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"Insanity Is Smashing up against My Soul": The Fifth Circuit and Competency to Be Executed Cases after Panetti v. Quarterman

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"INSANITY IS SMASHING UP AGAINST MY SOUL": THE FIFTH CIRCUIT AND COMPETENCY TO BE EXECUTED CASES AFTER *PANETTI V. QUARTERMAN*

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INTRODUCTION

One of the open secrets of death penalty law and policy is the astonishingly high percentage of individuals on death row with serious mental disabilities.[1] This is well known to lawyers who represent this cohort[2] (and presumably, equally well known to the district attorneys who nevertheless prosecute them and the judges who try their cases and sentence them),[3] but is not generally discussed in the press or, certainly, in political discourse.[4] There is the occasional case that anecdotally becomes famous—perhaps none more so than that of Ricky Rector, who had so little

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[1] Hearing on S. 1479 Before the S. Judiciary Comm., 1984 Leg., Leg. No. 201, 1st Sess. (N.J. 1984) (statement of Joseph H. Rodriguez, Pub. Advoc. N.J.) (cited in MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 1 (2013) [hereinafter PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY]); *compare Position Statement 54: Death Penalty and People with Mental Illness*, MENTAL HEALTH AM. (June 14, 2016), http://www.mentalhealthamerica.net/positions/death-penalty [https://perma.cc/B3YL-Y6GZ] (noting at least 20% of death row inmates have a severe mental illness), *with* Danielle N. Devens, *Competency for Execution in the Wake of* Panetti*: Shifting the Burden to the Government*, 82 TEMP. L. REV. 1335, 1355 (2010) (estimating that half of the nation's death row population suffers from severe mental illness), *and* ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 50 (1990) (estimating that 70% of death row inmates suffer from mental illnesses).

[2] *See, e.g.*, Elena De Santis, *Life with the Imposition or Exacerbation of Severe Mental Illness and Chance of Death: Why This Distinct Punishment Violates the Eighth Amendment*, 56 AM. CRIM. L. REV. 235 (2019) (for a survey of all relevant issues).

[3] *See* Michael Mullan, *How Should Mental Illness Be Relevant to Sentencing?*, 88 MISS. L.J. 255, 262 (2019) (suggesting it appears that a significant number of "judges are not aware or not willing to use the discretion afforded to them to award lesser sentences to those with mental illnesses.").

[4] *See* Gerald E. Nora, *Prosecutor as "Nurse Ratched"? Misusing Criminal Justice as Alternative Medicine,* 22 CRIM. JUST. 18, 20 (2007) (noting the criminal justice system's willful ignorance of defendants' mental health issues).

appreciation of what death meant that "he thought he was going to come back that evening after the execution and finish off his dessert."[5] But, in the aggregate, this is far beneath society's radar.

Yet, it is now over fourteen years since the United States Supreme Court decided a case that purportedly clarified the underlying issues. In *Panetti v. Quarterman*, that Court had ruled that such a defendant had a constitutional right to make a showing that his mental illness "obstruct[ed] a *rational understanding* of the State's reason for his execution,"[6] thus expanding its jurisprudence in this area beyond its first modern foray into this area of the law in *Ford v. Wainwright*[7] some two decades earlier. *Ford* had regularly been interpreted to require that competency-to-be-executed depended only on three findings: that the prisoner is aware he committed the murders, that he is going to be executed, and that he is aware of the reasons the State has given for his execution.

The fourteen years that have passed since the *Panetti* decision have given us a body of law that makes clear that, at least in certain jurisdictions, that case has been paid little more than lip service, and that persons with profound mental disabilities are still subject to execution (and in some cases, have been executed).[8] Putting aside cites and references to other aspects of *Panetti*,[9] the issue on which the authors are focusing in this Article has, in the fourteen-

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[5] Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 SANTA CLARA L. REV. 1069, 1071 (1996) (discussing Rector v. State, 659 S.W.2d 168, 175 (Ark. 1983)).

[6] Panetti v. Quarterman, 551 U.S. 930, 956 (2007). As discussed below, Panetti was a profoundly mentally ill defendant with "severe, documented mental illness [that was] the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Id.* at 960; *see infra* notes 84–88 and accompanying text.

[7] Ford v. Wainwright, 477 U.S. 399 (1986). As discussed below, Ford suffered from "a severe, uncontrollable mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential'"—a "major mental disorder . . . severe enough to substantially affect [defendant's] present ability to assist in the defense of his life." *Id.* at 402–03; *see infra* notes 50–53 and accompanying text.

[8] *See, e.g.*, United States v. Montgomery, 635 F.3d 1074, 1079–80 (8th Cir. 2011) (discussed in this context in Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS L. REV. 215 (2021)). In five of the nine cases that the Fifth Circuit has decided that involved those aspects of *Panetti* that dealt with execution competency, the defendant has been executed. *See infra* note 147.

[9] These cases deal with, variously, questions of successor petitions, when habeas corpus, procedurally, may be granted (interpreting 28 U.S.C. § 2254(d)(1)), and ripeness of litigation questions. *Panetti*, 551 U.S. at 945–47; *see, e.g.*, Magwood v. Paterson, 561 U.S. 320 (2010); Brumfield v. Cain, 576 U.S. 305 (2015); Banister v. Davis, 140 S. Ct. 1698 (2020); Halprin v. Davis, 140 S. Ct. 1200 (2020); White v. Woodall, 572 U.S. 415 (2014); Johnson v. Williams, 568 U.S. 289 (2013); Lafler v. Cooper, 566 U.S. 156 (2012); Johnson v. Bredesen, 558 U.S. 1067 (2009) (separate statement by Stevens, J. and Breyer, J. on denial of certiorari); *see also* McDonough v. Smith, 139 S. Ct. 2149, 2158–59 (2019) (discussing non-death penalty case citing *Panetti*, 551 U.S. at 930).

plus years since the case was decided, only been cited in Supreme Court cases a handful of times: in *Madison v. Alabama*;[10] on the impact of a death row prisoner's cognitive impairment on executability;[11] in dissents from denial of certiorari in two cases in which such individuals alleged that *Panetti* applied to their cases;[12] on the question of the applicability of the death penalty to a non-murder case;[13] and, in one case, simply a cite to its holding.[14]

This Article is the third in a trilogy that the authors (MLP & TRH) have written on how the Fifth Circuit has interpreted Supreme Court cases in the context of defendants with mental disabilities facing the death penalty.[15] In the prior articles, there was little doubt as to the conclusions reached by the authors. In an article that dealt with interpretations of the Court's decision in *Atkins v. Virginia*,[16] which found that it violated the Eighth Amendment to

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[10] Madison v. Alabama, 139 S. Ct. 718 (2019); *see also* Dunn v. Madison, 138 S. Ct. 9 (2018); Cassidy Young, *Blurred Lines: How to Rationally Understand the "Rational Understanding" Doctrine after* Madison v. Alabama, 48 PEPP. L. REV. 497, 511 (2021) (reporting how the "ambiguities" of *Panetti* "resurfaced" in *Madison*); Marie A. MacCune, *Forget Me Not: Exploring American Death Penalty Jurisprudence and Dementia in Light of* Madison v. Alabama, 54 SUFFOLK U. L. REV. 131, 141 (2021) (analyzing how *Madison* "incorrectly" applied *Panetti*).

[11] *Madison*, 139 S. Ct. at 724.

[12] United States v. Higgs, 141 S. Ct. 645, 651 (2020) (Breyer, J., dissenting) (rejecting denial of certiorari); Barr v. Purkey, 140 S. Ct. 2594, 2600 (2020) (Breyer, J. and Ginsburg, J. dissenting) (rejecting vacation of preliminary injunction).

[13] Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) (death penalty inapplicable in case involving juvenile rape where such punishment "would not further retributive purposes.").

[14] Ryan v. Gonzales, 568 U.S. 57, 76 n.18 (2013) ("Our opinion today does not implicate the prohibition against 'carrying out a sentence of death upon a prisoner who is insane.'") (citing *Panetti*, 551 U.S. at 934).

[15] *See* Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, *"Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J.L. & POL'Y 451 (2021); *see also* Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the* Strickland *Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REF. 261, 296–97 (2020) (both of the prior articles were written with co-authors). The authors chose the Fifth Circuit because of the high number of death penalty verdicts in the three states—Texas (especially), Mississippi, and Louisiana—that make up that Circuit. *See, e.g.*, Alexander Rundlet, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need For a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 678–79 (1999) (discussing the "death-belt states" of Texas, Louisiana, Mississippi, Georgia, Alabama, and Florida, and the disproportionate number of death sentences handed down in those states). Other definitions of the "death belt" add South Carolina to this list. *See* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications,* 92 B.U. L. REV. 227, 230 (2012). It has been estimated that these states together accounted for over 90% of all executions carried out from 1976 to 2002 (the time that the survey in question was done). *See* Charles J. Ogletree Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 19 (2002).

[16] Atkins v. Virginia, 536 U.S. 304 (2002) (noting testing revealed that Atkins's IQ was 59. *Id.* at 308.). *See* Mark E. Olive, *The Daryl Atkins Story*, 23 WM. & MARY BILL RTS. J. 363 (2014). On *Atkins* generally, *see* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 17-4.2.2 (3d ed. 2016) (Autumn 2021 update).

subject persons with intellectual disabilities[17] to the death penalty,[18] the authors said this:

> The database we have considered here is infinitely depressing. There was only actual relief in 12.4% of the cases that raised *Atkins* issues, and this grouping of nine cases includes two in which the defendant died before the final relief could be implemented. What it reveals is a Court with little or no interest in the thoughtful opinions of Justice Stevens in *Atkins* and of Justice Kennedy in *Hall* [*v. Florida*]. The science is ignored, and the jurisprudence is ignored. Baseless fears of undetected malingering, the mindless use of lay stereotypes of what "looks like" remorse, and the corrupt employment of "ethnic adjustments" to lawlessly raise IQ scores making certain minority defendants improperly eligible for execution all are reflected in the cases decided by the Fifth Circuit.[19]

And, in the earlier article evaluating Fifth Circuit decisions in the context of *Strickland v. Washington*'s[20] "pallid" adequacy-of-counsel standard,[21] the authors were even more critical. They found the Fifth Circuit's corpus in this area of the law to be "bizarre and frightening,"[22] noting that, "in virtually all cases, *Strickland* errors—often egregious errors—were ignored, and in over a third of the cases in which they *were* acknowledged, defense counsel had confessed error,"[23] concluding that this cohort of cases was "an embarrassment to our system of criminal law and procedure."[24]

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[17] At the time of the *Atkins* case, the phrase "mental retardation" was used. Twelve years later, in the case of *Hall v. Florida*, the Court chose to use the phrase "intellectual disability" rather than "mental retardation" in all future cases to conform with changes in the U.S. Code and in the most recent version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5). Hall v. Florida, 572 U.S. 701, 704–05 (2014).

[18] *Atkins*, 536 U.S. at 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender" (citing Ford v. Wainwright, 477 U.S. 399, 321 (1986))).

[19] Perlin, Harmon & Wetzel, *supra* note 15, at 497.

[20] Strickland v. Washington, 466 U.S. 668 (1984).

[21] Michael L. Perlin & Alison J. Lynch, *"My Brain Is So Wired": Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities*, 27 B.U. PUB. INT. L.J. 73, 92–93 (2018) [hereinafter Perlin & Lynch, *My Brain*]. For a lengthy consideration of *Strickland* in cases involving defendants with serious mental disabilities facing the death penalty, *see* PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 1, at 123–38. On representation in such cases in the Fifth Circuit in particular, *see* Perlin, Harmon & Chatt, *supra* note 15. One of the co-authors of this article, MLP, "second sat" the *Strickland* case at the U.S. Supreme Court.

[22] PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 1, at 308.

[23] *Id.*

[24] *Id.* at 309.

Here, the authors complete their trilogy by considering all Fifth Circuit cases and certain cases from the federal district courts within the Fifth Circuit that have interpreted *Panetti*.[25] And the current findings are, perhaps, even more astonishing than were the authors' earlier findings in the *Strickland* article and the *Atkins* article. What an exhaustive review of the case law reveals is this: There has not been *a single case* decided by the Fifth Circuit in the fourteen years since *Panetti* in which that Circuit found that a defendant was not competent to be executed.[26] In two district court cases that were not appealed by the state, *Billiot v. Epps*[27] and *Aldridge v. Thaler*,[28] there *were* such findings,[29] but these two are the *only* reported federal cases in any Fifth Circuit jurisdiction that determined a defendant was incompetent for these purposes.[30]

There is a grotesque irony here in that, as the authors discuss more extensively below in Panetti's application for certiorari, his lawyers had told the Supreme Court that, subsequent to the *Ford* decision, the Fifth Circuit had not found a single death row defendant (of an *n* of at least 360) to be

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[25] *See, e.g.*, Rivera v. Quarterman, 505 F.3d 349 (5th Cir. 2007); Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010); Hines v. Thaler, 456 Fed. App'x. 357 (5th Cir. 2011) (explaining application of *Panetti* in the *Atkins* context). In a subsequent article, the authors are planning on expanding the current inquiry into a nationwide investigation of the actual impact of *Panetti* on all federal circuits.

[26] *See infra* notes 147-53.

[27] Billiot v. Epps, 671 F. Supp. 2d 840 (S.D. Miss. 2009), amended, 2010 WL 1490298 (S.D. Miss. 2010).

[28] Aldridge v. Thaler, No. H-05-6082010, WL 1050335 (S.D. Tex. 2010).

[29] *Billiot*, 671 F. Supp. 2d at 883.

[30] In three cases, state courts within the Fifth Circuit have found defendants to be incompetent to be executed per *Panetti*. *See, e.g.*, Staley v. State, 420 S.W.3d 785, 786 (Tex. Crim. Ct. App. 2013), discussed *infra* note 95; Mays v. State, 476 S.W.3d 454 (Tex. Ct. Crim. App. 2015), *vacated*, No. AP-77,055, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019) (initial order reinstated in unpublished opinion, *see infra* note 151); Druery v. State, 412 S.W.3d 523 (Tex. Ct. Crim. App. 2013) (defendant made substantial showing of incompetency to be executed). In *Ex parte Green*, the court stayed the defendant's execution on incompetency grounds, but, after further litigation, he was found competent to be executed, and that execution was carried out. Ex Parte Green, No. AP-76,374, 2010 WL 11566377 (Tex. Ct. Crim. App. 2010). In *Turner v. State*, the court remanded the defendant's case—following a death penalty verdict—for a retrospective competency hearing. Turner v. State, 422 S.W.3d 676 (Tex. Ct. Crim. App. 2013). For further proceedings, *see* Turner v. State, No. AP-76,580, 2017 WL 2571546 (Tex. Ct. Crim. App. 2017). Subsequently, the defendant was found guilty of capital murder, but was sentenced to life in prison. *See* Claire Goodman, *Ex-Rosenberg Death Row Inmate Sentenced to Life in Prison after Retrial for Double Homicide*, HOUSTON CHRON. (Sept. 20, 2021, 10:27 AM), https://www.houstonchronicle.com/neighborhood/sugarland/article/Former-Rosenberg-death-row-inmate-sentenced-to-16473049.php [https://perma.cc/WVB7-T52V]. For other district court cases that were not appealed to the Fifth Circuit, *see infra* note 144. For other state court cases in the states within the Fifth Circuit that have cited *Panetti*, *see infra* note 145.

incompetent to be executed.[31] Almost beyond belief, in the fourteen-plus years *since* the *Panetti* decision, there has been no change in those findings.

This Article will proceed in this manner: first, the authors consider the historical roots of the prohibition on the execution of the "currently insane," looking, in this context, at an important predecessor case, *Ford v. Wainwright*,[32] in which a fractured Court concluded that the Eighth Amendment did prohibit the imposition of the death penalty on an "insane" prisoner,[33] but in an opinion that left significant confusion as to its scope.[34] Then the bizarre facts and circumstances of *Panetti* are considered.[35] Next, the authors demonstrate how the Fifth Circuit has basically ignored the *Panetti* decision and failed to give it life.[36] Following this, therapeutic jurisprudence principles are applied in an effort to determine the extent to which the legal system can be a therapeutic agent in cases such as the ones under discussion here. The authors conclude with some suggestions for at least partial amelioration of this broken system.

The title of this Article incorporates a Bob Dylan lyric from the picaresque—and rarely performed—song *Highlands*,[37] from the much acclaimed 1997 album *Time Out of Mind*. A few couplets later in the same song, Dylan sings:

> Well, I'm lost somewhere
> I must have made a few bad turns[38]

Certainly, this applies to the population under discussion here.[39] In his analysis of this song, a leading Dylan critic, Tony Attwood, notes that the

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[31] Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1534–35 (2016) [hereinafter Perlin, *Merchants and Thieves*] (quoting Petition for Writ of Certiorari, *Panetti*, No. 06-6407, 2006 WL 3880284, at *26).

[32] Ford v. Wainwright, 477 U.S. 399 (1986).

[33] *Id.* at 405–10.

[34] In a prior work, co-author MLP noted "a continued failure on the part of many courts to authentically implement the *Ford* decision." MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 12-4.1e, at 543 (2d ed. 2002).

[35] This important collateral question must also be considered here: does a death row defendant have the right to refuse medication that would make him competent to be executed? The law, to be charitable, is muddled. *See infra* section IV.B.2.c.

[36] Co-author MLP used this phrase in the title of an earlier article about *Atkins v. Virginia*. *See* Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N. MEX. L. REV. 315 (2003).

[37] BOB DYLAN, HIGHLANDS (Criteria Studios 1997).

[38] *Id.*

[39] *See* David Weir, *Highlands*, BOB DYLAN SONG ANALYSIS (Sept. 30, 2016), https://bobdylansonganalysis.wordpress.com/2016/09/30/highlands/comment-page-1/ [https://perma.cc/XC42-

verse in question shows that "nothing is connected."[40] One of the major critical interpretations concludes, on the point of the lyric on which the authors draw for their title, "by treating insanity as something external to him [, the narrator] can distance himself from it as if rectifying it is no concern of his."[41] To the Fifth Circuit, the death row inmate's severe mental illness *is* of "no concern," and is a great shame of the legal system.

I. HISTORICAL ROOTS[42]

The issue of whether "insane" persons[43] can be executed "has plagued the legal system for centuries."[44] Blackstone, Hale, and Coke all specifically opposed such execution,[45] and, nearly a century ago, Dr. William White focused on the "general feeling of abhorrence against executing a person who is insane."[46] Notwithstanding this history, as recently as the mid-1980s, Professor Elyse Zenoff noted, "no consensus exists about the reasons for it, about the meaning of 'insane' in this context, or the procedures which should be used to determine it."[47] It is no wonder that, at about the same time, Dr. Paul Appelbaum aptly characterized this question as "one of the more perplexing issues in criminal justice today."[48]

The Supreme Court had rejected as recently as 1950 the argument that there was a due process right to a pre-execution judicial sanity

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ZQLZ] (on the ambiguity of whether it is the narrator's soul or his "insanity" thought to be in the process of being destroyed).

[40] Tony Attwood, *Bob Dylan's "Highlands"; Its Origins in Burns Poetry, and a Beautiful Rare Reworking in Concert*, UNTOLD DYLAN (Dec. 21, 2008), https://bob-dylan.org.uk/archives/41.

[41] Weir, *supra* note 39.

[42] *See generally* PERLIN & CUCOLO, *supra* note 16, § 17- 4.1.1, at 17-63 and 17-65.

[43] In this context, this refers to persons with serious mental illness, not those who have successfully pled an insanity defense.

[44] PERLIN & CUCOLO, *supra* note 16, § 17-4.1.1, at 17-63.

[45] Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 383–85 (1962) (citing WILLIAM BLACKSTONE, COMMENTARIES *395–*96 (13th ed. 1800); 1 MATTHEW HALE, PLEAS OF THE CROWN 34–35 (1736); and EDWARD COKE, THIRD INSTITUTE 6 (1797)).

[46] WILLIAM WHITE, INSANITY AND THE CRIMINAL LAW 245 (1981).

[47] Elyce Zenoff, *Can an Insane Person Be Executed?*, 1985-1986 PREVIEW U.S. SUP. CT. CASES 465, 466 (1986) (suggesting Professor Zenoff's graphic representation of the various policy arguments both in support of and in opposition to such a ban).

[48] Paul Appelbaum, *Competence to Be Executed: Another Conundrum for Mental Health Professionals*, 37 HOSP. & COMMUN. PSYCHIATRY 682 (1986) (on the range of ethical questions raised for psychiatrists in this context—the responsibility of psychiatrists to construe appropriately the key terms in operative statutes, assessment of the appropriate standard of proof, reliability of diagnoses, and possibility of regression between evaluation and execution); *see also* PERLIN & CUCOLO, *supra* note 16, § 17-4.1.2, at 17-65 to 17-69.

determination.[49] That decision, though, predated by twelve years the court's incorporation of the Eighth Amendment to be applied to the states,[50] so it was not until its decision in *Ford v. Wainwright*[51] in 1986 that the "modern" Supreme Court struggled with this issue.[52]

After a treating psychiatrist concluded that Ford suffered from "a severe, uncontrollable mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential'"—a "major mental disorder . . . severe enough to substantially affect [defendant's] present ability to assist in the defense of his life[,]"[53] Ford's counsel invoked Florida procedures governing the determination of competency of an inmate sentenced to death.[54] Examining psychiatrists found him to have sufficient capacity to be executed under state law,[55] and the governor subsequently signed the death warrant.[56]

Counsel then applied for a writ of habeas corpus in federal court, seeking an evidentiary hearing on his sanity, "proffering the conflicting findings of the Governor-appointed commission and subsequent challenges to their methods by other psychiatrists."[57] After a divided panel of the Eleventh Circuit affirmed the district court's denial of the writ,[58] a fractured Supreme Court reversed and subsequently remanded for a new trial.[59]

In the only portion of any of the four separate opinions to command a majority of the Court, Justice Marshall concluded that the Eighth Amendment did prohibit the imposition of the death penalty on an insane prisoner.[60] In seeking "objective evidence of contemporary values [so as to determine] whether a particular punishment comports with the fundamental human dignity that the Amendment protects,"[61] Justice Marshall concluded

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[49] Solesbee v. Balkcom, 339 U.S. 9, 17–19 (1950).

[50] Robinson v. California, 370 U.S. 660 (1962).

[51] Ford v. Wainwright, 477 U.S. 399 (1986). *See also* PERLIN & CUCOLO, *supra* note 16, § 17-4.1.3, at 17-69 to 17-80.

[52] Alvin Ford had been convicted in 1974 of murdering a police officer during an attempted robbery, and was sentenced to death. *Ford*, 477 U.S. at 401. While there was no suggestion that he was incompetent at the time of the offense, his trial, or his sentencing, he began to manifest behavioral changes in 1982, nearly eight years after his conviction, developing delusions and hallucinations. *Id.* at 402. He wrote letters—focusing on the local activities of the Ku Klux Klan—that revealed "an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide." *Id.*

[53] *Id.* at 402–03.

[54] FLA. STAT. ANN. § 922.07 (West 1985).

[55] *Ford*, 477 U.S. at 404.

[56] *Id.*

[57] *Id.*

[58] Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985).

[59] *Ford*, 477 U.S. at 399.

[60] *Ford*, 477 U.S. at 405–10.

[61] *Id.* at 406 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

that it was "clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England."[62]

The opinion left it to states to develop appropriate procedures "to enforce the constitutional restriction upon its execution of sentences,"[63] noting that it was not suggesting that "only a full trial on the issue of sanity will suffice to protect the federal interests."[64] The "lodestar" of any such procedures "must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination,"[65] concluding that the defendant was entitled under the habeas corpus statute to a de novo evidentiary hearing on the question of his competence to be executed.[66]

Some thirty years ago, one of the authors (MLP) wrote that "*Ford* served as a paradigm for the Supreme Court's confusion and, to some extent, its use of rationalization as a means of dealing with many of the cases it has decided in the past several decades dealing with mentally disabled criminal defendants."[67] It is clear that—standing alone—*Ford* had little "carryover" impact: A study of the aftermath of the *Ford* case some six years after the decision glumly concluded that, despite the decision in that litigation, "it remains all but impossible" for defense counsel to prove that a death row client is incompetent to be executed.[68]

In the next section, *Panetti* is discussed at length in an effort to understand how it changed the *Ford* standard, and how, if at all, this new statement of the law affected the cohort of cases under discussion here.

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[62] *Id.* at 409. On the question of what procedures were appropriate in such a case, the Court was sufficiently fragmented that no opinion commanded a majority of justices. In a four-Justice opinion, Justice Marshall concluded that, under the federal habeas corpus statute, 28 U.S.C. § 2254, and Townsend v. Sain, 372 U.S. 293 (1963), a de novo evidentiary hearing on Ford's sanity was required, unless "the state-court trier of fact has after a full hearing reliably found the relevant facts." *Id.* at 312–13.

[63] Ford v. Wainwright, 477 U.S. 399, 416–17 (1986).

[64] *Id.* at 416.

[65] *Id.* at 417.

[66] *Id.* at 417–18. Justice Powell concurred, joining fully in the majority's opinion on the substantive Eighth Amendment issue. *Id.* at 418. But he differed substantially from Justice Marshall's opinion on the issue of the appropriate procedures which states must follow pursuant to the habeas statute. Writing for herself and Justice White, Justice O'Connor concurred in part and dissented in part. *Id.* at 427. Finally, Justice Rehnquist and Chief Justice Burger dissented. *Id.* at 431.

[67] PERLIN & CUCOLO, *supra* note 16, § 17-4.1.4; *see also* Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?*, 29 ARIZ. L. REV. 1, 78–98 (1987).

[68] *See* Michael L. Radelet & Kent S. Miller, *The Aftermath of* Ford v. Wainwright, 10 BEHAV. SCI. & L. 339 (1992); *see also* John H. Blume et al., *Killing the Oblivious: An Empirical Study of Competency to Be Executed Litigation*, 82 UMKC L. REV. 335 (2014). On pre-*Panetti* litigation on this issue, *see* PERLIN & CUCOLO, *supra* note 16, § 17-4.1.5, at 17-85 to 17-88.

II. THE *PANETTI* CASE

Scott Panetti, who was convicted of capital murder in the slayings of his estranged wife's parents, had been hospitalized numerous times for serious psychiatric disorders.[69] Notwithstanding his "'bizarre,' 'scary,' and 'trance-like'" behavior,[70] he was found competent to stand trial and competent to waive counsel.[71] The jury rejected his insanity defense, and he was sentenced to death.[72] Following the exhaustion of state remedies and the dismissal of an earlier habeas corpus petition, Panetti filed a subsequent petition, alleging that he did not understand the reasons for his pending execution.[73]

The Fifth Circuit affirmed the denial of the writ,[74] and the Supreme Court reversed.[75] Its opinion elaborated on the *Ford* opinion in two different ways: on the procedures to be afforded to a defendant seeking to assert a *Ford* claim, and on the substance of the *Ford* standard.[76] First, the Court found error in the trial court's failure to provide the defendant an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts,[77] thus depriving him of his "constitutionally adequate opportunity to be heard."[78]

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[69] Panetti v. Quarterman, 551 U.S. 930, 936 (2007).

[70] *Id.* at 936. According to Panetti's stand-by counsel, his trial was a "judicial farce." Panetti v. Stephens, 727 F.3d 398, 400 (5th Cir. 2013) (quoting *Panetti*, 551 U.S. at 936.).

[71] *Panetti*, 551 U.S. at 936. *See, e.g.*, J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases,* 79 TENN. L. REV. 461 (2012). At his trial, Panetti, who wore a purple cowboy outfit, applied for more than two hundred subpoenas, requested testimony from, among others, John F. Kennedy, the Pope, and Jesus Christ. Brief for Petitioner at 11–16, Panetti, v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407).

[72] *Panetti,* 551 U.S. at 937.

[73] *Id.*

[74] Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006), *aff'g* 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004). On the way the Fifth Circuit has dealt with cases involving persons with mental disabilities sentenced to death, *see* Perlin, Harmon & Chatt, *supra* note 15 (cases construing Strickland v. Washington, 446 U.S. 668 (1984)), *and* Perlin, Harmon & Wetzel, *supra* note 15 (cases construing Atkins v. Virginia, 563 U.S. 304 (2002)).

[75] *Panetti*, 551 U.S. at 962.

[76] *Id.*

[77] *Id.* at 949.

[78] *Id.* The fact-finding procedures on which the trial court relied, it concluded, were "'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Id.* at 954 (quoting, in part, Ford v. Wainwright, 477 U.S. 399, 423–24 (1986) (Powell, J., concurring in part and concurring in judgment)). The question of access to expert evidence permeates the cohort of Fifth Circuit opinions we consider in this part. *See infra* section IV.B.2.a. On the significance of this aspect of the Court's holding, *see* Michael L. Perlin, *"Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow": Neuroimaging and*

On the second, it elaborated upon and clarified *Ford*.[79] Here, it rejected the Court of Appeals' interpretation of the *Ford* standard: that competency-to-be-executed depends only on three findings: that the prisoner is aware he committed the murders, that he is going to be executed, and that he is aware of the reasons the State has given for his execution.[80] Such an interpretation of *Ford* unconstitutionally foreclosed the defendant from establishing incompetency by the means that Panetti sought to employ in the case at bar: by making a showing that his mental illness "obstruct[ed] a *rational understanding* of the State's reason for his execution."[81] The Fifth Circuit's position was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."[82]

A prisoner's delusions were not irrelevant to his "'comprehen[sion]' or 'aware[ness]' if they so impaired the prisoner's concept of reality that he could not reach a rational understanding of the reason for the execution."[83] Executing an insane person, the *Panetti* majority concluded, "serves no retributive purpose":[84]

> [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. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, 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. This problem is not necessarily overcome once the test set forth by the Court of

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Competency to be Executed after Panetti, 28 BEHAV. SCI. & L. 671, 679 (2010) [hereinafter Perlin, *Good and Bad*].

[79] *Panetti*, 551 U.S. at 956.

[80] *Id.* (quoting Panetti v. Dretke, 448 F.3d 815, 819 (5th Cir. 2006), *aff'g* 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004)).

[81] *Id.* (emphasis added). The Court reviewed the testimony that demonstrated the defendant's "fixed delusion" system and approved of expert testimony that had pointed out that "an unmedicated individual suffering from schizophrenia can 'at times' hold an ordinary conversation and that 'it depends [whether the discussion concerns the individual's] fixed delusional system.'" *Id.* at 955. On the difficulties of assessing this "rational understanding," *see* Katie Arnold, *The Challenge of "Rationally Understanding" a Schizophrenic's Delusions: An Analysis of Scott Panetti's Subsequent Habeas Proceedings*, 50 TULSA L. REV. 243, 251 (2014).

[82] *Panetti*, 551 U.S. at 956–57.

[83] *Id.* at 958.

[84] *Id.* at 958 (quoting Ford v. Wainwright, 477 U.S. 399, 408 (1986)).

> Appeals is met. And under a similar logic the other rationales set forth by *Ford* fail to align with the distinctions drawn by the Court of Appeals.[85]

Merely being able to identify the stated reason for execution does not foreclose a prisoner from demonstrating incompetency.[86] The Court stressed, "[t]he beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder."[87] Here, Panetti's "severe, documented mental illness [was] the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced."[88] The Court then remanded so that the "underpinnings of petitioner's claims [could] be explained and evaluated in further detail."[89]

As Professor Stephen Morse has recently noted in this context, "[i]t is unfair and offensive to the dignity of criminal justice to treat people without understanding as if their understanding was unimpaired."[90] Although a recent article suggests that, "[a]s the Court's wording suggests, moral values and the intuition that certain punishments 'simply offend [] humanity' are the animating forces behind *Panetti*'s standard,"[91] as discussed below, it does not appear that the Fifth Circuit has paid any attention to these "animating forces."[92]

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[85] *Id.* at 958–59.

[86] *Id.*

[87] *Id.* at 960.

[88] *Id.*

[89] *Id.* at 962. Justice Thomas dissented (for himself, the Chief Justice, and Justices Scalia and Alito), characterizing Panetti's submissions to the trial court on the competency question as "meager." *Id.* at 974. He also criticizes the majority's opinion as a "half-baked holding" that "thrust[s] already muddled *Ford* determinations into . . . disarray." *Id.* at 978. Litigation in the *Panetti* case still continues. *See* Ex parte Panetti, No. WR-37,145-05, 2021 WL 2560138 (Tex. Ct. Crim. App. 2021), denying his then-most recent application for a writ of habeas corpus. Four years prior to this decision, the Fifth Circuit had reversed a district court order that had denied Panetti's motion for counsel and expert assistance as part of the process of determining his current competence to be executed. *See* Panetti v. Stephens, 863 F.3d 366 (5th Cir. 2017).

[90] Stephen J. Morse, *Internal and External Challenges to Culpability*, 53 ARIZ. ST. L.J. 617, 642 (2021).

[91] Elias Feldman, *Memory, Moral Reasoning, and* Madison v. Alabama, 37 TOURO L. REV. 105, 111–12 (2021).

[92] The authors believe that the remand opinion by the Fifth Circuit in 2017—*Panetti v. Stephens*—is the *only* opinion in *any* case in that Circuit in which a seriously mentally ill death row inmate was successful at any point in any proceedings on this issue. Perhaps this should not surprise the authors too much. *See* Blume et al., *supra* note 68, at 355 (suggesting the *Ford*/*Panetti* standard is "stringent in theory and very difficult to satisfy in practice."). On how procedural mechanisms like the allocation of the burden of proof and presumptions of competency "have stripped *Panetti* of much of its force," *see* Jonathan Greenberg, *For Every Action There Is A Reaction: The Procedural Pushback Against* Panetti v. Quarterman, 49 AM. CRIM. L. REV. 227 (2012).

The authors next turn to a collateral issue that, although never addressed by the Supreme Court directly in *Panetti*, has been of significance in multiple post-*Panetti* cases: the right of a death row defendant to refuse medication designed to make him competent to be executed.[93]

A. Involuntary Medication and Competency to Be Executed[94]

In this context, it is necessary to also consider a question that permeates this area of law: whether a state can involuntarily medicate an individual facing a death sentence to make him competent to be executed.[95] As discussed subsequently,[96] this is an astonishingly muddled area of the law. There is a split among the states and circuits on this question, and the Supreme Court has declined—somewhat curiously, under the circumstances—to resolve the question.[97]

It appeared, some thirty-one years ago, that the Supreme Court *would* address this question, when it initially granted certiorari in *Perry v. Louisiana*,[98] but it ultimately vacated and remanded the case to the Louisiana Supreme Court[99] for further reconsideration in light of its then-recent decision in *Washington v. Harper*,[100] on the right of prisoners to refuse medication, a case it decided about one week *prior* to its decision to grant certiorari in *Perry*.[101]

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[93] *See generally*, PERLIN & CUCOLO, *supra* note 16, § 17-5, at 17-140 to 17-148.

[94] *Id.*

[95] This has been considered by a state court (in one of the states within the Fifth Circuit) in an opinion that construed Panetti v. Quarterman, 551 U.S. 930 (2007). *See* Staley v. State, 420 S.W.3d 785, 786 n.2 (Tex. Crim. Ct. App. 2013) (concluding that then-operative Texas state statute, TEX. CODE CRIM. PROC. art. 46.05(h), "codifie[d] the constitutional standards" of *Panetti*, and holding that the trial court "lacked authority" to order the involuntary medication of a death-row inmate. *Id.* at 787.). The statutory section was subsequently repealed by 2021 Texas Senate Bill No. 188, after it was held to be "unconstitutionally narrow" in Wood v. Quarterman, 572 F. Supp. 2d 814, 818 (W.D. Tex. 2008), *vacated sub. nom.* Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011).

[96] *See infra* notes 102–13 and accompanying text.

[97] Such cases are sometimes categorized as involving the issue of *synthetic* competency. *See, e.g.*, Basso v. Stephens, No. H-14-213, 2014 WL 412549, at *6 (S.D. Tex. 2014). *See generally* Theodore Y. Blumoff, *On Executing Treatment-Resistant Schizophrenics: Identity and the Construction of "Synthetic" Competency*, 52 CRIM. L. BULL. 308 (2016).

[98] Perry v. Louisiana, 494 U.S. 1015 (1990).

[99] Perry v. Louisiana, 498 U.S. 38 (1990), *reh'g denied*, 498 U.S. 1075 (1991).

[100] Washington v. Harper, 494 U.S. 210 (1990). *See generally* PERLIN & CUCOLO, *supra* note 16, § 8-7.1.

[101] *Harper*, 494 U.S. 210.

Consider the facts of *Perry*. Perry had been charged with the murder of five family members, including his parents.[102] After he was found competent to stand trial, Perry withdrew his previously entered not guilty by reason of insanity plea (over counsel's advice) and entered a not guilty plea.[103] He was convicted and sentenced to death.[104] On appeal, the Louisiana Supreme Court affirmed both his conviction and death sentence but ordered an adversarial hearing on his then-present competence to be executed.[105]

At that competency hearing, the four expert witnesses agreed that Perry was psychotic and that his condition improved when he was properly medicated.[106] Two of the witnesses found that he would be competent to be executed if he were to receive medication; a third witness, who did not believe Perry understood the purpose of his sentence, was not sure if the medication would make him competent. The fourth witness remained unconvinced that the defendant understood that he had really committed the murders in question.[107]

At a subsequent hearing (held five months later), testimony was adduced that Perry was now aware of the reason he was to be executed.[108] In ordering his execution, the trial court found that any due process right to refuse medication that Perry might have had was outweighed by two compelling state interests: the provision of proper psychiatric care, and carrying out a valid death penalty, and ordered that Perry be medicated—by force if necessary—so that he would remain competent to be executed.[109] The Supreme Court then granted certiorari, but vacated and remanded in light of its decision in *Harper*.[110]

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[102] State v. Perry, 502 So. 2d 543, 546 (La. 1986), *cert. denied*, 484 U.S. 872 (1987), *reh'g denied*, 484 U.S. 992 (1987).

[103] *Id.* at 547.

[104] *Id.* at 545.

[105] *Id.* at 563-64.

[106] Brief for Petitioner at 23, Perry v. Louisiana, 498 U.S. 38 (1990) (No. 89-5120), 1989 WL 1127448, at *23.

[107] *Id.*

[108] *Id.*

[109] *Id.* The Louisiana Supreme Court declined to review this order. 543 So. 2d 487 (La.), *reh'g denied,* 545 So. 2d 1049 (1989).

[110] *Id.*

On remand, the Louisiana Supreme Court found, under state constitutional law,[111] that the State was prohibited from medicating Perry to make him competent to be executed.[112] The court concluded:

> For centuries no jurisdiction has approved the execution of the insane. The state's attempt to circumvent this well-settled prohibition by forcibly medicating an insane prisoner with antipsychotic drugs violates his rights under our state constitution. . . . First, it violates his right to privacy or personhood. Such involuntary medication requires the unjustified invasion of his brain and body with discomforting, potentially dangerous and painful drugs, the seizure of control of his mind and thoughts, and the usurpation of his right to make decisions regarding his health or medical treatment. Furthermore, implementation of the state's plan to medicate forcibly and execute the insane prisoner would constitute cruel, excessive and unusual punishment. This particular application of the death penalty fails to measurably contribute to the social goals of capital punishment. Carrying out this punitive scheme would add severity and indignity to the prisoner's punishment beyond that required for the mere extinguishment of life. This type of punitive treatment system is not accepted anywhere in contemporary society and is apt to be administered erroneously, arbitrarily or capriciously.[113]

Since *Perry*, the Supreme Court has not revisited this question.[114] However, there have been multiple other decisions in conflict with each other.[115] The South Carolina Supreme Court relied upon the Louisiana Supreme Court's decision in *Perry* to support its conclusion that medicating a defendant to make him competent to be executed would violate the South Carolina *state* constitution.[116] On the other hand, in *Singleton v. Norris*,[117] the Arkansas Supreme Court ruled that the state had the burden to administer antipsychotic medication as long as the prisoner was alive and was a potential danger either to himself or to others, and that the collateral effect of the

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[111] *See, e.g.*, Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOYOLA L.A. L. REV. 1249 (1987); Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness,* 28 N.Y.U. REV. L. & SOC. CHANGE 1 (2003) (both explaining how state constitutional law can be relied upon to provide *more* rights than are available under the federal constitution—even if the two constitutional provisions in question are worded identically).

[112] State v. Perry, 610 So. 2d 746 (La. 1992).

[113] *Id.* at 747–48. This decision was not re-appealed to the United States Supreme Court (no doubt because of its basis in state constitutional law).

[114] *See* PERLIN & CUCOLO, *supra* note 16, at § 17-5.1.7, at 143.

[115] Singleton v. State, 437 S.E.2d 53, 60–62 (S.C. 1993).

[116] *Id.*

[117] Singleton v. Norris, 992 S.W.2d 768 (Ark. 1999).

involuntary medication—rendering him competent to understand the nature and reason for his execution—did not violate due process.[118] The Supreme Court subsequently denied certiorari.[119]

Following the denial of Singleton's habeas corpus petition, the Eighth Circuit ruled that neither due process nor the Eighth Amendment prevented the state from executing an inmate who had regained competency as the result of forced medication that is part of "appropriate medical care."[120] In coming to its decision, the Court observed that Singleton had proposed no less intrusive means of insuring his competence and never argued that he was not competent with the medication—other than to put forth what the Court termed his "'artificial competence' theory."[121] In addressing the defendant's key claims, the Court reasoned:

> Singleton's argument regarding his long-term medical interest boils down to an assertion that execution is not in his medical interest. Eligibility for execution is the only unwanted consequence of the medication. The due process interests in life and liberty that Singleton asserts have been foreclosed by the lawfully imposed sentence of execution and the *Harper* procedure. In the circumstances presented in this case, the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution. Thus, we hold that the mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set.[122]

The Court also rejected Singleton's claim, based on *State v. Perry*, that the Eight Amendment prohibited execution of one who is made "artificially competent."[123] In a dissenting opinion, Judge Heaney stated, "I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called 'the barbarity of exacting mindless vengeance.'"[124]

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[118] *Id.* at 770.

[119] Singleton v. Norris, 528 U.S. 1084 (2000).

[120] Singleton v. Norris, 319 F.3d 1018, 1027 (8th Cir. 2003), *cert den.*, 540 U.S. 832 (2003).

[121] *Id.* at 1025.

[122] *Id.* at 1026.

[123] *Id.* at 1027.

[124] *Id.* at 1030 (quoting Ford. v. Wainwright, 477 U.S. 399, 410 (1986)). Judge Heaney further gives examples of Singleton's beliefs regarding death, including the belief that his victim was not truly dead and that a person can be executed by correctional officers and then have his breathing "started up again" by judges. *Id.* at 1034. The U.S. Supreme Court denied certiorari. Singleton v. Norris, 540 U.S. 832 (2003). After more than twenty years on death row, Singleton was executed in January 2004. *See Charles Laverne Singleton*, CLARK CNTY. PROSECUTING ATTORNEY'S OFF. http://www.clarkprosecutor.org/html/death/US/singleton887.htm [https://perma.cc/5Q2R-CFVF].

Several years later, in an earlier aspect of the *Panetti* case, the Fifth Circuit had found that a medicated defendant (in that case, Panetti) was competent to be executed.[125] There, it affirmed a decision of the district court that had found that the defendant both suffered from schizoaffective disorder and had a "'delusional belief system in which he viewed himself as being persecuted for his religious activities and beliefs,'" believing that the State is "'in league with the forces of evil to prevent him from preaching the Gospel.'"[126] Nonetheless, as the defendant was aware that he was to be executed, that he had committed the murders for which he was convicted and sentenced to death, and that the "'State's stated reason for executing him is that he committed two murders[,]'" the district court held that Panetti was competent to be executed.[127] Although the Supreme Court subsequently granted certiorari, its merits decision did not discuss the issue of involuntary medication, so this question remains unresolved.[128]

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[125] Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006). For a somewhat muddled earlier decision involving an attempted challenge to ad-hoc procedures in Texas for determining competency to be executed, *see* Kemp v. Cockrell, No. 3:00-CV-2044-H, 2003 WL 21394632 (N.D. Tex. 2003). Due process claims were procedurally barred, petitioner had no right to counsel or expert assistance under Ake v. Oklahoma, 470 U.S. 68, 74 (1985), and the issue of competency to be executed was not ripe because no execution date had been pending; *see also infra* notes 130–32 and accompanying text; *see also* Ex Parte Staley, No. WR-37,034-05, 2012 WL 1882267 (Texas Ct. Crim. App. 2012) (describing subsequent Texas decision staying defendant's execution, in part, as a result of his assertion that forced medication violates the constitutional prohibition against cruel and unusual punishment); *see also* Megan A. Rusciano, *Situating* Staley*: Investigating the Constitutionality of Forcibly Medicating a Texas Death Row Inmate to Render Him Competent for Execution*, 21 AM. U. J. GENDER SOC. POL'Y & L. 893 (2013); *see also supra* note 97; *see also* Brian D. Shannon & Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 TEX. TECH L. REV. 410 (2013) (reporting on Texas procedures in general); *see also supra* note 7 and *infra* notes 153, 269 (the issue of ripeness under *Panetti* is regularly litigated in a variety of fact contexts).

[126] *Panetti*, 448 F.3d at 817.

[127] *Id.*

[128] *See* Dominic Rupprecht, *Compelling Choice: Forcibly Medicating Death Row Inmates to Determine Whether They Wish to Pursue Collateral Relief*, 114 PENN ST. L. REV. 333 (2009) (providing subsequent reconsiderations of this issue); *see also* Chinyerum Okpara, *Forced into Execution: Involuntarily Medicating Mentally Ill Inmates to Achieve Competency for Execution,* 43 T. MARSHALL L. REV. ONLINE 2 (2019); *see also* Anna Trenga, *Forcible Medication of Criminal Defendants: to Stand Trial and to Be Executed*, 25 TEMP. POL. & CIV. RTS. L. REV. 265 (2016); *see also* Douglas Mossman, *Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033 (2002).

III. UNANSWERED QUESTIONS

First, consider how the less well-known aspect of *Panetti* (that which deals with the need for additional expert testimony) has been treated.[129] There appears to likely be a significant law-practice conflict between the expansive language in *Panetti* (seeing a broader role for experts), and the reality as to how *Ake v. Oklahoma*[130] and its successor opinion, *McWilliams v. Dunn*,[131] have been construed in the quarter century-plus since *Ake* was decided.[132] The issue is especially pressing in cases such as *Panetti*'s successors that inevitably deal with complex mental disability issues often far beyond the ken of laypersons and always subject to the misinterpretation caused by fact-finders' use of false "ordinary common sense."[133] Significantly, in its conclusion in *Panetti*, the Court cited to the American Psychological Association's amicus brief (that had discussed the ways that experts can

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[129] The issue of funding for experts appears multiple times in the cohort of Fifth Circuit post-*Panetti* opinions. *See infra* section IV.B.2.a.

[130] Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (discussing indigent defendant's right to insanity defense expert); s*ee generally* Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).

[131] McWilliams v. Dunn, 137 S. Ct. 1790, 1800 (2017) (expert witness must "help . . . the defense evaluate the [assigned doctor's] report [and defendant's] medical records and translate these data into a legal strategy." *Id.* at 1792.). The role of experts and the quality of experts has been a key element of some of the post-*Panetti* Fifth Circuit cases. *See infra* section IV.B.2.a; *see also* Michael L. Perlin, *"Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in Which Fact-finders Rely on Heuristic Reasoning and "Ordinary Common Sense"*, 13 L.J. SOC. JUST. 88, 98–99 (2020) [hereinafter Perlin, *Deceived Me*] (on *McWilliams* in this context).

[132] *See generally* Perlin, *Deceived Me*, *supra* note 131, at 116–17 (concluding that *Ake* and *McWilliams* require the appointment of *multiple* experts in certain cases); *see also* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform,* 97 MINN. L. REV. 1197, 1246 n.206 (2013) (quoting Giannelli, *supra* note 130, at 1311–12 n.36) (for the proposition that *Ake* implementation has "fall[en] far short of what is needed.").

[133] "Ordinary common sense" is "a powerful unconscious animator of legal decision making that reflects 'idiosyncratic, reactive decisionmaking,' and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities." Perlin, Harmon & Chatt, *supra* note 15, at 281 (citing, inter alia, Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Reasoning*, 69 NEB. L. REV. 3, 22–23, 29 (1990), *and* Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737–38 (1988)). *See also* Perlin & Lynch, *My Brain*, *supra* note 21, at 93–94 ("judges treated biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges' pre-existing positions."). *See also* Michael L. Perlin, *"And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process,* 2009 STANFORD TECHNOL. L. J. 1, 21 n.84 [hereinafter Perlin, *"And I See Through Your Brain"*] (suggesting among the markers of the use of this false "ordinary common sense" is decisionmaking that reflects these thought patterns: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is.").

inform competency determinations);[134] this citation tells us that a majority of the *Panetti* court (albeit a bare majority) was comfortable with and responsive to a greater role for mental health experts in judicial proceedings.[135] As discussed below,[136] expert testimony (as to issues of substance, believability, and funding) was critical in several of the post-*Panetti* cases considered here.

It is essential, the authors believe, to study post-*Panetti* cases in an effort to determine to what extent, if any, these questions have been addressed, and, if addressed, how they have been answered. It is equally essential, however, to first consider the startling data that *preceded* the *Panetti* case: Although the Court does not state this directly, it was clear that, in the Fifth Circuit at least (the federal circuit that includes Texas, the state in which Panetti was convicted), the *Ford* test had been no test at all.[137]

In other areas of the law, the Supreme Court has considered the (lack of) value of a "paper" remedy that had never been invoked.[138] Although this aspect of Panetti's certiorari petition was never directly addressed in the majority's opinion, it is certainly reasonable to speculate that this sorry "track record" might have had some impact on the majority's thinking.[139]

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[134] Panetti v. Quarterman, 551 U.S. 930, 962 (2007).

[135] *See* Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 L. & HUM. BEHAV. 141, 145–47 (1997) (discussing benefits of such expansion); *see also* Hall v. Florida, 572 U.S. 701 (2014) (expanding its opinion on its prior holding in Atkins v. Virginia, 536 U.S. 304 (2002), which declared capital punishment in the case of persons with intellectual disabilities to be unconstitutional). The Court made it clear that inquiries into defendants' intellectual disabilities for the purpose of determining whether they are potentially subject to the death penalty cannot be limited to a bare numerical reading of an IQ score, relying on the "medical community's opinions" on this issue, noting that that community defined intellectual disability according to three criteria: "significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Id.* at 710. On the implications of Justice Alito's dissent in *Hall*, arguing that the positions of professional associations relied on by the Court "at best, represent the views of a small professional elite."), *see* Michael L. Perlin, *"In These Times of Compassion When Conformity's in Fashion": How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process* (manuscript under submission), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3961674 [hereinafter Perlin, *In These Times*].

[136] *See infra* section IV.B.2.a.

[137] Two decades have passed since this Court decided Ford v. Wainwright, 477 U.S. 399 (1986), and the Fifth Circuit has yet to find a *single* death row inmate incompetent to be executed. *See* Perlin, *Merchants and Thieves*, *supra* note 31, at 1534. During this same period, the State of Texas has executed 360 people. Petition for Writ of Certiorari, Panetti v. Quaterman, 551 U.S. 930 (2007) (No. 06-6407), 2006 WL 3880284, at *26. Again, the Fifth Circuit is the heart of the "death belt." *See* Smith, *supra* note 15.

[138] *See* Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 634 (1993) (discussing Fuentes v. Shevin, 407 U.S. 67, 85 n.14 (1972) (noting provision of a discovery mechanism not invoked by a single defendant in a 442-case sample)).

[139] *Id.*

IV. THE CURRENT PROJECT

In this Article, we examine how the Fifth Circuit (and, in certain circumstances, district courts in the Fifth Circuit) have dealt with cases in which defendants who have been sentenced to death have sought to invoke *Panetti*, alleging that, under the terms of that case, they were not competent to be executed. As noted above, the authors previously studied the Fifth Circuit's resolutions of cases involving challenges to adequacy of counsel in death penalty cases involving defendants with mental disabilities and in cases involving defendants alleging that their intellectual disabilities estopped the state from executing them.[140] We found the intellectual disability cases to be "infinitely depressing"[141] and the adequacy of counsel cases to be "bizarre and frightening."[142] Would this cohort of cases yield similar or contrary results?[143]

In brief, there are many fewer cases in this cohort.[144] We were only able to find nine Fifth Circuit cases that dealt with substantive aspects of *Panetti* that are relevant to our inquiry here,[145] and to this cohort, we have added four

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[140] *See* Perlin, Harmon & Chatt, *supra* note 15; *see also* Perlin, Harmon & Wetzel, *supra* note 15. In addition to the raw number of death penalty cases emanating from Fifth Circuit states, the authors also chose the Fifth Circuit because of the finding that was shared with the Supreme Court by Panetti's lawyers in their application for a writ of certiorari that in the twenty-plus years that passed between the decision in *Ford* and the *Panetti* case, not a single defendant in the Circuit had been found to meet the *Ford* test. *See* Perlin, *Merchants and* Thieves, supra note 31, at 1534.

[141] Perlin, Harmon & Wetzel, *supra* note 15, at 497.

[142] Perlin, Harmon & Chatt, *supra* note 15, at 308.

[143] *See infra* section IV.A (providing explanation of the methodology that the authors employed).

[144] It may be significant to note that, in other cases, *Panetti* issues were raised (unsuccessfully) at the federal district court level but then abandoned on appeal. *See, e.g.*, Barbee v. Stephens, No. 4:09-CV-074-Y, 2015 WL 4094055 (N.D. Tex. 2015); Hoffman v. Cain, No. 09-3041 SECTION "B"(1), 2012 U.S. Dist. LEXIS 44610 (E.D. La. 2012); *see also* United States v. Huff, No. H-02-742, 2015 WL 5252129 (S.D. Tex. 2015) (noting unsuccessful defendant did not appeal). There has also been astonishingly little written about *Panetti* in recent years in the law review literature. In the past two years, the only articles that have discussed *Panetti* substantively at all are three student notes about *Madison v. Alabama*. *See* Young, *supra* note 10; MacCune, *supra* note 10; Nicole King, *From 2019 to 1984:* Madison v. Alabama *and the Court's Orwellian Approach to Executions*, 98 DENV. L. REV. FORUM 1 (2020). *See also* Marissa Stanziani et al., *Marking the Progress of a "Maturing" Society:* Madison v. Alabama *and Competency for Execution Evaluations*, 26 PSYCH. PUB. POL'Y & L. 145 (2020).

[145] *See* Basso v. Stephens, 555 Fed. App'x. 335 (5th Cir. 2014); Simon v. Epps, 463 Fed. App'x. 339 (5th Cir. 2012); *see also* Green v. Thaler, 699 F.3d 404 (5th Cir. 2012); ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007); Battaglia v. Stephens, 824 F.3d 470 (5th Cir. 2016); Martinez v. Quarterman, No. 09-70004, 2009 WL 211489 (5th Cir. 2009); Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. 2009); Wood v. Quarterman, 572 F. Supp. 2d 814 (W.D. Tex. 2008), *vacated sub. nom.* Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011), *aff'd*, Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015), *cert. den.*, 577 U.S. 1151 (2016); Eldridge v. Thaler, No. H-05-1847, 2013 WL 416210 (S.D. Tex.

other cases decided by district courts within the Fifth Circuit, two of which are the only cases within the Fifth Circuit jurisdictions in which defendants were successful in *Panetti* claims.[146] To the best of our knowledge, the defendants in five cases have been executed,[147] and one defendant has died on death row.[148] Stays of execution have been entered in two cases,[149] and three cases have been remanded to state court for further proceedings; one,

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2013); Charles v. Stephens, 612 Fed. App'x. 214 (5th Cir. 2015), *cert. den.*, 575 U.S. 1006 (2016). In four of these cases, in addition to the substantive issues we discuss below, the Fifth Circuit pointedly noted that the *Panetti* application had not been made in a timely manner. See *Charles*, 612 Fed. App'x. at 222; *Battaglia*, 824 F.3d at 472; *Green*, 699 F.3d at 422; *Martinez*, 2009 WL 211489, at *3. In each instance, the authors have tried to reach out—by email and/or phone calls—to the most recent defense counsel (per opinions available in Westlaw). In those instances where there were responses that illuminated the proceedings, we have made reference to them in footnotes. Beyond the scope of this Article generally are state court cases in the Fifth Circuit states that have considered *Panetti* issues. *See, e.g.*, Staley v. State, 420 S.W.3d 785 (Tex. Ct. Crim. App. 2013) (defendant not competent to be executed.), discussed *supra* note 95; *see also* Green v. State, 374 S.W.3d 434 (Tex. Ct. Crim. App. 2012) (state review standard lawful after *Panetti*); *see also* King v. State, 23 So. 3d 1067 (Miss. 2009) (intervening decision in *Panetti* did not overcome procedural bar doctrine); *see also* Druery v. State, 412 S.W.3d 523 (Tex. Ct. Crim. App. 2013) (defendant made substantial showing of incompetency to be executed); *see also* Adams v. State, No. 03-14-00180-CR, 2016 WL 110627 (Tex. Ct. App. 20016) (non-death penalty case; *Panetti* distinguished); Turner v. State, 422 S.W.3d 676, 700 (Tex. Crim. Ct. App. 2013) (Keller, J., dissenting) (arguing that, under *Panetti*, counsel's observations, especially with respect to delusions, are not alone a sufficient basis for concluding that a defendant is incompetent). The authors discuss excluded federal cases *infra* notes 159–65 and accompanying text.

[146] *Powers*, 2009 WL 901896, at *10–11 (*Panetti* claim denied); Mays v. Director, TDCJ-CID, No. 6:19-CV-426, 2020 WL 1333212 (E.D. Tex. 2020) (same); Billiot v. Epps, No. 1:86CV549TSL, 2010 WL 1490298 (S.D. Miss. 2010) (*Panetti* claim granted); Aldridge v. Thaler, No. H-05-608, 2010 WL 1050335 (S.D. Tex. 2010) (same). Interestingly, there was no appeal by the state in *Billiot* or *Aldridge*. Also, no appeal by the defendant in *Mays*. *See infra* note 151 (further development in the state courts in the *Mays* case).

[147] *Basso* , 555 Fed. App'x. 335; *Green*, 699 F.3d 404; *Battaglia*, 824 F.3d 470; *Martinez*, 2009 WL 211489; *Charles*, 612 Fed. App'x. 214; *see* Tom Dart, *Texas Killer Suzanne Basso Becomes 14th Woman Executed in US Since 1976*, THE GUARDIAN (Feb. 5, 2014, 11:46 PM), https://www.theguardian.com/world/2014/feb/06/texas-killer-basso-woman-executed-us-death-penalty [https://perma.cc/H6W4-M8DG]; *see also* Nancy Flake, *Green executed for murder of Neal, 12*, COURIER MONTGOMERY CNTY. (Oct. 10, 2012), https://www.yourconroenews.com/neighborhood/moco/news/article/Green-executed-for-murder-of-Neal-12-9270148.php [https://perma.cc/QRA2-YFVT]; *see also* Jolie Mccullough, *John Battaglia executed for killing his daughters despite late appeals*, TEX. TRIBUNE (Feb. 1, 2018), https://www.texastribune.org/2018/02/01/dallas-man-who-killed-his-daughters-set-again-execution/ [https://perma.cc/ZW4C-ZCRX]; *see also* David Carson, *Execution Report: Virgil Martinez*, TEX. EXECUTION INFO. CTR., http://www.txexecutions.org/reports/427.asp [https://perma.cc/L5ZN-6LK3]; *see also* Alan Turner, *Houston Killer Executed*, CHRON (May 12, 2015, 6:49 PM) https://www.chron.com/news/houston-texas/houston/article/Houston-killer-executed-6259315.php [https://perma.cc/3QXT-9DC8].

[148] *ShisInday*, 511 F.3d 514; *see* Michael Graczyk, *Houston Woman's Killer Dies on Death Row*, CHRON (Aug. 31, 2009), https://www.chron.com/news/houston-texas/article/Houston-woman-s-killer-dies-on-death-row-1736415.php [https://perma.cc/M4LF-GZXX].

[149] *Wood*, 787 F. Supp. 2d 458; *see also* Mays v. State, 476 S.W.3d 454 (Tex. Ct. Crim. App. 2015).

on questions involving jury selection and adequacy of counsel,[150] and, the other two, for further inquiries on his current competency, or lack of it.[151] In one case, no execution date has been scheduled.[152] Astonishingly, in one of the two not-appealed trial court victories for defendants, the defendant remains on death row eleven years after his death sentence was vacated.[153]

As discussed in depth below, these cases generally fall into four broad categories: "the battle of the experts;" allegations of malingering; questions of the involuntary administration of medication to make an incompetent defendant competent to be executed; and cases where there was a lack of strong evidence of mental illness.[154] But, as we will show, the Fifth Circuit has basically ignored *Panetti*'s holdings in all its decisions.[155]

A. The Methodology Employed

This section details the methodology that the authors employed in this Article. An extensive search of all substantive, valid incompetency-to-be-executed claims in the Fifth Circuit based on the Supreme Court's decision in *Panetti v. Quarterman*[156] was conducted using the Westlaw database. First, the key terms "Panetti v. Quarterman" offered 2,748 case opinions. We narrowed the search to include those opinions stemming only from the Fifth Circuit, which reduced the results down to 178. We refined the search further to include case opinions only from the Federal Court of Appeals and Federal District Courts, which generated 144 results.

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[150] *Powers*, 2009 WL 901896.

[151] Simon v. Fisher, 641 Fed. App'x. 386 (5th Cir. 2016); Mays v. State, No. AP-77,055, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019). In *Mays*, a stay of execution that had been entered in 476 S.W.3d 454 (Tex. Ct. Crim. App. 2015), was vacated subsequently by the same court in Mays v. State, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019), but, in an unreported opinion, that Court entered a new stay in May 2020. *See News Brief – Texas Appeals Court Stays Randall Mays' Execution on Issue of Intellectual Disability*, DEATH PENALTY INFO. CTR. (May 7, 2020) https://deathpenaltyinfo.org/stories/news-brief-texas-appeals-court-stays-randall-mays-execution-on-issue-of-intellectual-disability [https://perma.cc/BAR3-ZSJ6].

[152] Eldridge v. Davis, 137 S. Ct. 2215 (2017).

[153] Billiot v. Epps, No. 1:86CV549TSL, 2010 WL 1490298 (S.D. Miss. 2010). According to Billiot's appellate counsel, the trial court denied defendant's motion to be transferred to the state hospital, reasoning in part that "[he would] get better care on [death] row." Email from Joseph Margulies, Esq., to co-author MLP (Dec. 15, 2021) (on file with co-author MLP).

[154] *See infra* section IV.B.2.a–d.

[155] *See infra* section IV.B.3.f.

[156] Panetti v. Quarterman, 551 U.S. 930 (2007).

Of the remaining 144 case opinions, forty of them proved to include "valid"[157] *Panetti*-based claims—including cases in which Panetti himself was the defendant (seven case opinions), case opinions that included repeat-defendants (thirty case opinions), and defendants that appeared only once (four case opinions). In total, eighteen defendants made valid *Panetti*-based claims.[158] Twenty case opinions were excluded due to involving claims related to *Atkins v. Virginia*;[159] twenty-nine cases were excluded due to referencing *Panetti* on the issue of second, successive, or successor petitions;[160] one case was excluded due to referencing *Panetti* on an "opportunity to be heard" issue;[161] one case was excluded due to discussing *Panetti* because of a procedural default issue;[162] four cases were excluded due to citing *Panetti* to assist in explaining the trial court's reasonable or unreasonable application of federal law;[163] four cases were excluded as they dealt with *Panetti*'s interpretation of the ripeness doctrine;[164] and forty-three cases were excluded as they referenced *Panetti* for issues related to when habeas corpus, *procedurally*, may be granted.[165] The final list of cases included four district court cases,[166] and nine Fifth Circuit cases.[167]

B. The Cases

1. Introduction. — As we have already noted, there has not been a single other case in the fourteen-plus years since the Supreme Court decided *Panetti* in which the Fifth Circuit found that a defendant was incompetent to

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[157] The authors use "valid" here to indicate that the court considered the *Panetti* claim on the merits. It does not mean that the court found the claim substantively valid.

[158] *Infra* Table 1.

[159] Atkins v. Virginia, 536 U.S. 304 (2002); *see* Perlin, Harmon & Wetzel, *supra* note 15; *infra* Table 2.

[160] *Infra* Table 3.

[161] *Infra* Table 4.

[162] *Infra* Table 5.

[163] *Infra* Table 6.

[164] *Infra* Table 7.

[165] These cases involved interpretations of the Anti-Terrorism & Effective Death Penalty Act (AEDPA). Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (1996); *infra* Table 8.

[166] *See* Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. 2009); Billiot v. Epps, No. 1:86CV549TSL, 2010 WL 1490298 (S.D. Miss. 2010); Mays v. State, No. AP-77,055, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019); Aldridge v. Thaler, No. H-05-6082010, 2010 WL 1050335 (S.D. Tex. 2010).

[167] *See* Basso v. Stephens, 555 Fed. App'x. 335 (5th Cir. 2014); Simon v. Fisher, 641 Fed. App'x. 386 (5th Cir. 2016); Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011); Green v. Thaler, 699 F.3d 404, 407 (5th Cir. 2012); Eldridge v. Davis, 137 S. Ct. 2215 (2017); Charles v. Stephens, 612 Fed. App'x. 214 (5th Cir. 2015); ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007); Battaglia v. Stephens, 824 F.3d 470 (5th Cir. 2016); Martinez v. Quarterman, No. 09-70004, 2009 WL 211489 (5th Cir. 2009).

be executed, and only two such cases were decided by a district court within the Circuit.[168] Of those cases in which *Panetti* claims have been assessed (and ultimately rejected) on the merits,[169] all fall into one of the categories described below.[170]

2. Grounds for decisions. — Eight of the cases in which *Panetti* applications were rejected turned, at least in part, on questions related to expert testimony, a cohort that included five cases in which the trial court had evaluated believability,[171] and three that related to expert funding.[172] Three turned, again, in part, on questions of malingering[173] (in two of which the court had found that the defense expert conceded that he believed the defendant was malingering),[174] three on synthetic competency,[175] and two on the purported lack of evidence of major mental illness.[176] This Article now considers the implications of each of these cases.

(a) The Controlling Issues Relating to Witness Testimony. — The first issue relating to witness testimony is which expert was seen as more believable. Several cases illustrated the issue of "credibility" of the experts; in *Eldridge*, *Basso*, *Green*, and *Wood*, the state expert was found to be more

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[168] *See Billiot*, 2010 WL 1490298; *Aldridge*, 2010 WL 1050335. Only in a subsequent opinion in the *Panetti* litigation did the Fifth Circuit reverse a district court order that had denied Panetti's motion for counsel and expert assistance as part of the process of determining his current competence to be executed. Panetti v. Stephens, 863 F.3d 366 (5th Cir. 2017).

[169] This excludes cases that cite *Panetti* on questions related to (1) the viability of successor petitions (*see, e.g.*, Storey v. Lumpkin, 8 F.4th 382 (5th Cir. 2021); In re Cathey, 857 F.3d 221 (5th Cir. 2017); In re Sepulvado, 707 F.3d 550 (5th Cir. 2013)); (2) when habeas corpus, procedurally, may be granted, interpreting 28 U.S.C. § 2254(d)(1), the Anti-Terroism & Effective Death Penalty Act (AEDPA) (*see, e.g.*, Ramey v. Lumpkin, 7 F.4th 271 (5th Cir 2021); Smith v. Cain, 708 F.3d 628 (5th Cir. 2013)), and (3) ripeness of litigation (*see, e.g.*, In re Halprin, 88 Fed. App'x. 941 (5th Cir. 2019) ; In re Sepulvado, 707 F.3d 550 (5th Cir. 2013); Ramos v. Quarterman, No. M-07-059, 2008 U.S. Dist. LEXIS 126575 (S.D. Tex. 2008); United States v. Bernard, 820 Fed. App'x. 309 (5th Cir. 2020)).

[170] Some of these cases (*see, e.g.*, *Eldridge*, 137 S. Ct. 2215; *Basso*, 555 Fed. App'x. 335; *Simon*, 641 Fed. App'x. 386) fall into multiple categories. In *Wood*, malingering was discussed in a district court opinion. *See Wood*, 787 F. Supp. 2d at 480–84 (but not in the Fifth Circuit opinion). *See infra* section IV.B.2.f (providing a summary of findings on all categories of cases).

[171] Eldridge v. Thaler, No. H-05-1847, 2013 WL 416210 (S.D. Tex. 2013); *Basso*, 555 Fed. App'x. 335; Simon v. Epps, 463 Fed. App'x. 339 (5th Cir. 2012); Wood v. Quarterman, 572 F. Supp. 2d 814 (W.D. Tex. 2008), *vacated sub. nom.* Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011), *aff'd*, Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015), *cert. den.*, 577 U.S. 1151 (2016); *Martinez*, 2009 WL 211489.

[172] *Battaglia*, 824 F.3d 470; Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. 2009); *Charles*, 612 Fed. App'x. 214, *cert. den.*, 575 U.S. 1006 (2016).

[173] *Basso*, 555 Fed. App'x. 335; *Simon*, 463 Fed. App'x. 339; *Eldridge*, 2013 WL 416210.

[174] *Simon*, 463 Fed. App'x. 339; *Eldridge*, 2013 WL 416210.

[175] *Basso*, 555 Fed. App'x. 335; ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007); *see also* Staley v. State, 420 S.W.3d 785 (Tex. Ct. Crim. App. 2013).

[176] *Wood*, 787 F. Supp. 2d 458, *aff'd*, *Wood*, 619 Fed. App'x. 304, *cert. den.*, 577 U.S. 1151 (2016); *Simon*, 463 Fed. App'x. 339.

credible than the defense expert,[177] and that finding contributed significantly (in some cases, perhaps, dispositively), to the court's final decision.[178]

In *Wood*, the defendant had been convicted in Texas in 1998 of capital murder.[179] Although the Fifth Circuit did not expressly state that the defendant was malingering, it upheld the district court finding that the defendant's *Panetti* claim and his conspiracy theory were "little more than a ruse to avoid his own execution."[180] Much of this decision appeared to turn on the Peters Delusional Inventory [hereinafter "PDI"] that was used by the defense expert, Dr. Roman, to diagnose Wood with a delusional disorder.[181] A state's expert, Dr. Mary Conroy, had claimed that the PDI was not an accurate test for this diagnosis under the definition of the DSM-IV-TR,[182] leading the district court to conclude (a conclusion affirmed by the Fifth Circuit) that, "In light of Dr. Roman's subsequent admission as to the limited utility of the Peters Delusions Inventory, [we] question the efficacy of Dr. Roman's delusional diagnosis."[183]

What is most puzzling in this case is the apparent total absence of empirical evidence as to the validity and reliability of the PDI.[184] By way of examples, studies published before the court hearings in question concluded that validity of the test was confirmed, that there was consistency of scores when the test was repeated on subjects, and that psychotic inpatients had significantly higher scores, thus establishing the test's "criterion validity."[185]

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[177] The state expert that was ruled more credible in three of the cases was Dr. Mark Moeller. Additionally, Dr. Michael Roman was used as the defense expert in two of the cases where he was found not to be credible.

[178] *Eldridge*, 2013 WL 416210; *Basso*, 555 Fed. App'x. 335; Green v. Thaler, 699 F.3d 404, 407 (5th Cir. 2012); Wood v. Quarterman, 572 F. Supp. 2d 814 (W.D. Tex. 2008), *vacated sub. nom. Wood*, 787 F. Supp. 2d 458, *aff'd*, Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015), *cert. den.*, 577 U.S. 1151 (2016).

[179] *Wood*, 619 Fed. App'x. at 305; Wood v. Stephens, 540 Fed. App'x. 422, 424 (5th Cir. 2013) (noting, in prior proceedings, the Fifth Circuit had granted a certificate of appealability based on the fact that "jurists of reason could debate whether the district court's improper reliance upon its past experience with death row inmates resulted in an unfair hearing in violation of Wood's Fourteenth Amendment due process rights." *Id.*).

[180] *Wood,* 619 Fed. App'x. at 306.

[181] *Id.* at 307.

[182] *Id.* (noting, stupefyingly, Dr. Roman actually conceded later that this test was not "a proper test for determining a delusional disorder."); *see also id.* at 308 (providing the district court had ruled that, "In light of Dr. Roman's subsequent admission as to the limited utility of the Peters Delusions Inventory, [we] question the efficacy of Dr. Roman's delusional diagnosis.").

[183] *Id.* at 308.

[184] *See generally* Emmanuelle R. Peters et al., *Measuring Delusional Ideation: The 21-Item Peters et al. Delusions Inventory (PDI)*, 30 SCHIZOPHRENIA BULL. 1005 (2004); Wood v. Thaler, 787 F. Supp. 2d 458. 482 (W.D. Tex. 2011) (suggesting that Dr. Roman administered the twenty-one-item version of the PDI).

[185] Peters, *supra* note 184, at 1011.

Another research study concluded that "the expected high negative predictive value of the PDI (96%) in the general population suggests it will be a valuable tool in future research on psychosis proneness."[186] And a 2012 study concluded that the PDI is a "reliable and valid instrument for measuring the dimensionality of delusion proneness."[187] None of this scientifically (and easily accessible)[188] reliable data was apparently presented to any of the courts, or, if it was, none was mentioned in any of the multiple court opinions in this case.[189]

In *Green v. Thaler*, the defendant had been convicted and sentenced to death for capital murder in 2002.[190] The district court had initially granted the defendant's motion for a stay of execution,[191] but the Fifth Circuit reversed that stay.[192]

Here, in testimony on the question of the defendant's competency to be executed, the state's expert (again Dr. Mark Moeller) "concluded that despite likely having intermittent hallucinations and disorganized behaviors, it is unlikely [he] is suffering from schizophrenia."[193] The court concluded that, although Green presented evidence that he suffered from schizophrenia, he did not demonstrate that he "lacked the rational understanding that he was to be executed for Neal's death."[194] Significantly the court also ruled that "the most compelling evidence [of competency] was from your own expert."[195]

At the district court level, the State had produced documents "revealing *inter alia* that mental health professionals with the Texas Department of Criminal Justice . . . had concluded after observation in an inpatient clinical setting and psychological tests that Green suffered from delusions and hallucinations [, and that he had] been diagnosed as suffering from

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[186] Antonio Preti et al., *The Psychometric Discriminative Properties of the Peters et al. Delusions Inventory: A Receiver Operating Characteristic Curve Analysis*, 48 COMPREHENSIVE PSYCHIATRY 62 (2007).

[187] Yu-Chen Kao, *The Psychometric Properties of the Peters et al. Delusions Inventory (PDI) in Taiwan: Reliability, Validity, and Utility*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOL. 1221 (2012).

[188] All of the citations in notes 184–87 were accessed by simple searches in Google Scholar.

[189] It must be noted that more sophisticated instruments have since been developed, ones that now may render the PDI "problematic" in its ability to diagnose delusional disorder. Email from Mark Cunningham, Ph.D., to co-author MLP (Dec. 17, 2021) (on file with co-author MLP). *See,* e.g., Mark D. Cunningham, *Differentiating Delusional Disorder from the Radicalization of Extreme Beliefs: A 17-Factor Model*, 3 J. THREAT ASSESSMENT & MGMT. 137 (2018), (proposing a Model of Analysis for Differentiating Delusional Disorder from the Radicalization of Extreme Beliefs–17 Factor (MADDD-or-Rad-17)).

[190] Green v. Thaler, 699 F.3d 404, 407 (5th Cir. 2012).

[191] Green v. Thaler, No. CIV.A. H-07-827, 2012 WL 4765809 (S.D. Tex. Oct. 8, 2012), *vacated and remanded*, 699 F.3d 404 (5th Cir. 2012), as revised (Oct. 31, 2012).

[192] *Green*, 699 F.3d at 420–21.

[193] *Id.* at 415.

[194] *Id.*

[195] *Id.* at 418.

schizophrenia, undifferentiated type."[196] On appeal, the Circuit court simply said that the defendant had received "the process he was due,"[197] and paid no attention to the factual findings as to his diagnosis, and the severity of his mental illness that had been considered by the district court.[198]

Moreover, when the full paragraph of the trial court's finding as to the defendant's expert is read,[199] it is clear that the standards of *Panetti* were *not* met. The state court came to its conclusion because the testimony showed that the defendant "[knew he was] to be executed by the State, [knew he was] convicted of killing the victim . . . [knows] the execution date, and then . . . proclaimed [his] innocence which shows a rational understanding of [the] imminent date and . . . the charges . . . against [him]."[200] Nothing here, however, goes to a critical prong of *Panetti*: did the defendant have a "rational understanding of the State's reason for his execution"?[201] Although the issue of "rational understanding" was addressed, it appeared only to be considered in the context of the fact that the defendant was able to proclaim his innocence,[202] a far cry from what is demanded by *Panetti*.[203]

The second issue relating to witness testimony is denial of expert funding. In *Battaglia v. Davis*, the defendant sought funding for a mitigation specialist who could have obtained additional non-expert information to show that the defendant was not malingering.[204] This application was rejected because, given the limitations of 28 U.S.C. § 2254(d), it came "too late to produce evidence that may be presented to the state court in making the adjudication in question."[205] Interestingly, here the defendant conceded that some of this work could have been done by counsel, but that the proposed mitigation investigator "has the experience and training to conduct interviews involving sensitive mental health and background issues that counsel lacks."[206]

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[196] *Green*, 2012 WL 4765809, at *2 (noting "[t]esting indicated that he was not malingering.").

[197] *Green*, 699 F.3d at 413.

[198] *Id.*

[199] *Id.* at 418 (quoting Green v. State, 374 S.W.3d 434, 437–38 (Tex. Cr. Crim. App. 2012).

[200] *Id.*

[201] Panetti v. Quarterman, 551 U.S. 930, 956 (2007).

[202] *Green*, 699 F.3d at 418.

[203] *Panetti*, 551 U.S. at 956.

[204] Battaglia v. Davis, No. 3:16-CV-1687-B, 2018 WL 550518, at *2 (N.D. Tex. Jan. 24, 2018) (stay of execution denied); 138 S. Ct. 943 (2018). For earlier opinions in the *Battaglia* case, *see* Battaglia v. Stephens, 621 Fed. App'x. 781 (5th Cir. 2015) (affirming district court decision (2013 WL 5570216 (N.D. Tex. 2013)) that had denied his habeas corpus petition based on alleged ineffectiveness of counsel in defendant's capital murder case).

[205] *Id.*, at *6.

[206] *Id.*

There is no longer any question that capital mitigation specialists are critical members of the capital defense team.[207] The American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases makes it crystal-clear: "the use of mitigation specialists has become 'part of the existing standard of care' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'"[208] These Guidelines underscore that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."[209] There is no mention whatsoever of these Guidelines in *any Battaglia* opinion.[210]

In *Powers v. Epps*,[211] a case in which the defendant had suffered two strokes following his capital murder conviction,[212] the court rejected defendant's request that funds be made available for an expert witness to determine whether he had become incompetent to be executed under *Panetti*.[213] Here, inexplicably, the court concluded, "[i]t is questionable whether these affidavits [submitted on behalf of the defendant] raise a substantial question as to whether the memory loss caused by Powers's strokes 'prevents him from comprehending the reasons for the [death] penalty or its implications.'"[214]

There is no evidence that any testimony was ever taken on the impact of stroke-caused memory loss on one's ability to comprehend a future punishment.[215] Certainly, it is an issue whose resolution would have benefitted from competent expert opinion.[216]

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[207] Emily Hughes, *Mitigating Death,* 18 CORNELL J.L. & PUB. POL'Y 337, 379 (2009).

[208] AM. BAR ASS'N., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 4.1 cmt. (rev. ed. 2003), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf [https://perma.cc/AMK4-JEBT].

[209] *Id.*

[210] *See* Perlin, Harmon & Chatt, *supra* note 15, at 269 ("A review of eighty death sentences issued in four 'death belt states' (Georgia, Mississippi, Alabama, and Virginia) between 1997 and 2004 found that '[i]n 73 of the 80 cases, defense lawyers gave jurors little or no evidence to help them decide whether the accused should live or die.'" *Id.* at 268 (citing Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 352, 363 (2009))).

[211] Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. Mar. 31, 2009).

[212] *Id.*, at *3.

[213] *Id.*

[214] *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 418 (1986)).

[215] *See, e.g.*, Noor Kamal Al-Qazzaz et al., *Cognitive Impairment and Memory Dysfunction After a Stroke Diagnosis: A Post-Stroke Memory* Assessment, 10 NEUROPSYCHIATRIC DISEASE & TREATMENT 1677 (2014) (providing more on the extent of the impact of a stroke on brain functioning).

[216] Subsequently, the case was remanded to state court for further consideration of an adequacy of counsel issue. *Powers*, 2009 WL 901896.

The third issue relating to witness testimony is concessions by defense experts in which they essentially testified in agreement with state experts.[217]

(b) Whether the Defendant Was Malingering. — Multiple cases reflect the rejection of *Panetti* claims based on a state expert evaluation that the defendant was malingering his or her mental illness in order to be ruled incompetent to be executed.[218] Interestingly, and remarkably, in two of these cases, the potential for malingering was at least partially conceded by the defense expert.[219]

Basso's *Panetti* claim was rejected in part based on what was characterized as her "history of malingering and engaging in attention-seeking behavior including 'falsifying psychiatric and physical symptoms.'"[220] The Fifth Circuit agreed with the district court's conclusion that the state court's findings regarding malingering[221] were "well supported by the record."[222]

This was by no means a cut-and-dry case. One of the main pieces of evidence relied on by the courts that came to this conclusion was a claim the defendant made that she was a fourteen-year-old girl named Suzanne Burns who lived at the St. Anne's Institute in Albany, New York, "where she was sent because her mother was mean to her."[223] Yet, in state habeas proceedings, the defendant had produced documents that included evidence that "Basso was raised in poverty; her natural father was an abusive alcoholic who abandoned his family; she was sexually molested by her step-father, step-brother, and uncle; she was physically abused by her mother and step-father."[224] Apparently, largely because trial counsel decided against presenting evidence of sexual abuse Basso suffered as a child because of the similarity of it to the abuse Basso and her co-defendants had inflicted on the

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[217] *See infra* notes 235–40 and accompanying text (discussing this issue in the context of allegations of malingering in the *Eldridge* case) *and infra* notes 228–34 and accompanying text (discussing this issue in the context of allegations of malingering in the *Simon* case).

[218] See Simon v. Epps, 463 Fed. App'x. 339 (5th Cir. 2012); Eldridge v. Thaler, No. H-05-1847, 2013 WL 416210 (S.D. Tex. 2013).

[219] *Simon*, 463 Fed. App'x 339; *Eldridge*, 2013 WL 416210.

[220] Basso v. Stephens, 555 Fed. App'x. 335, 341 (5th Cir. 2014).

[221] *See* Basso v. State, No. 73672, 2003 WL 1702283 (Tex. Ct. Crim. App. Jan 15. 2003).

[222] *Basso*, 555 Fed. Appx. at 348.

[223] Basso v. Quarterman, No. H-07-3047, 2009 WL 9083708, at *9 (S.D. Tex. 2009).

[224] Basso v. Thaler, 359 Fed. App'x. 504, 508 (5th Cir. 2010).

victim in the case before the court,[225] this evidence was not presented.[226] When considered in context, this evidence might have had a significant impact on the malingering finding, but it does not appear that it was ever turned over to the examining state's witnesses.[227]

Malingering was also considered in *Simon v. Epps*,[228] a case in which the defendant had been convicted of capital murder of three of his family members.[229] There, the Fifth Circuit accepted the testimony of the state-retained expert, Dr. Gilbert S. Macvaugh III, who had found that Simon "was malingering his memory loss," and that the defendant had made "naïve attempts to malinger memory deficits and his rather severe antisocial personality traits."[230] Pointedly, defendant's own expert "could not rule out the potential that Simon was malingering."[231]

What is not mentioned anywhere in the Fifth Circuit opinion is the initial report of defense expert Dr. Goff, and that lack of mention is more than curious. In this report (based on a review of records as, at this point in time, defense counsel's request for an outside expert to evaluate Simon had been denied), Dr. Goff had said this:

> The course of events here suggests that the neuropsychological defect demonstrated by Mr. Simon may indeed be interfering substantially with his ability to communicate with his attorneys and that it may well constitute a mental illness or defect that is preventing him from comprehending the reasons for the penalty imposed upon him or its implications. The descriptions of him suggest that he may have little or no understanding of the concepts shared by his attorneys and the community as a whole. I am not even certain that he has a factual understanding of his current situation.[232]

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[225] *Id.* at 508. It is not unusual for individuals to inflict on victims the same abuse they had suffered at the hands of their families of origin. *See, e.g.*, Lynch, Perlin & Cucolo, *supra* note 8, at 222–23 (discussing United States v. Montgomery, 635 F.3d 1074, 1081–82 (8th Cir. 2011); Montgomery v. Barr, No. 4:20-CV-01281-P, 2020 WL 7353711, at *2 (N.D. Tex. Dec. 15, 2020)). *See generally* Amy T. Campbell, *Addressing the Community Trauma of Inequity Holistically: The Head and the Heart Behind Structural Interventions*, 98 DENV. L. REV. 1, 8–9 (2021) (discussing the long-lasting impact of childhood trauma).

[226] *Basso*, 2009 WL 9083708, at *13.

[227] *Id.*

[228] Simon v. Fisher, 641 Fed. App'x. 386 (5th Cir. 2016).

[229] *Id.* at 387.

[230] *Id.* at 388.

[231] *Id.* at 387. The district court had found that defendant—whom it found to have no history of mental illness—was competent to be executed, a conclusion with which the Fifth Circuit agreed. *Id.* at 388.

[232] Simon v. Epps, 463 Fed. App'x. 339, 342 (5th Cir. 2012).

Subsequently, some months after the Fifth Circuit opinion, Dr. Goff did do an in-person evaluation of Simon, and found that Simon did not appear to understand the purpose of his visit and "expressed a lack of recall or understanding of his situation in terms of his current incarceration and the penalty which had been imposed upon him."[233] He also found that Simon was exhibiting "global amnesia."[234]

The *Eldridge* case is a complicated one, and it may be that the evidence of malingering did outweigh the evidence of such serious mental illness as to prevent execution under *Panetti.*[235] However, as discussed below, the Fifth Circuit gave no heed to testimony that had been offered indicating the severity of that mental illness, notwithstanding the initial district court opinion in the case bringing focus to what at least two expert witnesses saw as severe mental illness and lack of malingering.[236]

Although the Fifth Circuit ultimately concluded that Dr. Nathan was credible, it found that his testimony was of "limited probative value" because most of his contact was "via video conference"[237] and he did not specifically

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[233] Simon v. McCarty, No. 2:11-CV-111-SA, 2014 WL 7338860, *13 (N.D. Miss. 2014).

[234] Simon v. Fisher, 641 Fed. App'x. 386, 387 (5th Cir. 2016). This predated the Supreme Court's decision in Dunn v. Madison, 138 S. Ct. 9 (2018), on the impact of a death row prisoner's cognitive impairment on executability. *See* Young, *supra* note 10; *see also* MacCune, *supra* note 10.

[235] In earlier proceedings, Eldridge had been convicted and sentenced to death in 1994 for the murder of his former girlfriend and her daughter. He originally had "made a substantial showing of incompetency based on demonstrated bizarre behavior and delusional statements, corroborated by expert evidence, and [therefore] was entitled to a hearing on his claim." Eldridge v. Stephens, 599 Fed App'x. 123, 126 (5th Cir. 2015).

[236] *See* Eldridge v. Thaler, H-05-1847, 2013 WL 416210 (S.D. Tex. 2013). In the initial *Eldridge* opinion, the court pointed out that "Eldridge expressed delusional beliefs that prison guards were poisoning his food[,]" that Eldridge was not malingering, and that Dr. Roman testified that Eldridge suffered from a "psychotic disorder." *Id.* at *11–12, *15, *17. Among the indicia of this disorder were these findings:

- Eldridge told Dr. Roman that his girlfriend was alive, that he had seen her recently, and that he knew he had been accused of killing her, but that it made no sense to him (the girlfriend was the victim in the case). *Id.* at *18.
- Eldridge also told Roman that his food was being poisoned, and that he has traveled outside the prison on a regular basis. *Id.*
- Dr. Roman also noted that Eldridge heard voices in his head and experienced hallucinations. *Id.* at *19.

See also Battaglia v. State, 537 S.W.3d 57, 74 (Tex. Crim. Ct. App. 2017) (discussing these fact-findings).

[237] *See* Loandra Torres et al., *Forensic Assessment in the Time of Covid-19: The Colorado Experience in Developing Videoconferencing for Evaluating Adjudicative Competency*, 27 PSYCH. PUB. POL'Y & L. 522 (2021) (providing a post-COVID analysis of the use of videoconferencing in such contexts in an article that cites the *Eldridge* case.) This article, written years after the case in question, concluded:

> In sum, the available guidelines suggest forensic evaluators using VC [videoconferencing] platforms must practice due diligence with regard to privacy of information; seek opportunities to develop their skills and knowledge related to VC technology and implementation; consider need, security, and validity when

test the defendant for malingering.[238] The court ultimately ruled that the "district court did not clearly err by finding [the defendant] competent to be executed because it relied on overwhelming evidence indicating [he was] malingering."[239]

In this case, a state expert, Dr. Mark S. Moeller, a board-certified psychiatrist, had evaluated the defendant and concluded "Eldridge was malingering" and "feigning mental illness to avoid execution."[240] Moreover, the court found that Dr. Moeller had "presented compelling evidence that the defendant is malingering, noting the atypical presentation of the defendant's symptoms."[241] Further, Dr. Moeller (and Dr. Allen, the other state expert), discredited the "double-bookkeeping" theory of schizophrenia on which Dr. Roman had relied,[242] concluding, instead, that the "inconsistencies in delusions and behaviors" were to be expected and "not an indication of [defendant's] malingering."[243] Dr. Moeller testified after a review of the "literature on double- bookkeeping" and concluded "the theory just doesn't hold water."[244] The court thus ruled that the district court "did not clearly err by finding [the defendant] competent to be executed because it relied on overwhelming evidence indicating Eldridge is malingering."[245]

> using psychological testing; ensure groups with fewer resources are not treated unfairly in the VC process; and be open with all parties regarding the benefits and limitations of VC evaluations in general.

Id. at 524.

[238] Eldridge v. Davis, 661 Fed. App'x. 253, 256 (5th Cir. 2016).

[239] *Id.* at 253.

[240] *Id.* at 255.

[241] *Id.* at 256.

[242] *Id.*

[243] *Id.* at 266.

[244] *Id.* at 260.

[245] *Id.* It is not clear from the opinions whether there was any testimony as to what articles Dr. Moeller reviewed when he testified as to the "literature." The "double-bookkeeping" theory—created by Dr. Eugen Blueler, *see* DEMENTIA PRAECOX OR THE GROUP OF SCHIZOPHRENIAS (J. Zinkin trans.) (1950), has been considered positively in important contemporary research, *see, e.g.*, Louis A. Sass, *Delusion and Double Book-Keeping*, KARL JASPERS' PHILOSOPHY AND PSYCHOPATHOLOGY 125 (Thomas Fuchs, Thiemo Breyer & Christoph Mundt eds. 2014); Mads G. Henriksen & Josef Parnas, *Self-disorders and Schizophrenia: A Phenomenological Reappraisal of Poor Insight and Noncompliance*, 40 SCHIZOPHRENIA BULL. 542 (2014) ("[what] Bleuler termed 'double bookkeeping,' is, in our view, central to understanding what poor insight in schizophrenia really is." *Id.* at 542.), and this research continues to this day. *See, e.g.*, Jo Ellen Wilson et al., *Pseudodelirium: Psychiatric Conditions to Consider on the Differential for Delirium*, 33 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCE 356 (2021) ("Clinicians should also be aware of the possibility of apparent disorientation due to 'double bookkeeping' in some psychotic conditions[] . . .), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8929410/pdf/nihms-1706575.pdf [https://perma.cc/QDJ2-2W6W]; José Eduardo Porcher, *Double Bookkeeping and Doxasticism about Delusion*, 26 PHIL., PSYCHIATRY & PSYCH. 111, 118 (2019) (". . . delusions are highly heterogeneous phenomena and, thus, it should come as no surprise that some delusions are more belief-like, while others depart from stereotypical beliefs."); Michel Cermolacce et al., *Multiple Realities and*

Dr. Allen noted "several oddities in the historical presentation of Eldridge's symptoms."[246] He testified that the "combination of auditory, tactile, and visual hallucinations" were inconsistent with "genuine mental illness."[247] Moreover, the results on the "TOMM, SIMS, and M-FAST" tests suggested a "high probability that Eldridge was feigning his symptoms."[248]

Remarkably, in spite of his conclusion that the defendant was not malingering,[249] it appears that elsewhere in his testimony, Dr. Roman had conceded that there was evidence of malingering in the defendant's psychiatric history.[250] Several red flags of malingering that were admitted by Dr. Roman include the following:

1) an absence of major mental health complaints prior to the scheduling of defendant's execution date in 2009;

Hybrid Objects: A Creative Approach of Schizophrenic Delusion, 9 FRONTIERS PSYCH. (2018), https://www.frontiersin.org/articles/10.3389/fpsyg.2018.00107/full [https://perma.cc/2QZ9-ZNR5]. It is not clear at all whether testimony as to the Sass reference and the Henrickson/Parnas reference—which were available at the time of the *Eldridge* opinions—was ever presented to the Court.

[246] *Eldridge*, 661 Fed. App'x. at 261.

[247] *Id.*

[248] *Id.* Dr. Roman had dismissed the M-FAST test (the Miller Forensic Assessment of Symptoms Test) as "unreliable because it lacks the precision necessary to distinguish between genuine and feigned response patterns." Eldridge v. Thaler, No. H-05-1847, 2013 WL 416210, *8 (S.D. Tex. 2013). Further, he criticized the use of the TOMM (Test of Memory Malingering) as irrelevant because "memory is not at issue," and similarly found Dr. Allen's administration of the SIMS (Structured Interview of Mental Symptoms) test to be unreliable "because it is written at a level beyond Eldridge's reading ability." *Id.* Valid and reliable research characterizes the M-FAST as "moderately a useful assessment in classifying individuals as either honest responders or malingerers." Khodabakhsh Ahmadi et al., *Malingering and PTSD: Detecting Malingering and War Related PTSD by Miller Forensic Assessment of Symptoms Test (M-FAST)*, 13 BMC PSYCHIATRY 1 (2013). A study of twenty-one research reports on the use of this instrument concluded that an examinee should not be classified as malingering from the results of the M-FAST total score alone. David Detullio et al., *A Meta-Analysis of the Miller Forensic Assessment of Symptoms Test (M-FAST)*, 31 PSYCH. ASSESSMENT 1319 (2019). A meta-analysis of the SIMS test concluded that it may overestimate feigning in patients who suffer from schizophrenia. Alfons van Impelen et al., *The Structured Inventory of Malingered Symptomatology (SIMS): A Systematic Review and Meta-analysis*, 28 CLINICAL NEUROPSYCHOLOGY 1336 (2014). There are, of course, many other tests to discern malingering in addition to the three used by Dr. Allan. *See, e.g.*, John E. Meyers & Marie E. Volbrecht, *A Validation Of Multiple Malingering Detection Methods In a Large Clinical Sample*, 18 ARCH. CLIN. NEUROPSYCHOL. 261 (2003); Tina Hanlon Inmana & David T.R. Berry, *Cross-Validation of Indicators of Malingering: A Comparison of Nine Neuropsychological Tests, Four Tests of Malingering, and Behavioral Observations*, 17 ARCHIVES CLINICAL NEUROPSYCHOLOGY 1 (2002). It does not appear any of these were ever mentioned in the *Eldridge* litigation.

[249] *See Eldridge*, 2013 WL 416210, at *17 (S.D. Tex. 2013). "[Roman] concluded that Eldridge is not malingering."

[250] *See Eldridge*, 661 Fed. Appx. at 261.

2) many statements and behavior of defendant's during his exam with Mr. Moeller that were "more consistent with malingering than schizophrenia"; and
3) the defendant's ability to obtain "cocaine in prison" was inconsistent with "somebody with a severe psychotic disorder."[251]

In sum, the state experts both believed the defendant was malingering, and both defense experts believed the defendant was incompetent to be executed.[252]

(c) Cases Involving Questions of "Synthetic Competency."[253] — Two cases of this cohort illustrate the controversial concept of "synthetic competency":[254] *Basso* (discussed earlier for expert clash and malingering issues) and *ShisInday v. Quarterman*.[255]

In the *Basso* case, the defendant highlighted a statement of Dr. Quijano's (her expert witness) that she would "not necessarily remain competent if taken off her medication," a conclusion disagreed with by the state's expert, again, Dr. Moeller.[256] In earlier proceedings, the district court had noted that Dr. Quijano was a clinical psychologist, not a medical doctor. In contrast, Dr. Moeller, a medical doctor, disagreed with Dr. Quijano's conclusion.[257] Dr. Moeller explained that Basso's medications were "prescribed for mood disorders, not a delusional disorder."[258] The district court found Dr. Moeller's opinion "more convincing[,]" and that finding was upheld by Fifth Circuit.[259]

Markedly, there was no discussion in *any* of the six *Basso* opinions of *any* of the most important cases that deal with questions of synthetic competency, all discussed extensively earlier:[260] *Perry v. Louisiana*,[261] *Singleton v. Norris*,[262] or *Singleton v. State*.[263]

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[251] *Id.*

[252] *Id.*

[253] *See generally* section II.A.

[254] *See, e.g.*, Lyn Suzanne Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641 (2009).

[255] ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007).

[256] Basso v. Stephens, 555 Fed. App'x. 335, 343 (5th Cir. 2014).

[257] Basso v. Stephens, No. H-14-213, 2014 WL 412549, at *15–16 (S.D. Tex. 2014).

[258] *Id.* at *16.

[259] *Id.*

[260] *See supra* notes 95–127 and accompanying text.

[261] Perry v. Louisianna, 498 U.S. 38 (1990), *reh'g denied*, 498 U.S. 1075 (1991); State v. Perry, 502 So. 2d 543, 546 (La. 1986), *cert. denied,* 484 U.S. 872, *reh'g denied*, 484 U.S. 992 (1987).

[262] Singleton v. Norris, 992 S.W.2d 768 (Ark. 1999), *cert. denied*, 528 U.S. 1084 (2000).

[263] Singleton v. State, 437 S.E.2d 53, 60–62 (S.C. 1993).

In the *ShisInday* case, the defendant had been convicted of capital murder in Texas and sentenced to death in 1982.[264] Although the Circuit conceded that he had a "long history of mental problems" and "mental illness,"[265] it simply relied on its decision in *In re Neville*[266]—a two paragraph per curiam pre-*Panetti* decision that had rejected the defendant's arguments that *Atkins* ought be extended to defendants with mental illness[267]—to similarly reject ShisInday's arguments, as he "does not claim that he is insane."[268]

Synthetic competency issues were also raised in several of the state and district court cases to which we have previously referred.[269] In *Billiot v. Epps*,[270] the defendant had argued that he could not be "restored to competency through forcible medication" and could not be executed "if his competence is synthetic or induced by medication."[271] The district court, which had entered an indefinite stay of execution, based on its "fundamental belief that Billiot is incompetent to be executed,"[272] held that, if the State were to move to vacate the stay (on the theory that the defendant had regained his competence), the court would then consider any claim by Billiot regarding the "method by which Billiot's competence was restored."[273] In *Staley v. Dretke*,[274] a pre-*Panetti* decision, the federal court had ruled to vacate the defendant's stay of execution on the grounds that the defendant "failed to make a substantial showing that he was incompetent."[275] Ultimately, however, the Texas Court of Criminal Appeals ordered a stay, finding that the trial court was unauthorized to forcibly medicate an incompetent death row inmate to achieve competency for execution.[276]

Finally, in the case of Larry Hatten, some five years after the Fifth Circuit rejected his final death penalty sentence appeal,[277] a case in which the defendant was forcibly administered anti-psychotic medication during his

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[264] ShisInday v. Quarterman, 511 F.3d 514, 515 (5th Cir. 2007).

[265] *Id.* at 514, 519, 521. In earlier proceedings, a writ of habeas corpus had been granted to the defendant because, among other reasons, he had been involuntarily medicated *at trial* "without [the Court] making a proper inquiry into his mental state." *Id.* at 519.

[266] In re Neville, 440 F.3d 220, 221 n.1 (5th Cir. 2006).

[267] *Id.* at 221.

[268] *ShisInday*, 511 F.3d at 521.

[269] *See, e.g.*, Basso v. Stephens, No. H-14-213, 2014 WL 412549 (S.D. Tex. 2014).

[270] Billiot v. Epps, No. 86CV659TSL, 2010 WL 1490298 (S.D. Miss. 2010).

[271] *Id.* at *3.

[272] *Id.* at *5.

[273] *Id.*

[274] Staley v. Dretke, 126 Fed. App'x. 667 (5th Cir. 2005).

[275] *Id.* at 669.

[276] Staley v. State, 420 S.W.3d 785 (Tex. Ct. Crim. App. 2013).

[277] *See* Hatten v. Quarterman, 570 F.3d 595 (5th Cir. 2009).

trial,[278] the Texas Court of Criminal Appeals, in an unreported case, stayed his execution, noting that he had been forcibly medicated while incarcerated.[279]

The Supreme Court *had* carefully considered the impact of involuntarily medicating a mentally ill defendant while on trial in 1992 in *Riggins v. Nevada*.[280] In *ShisInday*, however, the Fifth Circuit merely concluded that the admission of testimony when ShisInday was in a medicated state "did not have a substantial and injurious effect on the verdict;"[281] in *Basso*, it found that the medication was consensual, thus distinguishing *Riggins*,[282] notwithstanding defendant's argument that the state had "deceived counsel by not informing them about the medication[.]"[283] In short, the *Riggins* issues were given less than short shrift by the Circuit in these cases.[284]

(d) Cases Where the Court Found There Was Not Strong Enough Evidence of Mental Illness. — In two of the cases in the cohort we have studied, the courts ruled that there was not strong enough evidence of mental illness to make out a successful *Panetti* claim.[285] In *Wood*, the defendant had based his *Panetti* claim on a delusional disorder; however, the district court found that the defendant suffered from an antisocial personality disorder and

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[278] *See id.* at 604 n.9. *See also* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J.L., ETHICS & PUB. POL'Y 239, 249–54 (1994) (discussing Riggins v. Nevada, 504 U.S. 127 (1992) and the question of the impact on jurors of a defendant being involuntarily medicated at trial).

[279] *See* Kristin Houle, *Texas Court of Criminal Appeals Stays Execution of Larry Hatten,* TEX. COALITION ABOLISH DEATH PENALTY (Oct. 14, 2014), https://tcadp.org/2014/10/14/texas-court-criminal-appeals-stays-execution-larry-hatten/ [https://perma.cc/AT25-L2CH].

[280] *Riggins*, 504 U.S. 127 (1992).

[281] ShisInday v. Quarterman, 511 F.3d 514, 524 (5th Cir. 2007).

[282] Basso v. Thaler, 359 Fed. App'x. 504, 507–08 (5th Cir. 2010).

[283] Basso v. Quarterman, H-07-3047, 2009 WL 9083708, at *16 (S.D. Tex. 2009). In a prior state proceeding, the court had found that defense counsel's lack of notice regarding the appellant's medication "was due to the appellant's failure to inform her attorneys of her treatment." Basso v. State, No. 73,672, 2003 Tex. Crim. App. LEXIS 3, at *11 (Tex. Ct. Crim. App. 2003).

[284] *Id.*

[285] Even prior to *Panetti*, legal scholars had urged that—following the lead of *Atkins v. Virginia* (prohibiting execution of persons with mental retardation as it was known then)—evidence of mental illness should be a similar bar to execution. *See, e.g.*, Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1133–34 (2005); Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 283–84 (2006); John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing:* Atkins*, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93 (2003); Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 313 (2003); Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV.1493, 152–55 (2009). That position was endorsed by, inter alia, the ABA's House of Delegates, as well as by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill [now known as NAMI]. *Id.*

thus did not qualify as incompetent for execution.[286] The district court "credited the expert's opinion who testified in accordance with the district court's own experience, the court concluded that Wood does not suffer from a delusional disorder, but rather has a highly manipulative antisocial personality and thus is ineligible for relief under *Panetti*."[287] Following an evidentiary hearing, the district court ruled that the defendant failed to prove that he had a mental illness and failed to show he was "incompetent for execution under *Panetti*."[288]

Of special interest here was what led the district court judge to the ultimate conclusion: "Without citing empirical data, the court found that virtually all of the Texas death row inmates with whom this Court has dealt have been diagnosed by qualified mental health professionals with antisocial personality disorder."[289] The court goes on to say, "[i]t has been this Court's experience that the vast majority of Texas prison inmates in general, and Texas death row inmates in particular, demonstrate several significant characteristics of antisocial personality disorder, specifically, an unwillingness to accept responsibility for their criminal conduct."[290] As we discussed above, this is a textbook example of the dangers of false "ordinary common sense."[291] "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."[292]

In *Simon*, the Court again suggested that there was not strong evidence of mental illness.[293] Dr. Goff, the defendant's expert, found that the defendant's medical records quite "'strongly suggest the occurrence of a significant neuropsychological event'" around the time the defendant was admitted to the infirmary.[294] This event, a severe head injury, "may well constitute a mental illness or defect that is preventing him from comprehending the reasons for the penalty imposed upon him[.]"[295]

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[286] Wood v. Stephens, 540 Fed. App'x. 422, 424 (5th Cir. 2013).

[287] *Id.*

[288] Wood v. Stephens, 619 Fed. App'x. 304, 305 (5th Cir. 2015). Also noted above, the defendant's expert, Dr. Michael Roman, concluded Wood had a delusional disorder as defined by the DSM-IV-TS, that made him incompetent to be executed. *Id.* at 306. In contrast, the state's expert, Dr. Mary Alice Conroy, found, after the two-day evidentiary hearing, that "Wood does not suffer from a delusional disorder or any other mental illness." *Id.*

[289] *Wood*, 540 Fed. App'x. at 424.

[290] Wood v. Thaler, 787 F. Supp. 2d 458, 496 (W.D. Tex. 2011).

[291] *See* Perlin & Lynch, *My Brain*, *supra* note 21, at 93–94 (". . . judges treated biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges' pre-existing positions."). *See infra* notes 293–97.

[292] Perlin, *"And I See Through Your Brain"*, *supra* note 133, at 21 n.84.

[293] Simon v. Fisher, 641 Fed. App'x. 386, 390 (5th Cir. 2016).

[294] Simon v. McCarty, No. 2:11-CV-111-SA, 2014 WL 7338860, at *3 n.4 (N.D. Miss. Dec. 22, 2014).

[295] *Id.* at *36.

However, based on the state's contrary affidavits, the Mississippi Supreme Court denied Simon's appeal because Dr. Goff's report was "equivocal," finding "uncertainty" in Dr. Goff's opinion.[296] As noted above, the court also ruled that the defendant "ha[d] no history of mental illness" and concluded that the district court did not clearly err in finding the defendant competent to be executed.[297]

As previously discussed briefly, the relationship between traumatic brain injury and the death penalty is a profound one,[298] and it is often one that is missed by evaluators and correctional staff.[299] By way of example, and importantly, these injuries are not always reported in medical records.[300] The disregard of the finding of the defendant's expert in this case may have been a critical step on the litigation's entire path.[301]

(e) Summary of Case Results. — State experts were ruled more credible in 100% (4/4) of the cases (see *Eldridge*, *Basso*, *Green*, and *Wood*) in which this issue arose.[302] Defense experts made concessions in 44% (4/9) of the cases.[303] In two of the cases, the expert purportedly conceded to possible malingering (*Simon* and *Eldridge*).[304] In one case, the expert acknowledged not using the proper diagnostic test for mental illness (*Wood*).[305] In the other concession case, the defendant admitted and the expert agreed that he had a rational understanding of his impending execution (*Green*).[306]

The issue of synthetic competency arose in 22% (2/9) of the cases (see *Basso* and *ShisInday*).[307] This issue was also prevalent in 50% (2/4) of the

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[296] Simon v. Epps, 463 Fed. App'x. 339, 348 n.6 (5th Cir. 2012). Later, the Fifth Circuit ruled that the defendant's mental illness/memory problem was feigned. *Simon*, 641 Fed. App'x. at 390 (relying on testimony by the state's expert that the defendant "was malingering his memory loss." *Id.* at 388).

[297] *Id.* at 390.

[298] *See generally* Lynch, Perlin & Cucolo, *supra* note 8.

[299] *Id.* at 216.

[300] *See, e.g.*, Robert E. Hanlon et al., *Neuropsychological Features of Indigent Murder Defendants and Death Row Inmates in Relation to Homicidal Aspects of Their Crimes*, 25 ARCHIVES CLIN. NEUROPSYCHOLOGY 1, 6 (2009) (87% of the sample of murder defendants and death row inmates reported a history of closed head trauma; however, only 10% had a documented history of traumatic brain injury, based on medical and radiological records).

[301] *Simon*, 463 Fed. App'x. at 342.

[302] *See* Eldridge v. Stephens, 599 Fed. App'x. 123 (5th Cir. 2015); Basso v. Stephens, 555 Fed. App'x. 335 (5th Cir. 2014); Green v. Thaler, 699 F.3d 404 (5th Cir. 2012); Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015).

[303] *Simon*, 463 Fed. App'x. 339; *Eldridge*, 599 Fed. App'x. 123; *Wood*, 619 Fed. App'x. 304; *Green*, 699 F.3d 404.

[304] *Simon*, 463 Fed. App'x. 123; *Eldridge*, 599 Fed. App'x. 123.

[305] *But see supra* note 182 and accompanying text, suggesting that he was in error when he made this concession.

[306] *But see supra* notes 193–95 and accompanying text.

[307] *See Basso*, 555 Fed. App'x. at 343; ShisInday v. Quarterman, 511 F.3d 514, 521 (5th Cir. 2007).

district court cases (see *Billiot* and *Staley*).[308] Claims by the state arguing malingering was present in 33% (3/9) of the cases (see *Eldridge*, *Basso*, and *Simon*).[309] Finally, there was a perceived lack of strong evidence of mental illness in 22% (2/9) cases (see *Simon* and *Wood*).[310]

(f) What Was Not Considered—Neuroscience and Adequacy of Counsel Issues. — Of interest is the fact that the authors could not find a single case in this cohort in which the defendant introduced neuroscience testimony,[311] nor did the authors find any "*Panetti* case" in which it was alleged that counsel was inadequate under the doctrine of *Strickland v. Washington*.[312]

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[308] *See* Billiot v. Epps, No. 1:86CV549TSL, 2010 WL 1490298, at *3 (S.D. Miss. 2010); Staley v. Dretke, No. 4:99-CV-186-Y, 2003 WL 22290536 (N.D. Tex. 2003).

[309] *See Eldridge*, 599 Fed. App'x. at 132–33; *Basso*, 555 Fed. App'x. at 341–42; *Simon*, 641 Fed. App'x. at 388.

[310] *Simon*, 641 Fed. App'x. at 390; ; *Wood*, 619 Fed. App'x. at 305.

[311] Co-author MLP had incorrectly predicted, some eleven years ago, that there would be a turn to neuroscience in such cases. *See* Perlin, *Good and Bad*, *supra* note 78, at 688, stating "As more and more attention is paid to the role of neuroimaging in the courts, it is inevitable that this testimony will be used (or at least, sought to be used) at such hearings, both by defendants and by prosecutors. *See generally* Perlin, *In These Times*, *supra* note 135.

[312] In a district court decision in *Battaglia* that preceded the litigation on the *Panetti* issue that we discuss in this Article, the defendant unsuccessfully argued a *Strickland* claim on the merits. *See* Battaglia v. Stephens, No. 3-09-CV-1904-B, 2013 WL 5570216 (N.D. Tex. 2013). Subsequently, the Fifth Circuit did find that the defendant's counsel had "abandoned" him in the context of a state competency proceeding, and then appointed new counsel and stayed execution. Battaglia v. Stephens, 824 F.3d 470, 473–75 (5th Cir. 2016). There was no discussion of counsel adequacy in the context of the defendant's *Panetti* claims. Later, after a further stay of execution, the state court ruled that the defendant was competent to be executed. *See* Battaglia v. State, 537 S.W.3d 57 (Tex. Crim. Ct. App. 2017). Battaglia was then executed. *See supra* note 147. The state court discussed both the holding and the procedural history of Panetti's case extensively. *See Battaglia*, 537 S.W.2d at 65–68. The state court applied the *Panetti* holding to Battaglia's case. *See id.* at 81. They then concluded that the defendant was competent to be executed. *Id.* at 96. There was no *Strickland* issue discussed in this state court opinion. One case in this cohort has been remanded to state court for further proceedings on questions involving, inter alia, adequacy of counsel. Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. 2009). Other cases have cited *Panetti* and *Strickland* on separate issues. *See, e.g.*, e.g., Spicer v. Cain, No. 18-60791, 2021 WL 4465828 (5th Cir. 2021); Ramey v. Lumpkin, 7 F.4th 271 (5th Cir. 2021); Smith v. Davis, 927 F.3d 313 (5th Cir. 2019); Busby v. Davis, 925 F.3d 699 (5th Cir. 2019). But none on an application of *Strickland* to any of the *Panetti* issues discussed in this Article. Two district court decisions have considered aspects of *Panetti* beyond the scope of this Article in the context of a *Strickland* claim. *See* Blue v. Thaler, No. H-05-2726, 2010 WL 8742423 (S.D. Tex. 2010) (suggesting *Panetti*'s ripeness language inapplicable in cases involving alleged *Strickland* claims); Freeney v. Stephens, No. 4:14-CV-373, 2016 WL 320768, at *10 n.4 (S.D. Tex. 2016) (that aspect of *Panetti* that deprives the antecedent state court decision of the deference to which it is usually due is inapplicable in cases involving a run-of-the-mill *Strickland* claim). *See also* Jones v. Stephens, 541 Fed. App'x. 399, 413 (5th Cir. 2013) (describing defendant (unsuccessfully) relied on *Panetti* for an ineffectiveness of counsel claim). *See* PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 1 (describing the quality of defense counsel in death penalty cases involving defendants with mental disability in general). *See* Perlin, Harmon & Chatt, *supra* note 15, at 309 (providing representation in such cases in the Fifth Circuit in particular.

This is all the more perplexing, given the results of the exhaustive study done by Professor Deborah Denno, finding that (1) between 1992 and 2012, there were 800 criminal cases in which neuroscience evidence *was* introduced,[313] and that (2) in this universe, there was an "unusually high number of successful ineffective assistance of counsel claims regarding the omission or misuse of neuroscientific evidence."[314] Significantly, two-thirds of this universe (366 cases or 66.18%) began as capital cases in which the defendant was eligible for the death penalty even if that sentence was later reduced.[315]

It is ironic that, over a decade ago, one of the authors (MLP) focused on the potential impact that then-recent developments in neuroimaging[316] might have on *Panetti* cases,[317] and concluded that his answer was a "qualified 'maybe,' dependent on multiple interlocked variables."[318] It appears that these developments have had virtually no impact whatsoever.

"The story of how the Fifth Circuit has dealt with *Strickland* appeals in cases involving defendants with mental disabilities facing the death penalty is bizarre and frightening." *Id.* at 308.).

[313] Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493 (2015).

[314] Debora W. Denno, *How Courts in Criminal Cases Respond to Childhood Trauma*, 103 MARQ. L. REV. 301, 352 (2019).

[315] Denno, *supra* note 313, at 502.

[316] *See* Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016) [hereinafter Pelin & Lynch, *In the Wasteland*]; Perlin & Lynch, *My Brain*, *supra* note 21; Michael L. Perlin & Alison J. Lynch, *"Some Mother's Child Has Gone Astray": Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, 59 FAM. CT. REV. 478 (2021) [hereinafter Perlin & Lynch, *Some Mother's Child*].

[317] Perlin, *Good and Bad*, *supra* note 78, at 671.

[318] These variables included the following:

- Will defense counsel seek to introduce such testimony, and what, exactly, can we expect such testimony will say?
- In cases involving indigent defendants, will *Ake v. Oklahoma*, be interpreted expansively or restrictively?
- Will prosecutors seek to introduce such testimony to rebut defendants' *Panetti* applications?
- To what extent are judges more or less impervious to the "dazzle" or "Christmas tree effect" of such testimony than are jurors? See Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 891–92 (2009).
- How will such testimony be dealt with if there is a challenge under *Daubert*? Daubert v. Merrill Dow Pharmaceuticals Inc, 509 U.S. 579 (1993) (in determining whether to admit scientific evidence, the court must consider three factors: (1) the reliability, (2) the relevancy, and (3) the possible prejudicial nature of the evidence). Most recent scholarship tells us that the *Daubert* game is "fixed" against criminal defendants. See Susan Rozelle, Daubert, *Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 598 (2007) ("the game of scientific evidence looks fixed."). According to a recent piece studying *Daubert* outcomes in criminal cases in Wisconsin, the state was successful in all 134 criminal appellate cases on *Daubert* issues. *See* Michael D. Cicchini, *The Daubert Double Standard*, 2021 MICH. ST. L. REV. __ (forthcoming), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787772.

V. ALTERNATIVE JURISPRUDENTIAL FILTERS [319]

A. On Therapeutic Jurisprudence[320]

Therapeutic jurisprudence [hereinafter "TJ"] focuses on the law's influence on emotional life and psychological well-being,[321] and "asks us to look at law as it actually impacts people's lives."[322] It requires that we look at the "real world" implications of the way the legal system regulates individuals' behavior, most importantly, the way it regulates the lives and behavior of those who are marginalized.[323]

TJ's aim is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.[324] There is an inherent tension in this

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- How will fact-finders deal with such testimony in cases where the evidence revealed by neuroimaging testimony does not comport with their (false) ''ordinary common sense'' view of ''crazy'' criminal defendants?

See Michael L. Perlin, *"I've Got My Mind Made Up:" How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 98 (2018) [hereinafter Perlin, *Mind Made Up*].

[319] In addition to therapeutic jurisprudence—discussed extensively *infra* notes 320–33 and accompanying text—there are other alternative jurisprudences (procedural justice; restorative justice) that ought to be considered in assessments of whether aspects of the law are, in fact, fair. *See* Michael L. Perlin, *"I Hope the Final Judgment's Fair": Alternative Jurisprudences, Legal Decision-Making, and Justice*, *in* THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING (Monica Miller et al eds. 2022). Although there is significant literature about both of these alternative jurisprudences in the context of the death penalty in general (*see, e.g.*, Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381 (2007) (discussing procedural justice); C. Crystal Enekwa, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411 (2013) (discussing restorative justice)), there is none in the context of *Panetti* in particular, or competence to be executed in general.

[320] This section is largely adapted from Perlin & Lynch, *Some Mother's Child*, *supra* note 316, at 482. Further, it distills the work of co-author MLP over the past twenty-eight years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993) [hereinafter Perlin, *What Is*]. *See generally* Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. L. REV. 1135 (2017); Michael L. Perlin, *"Changing of the Guards": David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT'L J.L. & PSYCHIATRY 3 (2019).

[321] *See* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in DENNIS P. STOLLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000).

[322] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[323] *See, e.g.*, Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431 (2017).

[324] *See, e.g.*, Michael L. Perlin, *"And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735,

inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[325] To be clear, "[a]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[326]

TJ, rather, seeks to use the law to empower individuals, enhance rights, and promote well-being.[327] It is "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[328] It supports an ethic of care,[329] and is inherently "collaborative and interdisciplinary."[330]

One of the keystones of TJ is a commitment to dignity.[331] As Professor Carol Zeiner has noted, "[t]herapeutic jurisprudence highlights the worth and dignity of the individual human being."[332] Dignity means that people "possess an intrinsic worth that should be recognized and respected, and that

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751 (2005); Heather Ellis Cucolo & Michael L. Perlin, *''Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125, 165 (2015).

[325] *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); *see also* David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCH. 179 (1996).

[326] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000) [hereinafter Perlin, *Law of Healing*]; Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

[327] *See, e.g.*, Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 278 (2014).

[328] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341 (Marjorie A. Silver ed., 2007) [hereinafter Winick, *Overcoming Psychological Barriers*]; Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006) [hereinafter Winick & Wexler, *Use of Therapeutic*]. The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). On how to practice law from a TJ perspective, *see* articles and essays collected in STOLE ET AL., *supra* note 321.

[329] *See, e.g.*, Winick & Wexler, *Use of Therapeutic*, *supra* note 328, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

[330] *Therapeutic Jurisprudence – A Strong Community and Maturing Discipline*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 15, 18 (Nigel Stobbs, Lorana Bartels & Michel Vols, eds. 2019).

[331] BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005); *see also* Perlin, *What Is*, *supra* note 320, at 633.

[332] Carol L. Zeiner, *Should Therapeutic Jurisprudence Be Used to Analyze Impacts of Legal Processes on Government?*, 28 ST. THOMAS L. REV. 1, 6 (2016).

they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth."[333]

*B. Therapeutic Jurisprudence and the Dispositive Factors in Post-*Panetti *Cases in the Fifth Circuit*

1. Introduction. — A review of the cohort of cases we examine here reveals that the principles of therapeutic jurisprudence are utterly ignored. In the words, again, of Professor Stephen Morse, writing in this context, they are "unfair and offensive to the dignity of criminal justice."[334] In Justice Marshall's opinion in *Ford v. Wainwright*, he focused on how the Eighth Amendment is the tool by which we "protect the dignity of society itself from the barbarity of exacting mindless vengeance."[335] This protection was absent from Panetti's initial trial,[336] and, again, from the cohort of post-*Panetti* cases discussed here. Again, this absence violates any concept of therapeutic jurisprudence.[337]

2. TJ and Expert Believability. — It is well known that in another area of the law involving litigants with severe mental disabilities, studies show that judges "rubber stamp" the conclusion of state clinical witnesses in between 79% and 100% of all cases, most frequently exceeding 95%.[338] One of the authors (MLP) has written about how TJ demands a re-evaluation of the role of expert witnesses in death penalty cases who too often have testified on behalf of the state, there is no other word, fraudulently.[339]

Just as importantly, courts are teleological in cases involving all litigants with mental disabilities. Judges decide cases in outcome-determinative ways;

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[333] Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585, 617–18 (2021) (quoting Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009)).

[334] Morse, *supra* note 90, at 642.

[335] Ford v. Wainwright, 477 U.S. 409 (1986).

[336] *See generally* Richard Bonnie, Panetti v. Quarterman*: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007).

[337] *See* Perlin, *Good and Bad*, *supra* note 78, at 688 (concluding that the Supreme Court's opinion in *Panetti* "frontally considers the implications of this dilemma.").

[338] Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 41–42 (1999) (citing, inter alia, Norman G. Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 213 (1977); Jan C. Costello, *Why Would I Need A Lawyer? Legal Counsel and Advocacy for People with Mental Disabilities*, *in* LAW, MENTAL HEALTH AND MENTAL DISORDER 15, 17 (Bruce D. Sales & Daniel W. Shuman eds., 1996)).

[339] *See* Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U.L. REV. 1437 (2016) (discussing the spurious use of "ethnic adjustments" in cases

social science that enables judges to satisfy predetermined positions is privileged, while data that would require judges to question such ends are rejected.[340] Empirical research tells us that judges treat biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges' pre-existing positions.[341] In short, they privilege such evidence (where that privileging serves what they perceive as a socially-beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness.[342]

In the relevant cases in the cohort studied, there is not an iota of evidence that suggests any valid and reliable reason for the court to have privileged the testimony of the state witnesses and subordinated the testimony of the defense witnesses, other than because that gambit allowed them to decide the case in the way they wished.[343] This is truly a fatal misuse of what we have characterized as "false ordinary common sense."[344]

3. TJ and Expert Funding. — Although the Supreme Court has twice decided cases granting indigent defendants access to expert assistance,[345] lower court interpretations have, by and large, been "penurious."[346] Ironically, in a recent article about the increase in criminal cases involving

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involving defendants with intellectual disabilities). "The worthless and baseless testimony of Dr. James Grigson on questions of future dangerousness, and how that testimony led inexorably to the improper executions of defendants with mental disabilities, is well known." Perlin, *Merchants and Thieves*, *supra* note 31, at 1528 (citing PERLIN, MENTAL DISASBILITY AND THE DEALTH PENALTY, *supra* note 1, at 19–28). Dr. Grigson was decertified by both the American Psychiatric Association and the Texas Society of Psychiatric Physicians in 1995, but he was called by the state as an expert witness in at least fifty-seven such cases from 1995 until his death in 2004. *Id.* at 1528.

[340] Perlin, *Mind Made Up*, *supra* note 318, at 82; *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 549 (1991) ("Some commentators suggest that the Court's use of science is disingenuous; these critics believe that the Court cites empirical research when it fits the Court's particular needs, but eschews it when it does not.").

[341] Perlin & Lynch, *In the Wasteland*, *supra* note 316, at 333–34 (discussing the research reported in Nicholas Scurich & Adam Shniderman, *The Selective Allure of Neuroscientific Explanations,* 9 PLOS ONE (Sep. 10, 2014), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107529 [https://perma.cc/97DW-XF85]).

[342] Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 599–600 (2008); *see also* JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 156 (1992).

[343] *See* Perlin & Lynch, *My Brain*, *supra* note 21, at 93–94.

[344] *See, e.g.*, *id.* at 97–99.

[345] *See supra* notes 130–33 (discussing Ake v. Oklahoma, 470 U.S. 68 (1985) and McWilliams v. Dunn, 137 S. Ct. 1790 (2017)).

[346] Perlin, *Merchants and Thieves*, *supra* note 31, at 1506 n.19 (noting that this has caused some of those cases to become "an utter sham.").

neuroscience evidence, one of the authors (MLP) and another colleague concluded that this expansive use of such testimony "will be a good thing *only* if . . . the Supreme Court's holding in *Ake* is expanded so that lawyers representing indigent defendants . . . receive court approval for expert funding."[347]

The cases in the cohort we have studied here basically ignore the teachings of *Ake* and *McWilliams*, as well as, in the case of *Powers*, the American Bar Association. Once more, they mock the principles of therapeutic jurisprudence.

4. TJ and Malingering. — In an earlier article about other Fifth Circuit cases, the authors concluded that "the tiresome and threadbare allegations of malingering . . . basely, and disgracefully, violate the most minimal standards of therapeutic jurisprudence."[348] Elsewhere, one of the authors (MLP) has concluded that courts' teleological decisions in the area of malingering law—employing outcome-determinative reasoning, in which social science that enables judges to satisfy predetermined positions is privileged, while data that would require judges to question such ends are rejected—violate TJ.[349]

In each of the relevant cases discussed in this Article, the trial judges accepted at face value the states' experts who testified that the defendants malingered.[350] In none of the opinions is there any consideration of the extensive valid and reliable evidence that tells us that even "*clinicians* working in forensic settings, who are familiar with malingering, have a high

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[347] Perlin & Lynch, *My Brain*, *supra* note 21, at 96–97. *Compare* Giannelli, *supra* note 130, *with* Lucas, *supra* note 132 (criticizing limiting interpretations of *Ake*).

[348] Perlin, Harmon & Wetzel, *supra* note 15, at 496. *See also* Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCH., PUB POL'Y, & L. 1034 (1999) (concluding that a professional who is not part of the offender's treatment team might be called to counter any claim of malingering). *See* Perlin, *Deceived Me*, *supra* note 131 (discussing the need for multiple experts in such cases).

[349] Perlin, *Mind Made Up*, *supra* note 318, at 81.

[350] It appears that three of the five defendants in the cohort of cases in which malingering was raised were African American. *See Mississippi Department of Corrections Offender Data Sheet*, MISS. DEP'T CORR., https://www.mdoc.ms.gov/Death-Row/DeathRowInmates/Simon,%20Robert%20Jr.pdf [https://perma.cc/HMG2-WBJ9]; *George Cornelius Eldridge*, TEX. DEP'T CORR., https://www.tdcj.texas.gov/death_row/dr_info/eldridgegerald.jpg [https://perma.cc/963X-FKMG; *Texas Man Executed for Killing 12-Year-Old Girl*, USA TODAY (Oct. 11, 2012, 12:30 AM), https://www.usatoday.com/story/news/nation/2012/10/11/texas-execution/1626179/ [https://perma.cc/S2XB-6AA7]. There is substantial evidence that clinicians may overdiagnose malingering in black defendants. *See* Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 L. & HUM. BEHAV. 375, 382 (1989) (discussed in this context in Alison J. Lynch & Michael L. Perlin, *"I See What Is Right and Approve, But I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. 453, 473 n.118 (2021)).

misidentification rate."[351] By way of examples, one well-known study reports that only 8% of defendants studied actually malingered,[352] whereas another study tells us that only *1.5%* met the criteria for malingering.[353]

Interestingly, the Supreme Court has taken a more nuanced view. In *McWilliams*, in ruling that the defendant had the right to an expert witness to "help . . . the defense evaluate the [assigned doctor's] report [and defendant's] medical records and translate these data into a legal strategy,"[354] it noted that his "purported malingering was not necessarily inconsistent with mental illness."[355] There is no evidence that any of the cohort of cases that were decided after *McWilliams* under study here ever considered this language. The aim of TJ—to maximize "psychological wellness"[356]—is utterly ignored.

5. TJ and Synthetic Competency. — Following the decision in *State v. Perry*,[357] Professors David Wexler and Bruce Winick raised the issue of the "therapeutic implications of permitting the state to coercively treat a defendant found incompetent to be executed."[358] This has been an astonishingly-under-considered topic.[359] In an important article written nearly thirty years ago, Winick set out a strong case as to why medicating prisoners to make them competent to be executed violated TJ tenets.[360] Winick looked at a variety of factors including the consequences to the "healing professions" that would have to administer this medication; the way

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[351] JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY: LAW, EVIDENCE, AND TESTIMONY 243 (2007).

[352] Dustin B. Wygant et al., *Association of the MMPI-2 Restructured Form (MMPI-2-RF) Validity Scales with Structured Malingering Criteria*, 4 PSYCH. INJ. & L. 13, 18 (2011).

[353] Tayla T. C. Lee et al., *Examining the Potential for Gender Bias in the Prediction of Symptom Validity Test Failure by MMPI-2 Symptom Validity Scale Scores*, 24 PSYCH. ASSESSMENT 618, 621 (2012). Both the Wygant study (*see* Wygant, *supra* note 352) and the Lee study are discussed in this context in GERALD YOUNG, MALINGERING, FEIGNING, AND RESPONSE BIAS IN PSYCHIATRIC/PSYCHOLOGICAL INJURY: IMPLICATIONS FOR PRACTICE AND COURT 44–45 (2014), and in Gerald Young & Eric Drogin, *Psychological Injury and Law I: Causality, Malingering, and PTSD*, 3 MENTAL HEALTH L. & POL'Y J. 373, 408 (2013).

[354] McWilliams v. Dunn, 137 S. Ct. 1790, 1800 (2017).

[355] *Id.*

[356] *See* Brookbanks, *supra* note 328, at 329–30.

[357] State v. Perry, 502 So. 2d 543, 546 (La. 1986). *See supra* section II.A.

[358] David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 993 (1991) [hereinafter Wexler & Winick, *Therapeutic Jurisprudence*]. *See also* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues,* 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 226 (1992).

[359] *See* Bruce J. Winick, *Competency to Be Executed: A Therapeutic Jurisprudence Perspective*, 10 BEHAV. SCI. & L. 317 (1999) [hereinafter Winick, *Competency*]. *See infra* notes 360–63 and accompanying text. There has been virtually no literature on this topic since.

[360] Winick, *Overcoming Psychological Barriers*, *supra* note 328.

that it would dehumanize the prisoner; the likelihood that the prisoner would seek to resist and frustrate such treatment;[361] and further urged that the then-recent case of *Perry v. Louisiana*[362] suggested a new "research agenda for social scientists."[363] But there has been virtually no literature about this important topic—from any perspective—since the *Panetti* case.[364]

And the decisions considered here do not take these issues seriously in the least, thus, once more, ignoring the principles of therapeutic jurisprudence. Certainly, the admonitions of Professors Wexler and Winick saying "the constitutionality of coercive treatment of death row inmates found incompetent to be executed,"[365] in which they offered lists of TJ-focused questions designed to help answer and foster sound legal rules and rulings,[366] have not been the subject of thoughtful consideration by the courts.

6. TJ and the Future. — It is clear to us that the Fifth Circuit has not, even remotely, factored in the teachings of therapeutic jurisprudence in its post-*Panetti* decisions. These cases reflect a remarkable lack of individualization in the court's decision-making process:

- the state's witness says the defendant was malingering, and, ergo, the defendant malingered;[367]

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[361] *Id.* at 333. This aspect of Winick's article is considered carefully in Jamie Mickelson, *"Unspeakable Justice": The Oswaldo Martinez Case and the Failure of the Legal System to Adequately Provide for Incompetent Defendants*, 48 WM. & MARY L. REV. 2075, 2096–97 (2007).

[362] Perry v. Louisianna, 494 U.S. 1015 (1990). *See also supra* notes 98–114.

[363] Winick, *Overcoming Psychological Barriers*, *supra* note 328, at 337. Over two decades ago, co-author MLP relied on Winick's article in arguing that the underlying question "screams out for analysis." Perlin, *Law of Healing*, *supra* note 326, at 432.

[364] For other pre-*Panetti* (non-TJ-focused) literature, *see, e.g.*, Kirk Heilbrun & Harry A. McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 205 (1988); Mark A. Small & Randy Otto, *Evaluations of Competency to be Executed: Legal Contours and Implications for Assessment*, 18 CRIM. JUST. & BEHAV. 146 (1991); Patricia A. Zapf, Marcus T. Boccaccini & Stanley L. Brodsky, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 BEHAV. SCI. & L. 103 (2003); Mark Cunningham, *Special Issues in Capital Sentencing*, 2 APPL. PSYCH. CRIM. JUST. 205 (2006); Kirk Heilbrun, *The Assessment of Competency for Execution: An Overview*, 5 BEHAV. SCI. & L. 383 (1987); Mark Cunningham, *Competence to be Executed [Case Report]*, *in* FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK 96 (Kirk Heilbrun, Geoffrey Marczyk & David DeMatteo eds. 2002).

[365] Wexler & Winick, *Therapeutic Jurisprudence*, *supra* note 358, at 990.

[366] Although Professor David Yamada recently cited this discussion to reflect an important part of TJ's "initial foundational base," *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. MIAMI L. REV. 660, 671 (2021), other than Professor Winick's 1999 article, *see* Winick, *Competency*, *supra* note 359, there has been virtually no literature on this topic since.

[367] *E.g.*, Basso v. Stephens, 555 Fed. App'x. 335 (5th Cir. 2014); Simon v. Fisher, 641 Fed. App'x. 386 (5th Cir. 2016); Eldridge v. Davis, 661 Fed. App'x. 253 (5th Cir. 2016).

- the state seeks to involuntarily medicate the prisoner to make him competent to be executed, and such medication is ordered;[368]
- the state witness comes to a conclusion about the defendant, and that conclusion is endorsed;[369] and
- the state opposes funding for experts—funding that clearly would come within the ambit of both *Ake* and *McWilliams*—and that funding is denied.[370]

In the aggregate, these decisions reflect an abject level of *stereotyping* on the part of the court, and this stereotyping starkly reflects how this bias, coupled with judges' use of false "ordinary common sense,"[371] has a significant impact on their decision-making processes.[372] On the other hand, if the court embraced TJ principles, each of these decision-making "pressure points" could have been invigorated with new options and individualized decision-making.

First, as stated flatly by Judge Juan Ramirez and Professor Amy Ronner, "the right to counsel is . . . the core of therapeutic jurisprudence."[373] As the authors discussed extensively in a previous article on the Fifth Circuit's wanton disregard of effectiveness-of-counsel issues in the context of the *Strickland* case, "any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective."[374] David Wexler and Bruce Winick foresaw this nearly thirty years ago (applying TJ to cases involving incompetent death row inmates),[375] yet, the Fifth Circuit has, basically, paid no attention to this.

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[368] *E.g.*, *Basso*, 555 Fed. Appx. 335; ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007).

[369] *E.g.*, Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015); *Simon*, 641 Fed. App'x. 386.

[370] *E.g.*, Powers v. Epps, No. 2:07CV20HTW, 2009 WL 901896 (S.D. Miss. 2009); Battaglia v. Stephens, 824 F.3d 478 (5th Cir. 2016); Charles v. Stephens, 612 Fed. App'x. 214 (5th Cir. 2015).

[371] *E.g.*, *Powers*, 2009 WL 901896; *Battaglia*, 824 F.3d 478; *Charles*, 612 Fed. Appx. 214.

[372] *See, e.g.*, Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC'Y REV. 202 (2019); Colleen M. Berryessa, *Judges' Views on Evidence of Genetic Contributions to Mental Disorders in Court*, 27 J. FORENSIC PSYCHIATRY & PSYCH. 586 (2016).

[373] Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

[374] Perlin, Harmon & Chatt, *supra* note 15, at 306 (quoting Michael L. Perlin, *"The Executioner's Face is Well Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y. L. SCH. L. REV. 201, 235 (2020)).

[375] *See* Wexler & Winick, *Therapeutic Jurisprudence*, *supra* note 358.

Second, the inability of some of the defendants in the cohort under consideration[376] to retain mitigation experts (and the Court's blithe ignoring of the ABA Standards related to mitigation)[377] again violate TJ principles. Rebecca Covarrubias's admonition to defense counsel in death penalty cases—to "gather as much information as possible about the defendant's history including police reports, medical records, birth records, pediatric records and hospital records"[378]—sets out a TJ blueprint for the representation of defendants, one that needs to be adopted by the Fifth Circuit and other courts hearing similar death penalty cases.[379]

Third, the use of state-sanctioned psychiatry (medicating incompetent defendants) violates their dignity and also "delegitimizes the process involved, making that process anti-therapeutic not solely for those incompetent persons facing death, but for all subject to the same penalty."[380] Similarly, prosecutors who call expert witnesses knowing that the "scientific bases" of the experts' testimony is baseless (perhaps, at this point in time, fraudulent) similarly invalidate the legitimacy of the proceedings in question.[381]

Fourth, courts should be obligated to take into account TJ principles and TJ teachings in deciding cases involving seriously mentally ill defendants, whether they are facing the death penalty or not. In a full-length book about the insanity defense written by co-author MLP over twenty-five years ago, this was the recommendation:

> [W]e must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning and teleological decision making from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.[382]

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[376] *See, e.g.*, *Battaglia*, 824 F.3d 478.

[377] *See* AM. BAR ASSOC., *supra* note 208.

[378] Rebecca Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 467 (2009).

[379] *Id.*

[380] PERLIN, MENTAL DISABILITY AND THE DEATH Penalty, *supra* note 1, at 1541–42.

[381] *Id.*

[382] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 443 (1994), as discussed in this context in Michael L. Perlin, *"Too Stubborn to Ever Be Governed by Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT'L J.L. & PSYCHIATRY 475, 483 (2010).

The exact same prescription applies to cases involving defendants with mental disabilities facing the death penalty.[383] Had the Fifth Circuit acknowledged the precepts of therapeutic jurisprudence, had it recognized TJ's focus on dignity,[384] had it even considered the role of compassion in the judicial process,[385] it could never have decided this entire array of cases in the way it did.

CONCLUSION

When the authors embarked on the *Strickland* project, they expected that that case would have been interpreted grudgingly by the Fifth Circuit, but their findings far surpassed their fears.[386] There, as noted above, the authors concluded that that cohort of cases was "an embarrassment to our system of criminal law and procedure."[387] When they embarked on the *Atkins* project,[388] they had no greater hopes, and again, the results were "infinitely depressing."[389] The authors undertook this current project in the vainly-optimistic hopes that the Circuit's track record would be somewhat better.

However, it is not. In fact (and the authors never would have believed this when starting their research), it is far worse. One of the reasons, the authors believe, that the Supreme Court granting certiorari in *Panetti* was in response to the reality, cited above, that the Fifth Circuit had not found a single death row defendant (of an *n* of at least 360) to be incompetent to be executed in the two decades since the court had decided *Ford v. Wainwright*.[390] And that streak continues. There may be some irony that the only two "victories" for defendants *within* the Fifth Circuit on *Panetti* issues took place at the district court level, and that in neither case did the state

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[383] *Id.*

[384] It is not insignificant that in *Ford*, Justice Marshall highlighted the importance of dignity, noting that the court was bound to consider "whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects." Ford v. Wainwright, 477 U.S. 399, 406 (1986).

[385] "Justice with compassion is one of the central premises of TJ, and a judge who demonstrates compassion best 'represent[s] the goals of therapeutic jurisprudence.'" Perlin, *In These Times*, *supra* note 135, at 11 (citing, in part, LeRoy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 287–8 (2001)).

[386] *See* Perlin, Harmon & Chatt, *supra* note 15, discussed in this context *supra* notes 23–25 and accompanying text.

[387] *Id.* at 309.

[388] *See* Perlin, Harmon & Wetzel, *supra* note 15, discussed in this context *supra* notes 15–20 and accompanying text.

[389] *Id.* at 497.

[390] Perlin, *Merchants and Thieves*, *supra* note 31, at 1534–45 (quoting Petition for Writ of Certiorari, *Panetti*, No. 06-6407, 2006 WL 3880284, at *26.). *See supra* note 140 and accompanying text.

appeal.[391] In an article written just after the *Panetti* decision, Professor Richard Bonnie discussed how that case "amply documented" the "appalling failures" of the criminal justice system.[392] The near-quarter century since that decision has amplified these failures even more.

In the authors' article on *Strickland*, they concluded that "the Fifth Circuit regularly and consistently mocked the idea of adequate and effective counsel."[393] In our piece on *Atkins*, we concluded that "an alternative title for this article could have been Mental Disability and the Death Penalty: The Shame of the Fifth Circuit."[394] The lyric from the Bob Dylan song, *Highlands*, from which the authors drew the beginning of this Article's title is "Insanity is smashing up against my soul." The authors can say, without any fear of contradiction, that the Fifth Circuit, simply, has no soul.

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[391] *See supra* notes 27–30 and accompanying text.

[392] Bonnie, *supra* note 336, at 282. "The prisoner has a right, even under imminent sentence of death, to be treated as a person, worthy of respect, not as an object of the State's effort to carry out its promises." *Id.* at 277.

[393] Perlin, Harmon & Chatt, *supra* note 15, at 308.

[394] Perlin, Harmon & Wetzel, *supra* note 15, at 498.

APPENDIX

Table 1: Citations to *Panetti v. Quarterman* on issues related to competency to be executed (including cases directly involving Scott Panetti) (46 total)

Basso v. Stephens, 555 Fed. App'x. 335 (5th Cir. 2014)
Battaglia v. Davis, 2018 WL 550518 (5th Cir. 2018)
Battaglia v. Stephens, 824 F.3d 478 (5th Cir. 2016)
Charles v. Stephens, 612 Fed. App'x. 214 (5th Cir. 2015)
Eldridge v. Davis, 661 Fed. App'x. 253 (5th Cir. 2016)
Eldridge v. Stephens, 599 Fed. App'x. 123 (5th Cir. 2015)
Eldridge v. Stephens, 608 Fed. App'x. 289 (5th Cir. 2015)
Green v. Thaler, 699 F.3d 404 (5th Cir. 2012)
Green v. Quarterman, 312 Fed. App'x. 635 (5th Cir. 2009)
Johnson v. Stephens, 617 Fed. App'x. 293 (5th Cir. 2015)
Martinez v. Quarterman, 2009 WL 211489 (5th Cir. 2009)
Panetti v. Davis, 863 F.3d 366 (5th Cir. 2017)
Panetti v. Stephens, 727 F.3d 398 (5th Cir. 2013)
Panetti v. Quarterman, 235 Fed. App'x. 328 (5th Cir. 2007)
ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007)
Simon v. Epps, 463 Fed. App'x. 339 (5th Cir. 2012)
Simon v. Fisher, 641 Fed. App'x. 386 (5th Cir. 2016)
Staley v. Dretke, 126 Fed. App'x. 667 (5th Cir. 2005)
Wood v. Stephens, 540 Fed. App'x. 422 (5th Cir. 2013)
Wood v. Stephens, 619 Fed. App'x. 304 (5th Cir. 2015)
Hoffman v. Cain, 2012 WL 1088832 (E.D. La. 2012)
Billiot v. Epps, 671 F. Supp. 2d 840 (S.D. Miss. 2009)
Billiot v. Epps, 2010 WL 1490298 (S.D. Miss. 2010)
Powers v. Epps, 2009 WL 901896 (S.D. Miss. 2009)
Simon v. Epps, 2011 WL 1988388 (N.D. Miss. 2011)
Simon v. McCarty, 2014 WL 7338860 (N.D. Miss. 2014)
Aldridge v. Thaler, 2010 WL 1050335 (S.D. Tex. 2010)

Basso v. Stephens, 2014 WL 412549 (S.D. Tex. 2014)
Battaglia v. Stephens, 2013 WL 5570216 (N.D. Tex. 2013)
Charles v. Stephens, 2015 WL 11117729 (S.D. Tex. 2015)
Eldridge v. Thaler, 2009 WL 3858872 (S.D. Tex. 2009)
Eldridge v. Thaler, 2010 WL 555127 (S.D. Tex. 2010)
Eldridge v. Thaler, 2013 WL 416210 (S.D. Tex. 2013)
Green v. Thaler, 2012 WL 4765809 (S.D. Tex. 2012)
Hatten v. Quarterman, 2007 WL 2818009 (S.D. Tex. 2007)
Johnson v. Stephens, 2013 WL 4482865 (S.D. Tex. 2013)
Martinez v Quarterman, 2009 WL 10710035 (S.D. Tex. 2009)
Mays v. Director, 2020 WL 1333212 (E.D. Tex. 2020)
Panetti v. Dretke, 401 F. Supp. 2d 702 (W.D. Tex. 2004)
Panetti v. Thaler, 2010 WL 2640336, (W.D. Tex. 2010)
Panetti v. Thaler, 2012 WL 290115 (W.D. Tex. 2012)
Panetti v. Quarterman, 2008 WL 2338498 (W.D. Tex. 2008)
Saldano v. Director, 2016 WL 3883463 (E.D. Tex. 2016)
Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011)
Wood v. Quarterman, 572 F. Supp. 2d 814 (W.D. Tex. 2008)
Wood v. Quarterman, 2009 WL 10710464 (N.D. Tex. 2009)

Table 2: Excluded due to *Atkins*-related claims (20 total)

Blue v. Thaler, 665 F.3d 647 (5th Cir. 2011)
Brumfield v. Cain, 744 F.3d 918 (5th Cir. 2014)
Busby v. Davis, 925 F.3d. 699 (5th Cir. 2019)
Chester v. Thaler, 666 F.3d 340 (5th Cir. 2011)
Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008)
Hines v. Thaler, 456 Fed. App'x. 357 (5th Cir. 2011)
Ibarra v. Thaler, 691 F.3d 677 (5th Cir. 2012)
In Re Cathey, 857 F.3d 221 (5th Cir. 2017)
Ladd v. Stephens, 748 F.3d 637 (5th Cir. 2014)
Pierce v. Thaler, 604 F.3d 197 (5th Cir. 2010)
Rivera v. Quarterman, 505 F.3d 349 (5th Cir. 2007)
Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010)

Wilson v. Thaler, 450 Fed. App'x. 369 (5th Cir. 2011)
Brumfield v. Cain, 854 F. Supp. 2d 366 (M.D. La. 2012)
Wiley v. Epps, 668 F. Supp. 2d 848 (N.D. Miss. 2009)
Blue v. Thaler, 2013 WL 12112954 (S.D. Tex. 2013)
Braziel v. Stephens, 2015 WL 3454115 (N.D. Tex. 2015)
Bridgers v. Quarterman, 2008 WL 4500396 (E.D. Tex. 2008)
Cathey v. Davis, 2016 WL 9449738 (S.D. Tex. 2016)
Hearn v. Quarterman, 2008 WL 679030 (N.D. Tex. 2008)

Table 3: Excluded due to the issue of 2nd or successive petitions (29 total)

Adams v. Thaler, 679 F. 3d 312 (5th Cir. 2012)
Blackman v. Davis, 909 F. 3d 772 (5th Cir. 2018)
In Re Halprin, 788 Fed. App'x. 941 (5th Cir. 2019)
In Re Hensley, 836 F.3d 504 (5th Cir. 2016)
In Re Sepulvado, 707 F.3d 550 (5th Cir. 2013)
In Re Will, 970 F.3d 536 (5th Cir. 2020)
Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009)
Ramos v. Davis, 653 Fed. App'x. 359 (5th Cir. 2016)
Storey v. Lumpkin, 8 F.4th 382 (5th Cir. 2021)
United States v. Bernard, 820 Fed. App'x. 309 (5th Cir. 2020)
Collier v. Wyles, 2021 WL 1914244 (W.D. La. 2021)
Morgan v. Vannoy, 2021 WL 3009107 (W.D. La. 2021)
Runnels v. Edwards, 2019 WL 1714509 (W.D. La. 2019)
Turner v. Warden, 2012 WL 4960384 (W.D. La. 2012)
United States v. Boutte, 2012 WL 13103341 (W.D. La. 2012)
United States v. Givens, 2020 WL 6060949 (W.D. La. 2020)
Castaneda v. Davis, 2019 WL 691035 (W.D. Tex. 2019)
Fielding v. Davis, 2019 WL 1767338 (W.D. Tex. 2019)
Halprin v. Davis, 2019 WL 12095442 (N.D. Tex. 2019)
Halprin v. Davis, 2019 WL 12117150 (N.D. Tex. 2019)
Huff v. United States, 2015 WL 5252129 (S.D. Tex. 2015)
Ramos v. Stephens, 2014 WL 12675241 (S.D. Tex. 2014)
Ramos v. Stephens, 2014 WL 12675242 (S.D. Tex. 2014)

Ramos v. Quarterman, 2008 WL 11325032 (S.D. Tex. 2008)
Reese v. United States, 2016 WL 9083384 (S.D. Tex. 2016)
Rodriguez v. United States, 2012 WL 1038575 (W.D. Tex. 2012)
United States v. Bernard, 2020 WL 7075300 (W.D. Tex. 2020)
Williams v. United States, 2013 WL 12231888 (W.D. Tex. 2013)
Zuniga v. Holder, 2014 WL 11283056 (W.D. Tex. 2014)

Table 4: Excluded due to "Opportunity to be Heard" references to *Panetti* (1 total)

Hudson v. Director TDCJ-CID, 2018 WL 11304103 (E.D. Tex. 2018)

Table 5: Excluded due to Procedural Default (1 total)

Vasquez v. Stephens, 2016 WL 1238197 (S.D. Tex. 2016)

Table 6: Excluded due to only quoting/citing *Panetti* to explain the Court's reasonable or unreasonable application of federal law (4 total)

Escamilla v. Stephens, 602 Fed. App'x. 939 (5th Cir. 2015)
Garcia v. Lumpkin, 824 Fed. App'x. 252 (5th Cir. 2020)
Jones v. Stephens (157 F. Supp. 3d 623 (N.D. Tex. 2016)
Wardrip v. Davis, 2018 WL 1536279 (N.D. Tex. 2018)

Table 7: Excluded as they dealt with *Panetti*'s interpretation of the ripeness doctrine (4 total)

In re Halprin, 88 Fed. App'x. 941 (5th Cir. 2019)
In re Sepulvado, 707 F.3d 550 (5th Cir. 2013)
Ramos v. Quarterman, 2008 WL 11325032 (S.D. Tex. 2008)
United States v. Bernard, 820 Fed. App'x. 309 (5th Cir. 2020)

Table 8: Excluded due to AEDPA-related issues (43 total)

Hayes v. Thaler, 361 Fed. App'x. 563 (5th Cir. 2010)
Hernandez v. Thaler, 398 Fed. App'x. 81 (5th Cir. 2010)
In Re Will, 970 F.3d 536 (5th Cir. 2020)

Jones v. Stephens, 541 Fed. App'x. 399 (5th Cir. 2013)
Lucio v. Lumpkin, 987 F.3d 451 (5th Cir. 2021)
Ramey v. Lumpkin, 7 F.4th 271 (5th Cir. 2021)
Smith v. Cain, 708 F.3d 628 (5th Cir. 2013)
Smith v. Davis, 927 F.3d 313 (5th Cir. 2019)
Spicer v. Cain, 2021 WL 4465828 (5th Cir. 2021)
Manning v. Louisiana, 2021 WL 608742 (W.D. La. 2021)
Wilson v. Cain, 2016 WL 1444466 (W.D. La. 2016)
Woodfox v. Cain, 2012 WL 1676691 (M.D. La. 2016)
Chamberlin v. Fisher, 2015 WL 1485901 (S.D. Miss. 2015)
Kelly v. Kelly, 2007 WL 4966992 (S.D. Miss. 2007)
Smith v. Errington, 2019 WL 8228983 (S.D. Miss. 2019)
Spicer v. Fisher, 2016 WL 11475133 (S.D. Miss. 2016)
Armstrong v. Lumpkin, 2020 WL 8188422 (S.D. Tex. 2020)
Avila v. Quarterman, 499 F. Supp. 2d 713 (W.D. Tex. 2007)
Baldwin v. Thaler, 2011 WL 744742 (S.D. Tex. 2011)
Barbee v. Stephens, 2015 WL 4094055 (N.D. Tex. 2015)
Bess v. Davis, 2020 WL 2066732 (N.D. Tex. 2020)
Brown v. Thaler, 2011 WL 798391 (S.D. Tex. 2011)
Cade v. Davis, 2020 WL 6576179 (N.D. Tex. 2020)
Camacho v. Thaler, 2011 WL 3703718 (W.D. Tex. 2011)
Doyle v. Thaler, 2012 WL 2376642 (N.D. Tex. 2012)
Drones v. Lumpkin, 2020 WL 6888573 (S.D. Tex. 2020)
Edwards v. Stephens, 2014 WL 3880437 (N.D. Tex. 2014)
Freeney v. Stephens, 2016 WL 320768 (S.D. Tex. 2016)
Garcia v. Thaler, 2011 WL 13371386 (N.D. Tex. 2011)
Gaytan v. Collier, 2021 WL 1170216 (S.D. Tex. 2021)
Guzman v. United States, 2012 WL 13170875 (S.D. Tex. 2012)
Halprin v. Davis, 2017 WL 4286042 (N.D. Tex. 2017)
Holberg v. Davis, 2021 WL 3603347 (N.D. Tex. 2021)
Johnson v. Director TDCJ-CID, 2020 WL 4782312 (E.D. Tex. 2020)
Knod v. Director TDCJ-CID, 2011 WL 6016470 (E.D. Tex. 2011)
Nash v. Director TDCJ-CID, 2019 WL 9809650 (E.D. Tex. 2019)

Petrus v. Quarterman, 2008 WL 2783673 (S.D. Tex. 2008)
Pridgen v. Director TDCJ-CID, 2019 WL 1760079 (E.D. Tex. 2019)
Pridgen v. Director TDCJ-CID, 2019 WL 2464769 (E.D. Tex. 2019)
Rodriguez v. Davis, 2020 WL 685668 (W.D. Tex. 2020)
Ruiz v. Davis, 2017 WL 1962758 (W.D. Tex. 2017)
Tercero v. Thaler, 2013 WL 474769 (S.D. Tex. 2013)
Wardrip v. Davis, 2017 8677939 (N.D. Tex. 2017)