DECLINING COMPETENCY: PROTECTING DEFENDANTS WITH WORSENING MENTAL ILLNESS ON DEATH ROW FROM THE DEATH PENALTY

Abstract: In 1986, in *Ford v. Wainwright*, the U.S. Supreme Court held that the Eighth Amendment's protection against cruel and unusual punishment exempts anyone deemed incompetent from receiving the death penalty. In 2007, in *Panetti v. Quarterman*, the Supreme Court attempted to define incompetency, citing a lack of rational understanding of the reasons for and consequences of a death sentence. The Court appeared to expand the scope of incompetency in 2019, in *Madison v. Alabama*, by exempting those with any mental condition, not only diagnosed mental illnesses, provided that they lack a rational understanding. Nevertheless, the presumption of competency deprives the *Ford* protection of practical meaning, enabling experts and courts to overlook the purpose of a rational understanding, along with a defendant's declining mental health on death row. This Note first shows how competency-for-execution challenges are not only rare, but largely unsuccessful. This Note then argues that, although a categorical exemption from the death penalty based on mental illness is both unlikely and normatively undesirable, the presumption of competency should be reversed at the time of execution to account for the detrimental impact on death row for defendants with past or present signs of Serious Mental Illness.

INTRODUCTION

On October 19, 2022, Benjamin Cole sought relief from the U.S. Supreme Court to block his execution, set for the following day.[1] In 2004, Cole received the death sentence in an Oklahoma state court for the murder of his nine-month-old daughter.[2] In 2015 and again in 2022, Cole filed a writ of ha-

[1] Ellena Erskine, *Court Denies Mental Incompetency Plea in Oklahoma Execution Case*, SCOTUSBLOG (Oct. 19, 2022), https://www.scotusblog.com/2022/10/court-denies-mental-incompetency-plea-in-oklahoma-execution-case/ [https://perma.cc/M3TL-WDKU].

[2] Cole v. Farris, 54 F.4th 1174, 1178 (10th Cir.) (per curiam), *cert. denied*, 143 S. Ct. 366 (2022) (mem.); *see* Cole v. State, 164 P.3d 1089, 1102 (Okla. Crim. App. 2007) (affirming the jury conviction of first-degree murder and imposition of the death penalty). To stop his daughter from crying, Cole had pushed his daughter's legs toward her head while she was lying on her stomach, causing her spine to break and her aorta to tear. *Cole*, 164 P.3d at 1092. Cole did not take immediate action, but rather continued to play video games and denied that anything was wrong when his wife confronted him. *Id.* He attempted CPR when the child's condition grew alarming before the ambulance arrived. *Id.* at 1092–93. At trial, Cole presented, as mitigating evidence, that he was sexually molested as a child, suffered brain damage, had intermittent explosive personality disorder, and struggled with alcoholism. *Id.* at 1102. The prosecution presented, as aggravating evidence, that Cole had a previous violent felony conviction involving his first child, and that the current offense was gruesome. *Id.*

beas corpus in the U.S. District Court for the Northern District of Oklahoma, pleading that he did not understand the reasons for his sentence and thus was not competent to be executed.[3] Reports from 2016, 2018, and 2022 indicated that Cole had developed paranoid schizophrenia and suffered general mental deterioration since his arrival to death row.[4] Despite noting some abnormal behaviors, a forensic psychologist deemed Cole competent for execution in 2022.[5] Based on this finding, the district court rejected Cole's petition, reasoning that his declined mental state did not prevent him from understanding his punishment.[6] The U.S. Court of Appeals for the Tenth Circuit and the Supreme Court likewise dismissed Cole's appeals, and Cole was executed on October 20, 2022.[7]

Next, consider the case of Raymond Riles, who received the death sentence in a Texas state court in 1976 and remained on death row for forty-five years.[8] Despite a failed claim of insanity at trial, Riles survived three cancelled

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[3] Cole v. Farris, No. 15-CV-0049, 2022 WL 11271018, at *9 (N.D. Okla.), *aff'd*, 54 F.4th 1174, *cert. denied*, 143 S. Ct. 366 (2022) (mem.); *see* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that the Eighth Amendment bars the execution of anyone deemed "insane" or incompetent); Panetti v. Quarterman, 551 U.S. 930, 952 (2007) (clarifying that all defendants who successfully plead insanity require a competency hearing and opportunity to provide evidence); *see also Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining habeas corpus as a writ used to bring a prisoner before a court, typically to ensure the legality of his or her incarceration or detention). Cole had previously claimed incompetency to stand trial and assist in his appeal, both of which had failed. Cole v. Trammell, 755 F.3d 1142, 1148, 1177 (10th Cir. 2014). The U.S. Supreme Court stayed Cole's execution, originally scheduled for March 2015, pending the decision of a case challenging Oklahoma's lethal injection protocol. *Cole*, 2022 WL 11271018, at *3. Once the lethal injection case was resolved, the Oklahoma Court of Criminal Appeals rescheduled Cole's execution for October 2015, but then ordered an indefinite stay for reasons unrelated to incompetency. *Id.* at *5. In February 2022, Cole sought to reopen the matter with new evidence challenging his competency. *Id.*

[4] *Cole*, 2022 WL 11271018, at *5–6. Cole argued that he was no longer competent for execution based on new clinical reports. *See id.* at *9 (demonstrating that claimants must overcome a presumption of competency). Before 2015, an expert diagnosed Cole with schizophrenia, but noted that Cole was aware of the proceedings. *Id.* at *6. In 2016 and 2022, another expert deemed Cole incompetent, based on his mental illness and refusal to interact with the expert or leave his cell. *Id.* In 2022, a radiologist found that Cole had a brain lesion that likely worsened his schizophrenia. *Id.*

[5] *Id.* The U.S. District Court for the Northern District of Oklahoma had granted a joint request for a mental health evaluation of Cole. *Id.* at *5. In July 2022, Cole received testing from a forensic psychologist in Oklahoma, and a week later, the psychologist reported that Cole was competent for execution. *Id.* The psychologist noted that although Cole showed "some peculiar behaviors," he did not demonstrate significant signs of mental illness that would prevent him from rationally understanding the reasons for his sentence. *Id.* at *6. Meanwhile, the Oklahoma Court of Criminal Appeals rescheduled Cole's execution for October 20, 2022. *Id.* at *5.

[6] *Id.* at *10.

[7] *Cole*, 54 F.4th at 1183; Erskine, *supra* note 1. The Antiterrorism and Effective Death Penalty Act (AEDPA) limits habeas courts to provide relief only if a state court's decision opposed unreasonably applied clearly established Supreme Court precedent, or made an unreasonable factual determination. *See Cole*, 54 F.4th at 1180 (citing 28 U.S.C. § 2254(d)).

[8] Keri Blakinger & Maurice Chammah, *He's Too Mentally Ill to Execute. Why Is He Still on Death Row After 45 Years?*, MARSHALL PROJECT (Feb. 4, 2021), https://www.themarshallproject.org/2021/02/04/he-s-too-mentally-ill-to-execute-why-is-he-still-on-death-row-after-45-years [https://perma.

executions due to repeated findings of incompetency.[9] In April 2021, the Texas Court of Criminal Appeals remanded his case for resentencing, instructing the jury to consider Riles' mental illness before imposing the death penalty.[10]

To appreciate the increasingly high stakes of proving incompetency in capital proceedings, compare the cases of Cole and Riles with that of Nikolas Cruz, the Parkland shooter.[11] Cruz was convicted in 2018 for the murder of seventeen students and teachers at Marjory Stoneham Douglas High School in Parkland, Florida.[12] On October 13, 2022, a jury sentenced Cruz to life in prison without the possibility of parole.[13] Though Cruz never claimed incompetency at trial, his alleged condition of fetal alcohol syndrome deterred at least one juror from imposing the death penalty.[14] The decision to spare Cruz's life sparked outrage

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cc/SPW2-HNL6]. Riles was convicted for shooting and killing a car salesman after attempting to return a newly purchased car. Jolie McCullough, *Texas' Highest Criminal Court Tosses Death Sentence of Raymond Riles, State's Longest-Serving Death Row Inmate*, TEX. TRIB. (Apr. 14, 2021), https://www.texastribune.org/2021/04/14/raymond-riles-texas-death-penalty/ [https://perma.cc/7K7K-W5NG].

[9] Blakinger & Chammah, *supra* note 8; *see* McCullough, *supra* note 8 (explaining that numerous experts had deemed Riles incompetent and found that Riles suffered from a history of paranoid delusions, psychosis, schizophrenia, and hospitalizations). At trial, Riles' lawyer presented evidence of his psychiatric history, and Riles' family testified to his peculiar behaviors and familial history of mental illness. Blakinger & Chammah, *supra* note 8. The prosecution argued that Riles was malingering, or faking his symptoms, and the jury rejected Riles' defense of insanity. McCullough, *supra* note 8; *see* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 726 (5th ed. 2013) (defining malingering as intentionally faking or exaggerating psychological or sometimes physical symptoms, due to external motivations).

[10] McCullough, *supra* note 8. Three judges dissented, noting that the possibility of releasing Riles on parole would likely result in his facing homelessness or unemployment. *Ex parte* Riles, 620 S.W.3d 830, 833 (Tex. Crim. App. 2021) (Slaughter, J., dissenting). One of Riles' attorneys remarked that any option other than solitary confinement on death row would be preferable for a defendant with Serious Mental Illness (SMI). McCullough, *supra* note 8.

[11] *See generally Parkland School Shooting Verdict: Families Shocked as Jury Spares Life of Parkland Killer*, N.Y. TIMES, https://www.nytimes.com/live/2022/10/13/us/parkland-trial-verdict [https://perma.cc/NV7Z-3T9Y] (Oct. 14, 2022) (detailing the background of the case, jury verdict, and public reception).

[12] Patricia Mazzei & Nicholas Bogel-Burroughs, *Gunman Who Killed 17 in Parkland Is Spared the Death Penalty*, N.Y. TIMES, https://www.nytimes.com/2022/10/13/us/parkland-trial-verdict-gunman.html [https://perma.cc/4XRW-9C4E] (Oct. 14, 2022). This act of gun violence, implicating mental illness, sparked a national movement led primarily by high school students who felt outraged and frightened by an era of school shootings. *Id.*; *see* Sequoia Carrillo & Pooja Salhotra, *We Asked 5 Students: What Inspired You to Become a Gun Control Activist?*, NPR (June 29, 2022), https://www.npr.org/2022/06/29/1108042591/gun-control-student-activists [https://perma.cc/9UQQ-CA82] (discussing the Parkland shooting as a pivotal moment for student organizations to advocate for gun control).

[13] Mazzei & Bogel-Burroughs, *supra* note 12.

[14] *See Non-unanimous Florida Jury Sentences Nikolas Cruz to Life Without Parole for Parkland School Shootings*, DEATH PENALTY INFO. CTR. (Oct. 13, 2022), https://deathpenaltyinfo.org/news/non-unanimous-florida-jury-sentences-nikolas-cruz-to-life-without-parole-for-parkland-school-shootings [https://perma.cc/8KHR-QUJ5] (explaining that three jurors considered Cruz's neurodevelopmental disorder, caused by his mother's substance use during her pregnancy, to be mitigating evidence); *see also Red Flags: The Troubled Path of Accused Parkland Shooter Nikolas Cruz*, WASH. POST (Mar. 10, 2018), https://www.washingtonpost.com/graphics/2018/national/timeline-parkland-

among victims' families and across the nation.[15] Commentators have since interpreted this outcome as a sign of America's growing skepticism of capital punishment, particularly when mental illness may be involved.[16]

Though only roughly analogous, these cases reveal the contradictions and questionable standards in the United States' capital punishment jurisprudence regarding defendants with mental illness.[17] Cruz did not challenge his competency for execution, let alone ability to stand trial, but his purported mental health condition became his saving grace in the eyes of some jurors.[18] By contrast, Riles' history of mental illness did not persuade a jury of his insanity, but experts and a majority of judges have since deemed him incompetent to save him from death.[19] Meanwhile, after one expert deemed him competent, Cole's

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shooter-nikolas-cruz/ [https://perma.cc/ZEM8-D96S] (discussing Cruz's history of behavioral and mental health problems, including developmental delay, school suspensions and transfers for physical violence and emotional outbursts, and reports to law enforcement concerning Cruz's threat to himself and to others). After describing Cruz as broken due to brain damage and mental illness, Cruz's lawyer asked the jury whether a civilized society should kill such an individual. *Non-unanimous Florida Jury Sentences Nikolas Cruz to Life Without Parole for Parkland School Shootings*, *supra*.

[15] *See* Mazzei & Bogel-Burroughs, *supra* note 12 (reporting that several family members were upset that "[t]he monster that killed them gets to live another day"). In response to the decision, Governor Ron DeSantis of Florida suggested changing the state's unanimous jury requirement to allow for capital punishment in such situations. Anthony Izaguirre & Terry Spencer, *Florida Could End Unanimous Jury Requirement for Executions*, AP NEWS (Feb. 2, 2023), https://apnews.com/article/ron-desantis-florida-state-government-crime-legal-proceedings-nikolas-cruz-e86c7e9e7ff92fbaa025677fbf96d8fe [https://perma.cc/HNT8-BUHG].

[16] Mazzei & Bogel-Burroughs, *supra* note 12; *see* AM. BAR ASS'N, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 1 (2016), https://www.prisonpolicy.org/scans/aba/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf [https://perma.cc/4AG7-5HRB] (noting that the American Bar Association (ABA), American Psychiatric Association, American Psychological Association (APA), and National Alliance on Mental Illness (NAMI) have opposed the death penalty for individuals with SMI for over a decade); *2021 Gallup Poll: Public Support for Capital Punishment Remains at Half-Century Low*, DEATH PENALTY INFO. CTR. (Nov. 19, 2021), https://deathpenaltyinfo.org/news/2021-gallup-poll-public-support-for-capital-punishment-remains-at-half-century-low [https://perma.cc/AZ5A-WAUB] (reporting that 54% of American respondents supported the death penalty for individuals convicted of murder, marking a decline from 80% of supporters before the turn of the twenty-first century); *Poll: Americans Oppose Death Penalty for Mentally Ill by 2–1*, DEATH PENALTY INFO. CTR. (Dec. 1, 2014), https://deathpenaltyinfo.org/news/poll-americans-oppose-death-penalty-for-mentally-ill-by-2-1 [https://perma.cc/92ES-PCQF] (discussing how 58% of American pollsters opposed executing individuals with mental illness, whereas only 28% supported it).

[17] *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 174 (2010) (describing America's death penalty jurisprudence as vast and contradictory).

[18] *See* Tim Craig, *Parkland School Shooting Jury Spares Gunman Death Penalty in 2018 Massacre*, WASH. POST, https://www.washingtonpost.com/nation/2022/10/13/nikolas-cruz-spared-death-penalty-parkland-shooting/ [https://perma.cc/L3EB-T7YW] (Oct. 13, 2022) (noting that one juror did not want to impose the death penalty because she believed that Cruz was mentally ill).

[19] *See* McCullough, *supra* note 8 (explaining that Riles may have initially received the death sentence because the sentencing judge did not instruct the jury to consider his mental illness).

onset of paranoid schizophrenia and mental decline on death row did not stop a single court from sanctioning his execution.[20]

Some might consider these outcomes to be case-specific and therefore unhelpful to compare, but from a mental health law perspective, there is reason for pause and concern.[21] In 1986, the Supreme Court held that a defendant who is mentally incompetent is unfit for execution.[22] Competency challenges, however, remain relatively rare, and outcomes like Riles' are even rarer.[23] Once a jury returns a death sentence, both the legal standard and time in incarceration work against a defendant with signs of Serious Mental Illness (SMI).[24] Despite the likelihood of mental decline among prisoners with SMI on death row, the presumption of competency remains in effect up to the time of execution.[25]

Part I of this Note details the landscape of mental illness and capital punishment jurisprudence in the United States, and homes in on the constitutional bar against executing incompetent defendants.[26] Part I also discusses competency evaluations that represent the last chance at life or death for defendants with mental illness.[27] Part II shows how states' current standards for competency for execution fail to protect most defendants with mental illness, as the presumption of competency misguides experts and courts to overlook signs of

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[20] *See* Cole v. Farris, 54 F.4th 1174, 1183 (10th Cir.) (per curiam) (denying Cole's competency appeal), *cert. denied*, 143 S. Ct. 366 (2022) (mem.) (declining to stay Cole's execution).

[21] *See generally Developments in the Law–The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1117 (2008) (discussing the failure of the criminal justice system to protect individuals with mental illness).

[22] Ford v. Wainwright, 477 U.S. 399, 401 (1986).

[23] *See* Transcript of Oral Argument at 24, Madison v. Alabama, 139 S. Ct. 718 (2019) (No. 17-7505) (noting that 1,209, or 93%, of the thirteen hundred defendants sentenced to death over the past thirty years did not plead incompetency); Brian D. Shannon & Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 TEX. TECH. L. REV. 419, 421 (2013) (noting that a claim of incompetency is uncommon); *see also* Panetti v. Quarterman, 551 U.S. 930, 959 (2007) (explaining that even a defendant whom a layperson would not consider normal or rational may be competent for execution).

[24] *See* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42 (1986) (noting a possible positive correlation between confinement on death row and incompetency); *Panetti*, 551 U.S. at 959 (suggesting that the bar for competency is not high). Approximately 20% of defendants on death row suffer from SMI. *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM., https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses#_edn9 [https://perma.cc/H2D7-YQF3] [hereinafter *Position Statement 54*]; *see Report: 75% of 2015 Executions Raised Serious Concerns About Mental Health or Innocence*, DEATH PENALTY INFO. CTR. (Dec. 18, 2015), https://deathpenaltyinfo.org/news/report-75-of-2015-executions-raised-serious-concerns-about-mental-health-or-innocence [https://perma.cc/P6Q3-7ZEX] (finding that, of the twenty-eight defendants executed in 2015, seven suffered from SMI, and another seven had either a serious intellectual impairment or brain injury).

[25] *See, e.g.*, *Cole*, 54 F.4th at 1179, 1181 (rejecting Cole's claim of incompetency, despite repeated pleadings for the past decade and reports indicating his deteriorating mental state).

[26] *See infra* notes 30–100 and accompanying text.

[27] *See infra* notes 101–129 and accompanying text.

SMI through discretionary procedures.[28] Finally, Part III argues that to protect more defendants with SMI from capital punishment, in accordance with normative values, the presumption of competency should be reversed at the time of execution to account for mental deterioration that occurs on death row.[29]

I. COURTING DEATH IF DEEMED COMPETENT: MENTAL ILLNESS AND THE DEATH PENALTY IN THE UNITED STATES

The evolution of the death penalty in the United States reveals both small victories and concerning gaps for people with mental illness.[30] Since the turn of the twenty-first century, mental health activists have successfully fought to broaden both the awareness and acceptance of mental illness in society.[31] This achievement, however, has had unintended ripple effects—normalizing individuals with mental illness justifies a presumption of their competency in legal proceedings, subjecting them to the same procedures as other offenders, including capital punishment.[32] Section A of this Part discusses the prevalence of mental illness in the United States and within the criminal justice system.[33] Section B details the Supreme Court's death penalty jurisprudence concerning defendants with mental illness and other conditions, noting the main exemptions from capital punishment and the Court's shift away from providing such protections.[34] Section C examines the various stages in which a defendant can plead incompetency, focusing on the high stakes and low success rates of competency challenges at the time of execution.[35]

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[28] *See infra* notes 130–183 and accompanying text.

[29] *See infra* notes 184–231 and accompanying text.

[30] *See* GARLAND, *supra* note 17, at 10–11 (noting that a shift in the use of capital punishment in the United States since the 1970s prompted moral and political debates). Mental illness presents several challenges regarding the imposition of a death sentence. *See id.* at 5 (discussing how jurors perceive evidence of mental illness differently, ranging from signs of wickedness to a faultlessly damaged character).

[31] *See, e.g.*, MAKE IT OK, 10 YEAR REPORT TO THE COMMUNITY 4–5 (2022), https://makeitok.org/wp-content/uploads/2022/12/2012-22_hp_make_it_ok_report_ua_compliant_cc.pdf [https://perma.cc/Q4A5-FMH8] (highlighting the work of NAMI, among other organizations, to destigmatize mental illness since 2012).

[32] *See Mental Health Rights*, MENTAL HEALTH AM., https://mhanational.org/issues/mental-health-rights#:~:text=People%20living%20with%20mental%20health%20conditions%20have%20the%20right%20to,that%20a%20person%20is%20incompetent [https://perma.cc/3QYX-C2DV] (positing that people suffering from a mental illness are competent to make personal choices regarding their treatment); *Position Statement 54*, *supra* note 24 (explaining that courts across the United States continue to permit capital punishment for individuals with mental illness so long as defendants understand the reasons for the sentence and that the execution is imminent).

[33] *See infra* notes 36–80 and accompanying text.

[34] *See infra* notes 81–100 and accompanying text.

[35] *See infra* notes 101–129 and accompanying text.

A. Mental Illness in the United States and on Death Row

In the past decade, the prevalence of mental illness throughout society has increased, targeting certain groups disproportionately.[36] In 2009, the Council of State Governments Justice Center found that approximately seventeen percent of incarcerated individuals suffered from SMI.[37] That number constituted three to six times the rate of SMI among the general population.[38] Subsection 1 of this Section details the extent of mental health disorders in the United States and on death row, along with society's changing view of mental illness.[39] Subsection 2 discusses the ongoing debate over capital punishment and the movement to exempt defendants with mental illness from the death penalty.[40]

1. The Increasing Prevalence and Awareness of Mental Health Conditions

Over the last few decades, society's awareness of mental health conditions has broadened.[41] Subsection (a) discusses the increasing understanding of Any Mental Illness (AMI) and SMI, two terms that clinicians currently use to describe various mental health disorders.[42] Subsection (b) addresses the pervasiveness of mental illness among people in the criminal justice system and on death row.[43]

a. Mental Illness in Society and Views of Competency

The National Institute of Mental Health (NIMH) defines AMI as any recognized mental, behavioral, and emotional health disorder.[44] Common AMI

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[36] *See Make It OK: 10 Year Report to the Community*, *supra* note 31, at 7 (indicating that society's awareness of mental illness has broadened through conversation, media coverage, and especially the COVID-19 pandemic); ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 11, 92 (2018) (discussing the overrepresentation and inadequate treatment of incarcerated individuals with SMI, despite society's evolved view of mental illness).

[37] *Addressing Mental Illness in the Criminal Justice System*, U.S. DEP'T JUST. ARCHIVES (Dec. 1, 2009), https://www.justice.gov/archives/opa/blog/addressing-mental-illness-criminal-justice-system [https://perma.cc/K2S8-2EH5].

[38] *Id.*

[39] *See infra* notes 41–68 and accompanying text.

[40] *See infra* notes 69–80 and accompanying text.

[41] *See generally* VICTORIA RIDEOUT & SUSANNAH FOX, DIGITAL HEALTH PRACTICES, SOCIAL MEDIA USE, AND MENTAL WELL-BEING AMONG TEENS AND YOUNG ADULTS IN THE U.S. 4 (2018), https://wellbeingtrust.org/wp-content/uploads/2021/11/a-national-survey-by-hopelab-and-well-being-trust-2018.pdf [https://perma.cc/ZM46-7XAA] (detailing the pervasiveness of mental health conditions among young adults and society's growing awareness of their prevalence).

[42] *See infra* notes 44–59 and accompanying text.

[43] *See infra* notes 60–68 and accompanying text.

[44] *Mental Illness*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness#part_2538 [https://perma.cc/EJV4-QQJ2] (Mar. 2023). The vast range of AMI includes conditions that create little to no impairment in a person's life, mood, or mindset, as well as conditions that cause a mild to moderate effect on a person's well-being. *Id.*

includes depression, anxiety, and trauma-related disorders.[45] In 2021, approximately 23% of American adults reported having AMI.[46] This rising prevalence has created a sense of normalcy and, in some cases, pride among those with AMI.[47] For instance, in 2020, 53% of Americans viewed seeking professional help for mental illness as a sign of strength, and 57% considered talking openly about mental health as a mark of bravery.[48]

Although the concept of mental illness arose during the nineteenth century, it has only recently become a more openly discussed talking point.[49] In 2019, eighty-seven percent of Americans reported that having a mental illness should not be a source of shame.[50] Still, both public and self-stigma of mental illness linger, particularly for those with SMI.[51]

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[45] *See Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions [https://perma.cc/S4QJ-HHKA] (listing common mental illnesses).

[46] *Mental Illness*, *supra* note 44. In 2021, AMI was more prevalent among females and adults between eighteen and twenty-five years old. *Id.* Since the onset of the COVID-19 pandemic, an estimated 53.2 million cases of major depression and 76.2 million cases of anxiety have arisen worldwide. Damian F. Santomauro et al., *Global Prevalence and Burden of Depressive and Anxiety Disorders in 204 Countries and Territories in 2020 Due to the COVID-19 Pandemic*, 398 LANCET 1700, 1700 (2021). For more on the social determinants of mental health and potential solutions to the so-called mental health crisis, including better access to nutrition, employment, housing, and education to buffer against chronic stress, see Danielle Carr, *Mental Health Is Political*, N.Y. TIMES (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/opinion/us-mental-health-politics.html [https://perma.cc/K9QM-RY55].

[47] *Mental Health Conditions*, *supra* note 45. From 2018 to 2022, the number of people reporting that they ever had a mental health condition increased from 57% to 67%. *New Perception Poll Shows Adults in the U.S. See Mental Health and Suicide as High Priority Issues, and Still Face Barriers to Seeking Help*, AM. FOUND. FOR SUICIDE PREVENTION (Oct. 6, 2022), https://www.prnewswire.com/news-releases/new-perception-poll-shows-adults-in-the-us-see-mental-health-and-suicide-as-high-priority-issues-and-still-face-barriers-to-seeking-help-301642184.html [https://perma.cc/3S57-Z5P9].

[48] *New Perception Poll Shows Adults in the U.S. See Mental Health and Suicide as High Priority Issues, and Still Face Barriers to Seeking Help*, *supra* note 47. The poll was conducted in July 2020 and involved 2,054 Americans, aged eighteen and older. *Id.* The CEO of the American Foundation for Suicide Prevention welcomed the findings as progress in how the public perceived seeking assistance for mental health struggles. *Id.*

[49] *See* José M. Bertolote, *The Roots of the Concept of Mental Health*, 7 WORLD PSYCHIATRY 113, 113 (2008) (noting that explicit references to mental health in the English language date back to 1843); Jessica Cabrera, *Why Are We Talking About Mental Health All the Time Now?*, FARM BUREAU (May 18, 2022), https://www.fb.org/viewpoints/why-are-we-talking-about-mental-health-all-the-time-now [https://perma.cc/F4YT-B69Z] (suggesting that mental health has become a more popular talking point due to frequent deaths related to mental health disorders, particularly in rural and other marginalized communities). Some have criticized the pervasiveness of mental health in popular discourse: one psychologist has argued that although increased attention to mental health is a good thing, the vagueness of the term may lend itself to cynical uses. *See* Huw Green, *We Have Reached Peak 'Mental Health'*, N.Y. TIMES (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/opinion/us-mental-health-awareness.html [https://perma.cc/KY4C-YWH4] (asserting that the concept of mental health can serve to excuse people with mental health conditions who commit harmful acts).

[50] *Survey: Americans Becoming More Open About Mental Health*, AM. PSYCH. ASS'N (May 1, 2019), https://www.apa.org/news/press/releases/2019/05/mental-health-survey [https://perma.cc/WR7H-

SMI encompasses any mental, behavioral, or emotional dysfunction that creates a functional impairment or significantly interferes with major life activities, including work, sleep, communication, and self-care.[52] In 2008, the NIMH classified schizophrenia, severe major depression, severe bipolar disorder, and several other disorders as SMI.[53] Symptoms of SMI, particularly psychotic disorders, may include hallucinations, delusions, disorganized thinking, or other breaks from reality.[54] In 2021, approximately 5.5% of U.S. adults reported having SMI.[55] Compared to AMI, the public's view of SMI is less accepting.[56] By way of analogy, a report from 2016 indicated that many individuals living in Britain and Australia continued to judge people with SMI.[57]

Given the lingering stigma, mental health activists continue to fight for equal rights for all people with mental illness.[58] Whereas some advocates push

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T675]. The APA's CEO interpreted this finding as a sign the public is more willing to discuss mental illness openly. *Id.*

[51] *See id.* (noting that 39% of respondents viewed a person differently if they had a mental illness). The *Journal of the American Medical Association* found that stigma of depression had decreased over the last twenty years, whereas stigma and the perceived dangerousness of individuals with schizophrenia may have increased. Bernice A. Pescosolido, Andrew Halpern-Manners, Liying Luo & Brea Perry, *Trends in Public Stigma of Mental Illness in the U.S., 1996–2018*, 4 J. AM. MED. ASS'N 1, 9 (2021). One possible explanation is that many Americans do not consider more common mental illnesses, like depression, to be disorders. *See Survey: Americans Becoming More Open About Mental Health*, *supra* note 50 (finding that 22% of adults did not consider depression to be a mental health disorder).

[52] *What Is Serious Mental Illness?*, SMI ADVISER, https://smiadviser.org/about/serious-mental-illness [https://perma.cc/VY2L-HL8C]. Serious psychotic disorders, like bipolar disorder or schizophrenia, significantly impair a person's ability to form rational thoughts or understand reality. *See* Panetti v. Quarterman, 551 U.S. 930, 954 (2007) (describing experts' testimony of Panetti's schizoaffective disorder that caused delusions and an inability to understand the reasons for his death sentence).

[53] *What Is Serious Mental Illness?*, *supra* note 52.

[54] AM. PSYCHIATRIC ASS'N, *supra* note 9, at 87.

[55] *Mental Illness*, *supra* note 44.

[56] *See Position Statement 54*, *supra* note 24 (discussing the disadvantages that people with SMI face in the criminal justice system, in part due to stigma); *cf. The Health Crisis of Mental Health Stigma*, 387 LANCET 1027, 1027 (2016) (noting that stigma becomes more problematic for individuals living with multiple, complex disorders that include SMI).

[57] *The Health Crisis of Mental Health Stigma*, *supra* note 56. People living with SMI reported feeling equally judgmental of themselves. *Id.*

[58] *See Position Statement 54*, *supra* note 24 (highlighting the barriers that individuals with mental illness face in the criminal justice system). In 2017, NAMI released a report that highlighted the barriers that people face when accessing mental healthcare, as opposed to other medical providers. NAT'L ALL. ON MENTAL ILLNESS, THE DOCTOR IS OUT 3 (2017), https://www.nami.org/Support-Education/Publications-Reports/Public-Policy-Reports/The-Doctor-is-Out/DoctorIsOut [https://perma.cc/7EWR-29YF]. Given these findings, NAMI argued that people with mental illnesses do not receive adequate treatment. *Id.* at 10. In 2018, the UN issued a statement that mental health qualifies as a human right. *Mental Health Is a Human Right*, UN (May 24, 2018), https://www.ohchr.org/en/stories/2018/05/mental-health-human-right [https://perma.cc/WWS5-BQG8]. The report highlighted the pervasiveness of mental illness and stigmatic barriers to seeking treatment. *Id.*

for more accommodations, others argue that people living with mental illness should be considered as competent as anyone else.[59]

b. Mental Illness on Death Row and Claims of Incompetency

People with AMI or SMI constitute a disproportionate percentage of defendants in the American criminal justice system.[60] Once charged with an offense, defendants with mental illness are more likely to receive longer sentences, endure solitary confinement, and commit suicide.[61] Defendants on death row have higher rates of AMI and significantly higher rates of SMI compared to the general population.[62] In 2015, nearly 9% of defendants on death row showed signs of SMI, such as schizophrenia and antisocial personality disorder, compared to less than 1% of the public.[63] About 50% of people executed between 2000 and 2015 had a diagnosed mental illness or substance use disorder.[64]

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[59] *See, e.g.*, *Mental Health Rights*, *supra* note 32 (advocating for the assumption that people with mental health conditions are competent to make decisions about medical treatment). This push to presume competency of individuals with mental illness adds a layer of complexity to one's competency for execution. *Cf.* Douglas Mossman, Atkins v. Virginia: *A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 289 (2003) (explaining that the decision to exempt individuals with intellectual disabilities from capital punishment is demeaning because it conflates intellectual disability with inferior moral capacity). *But cf.* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment bars capital punishment of defendants with intellectual disabilities because the punishment lacks deterrent or retributive value in such circumstances).

[60] *See* ROTH, *supra* note 36, at 92–93 (describing the disproportionate presence of incarcerated individuals with SMI due to their increased likelihood of arrest and the reduced likelihood of obtaining bail, a good plea bargain, or probation); *see also* Shannon Scully, *Criminal Justice Reform Means Reforming the Mental Health System*, NAT'L ALL. ON MENTAL ILLNESS (Mar. 5, 2021), https://www.nami.org/Blogs/NAMI-Blog/March-2021/Criminal-Justice-Reform-Means-Reforming-the-Mental-Health-System (discussing the overrepresentation of individuals with mental illness who are incarcerated).

[61] ROTH, *supra* note 36, at 3–4.

[62] *See* FRANK R. BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 244 (2018) (predicting that, based on publicly available data, at least 40% of criminal defendants have suffered from SMI at some point in their adult life). Approximately 48% of defendants executed from 2000 to 2015 suffered from a mental illness or substance use disorder as an adult. *Id.* at 238. The existing literature regarding people on death row with mental illnesses, however, is severely limited. *Id.* at 240. In 2002, for example, only thirteen clinical studies were publicly available. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCIS. & L. 191, 192 (2002).

[63] *See* BAUMGARTNER ET AL., *supra* note 62, at 246 (explaining that prosecutors can frame a defendant's SMI as an aggravating factor because of negative connotations in popular culture); Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked.*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/ [https://perma.cc/H7JH-584U].

[64] ROTH, *supra* note 36, at 271. The study reported that 20% of people who were executed had a diagnosis of a personality disorder, and 8.9% received a diagnosis of antisocial personality disorder specifically. Baumgartner & Neill, *supra* note 63. Prisoners on death row were more likely to have suffered from childhood trauma and have intellectual disabilities than most Americans. *Id.*

Despite the pervasiveness of mental illness among incarcerated individuals, mental healthcare in jails and prisons is largely under-resourced.[65] What's more, conditions of incarceration, which may include loud noises, overcrowding, and use of punishment and violence, can exacerbate or even cause symptoms of mental illness.[66] Research further indicates that a defendant's mental health declines with time spent on death row.[67] The structure of death row causes short- and long-term damage to a person's mental health due to forced isolation, lack of physical contact, and deprivation of adequate sleep, nutrition, and medical care.[68]

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[65] *See* ROTH, *supra* note 36, at 97, 104–05 (explaining that diagnosing recently incarcerated individuals is difficult, especially if they are under the influence of substances, and that state institutions often fail to follow protocols, such as keeping accurate healthcare records). In 1980, in *Ruiz v. Estelle*, the U.S. District Court for the Southern District of Texas laid out the basic requirements of mental healthcare in prisons, including systematic screening, professional treatment, accurate recordkeeping, and suicide-prevention programs. *See generally* 503 F. Supp. 1265, 1332–40 (S.D. Tex. 1980) (discussing current problems with and ways to reform mental healthcare in prisons), *aff'd in part*, *rev'd in part*, 679 F.2d 115 (5th Cir.), *amended in part*, *vacated in part* 688 F.2d 266 (5th Cir. 1982). The U.S. Court of Appeals for the Fifth Circuit upheld some of these requirements, while reversing many others, related to community corrections programs, work furlough, legal assistance, fire safety, and correctional facility management. *Ruiz*, 679 F.2d at 1126.

[66] Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [https://perma.cc/58EY-6MYC]; *see* HANS TOCH, JAMES R. ACKER & VINCENT MARTIN BONVENTRE, LIVING ON DEATH ROW: THE PSYCHOLOGY OF WAITING TO DIE 4 (2018) (describing typical conditions of death row, including isolation, overcrowding, and medical neglect). Solitary confinement is particularly damaging to mental health, regardless of a prisoner's preexisting conditions. *See* ROTH, *supra* note 36, at 139 (describing possible effects of isolation, including sleeplessness, paranoia, hallucinations, psychosis, and self-harm); Thomas Hubert, *Death Penalty Systems Disregard Mental Health—Experts*, WORLD COAL. AGAINST DEATH PENALTY (Sept. 25, 2014), https://worldcoalition.org/2014/09/25/death-penalty-systems-disregard-mental-health-experts/ [https://perma.cc/D67M-N8WE] (explaining that, from a psychologist's experience working with death row inmates, solitude in a cell, with physical discomfort and without others to communicate, is conducive to paranoia).

[67] *See* Kshitij Goyal, *Over 60% Prisoners on Death Row Were Found to Be Enduring Mental Illness: Study*, QUINT WORLD (Dec. 5, 2021), https://www.thequint.com/voices/opinion/over-60-prisoners-on-death-row-were-found-to-be-enduring-mental-illness-study#read-more [https://perma.cc/8UG7-875G] (discussing a 2016 report from the Death Penalty Centre at the National Law University in Delhi, India that found a negative correlation between time spent on death row and the prisoners' mental health). In the United States, criminal defendants typically spend more than ten years on death row. *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [https://perma.cc/2R26-KMQW]. Since 2013, over 50% of prisoners on death row have waited at least twenty-five years to be exonerated. *Id.*

[68] *See, e.g.*, *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Const., C.R. & Hum. Rts. of the Comm. on the Judiciary*, 112th Cong. 25–26 (2012) [hereinafter *Hearing*] (statement of Anthony C. Graves, Founder, Anthony Believes) (describing how for eighteen years, Graves, who was wrongfully convicted, lived in an eight-by-twelve cell; lacked adequate food, sleep, medical care, and physical contact; witnessed other prisoners attempt and die by suicide; and now lives with his own mental health challenges).

2. Debating the Death Penalty While Killing Defendants with Mental Illness

The United States remains one of few countries to still sanction the death penalty, although a growing number of states opposes its continued practice.[69] As of November 2021, fifty-four percent of U.S. respondents supported capital punishment for defendants convicted of murder.[70] For context, close to eighty percent of Americans supported the death penalty in September 1994.[71] Given this shift, scholars believe that the United States is gradually rejecting capital punishment.[72]

Death penalty opponents argue that depriving anyone of life is morally wrong, especially when a defendant is considered marginalized.[73] To counter, proponents of the death penalty tend to cite the retributivist logic of "an eye for an eye," but this rationale assumes that offenders are just as mentally compe-

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[69] *See* TRACY L. SNELL, U.S. DEP'T OF JUST., NCJ 300381, CAPITAL PUNISHMENT, 2019—STATISTICAL TABLES 2 (2021) (highlighting that thirty-two states and the federal government sanctioned the death penalty in 2019). At least 70% of foreign countries have abolished the death penalty. *Policy Issues*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international [https://perma.cc/3F28-3VB5].

[70] *2021 Gallup Poll: Public Support for Capital Punishment Remains at Half-Century Low*, DEATH PENALTY INFO. CTR. (Nov. 19, 2021), https://deathpenaltyinfo.org/news/2021-gallup-poll-public-support-for-capital-punishment-remains-at-half-century-low [https://perma.cc/R5WB-YF7G] [hereinafter *2021 Gallup Poll*]. A study from Pew Research in June 2021 found that 60% of U.S. adults supported the death penalty under similar circumstances. PEW RSCH. CTR., MOST AMERICANS FAVOR THE DEATH PENALTY DESPITE GROWING CONCERNS ABOUT ITS ADMINISTRATION 4 (2021). This study also found that most Americans doubted that the death penalty actually deterred people from committing serious crimes. *Id.* at 5.

[71] *2021 Gallup Poll*, *supra* note 70.

[72] *See* Matt Ford, *The Death Penalty Is Unpopular Everywhere but the Supreme Court*, THE SOAPBOX (Dec. 22, 2022), https://newrepublic.com/article/169679/2022-abolish-death-penalty-popularity [https://perma.cc/9PYD-XH83] (noting that the use of the death penalty is in decline); Maurice Chammah, *America's 'Machinery of Death' Is Slowly Grinding to a Halt*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/opinion/death-penalty-executions.html [https://perma.cc/V3VH-W25Q] (explaining that the number of executions and death sentences have dropped in recent years, and that state legislatures have considered bills to abolish or limit use of the death penalty). Although international law does not prohibit the death penalty, most countries deem capital punishment a human rights violation. *Policy Issues*, *supra* note 69. The U.S. Supreme Court considers international law to be relevant to the meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (explaining that the Court considers international authorities when interpreting the meaning of the Cruel and Unusual Punishments Clause (citing Trop v. Dulles, 356 U.S. 86, 102–103 (1958) (plurality opinion))).

[73] *See* BAUMGARTNER ET AL., *supra* note 62, at 267 (citing Gallup surveys from 1991, 2003, and 2014 that found that approximately 40% of respondents who opposed capital punishment cited the belief that capital punishment is morally wrong as their main rationale). Other respondents worry that capital punishment risks killing innocent people or interfering with a higher power. *Id.*

tent as victims.[74] Thus, when considering defendants with questionable levels of competency, support for the practice drops.[75]

Mental health activists and legal scholars alike have argued that defendants with mental illness should be exempt from capital punishment.[76] Though polls from the past decade show mixed results, in 2014, U.S. respondents opposed the death penalty for defendants with mental illness by a two-to-one margin.[77] In 2007, the American Psychological Association (APA), American Psychiatric Association, and National Alliance on Mental Illness (NAMI) successfully argued that capital defendants with mental illnesses who fail to grasp the reasons for and consequences of a pending death sentence are incompetent for execution.[78] Nevertheless, the Supreme Court has not recognized a categor-

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[74] *Id.* at 266; *see Retributivism*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining retributivism as justifying criminal punishment solely based on moral accountability, dismissing other factors such as deterrence, remorse, or varying levels of competency).

[75] BAUMGARTNER ET AL., *supra* note 62, at 278; *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (banning the death penalty for criminal defendants with intellectual disabilities in part because various legislatures have gradually addressed the matter); *Roper*, 543 U.S. at 578 (exempting defendants who committed capital crimes as minors from receiving the death sentence because most states, by 2005, rejected the practice).

[76] *See, e.g.*, Laurie T. Izutsu, Note, *Applying* Atkins v. Virginia *to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1003 (2005) (arguing for a categorical exemption of defendants with SMI from the death penalty in light of their impaired cognitive and adaptive functioning and society's apparent rejection of the practice); *Severe Mental Illness Initiative*, AM. BAR ASS'N (Mar. 19, 2021), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/ [https://perma.cc/TVQ4-ZH98] (arguing that defendants with SMI should receive life imprisonment rather than a death penalty).

[77] *Americans Oppose Executing Mentally Ill by 2-to-1 Margin*, Poll in *National Polls and Studies*, DEATH PENALTY INFO. CTR., (Nov. 21, 2022) https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies#mentalillness2014 [https://perma.cc/YMB5-AQHX]. The poll limited the meaning of mental illness to severe psychotic disorders. Baumgartner & Neill, *supra* note 64. Not surprisingly, many who oppose executing individuals with mental illness also oppose the death penalty in general. *See, e.g.*, *The Death Penalty in the United States*, AM. PSYCH. ASS'N (Aug. 2001), https://www.apa.org/about/policy/death-penalty [https://perma.cc/476R-RL4G] (urging every state to stop imposing the death penalty until addressing the practice's deficiencies, including its lack of deterrence, reliance on jurors who may be misguided, and disproportionate application to Black defendants).

[78] *See* Brief for Amici Curiae American Psychological Association, American Psychiatric Association, and National Alliance on Mental Illness in Support of Petitioner at 3, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407) [hereinafter Brief for Amici Curiae APA et al.] (arguing that an awareness of a pending execution is insufficient to show competency). The APA effectively provided the Supreme Court with the current test for competency, based on a rational understanding, as well as general guidelines for competency determinations. *Id.* In 2019, in *Madison v. Alabama*, the APA argued that the *Ford* exemption should apply to anyone who lacks a rational understanding due to some mental condition, not only SMI. Brief for the American Psychological Association and American Psychiatric Association as Amici Curiae in Support of Petitioner at 12, Madison v. Alabama, 139 S. Ct. 718 (2019) (No. 17-7505). The Supreme Court agreed, holding that anyone, regardless of diagnosis, who lacks a rational understanding of the reasons for a death sentence cannot be executed. Madison v. Alabama, 139 S. Ct. 718, 726–27 (2019).

ical exemption for defendants with mental illness.[79] States that continue to impose the death penalty have thus been hesitant to enact exemptions of their own, despite society's changing views of mental illness and capital punishment.[80]

B. The Supreme Court's Capital Punishment Jurisprudence Concerning Defendants with Mental Illness and Other Conditions

Today, courts within the United States may impose the death penalty against any defendant who has been convicted of a capital offense, subject to certain limitations.[81] In 1958, in *Trop v. Dulles*, the Supreme Court explained that the Eighth Amendment's bar against cruel and unusual punishment reflects

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[79] *See* Transcript of Oral Argument, *supra* note 23, at 59 (expressly waiving the argument that people with certain conditions deserve a categorical exemption from the death penalty). In 2021, the ABA supported a categorical exemption for defendants with SMI from the death penalty. *Severe Mental Illness Initiative*, *supra* note 76. Previously, the ABA had recommended exempting defendants with serious mental disorders or disabilities that restrict their ability to understand the nature, consequences, and severity of their actions, to make reasoned judgments, or to conform their conduct to applicable law. PAUL M. IGASAKI ET AL., AM. BAR ASS'N, RECOMMENDATION 122A 1 (2006), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf [https://perma.cc/BG6S-A7RD]. The ABA stated that it neither supported nor opposed capital punishment as a practice. *Id.* Others have argued that defendants whose mental capacities prevent juries from reasonably assessing their culpability should be exempt from capital punishment. Scott E. Sundby, *The True Legacy of* Atkins *and* Roper: *The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 524 (2014). Although the nation appears to increasingly disapprove of capital punishment, the Supreme Court has not considered polling data or organizational efforts to constitute a national consensus. *See* Ford v. Wainwright, 477 U.S. 399, 406, 408 (1986) (explaining that the fact no state executed incompetent defendants presented clear, compelling data of modern values under the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (noting that the public perception of whether a punishment is acceptable informs the meaning of the Cruel and Unusual Punishments Clause). *But see Atkins*, 536 U.S. at 343 (Scalia, J., dissenting) (arguing that eighteen states' apparent rejection of capital punishment for defendants with intellectual disabilities is not a national consensus).

[80] *Mental Illness*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/mental-illness [https://perma.cc/4ESF-H5CT]; *see, e.g.*, Liliana Segura, *Tennessee Plans to Restart Executions by Killing a Man with Mental Illness*, THE INTERCEPT (July 15, 2018), https://theintercept.com/2018/07/15/death-penalty-mental-illness/ [https://perma.cc/VV9Q-NJ28] (discussing the Tennessee legislature's unsuccessful attempts to enact exemptions for people with SMI from the death penalty); Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS (June 28, 2017), https://www.usnews.com/opinion/op-ed/articles/2017-06-28/as-william-morva-case-shows-america-should-stop-executing-the-mentally-ill [https://perma.cc/ZTQ3-HPXJ] (stating that eight states in 2017 considered bills to bar executing individuals with mental illness, but none enacted such legislation).

[81] *See* SNELL, *supra* note 69, at 3 (noting that the most common capital offense is first-degree murder with one or more aggravating factors); *see also* BAUMGARTNER ET AL., *supra* note 62, at 117 (noting that thirty-one states had active death penalty statutes as of 2015). The U.S. Constitution refers to capital punishment explicitly: the Fifth Amendment references capital crimes that may jeopardize one's life. U.S. CONST. amend. V. The Fourteenth Amendment also prohibits the deprivation of life unless the state conforms with due process requirements. *Id.* amend. XIV.

society's changing standards.[82] Since then, the Court has created three categorical exemptions from capital punishment, based on age, intellectual capacity, and competency.[83] Subsection 1 discusses these exemptions and their justifications.[84] Subsection 2 elaborates on the Court's interpretation of incompetency and the current standard to gauge competency for execution.[85]

1. Fitness for Execution: From *Ford* to *Roper*

In 1986, in *Ford v. Wainwright*, the Supreme Court held that imposing the death penalty on an incompetent, or "insane," defendant constitutes cruel and unusual punishment.[86] The Court explained that such a person cannot make allegations to stay the execution or make peace with God, that incompetency itself is punishment, and that the execution would lack deterrent and retributive value, and offend humanity.[87] The Court noted that the Eighth Amendment bars punishment condemned both at early common law and in the present day.[88] Because no state in 1986 executed defendants found to be incompetent,

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[82] 356 U.S. 86, 100–01 (1958) (plurality opinion). The Supreme Court noted that although the scope of the Cruel and Unusual Punishments Clause is ambiguous, its meaning arises from the notion of human dignity. *Id.* at 99–100.

[83] *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) (exempting from the death penalty criminal defendants who committed capital crimes before the age of eighteen); *Atkins*, 536 U.S. at 321 (prohibiting capital punishment of criminal defendants with intellectual disabilities); *Ford*, 477 U.S. at 409–10 (barring the death sentence against defendants who are incompetent and unable to understand the reasons for execution).

[84] *See infra* notes 86–94 and accompanying text. After all, "[t]o attempt to formulate a standard of competency for execution is to stumble in the dark unless one first understands why the incompetent are exempt." Ward, *supra* note 24, at 63.

[85] *See infra* notes 95–100 and accompanying text.

[86] 477 U.S. at 410. The *Ford* Court used the terms "insane" and "incompetent" interchangeably. *Id.* at 401–02. Though the word "insane" continues to appear in legal contexts, some disability activists oppose its usage as stigmatizing, along with the word "crazy." All Things Considered, *Why People Are Rethinking the Words 'Crazy' and 'Insane*,*'* NPR, at 00:44 (July 18, 2019), https://www.npr.org/2019/07/08/739643765/why-people-are-arguing-to-stop-using-the-words-crazy-and-insane [https://perma.cc/C7QC-PBEJ].

[87] *Ford*, 477 U.S. at 406–09. The *Ford* Court drew from Justice Frankfurter's dissent in *Solesbee v. Balkcom*. *Id.* at 412; *see* Solesbee v. Balkcom, 339 U.S. 9, 17–19 (1950) (Frankfurter, J., dissenting) (explaining that ancient legal scholars supported an exemption for the mentally incompetent); *see also* 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 35 (1736) (explaining that defendants who become incompetent after receiving a death sentence must be exempt because they can no longer make legal arguments to stay the execution); 4 WILLIAM BLACKSTONE, COMMENTARIES *388–89 (basing an exemption on an incompetent person's inability to make peace before death, and that madness itself is punishment); EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 6 (1797) (explaining that executing an incompetent person lacks deterrent and retributive value).

[88] *Ford*, 477 U.S. at 406. In 1986, no state allowed capital punishment of anyone deemed insane. *See id.* at 408 & n.2 (noting that, of the forty-one states recognizing capital punishment, twenty-six states' statutes barred executing the incompetent, and that the remaining states recognized the similar common-law ban).

the Court concluded that all capital defendants must be competent for execution, as determined through an evidentiary hearing.[89]

Over the next two decades, the Supreme Court created two new categorical exemptions from the death penalty.[90] In 2002, in *Atkins v. Virginia*, the Court prohibited the execution of criminal defendants with intellectual disabilities.[91] In 2005, in *Roper v. Simmons*, the Court exempted defendants who had committed capital offenses before the age of eighteen.[92] In both decisions, the Court echoed *Ford*'s rationale that imposing the death penalty on such individuals lacked deterrent effect, retributive value, and national support.[93] Given these rulings, many scholars and activists believed that an exemption for defendants with mental illness was on the horizon.[94]

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[89] *See id.* at 416–18 (remanding to the state court to provide an evidentiary hearing on the issue of insanity).

[90] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (exempting defendants with intellectual disabilities from capital punishment); Roper v. Simmons, 543 U.S. 551, 568 (2005) (barring the use of the death penalty against juvenile capital offenders).

[91] 536 U.S. at 321. The Court referred to individuals with intellectual disabilities as "mentally retarded," a commonly used phrase at the time that has since been rejected. *Id.*; *see* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (replacing the use of the phrase "mental retardation" with "intellectual disability"). The Court reasoned that the states' practices of exempting people with intellectual disabilities from the death penalty since the 1990s reflected a national consensus on the issue. *Atkins*, 536 U.S. at 316–17. The Court added that executing such individuals lacked retributive and deterrent value. *Id.* at 317–18. Previously, the Court had allowed for the imposition of the death penalty against individuals with intellectual disabilities. Penry v. Lynaugh, 492 U.S. 302, 340 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). For more discussion on the impact of and the states' looser interpretations of *Atkins*, see generally Victoria E. Broderick, Note, *Executing Defendants with Intellectual Disabilities: Unconstitutional in Theory, Persistent in Practice*, 63 B.C. L. REV. 301 (2022).

[92] 543 U.S. at 568. Because most states did not impose the death penalty upon offenders under eighteen years old, the Court determined that a constitutional prohibition was warranted. *Id.* at 567. The *Roper* Court overturned precedent that sanctioned the execution of criminal defendants over the age of fifteen. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005). The *Roper* Court reasoned that juvenile defendants were less culpable than adults, and that sentencing them to death lacked retributive and deterrent value. 543 U.S. at 571.

[93] *See Atkins*, 536 U.S. at 317 (noting a national consensus against capital punishment of individuals with intellectual disabilities, and explaining that the impairments of such individuals undermined the retributive and deterrent justifications for capital punishment); *Roper*, 543 U.S. at 568, 571 (observing states' movement away from executing juvenile offenders, and discussing the reduced culpability of youth as the basis for excluding juvenile offenders from the death penalty).

[94] *See, e.g.*, Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 314 (2003) (asserting that the execution of individuals with SMI departs from the reasoning of *Atkins*); AM. BAR ASS'N, *supra* note 16, at 4 (concluding that the trend against capital punishment of individuals with SMI and the lack of adequate protections for such individuals in the criminal legal system warrant an exemption); ACLU, MENTAL ILLNESS AND THE DEATH PENALTY 6 (May 5, 2009), https://www.aclu.org/sites/default/files/field_document/mental_illness_may2009_0.pdf [https://perma.cc/9MGZ-DF57] (noting the growing recognition that SMI should exempt people from capital punishment).

2. Defining Incompetency: From Identity to Symptomatology

In 2007, in *Panetti v. Quarterman*, the Supreme Court turned to the *Ford* exemption to attempt to define incompetency.[95] The Court explained that a defendant must show the lack of rational understanding of the reasons for a pending death sentence to be considered incompetent, and required that those reasons must arise from SMI.[96] Rather than provide a uniform standard for evaluating incompetency, the Court instructed states to develop their own procedural requirements.[97]

In 2019, the Court broadened the scope of incompetency without altering the underlying test.[98] In *Madison v. Alabama*, the Court reiterated that any defendant who lacks a rational understanding of the reasons for a death sentence is incompetent for execution, regardless of the kind of underlying mental condition.[99] In theory, this expansion would allow more defendants, with various

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[95] 551 U.S. 930, 958–59 (2007). The Supreme Court did not offer a precise definition for incompetency in *Ford v. Wainwright*, but rather stated that a defendant whose mental illness precludes the comprehension of the reasons for and consequences of a death sentence may be insane. 477 U.S. 399, 417 (1986). States struggled to apply *Ford*'s guidelines consistently. Christopher S. Wadsworth, William J. Newman & Paul R.S. Burton, Ferguson v. Florida: *Rationally Understanding Competence to Be Executed?*, 42 J. AM. ACAD. PSYCHIATRY & L. 234, 236 (2014).

[96] *Panetti*, 551 U.S. at 959–60. The *Panetti* Court used language that mirrored its decision in *Dusky v. United States*, which addressed competency to stand trial. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (stating that a defendant is competent to stand trial if they are able to rationally consult with counsel and have a rational and factual understanding of the case). The *Panetti* Court admitted that a rational understanding is hard to define. 551 U.S. at 959. *Panetti* appeared to raise the bar of competency under *Ford*, requiring more than a mere awareness of the reasons for receiving a death sentence. *Id.* Nonetheless, the *Panetti* Court declined to exempt defendants with SMI from capital punishment, and instead required courts to consider evidence of documented SMI. *See id.* at 960 (concluding that the lower court should have considered Panetti's symptoms of delusion, hallucinations, and personality disorder). *But see* Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 435 n.39 (2009) (explaining that *Panetti* could indicate a possible categorical exemption for defendants with SMI). As in *Atkins* and *Roper*, the *Panetti* Court reasoned that executing a defendant who lacks a rational understanding does not have any retributive or deterrent value. *Panetti*, 551 U.S. at 958–59.

[97] *Panetti*, 551 U.S. at 960–61.

[98] *See* Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (allowing any capital defendant, regardless of diagnosis, to claim incompetency if they show a lack of rational understanding of a pending execution).

[99] *Id.* The Court explained that an incompetent defendant need not suffer from delusions or a psychotic disorder, but may have any mental condition, like dementia, that precludes a rational understanding. *Id.* In this sense, *Madison* expanded the scope of incompetency by eliminating the previous requirement of SMI. *See id.* at 729 (directing courts to look past diagnoses for downstream effects to test for competency). At the same time, there remained a clear limit: even Bryan Stevenson, as counsel for Mr. Madison, clarified that he was not arguing for a categorical exemption for individuals with any particular condition. Transcript of Oral Argument, *supra* note 23, at 59 ("[W]e've never argued that this is a case about a categorical ban on executing people with a certain kind of condition.").

cognitive and mental health conditions, to claim incompetency, but in practice, the bar to prove incompetency remains exceptionally high.[100]

C. The Presumption of Competency in Expert Evaluations and Court Procedures

On the one hand, the *Panetti* Court appeared to more clearly define competency for execution.[101] But on the other hand, the Court allowed the states to come up with their own procedural requirements for proving incompetency.[102] Across states, competency evaluations—now a matter of life or death—aim to discern a defendant's rational understanding or lack thereof.[103] Despite its conceptual vagueness, a rational understanding is not hard to establish, as the bar for competency is admittedly low.[104] Subsection 1 describes when a defendant can claim incompetency.[105] Subsection 2 discusses how evaluators gauge competency for execution and how courts weigh competency evidence.[106]

1. Claiming Incompetency: From Trial to Execution

In states that allow capital punishment, a court may impose the death penalty upon a person who has been convicted of a capital offense.[107] Although each state follows its own criminal laws, the Sixth Amendment guarantees procedural rights for all criminal, including capital, defendants.[108] Based on the

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[100] *See* Cole v. Farris, 54 F.4th 1174, 1178 (10th Cir.) (per curiam) (explaining that the test for competency for execution is not hard to meet), *cert. denied*, 143 S. Ct. 366 (2022) (mem.); *cf.* Medina v. California, 505 U.S. 437, 446, 452–53 (1992) (holding that a statutory presumption of a defendant's competency to stand trial and the requirement that a defendant bear the burden of proving incompetency by a preponderance of the evidence does not violate due process).

[101] 551 U.S. at 959.

[102] *See id.* at 960–61 (declining to articulate a uniform rule to govern all competency determinations across states due to the difficulty in articulating a precise standard to capture all possible mental health conditions).

[103] *See id.* at 962 (remanding the case to provide Panetti with a competency hearing to involve psychiatrists, doctors, and other experts).

[104] Alexander H. Updegrove & Michael S. Vaughn, *Evaluating Competency for Execution After* Madison v. Alabama, 48 J. AM. ACAD. PSYCHIATRY & L. 1, 5 (2020); *see, e.g.*, *Cole*, 54 F.4th at 1178 (stating that the bar for competency is not high (citing *Panetti*, 551 U.S. at 959)). The concept of competency is particularly challenging because it implicates personhood, essentially asking whether a defendant's understanding of reality and themselves is cognizable across legal, social, and medical contexts. Ward, *supra* note 24, at 57. Discerning a rational understanding thus involves both empirical and moral determinations. *Id.* at 58 (citing Benjamin Freedman, *Competence, Marginal and Otherwise*, 4 INT'L J.L. & PSYCHIATRY 53, 55 (1981)).

[105] *See infra* notes 107–114 and accompanying text.

[106] *See infra* notes 115–129 and accompanying text.

[107] *See* SNELL, *supra* note 69, at 3 (defining capital punishment as imposing and carrying out a death sentence upon an offender convicted for the most serious of crimes); BAUMGARTNER ET AL., *supra* note 62, at 27 (describing capital trials as involving cases of particularly egregious crimes).

[108] U.S. CONST. amend. VI; *see* BAUMGARTNER ET AL., *supra* note 62, at 27 (explaining that criminal laws fall within states' discretion). The Sixth Amendment right to a fair trial allows the

Supreme Court's interpretation of the Sixth, Eighth, and Fourteenth Amendments, a criminal case must cease if the defendant is found incompetent at several stages in the proceedings.[109]

First, a defendant who clearly manifests insanity may be deemed incompetent to stand trial.[110] During the fact-finding stage, the jury or judge may consider a defendant's mental health as a mitigating or aggravating factor to determine guilt or innocence.[111] At sentencing, the jury may consider any mental health condition to determine whether a convicted defendant is eligible for the death penalty.[112] Even after receiving a death sentence, a defendant may plead incompetency for execution.[113] If a defendant challenges their competency after imposition of a death sentence, they must make a substantial showing of incompetency to warrant a competency determination.[114]

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community to impose its moral judgments on criminal defendants. Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1417 (2017).

[109] *See* Pate v. Robinson, 383 U.S. 375, 385–86 (1966) (holding that a defendant's right to a fair trial was violated when the court denied an evidentiary hearing on competency to stand trial that conformed with due process); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (concluding that capital punishment for incompetent individuals constitutes cruel and unusual punishment under the Eighth Amendment); ROTH, *supra* note 36, at 176 (noting that competency to stand trial is one of two points in criminal proceedings where sanity matters); BAUMGARTNER ET AL., *supra* note 62 at 240 (highlighting three moments during criminal proceedings where a defendant may claim incompetency, including at the time of the crime, at trial, and before execution).

[110] *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (explaining that competency to stand trial requires a present capacity to communicate with counsel, as well as a factual and rational appreciation of the proceedings). *See generally* Ronald Roesch, Patricia A. Zapf, Stephen L. Golding & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, *in* THE HANDBOOK OF FORENSIC PSYCHOLOGY 327, 327 (Allen K. Hess & Irving B. Weiner eds., 1999) (explaining that because competency-to-stand-trial challenges occur more frequently than insanity pleas, experts must have adequate preparation and experience to make such assessments).

[111] BAUMGARTNER ET AL., *supra* note 62, at 240.

[112] *See id.* at 236 (suggesting that mental illness can serve as mitigating evidence if capital punishment is meant to be applied only to the most culpable offenders); *see also Ex parte* Riles, Nos. WR-11,312-01, WR-11,312-04, 2021 WL 1397906, at *3 (Tex. Crim. App. Apr. 14, 2021) (overturning a death sentence and remanding with instructions to consider evidence of mental illness); *Harris County DA Seeks to Vacate Sentence for Nation's Longest-Serving Death-Row Prisoner*, DEATH PENALTY INFO. CTR. (Feb. 8, 2021), https://deathpenaltyinfo.org/news/harris-county-da-seeks-to-vacate-sentence-for-nations-longest-serving-death-row-prisoner [https://perma.cc/4AE4-4T6T] (explaining that the Harris County District Attorney requested a resentencing hearing for a death row inmate to allow jurors to consider mitigating evidence, such as child abuse or trauma). The jury, not the judge, must make factual determinations to decide whether to impose the death sentence. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (overturning an Arizona law that allowed a judge to make factual determinations necessary to impose the death penalty); GARLAND, *supra* note 17, at 48–49 (explaining that the decision to impose capital punishment today in America is made not by a court, but rather by a lay jury with absolute, unreviewable discretion).

[113] *See Ford*, 477 U.S. at 417–18 (holding that defendants deemed incompetent cannot receive capital punishment).

[114] *See id.* at 416–17 (suggesting that a high threshold to prove incompetency may be necessary to avoid unmeritorious claims).

2. Determining Competency for Execution

In holding that all defendants must be competent for execution, the *Ford* Court tasked states with developing their own methods to determine competency.[115] Because the issue of competency recurs throughout criminal proceedings, the Court suggested that states use other competency-based procedures for guidance.[116] Nonetheless, due to the slightly different standards at each stage, a defendant who is deemed competent to stand trial may still be found incompetent for execution.[117]

Under *Panetti*, competency for execution depends solely on a person's rational understanding of the reasons for receiving a death sentence.[118] Competency determinations thus probe a factual understanding of the nature of the execution, a causal connection between the crime and sentence, and an awareness of death's consequences.[119] Evaluators must be highly qualified clinicians, such as licensed psychologists, psychiatrists, or physicians who have extensive experience assessing mental health disorders.[120] Evaluations typically begin

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[115] *Id.* In his concurrence, Justice Powell explained that the Eighth Amendment requires each defendant to at least be aware of a pending execution and the reasons for it. *Id.* at 421–22 (Powell, J., concurring); *see* Wadsworth et al., *supra* note 95, at 235 (explaining that states have generally followed Justice Powell's standard that effectively set the constitutional floor).

[116] *See Ford*, 477 U.S. at 416–17 & n.4 (suggesting that Florida use its standard of competency to stand trial to shape its standard for competency for execution (citing Pate v. Robinson, 383 U.S. 375, 387 (1966))); *see also* Ward, *supra* note 24, at 49 (noting the pattern in criminal law to establish competency at various stages of criminal proceedings).

[117] BAUMGARTNER ET AL., *supra* note 62, at 236; *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 318 (2002) (indicating that a criminal defendant with an intellectual disability may be competent to stand trial but not for execution); *see also* Carol S. Steiker, Panetti v. Quarterman: *Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 287 (2007) (finding it remarkable that Panetti was deemed competent to stand trial and represent himself, yet his competency for execution was widely debated). One justification for requiring different levels of competency at different stages of criminal proceedings is that a defendant who faces capital punishment should be more competent, or morally culpable, than someone charged with a minor misdemeanor. ROTH, *supra* note 36, at 183. *But see* Transcript of Oral Argument, *supra* note 23, at 51–52 (raising an argument that competency to stand trial, to waive post-conviction review, and to be executed follow the same analysis).

[118] 551 U.S. at 959. In *Madison v. Alabama*, the Court clarified that a particular diagnosis or medical event is not dispositive, though may be relevant to a competency-for-execution determination. 139 S. Ct. 718, 727 (2019).

[119] *See* Jeffrey L. Kirchmeier, *The Undiscovered Country: Execution Competency & Comprehending Death*, 98 KY. L.J. 263, 280–81 (2010) (explaining that *Panetti* requires a defendant's recognition of the severity of the wrongs committed and the reasons for the sentence).

[120] *See Panetti*, 551 U.S. at 962 (guiding psychiatrists, doctors, and other experts to lead competency-for-execution determinations); Updegrove & Vaughn, *supra* note 104, at 5 (recommending that psychiatrists, psychologists, or doctors with relevant experience conduct competency determinations). The APA, American Psychiatric Association, and NAMI argued that mental health professionals are best equipped to discern a defendant's rational understanding of the reasons for their execution. Brief for Amici Curiae APA et al., *supra* note 78, at 17. There is no standardized method to determine competency for execution, but rather several commonly used tests. *See* Updegrove & Vaughn, *supra* note 104, at 5 (noting that the relevant considerations for competency for execution are helpful, but not

with broad questions posed to the defendant to assess their awareness of the proceedings and the reasons for receiving a death sentence.[121] Evaluators must then determine whether the defendant understands the purpose of the punishment, based on the severity of the crime, as well as the finality of the sentence.[122]

Once an expert has made a competency determination, a judge, in most states, has the power to overrule that finding.[123] Courts, however, typically accept experts' findings.[124] A defendant may hire his or her own expert to present evidence of incompetency at sentencing, and the judge makes a final determination.[125] Given courts' historical deference to experts and the high stakes of finding competency, mental health professionals often face moral dilemmas when deciding whether to conduct such evaluations, as their determination could result in the death of another person.[126]

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prescriptive). Evaluations may be brief or last several hours, depending on a defendant's condition. *Id.* When a defendant presents complex, active symptoms or clear cognitive decline, an evaluator may choose to meet on several occasions to better understand the defendant's condition. *Id.* Experts have recommended videotaping all evaluations. Michael L. Radelet & George W. Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 47 (1986). Beyond leading in-person interviews, evaluators may study other sources, such as medical, psychiatric, academic, and military records, as well as any writings, letters, videotapes, or art that a defendant produced while incarcerated. Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCH. REV. 29, 49 (2001).

[121] *See* Brief for Amici Curiae APA et al., *supra* note 78, at 17–18 (suggesting that an evaluator ask why the defendant is in prison and why he or she received the death sentence).

[122] *Id.* at 18. This determination requires a clinician to be at least familiar with the pertinent mental conditions of the defendant. *Id.* Although a defendant's past medical and psychological records are relevant, the evaluator should focus on the defendant's present state of mind to determine competency. Updegrove & Vaughn, *supra* note 104, at 5.

[123] *See* Ford v. Wainwright, 477 U.S. 399, 416 (1986) (invalidating Florida's statute in part because it left the decision to sanction an execution, pending a finding of competency, to the Governor); *see also* Michael L. Radelet & George W. Barnard, *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 297, 298 (1988) (explaining that Florida now leaves competency determinations up to the court). Judges tend to agree with the evaluators' findings of competency—in some cases, up to 99% of the time—and defer to the experts' majority opinion in cases of disagreement. *Cf.* Lauren E. Kois, Preeti Chauhan & Janet I. Warren, *Competence to Stand Trial and Criminal Responsibility*, *in* PSYCHOLOGICAL SCIENCE AND THE LAW 293, 306 (Neil Brewer & Amy Bradfield Douglass eds., 2019) (discussing such findings in the context of competency to stand trial).

[124] Kois, Chauhan & Warren, *supra* note 123, at 306; *see, e.g.*, Cole v. Farris, 54 F.4th 1174, 1179–80, 1183 (10th Cir.) (per curiam) (explaining that the federal district court and Oklahoma Court of Criminal Appeals denied relief after one expert found that the defendant was competent), *cert. denied*, 143 S. Ct. 366 (2022) (mem.).

[125] *See Ford*, 477 U.S. at 418 (remanding to provide a competency hearing before the judge can decide whether to impose the death penalty); *Panetti*, 551 U.S. at 962 (remanding for an evidentiary hearing on competency).

[126] *See* Tess M.S. Neal, *Choosing the Lesser of Two Evils: A Framework for Considering the Ethics of Competency-for-Execution Evaluations*, 10 J. FORENSIC PSYCH. PRAC. 145, 146 (2010) (noting the ethical issues related to conducting competency evaluations); Updegrove & Vaughn, *supra*

Despite the pervasiveness and severity of mental illness on death row, competency-for-execution challenges are relatively rare.[127] Since the 1990s, less than seven percent of thirteen hundred defendants who had received death sentences pleaded incompetency.[128] Little clinical research exists regarding a person's competency for execution.[129]

II. POST-*PANETTI* PROBLEMS: PRESUMING COMPETENCY LEAVES DEFENDANTS WITH MENTAL ILLNESS UNPROTECTED ON DEATH ROW

In 2007, in *Panetti v. Quarterman*, the Supreme Court clarified that a defendant who lacks a rational understanding of the reasons for a death sentence cannot be executed.[130] To enforce this protection, the Court entitled all defendants who plead incompetency, based on SMI, to an evidentiary hearing.[131] In 2019, in *Madison v. Alabama*, the Court extended this right to defendants with other mental conditions, like dementia.[132]

Although the Court appeared to make incompetency claims more accessible, proving incompetency remains challenging in practice.[133] Across states, post-*Panetti* cases reveal that competency-for-execution challenges, when

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note 104104, at 6 (encouraging evaluators to reflect before participating in competency determinations).

[127] *See* ACLU, *supra* note 94, at 1 (stating that between 5% to 10% of prisoners on death row have SMI (citing *Position Statement* 54, *supra* note 24)); Transcript of Oral Argument, *supra* note 23, at 24 (noting the infrequency of competency challenges among prisoners on death row).

[128] Transcript of Oral Argument, *supra* note 23, at 24. Some scholars suggest that the heavy burden to prove incompetency deters most defendants from trying. Brief of Petitioner at 21 n.13, Madison v. Alabama, 139 S. Ct. 718 (2019) (No. 17-7505) (explaining that although the *Panetti* test for competency appears to be broad, it has done little to prevent executions of defendants with mental illness (citing John H. Blume, Sheri Lynn Johnson & Katherine E. Ensler, *Killing the Oblivious: An Empirical Study of Competency to Be Executed Litigation*, 79 UMKC L. REV. 1, 7 (2013))); *see also* ROTH, *supra* note 36, at 271 (quoting a career capital defense attorney who called the incompetency standard impossibly high).

[129] Neal, *supra* note 126, at 147.

[130] 551 U.S. at 959–60. The Court articulated that the requirement for a rational understanding did not displace the presumption of competency, even at the point of execution. *See id.* at 959 (explaining that a rational understanding does not require that the defendant be considered normal or rational).

[131] *Id.* at 962.

[132] 139 S. Ct. 718, 726–27 (2019). Both *Panetti* and *Madison* effectively added procedural flourishes to *Ford*'s standard of competency for execution. *Panetti*, 551 U.S. at 960; *Madison*, 139 S. Ct. at 729. For more on the distinction between procedural and substantive rights for capital defendants with mental illness, including how the Supreme Court's focus on procedural guidance can undermine substantive rights, see *Developments in the Law—The Law of Mental Illness*, *supra* note 21, at 1162.

[133] *See* Blume et al., *supra* note 128, at 21 (noting that despite its vagueness, the threshold for incompetency under *Panetti* is strict in theory and even stricter in practice). Before *Panetti*, one dominant critique was that the test for incompetency was not too hard to meet, but rather too narrow in scope, overlooking those who had some understanding of a pending execution, but did not appreciate the reasons for or consequences of it, due to delusions or other disorders. Brief for Amici Curiae APA et al., *supra* note 78, at 6.

brought, rarely succeed.[134] Section A presents *Ferguson v. Secretary, Florida Department of Corrections* as case in point, illustrating how the majority test for competency is easy to satisfy, regardless of a defendant's SMI.[135] Section B discusses *Battaglia v. State*, a Texas case that shows how deferring to experts and trial courts tends to secure initial findings of competency.[136] Section C examines *Coe v. State* from Tennessee and explores the common lack of judicial expertise regarding mental illness despite vast discretion to weigh competency evidence.[137] Finally, Section D considers South Carolina's more stringent test for competency, in *Singleton v. State*, alongside its own limitations.[138]

A. Ferguson*: Florida's Close-Enough Cognitive View of Competency*

In July 1977, John Ferguson posed as an electrician to enter a stranger's residence and rob and shoot the eight people inside, killing six of them.[139] The next year, Ferguson shot and killed two seventeen-year-olds in their car after robbing them and raping the young woman.[140] Throughout the 1970s, multiple professionals had diagnosed Ferguson with paranoid schizophrenia, citing symptoms of psychosis.[141] Nevertheless, in 1978, four experts deemed him

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[134] *See, e.g.*, Battaglia v. State, 537 S.W.3d 57, 80–81 (Tex. Crim. App. 2017) (stating that only one of the three competency-for-execution cases heard after *Panetti* led to further proceedings); Singleton v. State, 437 S.E.2d 53, 60 (S.C. 1993) (noting that competency-for-execution challenges are not often raised post-conviction). Most states have not changed their standards of competency for execution that were drafted pre-*Panetti*. *See, e.g.*, *Battaglia*, 537 S.W.3d at 81 (explaining that Texas's preexisting standard for competency satisfied *Panetti*'s requirement that a defendant know the reason for the sentence, grasp that the execution is pending, and see a causal connection between the crime and punishment); Ferguson v. Sec'y, Fla. Dep't Corr., 716 F.3d 1315, 1335 (11th Cir. 2013) (determining that Florida's standard for competency did not conflict with *Panetti* because *Panetti* did not heighten the standard of *Ford*).

[135] *See infra* notes 139–153 and accompanying text.

[136] *See infra* notes 154–167 and accompanying text.

[137] *See infra* notes 168–173 and accompanying text.

[138] *See infra* notes 174–183 and accompanying text.

[139] *Ferguson*, 716 F.3d at 1318–19. Ferguson and two accomplices bound, blindfolded, and searched everyone before shooting each person in the head. *Id.* at 1319. Two victims survived. *Id.*

[140] *Id.* Ferguson shot the man in his chest and arm through the car window, and the woman attempted to escape. *Id.* Ferguson eventually caught up to her and raped her, then shot her in the head. *Id.* at 1319–20. Ferguson returned to the car to shoot the man in the head. *Id.* at 1320. He also stole cash from the man's wallet and jewelry from the woman's person. *Id.*

[141] *Id.* After Ferguson's father died when Ferguson was thirteen, he began experiencing hallucinations. Tamara Lush, *Convicted Mass Murderer Executed in Florida*, USA TODAY https://www.usatoday.com/story/news/nation/2013/08/05/convicted-mass-murderer-executed-in-florida/2621285/ [https://perma.cc/R3L6-GL53] (Aug. 5, 2013). Some of Ferguson's mother's new boyfriends began to abuse Ferguson, so he moved in to live with his sisters in an infested residence. *Id.* At twenty-one, for reasons unknown, a police officer shot Ferguson in the head. *Id.* In the 1970s, Ferguson was committed to a psychiatric facility and prescribed antipsychotic medications. *Ferguson*, 716 F.3d at 1320. In 1976, he was deemed competent and discharged. *Id.*

competent to stand trial because his psychosis had apparently subsided.[142] Ultimately, Ferguson was convicted of all eight murders and received the death sentence.[143]

In 1995, Ferguson filed a federal habeas petition, based in part on a plea of incompetency for execution.[144] After an evidentiary hearing in 2004, the U.S. District Court for the Southern District of Florida determined that Ferguson had a factual and rational understanding of the reasons for his sentence, and the Governor of Florida, Rick Scott, scheduled his execution for October 2012.[145] Pursuant to state law, Ferguson requested another competency hearing, where three psychiatrists deemed him competent.[146]

Ferguson next petitioned the state court, asserting that he lacked a rational understanding for the reason he received a death sentence.[147] The court rejected his claim, siding with the experts who had deemed him competent, notwithstanding his paranoid schizophrenia and delusion that he was a descendant of God.[148] Ferguson then argued that the state court ran afoul of *Panetti* by requir-

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[142] *Ferguson*, 716 F.3d at 1321. Some experts testified that Ferguson did not have schizophrenia, but rather was sociopathic and possibly malingering. *Id.* Two experts who had found previously that Ferguson was actively psychotic retreated from this position. *Id.* Deferring to the experts, the court also concluded that Ferguson was competent to stand trial. *Id.*

[143] *See id.* at 1320 (explaining that the Florida Supreme Court remanded for resentencing, and that the trial court reinstated the death penalty). Following his convictions, Ferguson pleaded not guilty by reason of insanity, an issue over which seven experts were evenly split. *Id.* at 1321. The trial court determined Ferguson to be competent, and the Florida Supreme Court affirmed the reimposition of the death penalty. *Id.* Ferguson later filed a motion to stay the proceedings, pleading incompetency to assist counsel. *Id.* Six experts offered conflicting testimony regarding Ferguson's mental health in August 1998. *Id.* The court decided that Ferguson did not have SMI but was more likely malingering and thus was competent to understand the proceedings and assist in his defense. *Id.*

[144] *Id.* Ferguson raised several constitutional claims related to aspects of the trial, sentencing, and post-conviction proceedings, including a violation of due process. *Id.*

[145] *Id.* at 1322. Based on conflicting testimony from six experts, the court determined that although Ferguson had shown signs of paranoid schizophrenia, his apparent improvement and likelihood of malingering rendered him competent for execution. *Id.*

[146] Ferguson v. State, 112 So. 3d 1154, 1155 (Fla. 2012) (per curiam); *see* FLA. STAT. § 922.07(1) (2023) (directing the Governor to stay the execution of a defendant who may be incompetent and appoint a panel to conduct a competency evaluation). The Governor stayed the execution and appointed three psychiatrists to evaluate Ferguson on October 1, 2012, and submit their findings the next day. *Ferguson*, 716 F.3d at 1322.

[147] *Ferguson*, 716 F.3d at 1323. Ferguson also argued that Florida's standard for competency ran afoul of *Panetti*, because the procedure only required a factual awareness, rather than a rational understanding, of the reasons for a pending execution. *Id.* at 1332. The court rejected this argument, reasoning that the Florida Supreme Court had stated previously that the state's standard considered both the defendant's factual and rational understanding. *Id.* at 1335–36; *see* Provenzano v. State, 750 So. 2d 597, 602 (Fla. 1999) (noting that the test for competency for execution considers rationality, but to a limited extent); FLA. R. CRIM. P. 3.811(b) (2023) (defining incompetency for execution as a lack of understanding for both the fact of and reason for a pending death sentence).

[148] *Ferguson*, 716 F.3d at 1335. One expert testified to Ferguson's history of mental illness and current incompetency, explaining that Ferguson believed that his death sentence was part of the state's ploy to intervene in his spiritual path to godly authority. *Id.* at 1324. A second expert determined from

ing only a factual awareness, rather than a rational understanding, of the pending sentence.[149] The district court denied his petition, and the Court of Appeals for the Eleventh Circuit affirmed, concluding that Florida's standard was properly "an awareness-plus-rational-understanding test."[150] Judge Carnes reasoned that Ferguson's belief in an afterlife could not amount to incompetency, as that would indicate many others with similar religious views are also incompetent.[151] In his concurrence, Judge Wilson noted that Florida's competency-for-execution standard erroneously required only a factual awareness, but nonetheless deferred to the state court's standard and findings per habeas review.[152] After the Supreme Court declined to intervene, Ferguson was executed on August 5, 2013.[153]

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the totality of tests administered that Ferguson was not malingering, but also noted that Ferguson did not show any signs of cognitive or verbal impairment. *Id.* at 1325. The state's first expert rejected that Ferguson had schizophrenia because his religious beliefs and visual and auditory hallucinations did not create significant impairment, and further testified that Ferguson was likely malingering. *Id.* at 1326. The state's second expert agreed that Ferguson's symptoms did not amount to SMI and that he rationally understood his sentence, based on his knowledge of the date, protocol, and consequences. *Id.* at 1327. Another psychologist doubted that Ferguson had schizophrenia because of his request for legal materials, and prison officials spoke to his lack of unusual behaviors in prison. *Id.* Finding the state's experts more credible, the court held that Ferguson's mental illness did not interfere with his rational understanding of the pending execution. *Id.* at 1328. The judge dismissed the idea that Ferguson's beliefs in an afterlife and being the prince of God were signs of insanity. *Id.* at 1329.

[149] *Id.*; *see* Panetti v. Quarterman, 551 U.S. 930, 945 (2007) (recognizing an exception for competency-for-execution claims that are filed as soon as they are ripe).

[150] *Ferguson*, 716 F.3d at 1336, 1338 (citing *Provenzano*, 750 So. 2d at 602–03). The Eleventh Circuit held that Florida's competency-for-execution standard did not conflict with clearly established law and that the state court reasonably applied the standard to Ferguson's competency hearing. *Id.* at 1344. Judge Carnes, writing for the majority, first noted that *Panetti* established the lack of clearly established law in this area of capital punishment jurisprudence. *Id.* at 1318. Under AEDPA, on habeas review, the panel deferred to the state court and affirmed that Ferguson was competent. *See id.* at 1337 (explaining that the AEDPA standard of deference applied with particular force because *Panetti* recognized that a rational understanding is difficult to define). Although the Florida Supreme Court used the terms "awareness" and "understanding" synonymously and without reference to the word "rational," the Eleventh Circuit reasoned that Florida did not clearly fail to heed *Panetti* or more directly defy it. *Id.*

[151] *See id.* at 1342 (explaining that Ferguson's requested standard for incompetency would render most Americans incompetent, given that the majority of religions include some notion of an afterlife). Judge Carnes cited a survey from the American Association of Retired Persons in 2006, which found that 23% of respondents over the age of fifty believe in reincarnation, and 50% believe in life after death. *Id.* (citing JEAN KOPPEN & GRETCHEN ANDERSON, AARP, THOUGHTS ON THE AFTERLIFE AMONG U.S. ADULTS 50+, at 4 (2007), https://assets.aarp.org/rgcenter/general/afterlife.pdf [https://perma.cc/77LV-LK8B]). Based on another study that found that 75% of American adults believe in some kind of afterlife, Judge Carnes asked whether courts should conclude that these Americans are therefore incompetent. *Ferguson*, 716 F.3d at 1343 (citing Andrew Singleton, *Beyond Heaven? Young People and the Afterlife*, 27 J. CONTEMP. RELIGION 453, 453 (2012)).

[152] *Ferguson*, 716 F.3d at 1344 (Wilson, J., concurring); *see* Renico v. Lett, 559 U.S. 766, 773 (2010) (citations omitted) (explaining that AEDPA demands that reviewing courts defer to state court decisions, even in doubt).

[153] Ferguson v. Crews, 570 U.S. 940 (mem.), *denying cert. to* Ferguson v. Sec'y, Fla. Dep't Corr., 716 F.3d 1315, 1335 (11th Cir. 2013); *see* Lush, *supra* note 141 (reporting that Ferguson's final words

B. Battaglia*: Fear of Malingering Outweighs Findings of Incompetency*

In 2002, John Battaglia was convicted for shooting and killing his two daughters, aged six and nine, as their mother, Battaglia's ex-wife, listened helplessly over speaker phone.[154] Hours after killing them, Battaglia left his daughters a voicemail, saying that he loved them and hoped that they were in a better place, free from their mother.[155] Battaglia did not plead insanity at trial, and the jury found him guilty of capital murder.[156] At sentencing, two psychiatrists testified that Battaglia suffered from bipolar disorder and had experienced psychosis during the murders.[157] A psychiatrist for the prosecution testified that Battaglia's main motive in murdering his daughters was to punish his ex-wife, but conceded that he had mild bipolar disorder.[158] Ultimately, Battaglia received the death sentence, and his execution was scheduled for March 30, 2016.[159]

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were "I just want everyone to know that I am the prince of God and will rise again"); Anna Arceneaux, *Florida Will Kill Severely Mentally Ill Man Unless Supreme Court Intervenes*, ACLU, https://www.aclu.org/news/capital-punishment/florida-will-kill-severely-mentally-ill-man [https://perma.cc/TM9G-PRCV] (Aug. 6, 2013) (arguing that Florida used an erroneous standard for competency to sanction his execution when assessing Ferguson's paranoid schizophrenia and delusions).

[154] Battaglia v. State, 537 S.W.3d 57, 59–60 (Tex. Crim. App. 2017). An arrest warrant for Battaglia was issued on May 2, 2001, for violating his probation after he was convicted for assaulting his ex-wife, Mary Jean. *Id.* at 60. Battaglia was having dinner with his daughters when Mary Jean received a call from her mother, who said that Battaglia had called. *Id.* at 60–61. Mary Jean called Battaglia, who put the phone on speaker mode. *Id.* at 61. One of her daughters asked, "Mommy, why do you want Daddy to go to jail?" *Id.* The girl then said, "No, Daddy, please don't, don't do it." *Id.* Mary Jean heard gunshots, her daughters screaming, and Battaglia's shouting, "Merry Fucking Christmas!" *Id.* By the time Mary Jean called 911 and arrived at Battaglia's apartment, Battaglia was gone. *Id.* Hours later, police officers found him outside a tattoo parlor and arrested him. *Id.*

[155] *Id.* Battaglia left the following message on the girls' answering machine:

> Good night my little babies. I hope you're resting in a different place. I love you. I wish that you had nothing to do with your mother. She was evil, vicious, stupid. You will be free of her. I love you very dearly. You were very brave girls. Very brave . . . . I love you so much. Bye.

Id.

[156] *Id.* The defense did not call any witnesses, and Battaglia testified only to say that he agreed with counsel to rest his case. *Id.* The defense stressed that Battaglia's sanity was not at issue. *Id.*

[157] *Id.* The first expert testified that Battaglia had bipolar disorder since early adulthood. *Id.* At the time of the offense, Battaglia was forty-five years old. *Death Row Profile of John Battaglia*, TEX. DEP'T CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_info/battagliajohn.html [https://perma.cc/QH87-G6T5]. The expert believed that Battaglia was aware of his committing the murders, but did not understand the wrongness of his actions because he was experiencing psychosis. *Battaglia*, 537 S.W.3d at 61. The second expert agreed that Battaglia had bipolar disorder but believed that Battaglia was aware that his actions were wrong. *Id.*

[158] *Battaglia*, 537 S.W.3d at 62. This expert believed that Battaglia had mild bipolar disorder and antisocial personality disorder. *Id.* He perceived Battaglia's actions as an attempt to protect his daughters, and interpreted Battaglia's explanation as rationalizing the murder his own children. *Id.*

[159] *Id.* at 62, 64. On appeal, Battaglia argued that his mental illness exempted him from capital punishment. *See id.* at 62 (noting Battaglia's argument that the impairing effects of mental illness

In February 2016, Battaglia filed a plea of incompetency for execution in the Dallas County District Court.[160] Later that year, three experts deemed him incompetent, given his lack of rational understanding of the sentence.[161] Another expert, however, deemed him competent, based on Article 46.05 of Texas's Code of Criminal Procedure—and a hunch that Battaglia was malingering.[162] Under Article 46.05, a defendant is competent if he or she understands the reasons for the execution and that the execution is imminent.[163] Finding this expert the most credible, the court agreed that Battaglia was competent.[164] In 2017, after an initial stay, the Texas Court of Criminal Appeals affirmed and

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undermine one's agency and culpability (citing Battaglia v. State, No. AP-74,348, 2005 WL 1208949, at *10 (Tex. Crim. App. May 18, 2005))). The Court of Criminal Appeals of Texas affirmed, rejecting Battaglia's apparent attempt to take responsibility for his actions, but avoid the death penalty. *Id.* at 62–63; *see Battaglia*, 2005 WL 1208949, at *10 (noting that mental illness does not exempt a defendant from execution under the Eighth Amendment). Battaglia filed a writ of error in state court and a writ of habeas corpus in federal court. *Battaglia*, 537 S.W.3d at 63. The U.S. District Court for the Northern District of Texas denied his petition, that the Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court denied Battaglia's petition for writ of certiorari. *Id.* at 64; *see* Battaglia v. Stephens, No. 3-09-CV-1904, 2013 WL 5570216, at *1 (N.D. Tex. Oct. 9, 2013) (denying Battaglia's habeas petition), *appeal denied*, 621 F. App'x 781 (5th Cir. 2015) (per curiam), *cert. denied*, 577 U.S. 1071 (2016) (mem.).

[160] *Battaglia*, 537 S.W.3d at 64; *see* TEX. CODE CRIM. PROC. ANN. art. 46.05(a) (West 2023) (barring the execution of a defendant deemed incompetent). The Texas Court of Criminal Appeals denied his motion, as did the U.S. District Court for the Northern District of Texas. Battaglia v. Stephens, No. 16-CV-0687, 2016 WL 7852338, at *8 (N.D. Tex. Mar. 18, 2016), *rev'd*, 824 F.3d 470, 476 (5th Cir. 2016). The Fifth Circuit granted a stay to hear Battaglia's claim of incompetency. *Battaglia*, 824 F.3d at 476. Given evidence of mental illness and delusions, Battaglia's execution was postponed until December 2016. *Battaglia*, 537 S.W.3d at 64.

[161] *Battaglia*, 537 S.W.3d at 82. The first expert, a clinical neuropsychologist, testified that Battaglia had bipolar disorder and delusional disorder, and was not malingering. *Id.* at 83–84. In her belief, Battaglia thought that he was being executed to silence him from blackmailing other members of the criminal justice system. *Id.* at 84. The second expert, a forensic psychologist, testified that Battaglia lacked a rational understanding of the reasons for his sentence due to delusions, despite having a factual awareness of the execution date. *Id.* The third expert, also a forensic psychologist, testified that Battaglia's delusions precluded a rational understanding, but wavered on the issue of malingering, noting that Battaglia did not receive regular psychological treatment in prison and had borrowed reading material on Heidegger and *Panetti*. *Id.* at 84–86.

[162] *Id.* at 86, 89; TEX. CODE CRIM. PROC. ANN. art. 46.05(a).

[163] TEX. CODE CRIM. PROC. ANN. art. 46.05(h). The Texas legislature did not revise Article 46.05 after the U.S. Supreme Court decided *Panetti v. Quarterman* in 2007. *Battaglia*, 537 S.W.3d at 78.

[164] *Battaglia*, 537 S.W.3d at 89, 93. The court found this expert to be the most credible due to his extensive work in forensic psychology. *Id.* at 86, 93. The expert deemed Battaglia competent for execution based on his understanding that he will be executed soon and for the reasons why. *Id.* at 86. The expert further dismissed that Battaglia had a delusional disorder. *Id.* at 87. At the hearing, the expert testified that Battaglia was aware of his pending execution and lacked any cognitive distortions that would prevent him from understanding that he was sentenced to death for murdering his daughters. *Id.* at 88. He noted that conspiracy-based allegations were not atypical among criminal defendants who challenge competency. *Id.* at 88–89. He also believed that Battaglia was malingering, positing that Battaglia's reading into the case law could have motivated him to fake symptoms of delusion to avoid execution. *Id.* at 89. The court agreed that Battaglia was malingering, given his apparent motive and ability to do so. *Id.* at 92.

remanded to reschedule the execution.[165] In her dissent, Judge Alcala asserted that the final expert and majority of judges overlooked Battaglia's symptoms of delusion that precluded his rational understanding of the reasons for the death penalty.[166] A year later, Battaglia was executed.[167]

C. Coe*: Tennessee's Test for Competency Based on Courtroom Behavior*

In 1981, Robert Coe was convicted for the aggravated rape, kidnapping, and capital murder of a young girl that led to the imposition of the death sentence.[168] After ten years on death row, Coe filed a plea of incompetency in state court.[169] In 2000, Coe's experts testified to a history of cognitive abnormalities and current mental health disorders, whereas the state's experts asserted that Coe did not have SMI and was malingering.[170] The court acknowledged its

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[165] *Id.* at 60. The Texas Court of Criminal Appeals held that the trial court did not abuse its discretion in ultimately finding that Battaglia was competent after reviewing the conflicting expert testimony. *Id.* at 96. The court clarified that a defendant is competent if they know that they are going to be executed soon, understand the reasons for the sentence, and show a causal connection between the offense and punishment, regardless of any delusions or mental illness. *Id.*

[166] *Id.* at 97 (Alcala, J., dissenting). Judge Alcala explained that the standard for competency must consider whether a defendant's understanding of the connection between the crime and punishment is not so detached from reality as to undermine the purpose of capital punishment. *Id.* at 98.

[167] *See Dallas Man Smiles Before Being Executed for Killing Two Daughters While Mother Listened*, CBS NEWS (Feb. 2, 2018), https://www.wbtw.com/news/national/dallas-man-smiles-before-being-executed-for-killing-two-daughters-while-mother-listened/949422419/ [https://perma.cc/8G4K-VEUG] (noting that Battaglia's last words to his ex-wife included "see y'all later").

[168] Coe v. State, 17 S.W.3d 193, 199 (Tenn. 2000), *abrogated by* State v. Irick, 320 S.W.3d 284 (Tenn. 2010). The U.S. Supreme Court denied Coe's petition for writ of certiorari. Coe v. Tennessee, 464 U.S. 1063 (1984) (mem.). Coe then filed three state habeas petitions, though all three were denied. *Coe*, 17 S.W.3d at 199. In 1987, Coe filed a habeas petition in the U.S. District Court for the Middle District of Tennessee. *Id.* After an evidentiary hearing in December 1996, the district court set aside Coe's convictions and sentences upon detecting several constitutional trial errors. *Id.* In 1998, the U.S. Court of Appeals for the Sixth Circuit reversed, the Supreme Court denied review, and Tennessee filed a motion to reschedule the execution. *Id.* at 199–200.

[169] *Coe*, 17 S.W.3d at 200. In December 1999, the Shelby County Criminal Court scheduled Coe's execution for March 23, 2000. *Id.* The court required a competency hearing to be held in January 2000 to determine whether Coe was aware of his pending sentence and the reasons for it. *See id.* To support his plea of incompetency, Coe filed an affidavit from a psychiatrist who had diagnosed him with schizophrenia. *Id.*

[170] *See generally id.* at 200–06 (discussing the four experts' findings). The first expert testified that Coe had congenital brain damage and paranoid schizophrenia, rejected that he was malingering, and explained that although he was factually aware of the pending execution, he did not grasp its consequences. *Id.* at 200–01. This expert noted that Coe would become increasingly incompetent as the execution approached. *Id.* at 201. A second expert diagnosed Coe with schizophrenia and deemed him incompetent based on four encounters; although Coe appeared competent during the last visit, this expert testified that he would likely dissociate again. *Id.* at 201–03. The state's first expert diagnosed Coe with multiple disorders, but not schizophrenia, despite conceding that he had not treated a patient with schizophrenia within a decade. *Id.* at 203–04. The state's second expert believed that Coe was malingering, but noted that Coe appeared paranoid, had some hallucinations, and did not know the current date. *Id.* at 204.

own lack of expertise about mental illness, but nevertheless deemed Coe competent for execution, based on his disruptive courtroom behavior that suggested some understanding of the proceedings.[171]

After the U.S. Supreme Court decided *Panetti* in 2007, the Tennessee Supreme Court updated its test for competency, clarifying that a defendant can still receive the death penalty so long as he or she does not question the reality of the past crime or pending punishment.[172] This adjustment has not clearly provided any more protection to those who plead incompetency in Tennessee.[173]

D. Singleton*: South Carolina's Stricter Two-Prong Test Still Not Enough*

In September 1982, Fred Singleton was arrested for the murder, rape, and burglary of a seventy-three-year-old widow.[174] The next year, Singleton was convicted and received the death penalty.[175] In 1990, after one failed attempt, Singleton filed a habeas petition in the Newberry County Circuit Court, pleading incompetency for execution.[176] In an evaluation that year, Singleton was

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[171] *Id.* at 235, 239. Disclaiming any expertise in mental health disorders, the judge expressed doubt as to one of the expert's diagnoses of Coe. *See id.* at 235 (discussing the expert's conflicting testimony regarding dissociative identity disorder). The judge interpreted Coe's behavior in court, including insults, screaming, and banging his hands, as deliberate disruption, indicating a rational understanding of the nature and reasons for the pending sentence. *See id.* at 236–37 (reasoning that Coe's shouting vulgarities, though inappropriate, was sufficiently logical, coherent, and responsive to suggest a rational understanding). The Tennessee Supreme Court affirmed, holding that the evidence supported a finding of competency, that the proceeding was conducted properly, and that the execution should proceed. *Id.* at 230. In his dissent, Judge Birch noted that the majority failed to consider Coe's ability to assist counsel and his right to have a jury decide the issue of competency. *Id.* at 248 (Birch, J., dissenting).

[172] *Irick*, 320 S.W.3d at 295.

[173] *See, e.g.*, Reid v. State, Nos. M2009-00128-CCA-R3-PD, M2009-00360-CCA-R3-PD, M2009-01557-CCA-R3-PD, 2011 WL 3444171, at *52 (Tenn. Crim. App. Aug. 8, 2011) (determining that the defendant was competent for post-conviction proceedings, despite having mental illness, because incompetency requires that a person is unable to take care of themselves or any business (citing State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001), *abrogated by* Reid *ex rel.* Martiniano v. State, 396 S.W.3d 478 (Tenn. 2013))). Since the mid-2010s, the Tennessee Alliance for the Severe Mental Illness Exclusion has fought to exempt all defendants with SMI, including bipolar disorder, delusional disorder, and major depression with psychotic features, as well as schizophrenia and schizoaffective disorder. Segura, *supra* note 80. In March 2018, however, an amendment to a proposed bill for exemption removed major depression from the list of SMI and required that a defendant show a documented medical history. *Id.*

[174] State v. Singleton, 326 S.E.2d 153, 155 (S.C. 1985), *overruled in part by* State v. Torrence, 406 S.E.2d 315 (S.C. 1991). Singleton strangled the woman in her bedroom with a bedsheet and was later arrested in possession of her car, jewelry, and $100. *Id.*

[175] *Id.*

[176] Singleton v. State, 437 S.E.2d 53, 54–55 (S.C. 1993). Previously, in 1985, Singleton filed a writ of habeas corpus in state court that was denied the following year. *Id.* In 1987, he managed to stay his execution, pending the filing of a writ of certiorari to the U.S. Supreme Court. *Id.* at 55. Because of Singleton's delay in filing, the Supreme Court of South Carolina ordered the Commissioner of the Department of Corrections to proceed with the execution. *Id.* Singleton then filed a writ of ha-

deemed incompetent under South Carolina's new standard.[177] This two-prong approach to competency deems a defendant unfit for execution if, due to a mental illness, he or she lacks an awareness or understanding of the nature of and reasons for the sentence, or is unable to communicate with counsel to assist in his or her defense.[178] The court determined that Singleton was incompetent because he believed that his genes would prevent him from dying by electrocution and because he had exchanged only a few words with his lawyer since his conviction.[179]

Although *Singleton* appeared to grant greater protections for defendants with mental illness, it has not clearly done so, and has instead received criticism for its underlying rationale.[180] The Tennessee Supreme Court, for exam-

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beas corpus in the U.S. District Court for the District of South Carolina. *Id.* The district court dismissed his petition without prejudice and required that he first exhaust all state claims. *Id.*

[177] *Id.* At the time of the decision, the South Carolina legislature had not addressed the proper standard for competency for execution. *Id.* at 58. In November 1990, the Newberry County Circuit Court conducted a hearing and ultimately adopted the ABA's recommendation. *Id.* at 55; *see* AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 269 (2d ed. 1989) (defining incompetency as the inability to understand the nature of the proceedings and the reasons for the sentence, or as the inability to communicate with counsel or the court). The court determined Singleton to be incompetent under either the ABA standard or the standard set forth by Justice Powell in his *Ford v. Wainwright* concurrence. *Singleton*, 437 S.E.2d at 55; *see* Ford v. Wainwright, 477 U.S. 399, 421–22 & n.3 (1986) (Powell, J., concurring) (requiring a defendant to understand the fact of and reason for a pending execution while acknowledging that states may also require a defendant to be able to assist counsel).

[178] *Singleton*, 437 S.E.2d at 55–56. South Carolina is one of three states to require the ability to assist counsel in the competency-for-execution standard. *See* John L. Farringer IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441, 2456–57 (2001) (noting that Missouri and Mississippi adopted the two-prong test for competency by statute, and South Carolina did so by judicial decision); MISS. CODE ANN. § 99-19-57(2)(b) (2023) (deeming a defendant incompetent for execution if, due to mental illness, a defendant lacks an understanding of the nature of the proceedings, the reason for trial, the purpose of capital punishment, that death is imminent, or a defendant is unable to inform counsel or the court of any information that would make the punishment unjust or unlawful); MO. REV. STAT. § 552.060(1) (West 2023) (prohibiting the death penalty for individuals that fail to understand the purpose of their punishment).

[179] *Singleton*, 437 S.E.2d at 58. Beyond adopting the two-prong test and deeming Singleton incompetent, the Supreme Court of South Carolina barred the use of forced medication to restore a defendant's competency. *Id.* at 61–62. Singleton is the longest-serving prisoner on death row in South Carolina, among thirty-four others. *See* Jeffrey Collins, *Inmate on SC's Death Row for 37 Years Dies of Natural Causes*, WIS NEWS (Aug. 23, 2021), https://www.wistv.com/2021/08/23/inmate-scs-death-row-37-years-dies-natural-causes/ [https://perma.cc/5H2H-NJEY] (reporting on the death by stroke of the second-longest serving prisoner on South Carolina's death row).

[180] *See, e.g.*, Van Tran v. State, 6 S.W.3d 257, 266 (Tenn. 1999) (rejecting South Carolina's two-prong standard and requiring solely that a defendant understand the fact of and reason for a pending execution), *abrogated by* State v. Irick, 320 S.W.3d 284 (Tenn. 2010). In Mississippi, a defendant who received the death sentence for capital murder in 1982 claimed incompetency, citing evidence of paranoid schizophrenia and delusions. Billiot v. State, 655 So. 2d 1, 5–6 (Miss. 1995). After eight experts disagreed over his symptoms and diagnoses, the court deemed him competent for execution. *Id.* at 3; *see* Farringer, *supra* note 178, at 2467–72 (discussing the experts' conflicting testimony). The Supreme Court of Mississippi affirmed the competency determination, reasoning that the court cor-

ple, rejected this test, reasoning that a defendant's need to assist counsel lessens after final conviction because of the restricted nature of habeas review.[181] Even in South Carolina, most defendants have been found competent to waive post-conviction review under the *Singleton* standard.[182] The Supreme Court of South Carolina has also made it clear that the presumption of competency operates throughout a capital case, notwithstanding the stricter test at the time of execution.[183]

III. RAISING THE BAR AND REMOVING THE BIAS TO ASSESS COMPETENCY FOR EXECUTION OF DEFENDANTS WITH SERIOUS MENTAL ILLNESS

Although the Supreme Court intended to provide states with procedural discretion under *Panetti v. Quarterman*, most states' standards for competency for execution serve as blank checks, overlooking the meaning and purpose of requiring a rational understanding of a death sentence.[184] Further, as shown and

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rectly relied upon the state statute and the holding of *Ford* to determine competency. *Billiot*, 655 So. 2d at 15–16 (citing MISS. CODE ANN. § 99-19-57(2)(b)).

[181] *Van Tran*, 6 S.W.3d at 266.

[182] *See, e.g.*, Hill v. State, 661 S.E.2d 92, 96–97 (S.C. 2008) (determining that a defendant was competent to waive his right to appeal despite a history of major depression, post-traumatic stress disorder, and brain damage); Reed v. Ozmint, 647 S.E.2d 209, 212–13 (S.C. 2007) (holding that a defendant was competent to waive his right to appeal even though he had paranoia, personality disorder, and borderline intellectual functioning); State v. Downs, 631 S.E.2d 79, 81, 85 (S.C. 2006) (concluding that, despite a history of suicidal attempts, the defendant was competent to waive his right to post-conviction review because he had mild, not major, depression). *But see* Hughes v. State, 626 S.E.2d 805, 815 (S.C. 2006) (deeming a defendant incompetent to waive his right to seek post-conviction relief based on his lack of understanding of the proceedings and inability to describe the procedures available to him); *see also* Janet Parker, *Delayed Justice: No Death on SC Death Row (Pt. 1)*, WACH FOX (May 17, 2017), https://wach.com/news/local/delayed-justice-no-death-on-sc-death-row [https://perma.cc/4B66-TNKF] (reporting that forty-three executions have occurred in South Carolina since 1985, and none of the thirty-eight men on death row were considered competent for execution).

[183] State v. Motts, 707 S.E.2d 804, 812 (S.C. 2011). The South Carolina Supreme Court has clarified that other competency-based standards may inform competency for execution. *Id.* at 813.

[184] *See Developments in the Law—The Law of Mental Illness*, *supra* note 21, at 1156 (discussing the Supreme Court's emphasis on procedural rights over substantive protections regarding mental illness). Courts have disagreed over whether *Panetti v. Quarterman* heightened or simply restated the test for competency for execution in *Ford v. Wainwright*. *See, e.g.*, Green v. State, 374 S.W.3d 434, 443 (Tex. Crim. App. 2012) (revealing an ongoing tension among courts over whether *Panetti* merely elaborated upon *Ford* or imposed additional requirements). Many courts have concluded that *Panetti* did not raise, let alone change, the bar for competency, but solely clarified the procedure that states must follow upon a substantial showing of incompetency. *See id.* at 440 (limiting *Panetti*'s relevance to requiring a hearing once a defendant successfully pleads incompetency). The predominant cognitive-based test for competency purports to be consistent with *Panetti*, but in practice, requires only a factual awareness of a pending sentence. *See supra* note 152 and accompanying text (noting that Florida's test for competency appeared to require only a factual awareness of a pending sentence). *But see* Panetti v. Quarterman, 551 U.S. 930, 959 (2007) (noting that a defendant's awareness of the arguments for an execution does not amount to a rational understanding). The more stringent assistance test is more protective in theory, but still relatively weak in practice. *See supra* notes 180–183 and accompanying text (discussing the lack of protection under the two-prong approach).

often self-admitted, courts are ill-equipped to handle competency evidence despite having vast discretion, and experts may feel inclined to deem defendants competent for execution, based on the legal presumption.[185] The *Ford* exemption from capital punishment has become unattainable, regardless of a defendant's severity of mental illness or cognitive decline on death row.[186]

Given these concerns, alongside society's evolving view of mental illness, a unilateral shift in the standard for competency for execution is warranted.[187] An updated, uniform approach from the Supreme Court would provide states with better guidance to discern incompetency and would protect more defendants with SMI from cruel and unusual punishment.[188] Section A proposes a new standard for competency for execution that the Supreme Court should adopt.[189] Section B shows how experts should conduct evaluations and how courts should weigh competency evidence under this standard.[190] Finally, Section C explains how this heightened standard furthers the mission of both mental health activists and the Cruel and Unusual Punishments Clause of the Eighth Amendment.[191]

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[185] *See, e.g.*, Coe v. State, 17 S.W.3d 193, 235–36, 239 (Tenn. 2000) (deeming the defendant competent despite the court's admitted lack of expertise in mental illness because of doubts about the experts' diagnoses and the defendant's seemingly intentional disruptions); Battaglia v. State, 537 S.W.3d 57, 93 (Tex. Crim. App. 2017) (explaining that the court found one expert who believed that the defendant was malingering to be the most credible due to his extensive experience in forensic psychology); Neal, *supra* note 126, at 153 (describing how those who opt to conduct competency evaluations may tend to support capital punishment and thus feel less conflicted in making clinical determinations based on the presumption of competency).

[186] *See* Mark A. Small, *Performing "Competency to Be Executed" Evaluations: A Psycholegal Analysis for Preventing the Execution of the Insane*, 67 NEB. L. REV. 718, 726 (1988) (noting that a finding of competency nearly guarantees a defendant's execution); *Report: 75% of 2015 Executions Raised Serious Concerns About Mental Health or Innocence*, *supra* note 24 (reporting that 75% of the twenty-eight defendants executed in 2015 had a mental impairment or disability, experienced childhood trauma, or were possibly innocent); Brief of Petitioner, *supra* note 128, at 21 n.13 (explaining that despite the prevalence of SMI on death row, claims of incompetency are rare, and that only 20% of the claims raised were successful between 1986 and 2013 (citing Blume et al., *supra* note 128, at 9–10)).

[187] *Cf. Developments in the Law—The Law of Mental Illness*, *supra* note 21, at 1156 (arguing that the Supreme Court should create both substantive and procedural rights to protect defendants with mental illness).

[188] *See* Wadsworth et al., *supra* note 95, at 234 (noting the challenges that courts have faced in applying the test for competency for execution after *Ford* and *Panetti*); *cf. Developments in the Law—The Law of Mental Illness*, *supra* note 21, at 1161 (explaining that even the strongest procedural safeguards fail to protect individuals with mental illness without clear substantive backing from the Supreme Court).

[189] *See infra* notes 192–205 and accompanying text.

[190] *See infra* notes 206–216 and accompanying text.

[191] *See infra* notes 217–231 and accompanying text.

A. Presuming Incompetency: A Harder Test to Pass at the Time of Execution

Empirical and anecdotal data indicate, unsurprisingly, that a defendant's mental health declines on death row.[192] People with SMI are particularly vulnerable to the harsh conditions of incarceration.[193] Presuming competency at the time of execution of defendants with SMI is therefore unsupported, as time on death row only exacerbates the mental health challenges prisoners face.[194]

Because of the adverse psychological impacts of death row, the standard for competency for execution should not simply rehearse other competency-based measures.[195] Rather, experts and courts should presume that defendants with SMI who plead incompetency for execution are more likely than not incompetent.[196] To justify this reversal, the Supreme Court should revisit the underpinnings of *Panetti*'s rational understanding standard that requires a defendant to share society's understanding of the connection between the crime and death sentence to justify capital punishment.[197] In most cases, defendants with SMI on death row do not share this level of awareness with society.[198]

Though commendable, the two-prong test for competency for execution, as seen in *Singleton*, still fails to adequately protect defendants with SMI from

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[192] *See, e.g.*, Goyal, *supra* note 67 (reporting a national study that found a negative correlation between time spent on death row and a prisoner's mental health); *Hearing*, *supra* note 68, at 69 (statement of Anthony C. Graves, Founder, Anthony Believes) ("I would watch guys come to prison totally sane and in three years they don't live in the real world anymore.").

[193] *See* ROTH, *supra* note 36, at 112–13 (explaining how isolation, overcrowding, loud noises, and other stressors exacerbate symptoms and behaviors of prisoners with mental illness).

[194] *See id.* at 272 (noting that the average wait time on death row is twenty years); Small, *supra* note 186, at 731 (explaining that death row conditions increase the likelihood of incompetency).

[195] *Compare* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (basing the test for competency to stand trial on a rational understanding of the proceedings), *with* Panetti v. Quarterman, 551 U.S. 930, 959 (2007) (defining competency for execution as a rational understanding of a pending sentence). As civil rights attorney Anthony Amsterdam argued before the Supreme Court in *Furman v. Georgia* in 1972, capital punishment is different. James D. Zirin, *Death Is Different*, THE HILL (Dec. 24, 2020), https://thehill.com/opinion/criminal-justice/531564-death-is-different/ [https://perma.cc/8JJV-HGS5]; *see* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty constitutes cruel and unusual punishment when applied in an arbitrary and discriminatory manner). For more on the life and work of Anthony Amsterdam, see Nadya Labi, *A Man Against the Machine*, N.Y.U. L. MAG. (2007), https://blogs.law.nyu.edu/magazine/2007/a-man-against-the-machine/ [https://perma.cc/9Z2U-DEGK].

[196] *See* Small, *supra* note 186, at 731 (explaining that time on death row increases the likelihood of incompetency and encouraging clinicians to consider the detrimental effects of incarceration when conducting competency evaluations).

[197] *See* 551 U.S. at 958–59 (discussing that capital punishment should not be imposed when a defendant does not share with the community an awareness or understanding of the punishment, due to mental illness).

[198] *See Hearing*, *supra* note 68, at 33 (describing how conditions of incarceration and solitary confinement cause many prisoners to lose touch with reality).

the death penalty, in part due to a misguided rationale.[199] At the time of execution, the relevant inquiry is not whether a defendant is capable of assisting counsel in his or her defense, but rather, whether his or her mental state justifies, or makes cruel and unusual, the death sentence.[200] The proposed standard avoids this criticism by remaining cognitively focused and, consequently, draws attention to the harsh conditions of death row, particularly for those with SMI.[201]

Under the American Bar Association's guidelines, a defendant should be considered incompetent for execution if he or she has SMI or another condition that significantly impairs the capacity to understand the nature and consequences of the punishment, as well as the reasons for and purpose of it.[202] At a minimum, a defendant should be able to presently grasp the complexities and consequences of the proceedings.[203] Moreover, evaluators should consider how a defendant's mental health has fared since arriving to death row.[204] A defendant should be considered incompetent even if he or she shows some awareness of the connection between the offense and sentence, particularly if that connection is so detached from reality as to undermine the purpose of capital punishment.[205]

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[199] *See* Singleton v. State, 437 S.E.2d 53, 58 (S.C. 1993) (determining that the defendant was incompetent based on a lack of rational understanding and inability to assist counsel). Many defendants with SMI may show a rational understanding and can communicate with counsel, but still be incompetent for execution under the Supreme Court's Eighth Amendment jurisprudence. *See* Battaglia v. State, 537 S.W.3d 57, 97 (Tex. Crim. App. 2017) (Alcala, J., dissenting) (arguing that a defendant's understanding of the connection between the crime and punishment must not be detached from reality or precluded by delusions); *cf.* Atkins v. Virginia, 536 U.S. 304, 318 (2002) (explaining that defendants with intellectual disabilities may be able to discern right from wrong, but cannot control their behavior or think logically and, thus, cannot be executed).

[200] *See* Van Tran v. State, 6 S.W.3d 257, 266 (Tenn. 1999) (reasoning that a defendant's need to assist counsel diminishes after a final conviction), *abrogated by* State v. Irick, 320 S.W.3d 284 (Tenn. 2010). Although this two-step inquiry appears to heighten the bar for competency for execution, it overlooks the main justifications for capital punishment: retribution and deterrence. *See* Ford v. Wainwright, 477 U.S. 399, 407–09 (1986) (questioning the deterrent effect and retributive value of sentencing someone to death who lacks the understanding of why he or she will be deprived of the right to life).

[201] *See* TOCH ET AL., *supra* note 66, at 8–9 (noting how intentionally harsh conditions of death row can aggravate symptoms of mental illness).

[202] IGASAKI ET AL., *supra* note 79, at 1. Although not a categorical limit, this standard would likely exempt only defendants with SMI, not AMI. *See* Brief for Amici Curiae APA et al., *supra* note 78, at 4 (noting that individuals with SMI, like schizophrenia, tend to have delusional beliefs that interfere with the ability to internalize and understand a pending execution). This limitation aligns with normative views of competency, as AMI has become more prevalent and less stigmatized in society. *Mental Health Conditions*, *supra* note 45.

[203] *See Battaglia*, 537 S.W.3d at 103–04 (explaining that competency for execution requires a firm awareness of the reasons for execution, grounded in reality, and not masked by delusions or other serious mental health conditions).

[204] *See* TOCH ET AL., *supra* note 66, at 9 (explaining that most defendants on death row show signs of SMI, aggravated by the harsh conditions of incarceration).

[205] *Battaglia*, 537 S.W.3d at 98; *see* Panetti v. Quarterman, 551 U.S. 930, 960 (2007) (noting that capital punishment lacks purpose when delusions prevent a connection between the crime and punishment); Gary R. Studen, Comment, Panetti v. Quarterman: *Solving the Competency Dilemma by*

B. Implementing the Presumption: Reframing Expert & Court Discretion

This proposed standard, like many others, defies perfect description.[206] As such, evaluators should not feel constrained by whatever language the Supreme Court chooses to adopt.[207] Rather, mental health professionals should follow their own best judgment and recommendations from other experts when assessing competency, keeping in mind the interests of the defendant and others with mental illness.[208]

To illustrate, evaluators should approach each defendant holistically, noting any history or current signs of SMI and assuming that available health records may be neither complete nor accurate.[209] Experts may also assume that a defendant who claims incompetency has and will receive little to no treatment while incarcerated.[210] By reversing the presumption of competency at this stage, mental health professionals may no longer face a moral dilemma in deciding whether to conduct competency evaluations.[211]

Although judges are entitled to discretion when weighing competency evidence, many lack adequate familiarity or expertise to assess signs of mental

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Broadening the Concept of Rational Understanding in Competency-to-Be-Executed Determinations, 39 SETON HALL L. REV. 163, 186 (2009) (suggesting that the test for competency for execution should probe a defendant's sense of reality to determine whether delusions or other symptoms preclude a rational understanding of the sentence).

[206] *Cf. Panetti*, 551 U.S. at 959 (noting the difficulty in defining the term "rational understanding"); *Developments in the Law—The Law of Mental Illness*, *supra* note 21, at 1164 (explaining that substantive standards are difficult to construct because mental illness itself poses definitional and categorical challenges).

[207] *See* Updegrove & Vaughn, *supra* note 104, at 6 (concluding from the Supreme Court's lack of guidance that mental health experts should take charge in conducting competency evaluations).

[208] *See id.* at 5–6 (offering best practices for competency evaluators, including the length of time, location, and content to be discussed); Radelet & Barnard, *supra* note 120, at 46 (encouraging thoroughness and attention to detail when evaluating competency of defendants with SMI). Although time may vary, evaluations should allow for a deep reflection of a defendant's current mental health and history, as opposed to a cursory check for a rational understanding promoted by a presumption of competency. *See* Updegrove & Vaughn, *supra* note 104, at 5 (recommending that some interviews should last several hours, whereas evaluations of those unable to meaningfully participate can be brief).

[209] *See, e.g.*, ROTH, *supra* note 36, at 167 (showing how mental health professionals in prisons can err when diagnosing prisoners or updating records); *Texas Death Row Prisoner Commits Suicide*, DEATH PENALTY INFO. CTR. (Feb. 1, 2023), https://deathpenaltyinfo.org/news/texas-death-row-prisoner-commits-suicide [https://perma.cc/F4F7-N7DQ] (reporting the death by suicide of a person on death row who had a history of suicidal ideation and whose lawyer said that his mental health had declined rapidly since the Supreme Court declined to review his case).

[210] *See* ROTH, *supra* note 36, at 119 (explaining that people with SMI constitute a disproportionate number of incarcerated people in many states' jails and prisons yet lack attention and treatment due in part to limited medical personnel).

[211] *See* Neal, *supra* note 126, at 146 (pointing to the ethical issues that psychologists face when deciding whether to conduct competency-for-execution evaluations).

illness.[212] Courts should thus defer to experts who have looked beyond a defendant's mere awareness and understanding of a sentence to assess his or her past or present signs of SMI.[213] Further, a judge should not attempt to diagnose or deem relevant any behaviors, like the ability to sit quietly in a cell or courtroom, outside the experts' findings.[214] Finally, judges should not base determinations of competency on fears of malingering, as this concern tends to be overexaggerated.[215] Indeed, the proposed standard precludes a court from siding with a minority view of competency based on a hunch of malingering.[216]

C. Presuming More Prisoners: Broader Considerations & Calls to Action

As activists have fought to destigmatize mental illness in society, so too have advocates pushed for stronger protections for people with mental illness in the criminal justice system.[217] Normatively speaking, the experience of liv-

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[212] *See* ROTH, *supra* note 36, at 223 (noting that many decision-makers in the criminal legal system may lack expertise about mental illness); *cf.* Deborah W. Denno, *"Death Is Different" and Other Twists of Fate*, 83 J. CRIM. L. & CRIMINOLOGY 437, 440 (1992) (warning against unstructured discretion in the case of capital sentences (citing Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring) (per curiam))). Judges may seek scientific and medical research, legal advice, and guidance from the mental health community, all of which point to a presumption of incompetency at this stage. *See, e.g.*, AM. BAR ASS'N, *supra* note 16, at 1–2, 4 (defining SMI, addressing the inadequate legal mechanisms to account for SMI in capital proceedings, and concluding that the death penalty for individuals with SMI must cease (citing AM. PSYCHIATRIC ASS'N, *supra* note 9, at 20)).

[213] *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, 266 (2014) (suggesting that courts should assess experts' competency evaluations based on the quality of structured, probing questions, as opposed to searching for isolated remarks that suggest an awareness of a pending sentence and the reasons for it). Generally, experts do not reach drastically different determinations of competency. *See* Park Elliott Dietz, *Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 85 (1985) (noting that experts agree in 92% of competency cases); *see also* Gerald E. Nora, *Prosecutor as "Nurse Ratched"? Misusing Criminal Justice as Alternative Medicine*, 22 CRIM. JUST. 2, 18, 20 (2007) (explaining that mental illnesses most pertinent to criminal justice are diagnosable through objective measures).

[214] *See* Coe v. State, 17 S.W.3d 193, 248 (Tenn. 2000) (determining that a defendant was competent for execution based on his disruptive behavior in court, notwithstanding experts' inconclusive findings and the court's admitted lack of expertise in mental health diagnoses), *abrogated by* State v. Irick, 320 S.W.3d 284 (Tenn. 2010).

[215] *See* Blume et al., *supra* note 128, at 20–21 (concluding that the fear of spurious claims of incompetency is unfounded based on the low percentage of competency challenges, low rate of established malingering, and well-documented history of SMI among claimants); *see also* Mossman, *supra* note 59, at 276 (describing fears of faking mental illness as misplaced).

[216] *Compare* Battaglia v. State, 537 S.W.3d 57, 93 (Tex. Crim. App. 2017) (concluding that the trial court did not err in finding one expert's opinion most credible based on a fear of malingering), *with id.* at 104 (Alcala, J., dissenting) (arguing that the expert, with whom the majority agreed, applied an erroneous standard to assess competency for execution).

[217] *Compare Mental Health Rights*, *supra* note 32 (advocating that individuals with mental illness are equally competent and capable of personal decision-making), *with Position Statement 54*, *supra*

ing with SMI on death row is not one that many are familiar with.[218] Presuming incompetency at the time of execution thus aligns not only with the documented exacerbation of SMI on death row, but also the recognition that a person is more vulnerable and less culpable in such conditions.[219]

Some may criticize this proposal as a disguised attempt to exempt all defendants with mental illness from capital punishment.[220] After all, one intended consequence is to deem more defendants with SMI incompetent and ineligible for the death penalty.[221] Courts, however, remain the final arbiters, and though defendants are presumed incompetent, courts may make a different finding.[222]

Although reversing the presumption of competency may add more incompetency pleadings to court dockets, doing so will force the legal system to confront its overlooked contradictions and need for reform.[223] For starters, courts should commute death sentences to life for all defendants deemed incompetent for execution.[224] Then, the criminal justice system and society, more

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note 24 (arguing to exempt individuals with SMI from the death penalty because of the disadvantages that they face in society and the legal system).

[218] *See Mental Illness*, *supra* note 44 (noting that 5.6% of American adults reported having SMI in 2020); *Position Statement 54*, *supra* note 24 (estimating that 20% of defendants on death row have SMI).

[219] *See Poll: Americans Oppose Death Penalty for Mentally Ill by 2–1*, *supra* note 16 (reporting that a majority of Americans oppose executing individuals with SMI, and suggesting that opposition to capital punishment for individuals with debilitating mental illness is growing); *cf.* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (explaining that juvenile capital offenders are not fit for capital punishment due to their vulnerability to external influences); Atkins v. Virginia, 536 U.S. 304, 318 (2002) (reasoning that individuals with intellectual disabilities are less culpable due to cognitive and behavioral impairments). The fact that people with SMI still face stigma justifies a separate approach in capital cases. *See Survey: Americans Becoming More Open About Mental Health*, *supra* note 50 (finding that 39% of respondents viewed individuals with SMI differently).

[220] *See* Chris Koepke, Note, Panetti v. Quarterman: *Exploring the Unsettled and Unsettling*, 45 HOUS. L. REV. 1383, 1407 (2008) (observing that many individuals may simply want more defendants to be found incompetent for execution under any test); ROTH, *supra* note 36, at 272–73 (arguing that the most obvious solution to executing people with mental illness is to abolish capital punishment).

[221] *See* Koepke, *supra* note 220, at 1407 (recognizing the goal to change the test for competency solely to include more individuals as incompetent).

[222] *See supra* notes 212–216 and accompanying text (explaining how courts should weigh competency evidence).

[223] *See* ROTH, *supra* note 36, at 272 (calling society's approach to people with mental illnesses who have received death sentences contradictory); Opinion, *Hoosier Mercy*, WASH. POST (Sept. 1, 2005), https://www.washingtonpost.com/archive/opinions/2005/09/01/hoosier-mercy/5eb83c95-3e33-4bd5-a406-00d084698e13/ [https://perma.cc/8G4A-6YNK] ("That it is still somehow okay to put to death a florid psychotic is a strange and amoral anomaly of contemporary American law, one that cries out for reform."). At any rate, fears of excessive incompetency claims appear to be unfounded. *See* Blume et al., *supra* note 128, at 20–21 (noting that only 6.6% of those eligible to bring *Ford* claims—about 1,307 individuals from 1986 to 2013—have made competency challenges).

[224] *See* IGASAKI ET AL., *supra* note 79, at 2 (providing that courts should reduce death sentences to those typically imposed when capital punishment is not available). This proposal eliminates the moral dilemma in treating defendants to restore competency for execution. *See* Singleton v. State, 437 S.E.2d 53, 62 (S.C. 1993) (banning the use of forced medication to restore a defendant's competency for execution).

broadly, must reckon with providing solutions for those unfit for death, yet still not fit for life outside prison.[225] For example, healthcare providers and organizations should work with prisons and state and local governments to coordinate treatment and allocate resources.[226]

Reframing the standard for competency for execution to consider not only a defendant's history and current signs of SMI, but also time and experiences on death row, properly acknowledges that person's humanity.[227] Moreover, ensuring that defendants with SMI who fail to grasp society's disapproval of their actions are afforded the chance to heal and reintegrate themselves fulfills the aim of the Eighth Amendment and an evolving nation.[228]

At the least, this standard provides states with clearer guidance to determine competency for execution.[229] At its height, the presumption of incompetency at the time of execution will save more defendants with SMI from death by capital punishment.[230] As a compromise, this proposal invites more mental health professionals to conduct competency evaluations, structures judicial discretion, and offers capital defendants with SMI the chance to heal and repair harm, an opportunity that requires their own survival.[231]

CONCLUSION

In *Ford v. Wainwright*, in 1986, the U.S. Supreme Court banned capital punishment of defendants who were deemed incompetent. In 2007, in *Panetti v. Quarterman*, the Court attempted to define incompetency, but left it to states to determine the procedural requirements of making competency determinations. Although the Court appeared to expand the scope of incompetency in

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[225] *See* Wilkins, *supra* note 96, at 469 (noting the deeper, more challenging question of the type and degree of punishment to apply to offenders with mental illness or other conditions that reduce culpability); ROTH, *supra* note 36, at 11 (describing how society proceeds to incarcerate sick people without offering adequate medical and psychological treatment).

[226] *See* Scully, *supra* note 60 (connecting the national underinvestment in mental healthcare to the overuse of criminal law to handle individuals with mental illness, and calling for better access to mental healthcare in and outside of prisons); *cf.* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to prisoners' medical needs violates the Eighth Amendment).

[227] *Cf.* Charles J. Ogletree Jr., *The Death Penalty Is Incompatible with Human Dignity*, WASH. POST (July 18, 2014), https://www.washingtonpost.com/opinions/charles-ogletree-the-death-penalty-is-incompatible-with-human-dignity/2014/07/18/c0849dea-0e6b-11e4-b8e5-d0de80767fc2_story.html [https://perma.cc/ZZ4P-YFM9] (arguing that capital punishment and society's commitment to human dignity cannot coexist).

[228] *See* Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (noting that society's changing standards inform the meaning of the Cruel and Unusual Punishments Clause (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion))).

[229] *See supra* notes 202–205 and accompanying text (discussing the proposed standard); *see also* Koepke, *supra* note 220, at 1412 (noting that *Panetti* provided little guidance to lower courts).

[230] *See supra* notes 221–222 and accompanying text (pairing the practical effect of fewer executions with judges' ultimate authority over competency determinations).

[231] *See supra* notes 207–216, 225–228 and accompanying text.

2019, in *Madison v. Alabama*, competency challenges remain rare across states, and if ever successful, are based on a problematic presumption of competency at the time of execution. The Supreme Court should reverse this presumption to account for the mental decline that defendants with SMI experience while on death row. An updated, uniform standard would provide clearer guidance to experts and courts to assess competency, ease the moral dilemma that some mental health professionals face to evaluate competency, and protect more defendants with SMI from the death penalty, in line with the country's evolving views of mental illness and capital punishment.

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