal Justice Legal Foundation, *supra* note 10, at 8–10 (arguing the prisoner's mental state at the time of punishment is largely irrelevant to retributivism and noting the absurd result if, in order for desserts to be just, the prisoner had to agree that his punishment was deserved).

203. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.")

204. See *DRESSLER*, *supra* note 96, at 17 (describing one common understanding of retribution).

205. See *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976) (describing retributive aims as reflective of the community's beliefs and outrage rather than a rational desire to achieve a good other than effectuating what the community thinks is deserved).

206. *Ford*, 477 U.S. at 409.

207. *Id.* at 422 (Powell, J., concurring).

208. See *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (arguing retributive aims are a product of agreement).

209. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (highlighting the importance of contemporary values to the Eighth Amendment and exploring the sources that inform courts of these values).

210. See *Law of Mental Illness*, *supra* note 97, at 1158 (arguing the *Panetti* court failed to advance substantive protections of the mentally ill); see also *supra* Part III.B.1 (arguing the Eighth Amendment does not require more than the Fifth Circuit test already required).

Viewed in the light of the Court's stated justifications for the death penalty as well as the constraints imposed by *Ford*, a rational understanding of the reasons the state seeks to impose the death penalty seems difficult, if not impossible, to achieve. Deterrence can be rationally understood, but it seems to play a small part in the Court's Eighth Amendment analysis.²¹¹ Retribution, however, implicates moral judgments rooted in agreement rather than rational calculation. Thus, the rational understanding requirement reflects yet another obstacle courts face when attempting to assess mental competency.²¹²

3. *More Protection Requires Departing from the Court's Guidance.* Because of the difficulties lower courts will face when trying to develop a test for competency that fits the demands of the Eighth Amendment and the decision in *Panetti*, it is likely that *Panetti* will only result in the addition of hollow language to competency determinations.²¹³ However, should the requisite support exist, the process for achieving greater protection is different than the one the Court describes.²¹⁴

The Court misconstrued the role of experts when describing the steps lower courts should take in fashioning a standard for competency.²¹⁵ Although experts can play some part in an Eighth Amendment analysis, the support they provide has functioned to affirm that legislation indeed reflects a social consensus.²¹⁶ In contrast, in *Panetti*, the Court pointed to no laws or practices of

211. See *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) ("[T]he primary justification for the death penalty is retribution.").

212. Commentators have expressed a desire for a more inclusive test than that employed by the Fifth Circuit. See, e.g., Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 306 (2006) (arguing against the execution of those whose mental illness prevents them from understanding why they are to be executed). The details a prisoner must understand about society's motivations, however, are left unexplored.

213. See *Law of Mental Illness*, *supra* note 97, at 1162 (arguing that in the absence of substantive guidelines, states will adopt narrow interpretations of holdings, depriving them of much of their protective effect); see also *supra* Part III.B.1–2 (detailing the constraints on lower courts that will likely prevent the rational understanding requirement from becoming a meaningful limitation on states' ability to conduct executions).

214. The Court instructs lower courts to rely, in part, on the opinions of experts in determining how a prisoner's mental state might affect the constitutional analysis of competency. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2863 (2007).

215. See *id.* at 2874 (Thomas, J., dissenting) (arguing legislatures, not mental health experts, should be the primary indicators of national consensus in an Eighth Amendment analysis).

216. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (referring to the opinions of professional organizations as support for the contention that legislation was indeed indicative of a national consensus).

courts indicating the existence of a consensus supporting a broader definition of insanity, but instead cited only expert opinion as the sole clear support for its mandate.²¹⁷ This represents an unprecedented departure from the focus on legislative enactments as indicia of consensus.²¹⁸

Developing a standard for determining the requisite competency to be executed in a way that provides meaningful protections requires at least two steps. First, the courts must define with precision the level of awareness required for an execution to serve the proper purposes of capital punishment and to avoid running afoul of the Eighth Amendment's ban on cruel and unusual punishment.²¹⁹ Although experts might play some role, legislation should be the key indicator of national consensus.²²⁰

Experts should be heavily involved in the second step toward providing greater protections: Developing the methodology to discern which prisoners have the requisite awareness and which do not.²²¹ Unless the mental awareness can be consistently and reliably assessed, there is a great risk that any protection, or lack thereof, would be "nakedly political" rather than a reflection of analysis consistent with constitutional principles.²²²

IV. CONCLUSION

How *Panetti* might reshape competency determinations remains unclear. *Panetti* provides little in the way of answers, and the sparse guidance it does supply will only function to frustrate lower courts' efforts to provide those answers. Not only did the Court misconstrue both precedent and the policy underpinnings of capital punishment in reaching its holding, it ultimately tasked the lower courts with crafting a standard for assessing competency consistent with its inconsistent guidance.

217. See *Panetti*, 127 S. Ct. at 2863 (instructing lower courts to rely on expert opinion to determine the proper analysis); see also *id.* at 2874 (Thomas, J., dissenting) (speculating the Court fails to provide support for its argument that a more searching test is required because such evidence does not exist).

218. See *Atkins*, 536 U.S. at 312 (indicating precedent calls predominantly for reliance on legislatures).

219. See *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting) (faulting the Court for "thrusting already muddled *Ford* determinations into . . . disarray" by not crafting a clear standard for lower courts to apply).

220. See *Atkins*, 536 U.S. at 312.

221. See *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (stressing the importance of reliable psychiatric evidence for assessments of a defendant's mental state).

222. See *Steiker*, *supra* note 158, at 300 (describing the Court's delineation of boundaries in the realm of competency determinations as "nakedly political").

2008]

PANETTI V. QUARTERMAN

1413

Further complicating lower courts' analyses, the Court reached the conclusion that there is a consensus supporting greater protections of the mentally ill, but the Court failed to conduct a constitutional analysis to establish that such protections are legitimately required under the Eighth Amendment.

Even assuming the Eighth Amendment requires greater protections than the rejected Fifth Circuit test for competency afforded prisoners, the rational understanding requirement emerging from *Panetti* is difficult to define. Close examination of society's motivations for pursuing the death penalty reveals that retribution, the central policy supporting capital punishment, does not necessarily lend itself to a rational understanding. Much like the Court's Eighth Amendment jurisprudence, retribution relies most heavily on the notion of societal consensus. Thus, the high likelihood that no such consensus exists will again cause lower courts to reach a dead end when trying to give substantive effect to the Court's holding in *Panetti*.

Perhaps the *Panetti* decision can best be appreciated for the questions it raises. However, given the sparse support for the Court's holding, it should be legislatures rather than lower courts providing the answers. When we define the rational understanding requirement and the contours of the protections we afford the mentally ill, we will be defining far more. When we as a society have absolute power over an individual, what we do and why goes a long way toward defining who we are.

Chris Koepke