

Executing the Mentally Ill

When Is Someone Sane Enough to Die?

By Michael Mello

The legislators who passed our current death penalty laws did not intend to force grotesque issues to the center stage of constitutional adjudication. The death penalty was supposed to be about getting even with Charles Manson and Ted Bundy, not executing teenagers and the retarded, or wrestling condemned schizophrenics to the gurney for forced doses of Haldol. But here we are.

—David Bruck, “Does the Death Penalty Matter?”
Speech Delivered at Harvard Law School, 1990

Mental illness is a phenomenon that knifes across the entire corpus of our criminal justice system. From interrogations and waivers of *Miranda* rights, to consent to searches and seizures, to plea negotiations and the capacity to stand trial, to calculating sentences and participating in appellate and postconviction proceedings, mental illness warps the machinery of our criminal law and challenges its most cherished assumptions about free will, decisional competence, and culpability. This is so regardless of whether or not life hangs in the

balance. But when the stakes are life and death, the structural distortions caused by mental illness become magnified, and the contradictions can rise to constitutional magnitude.

Death is different, according to the Supreme Court’s capital jurisprudence. Three doctrinal differences are particularly important here. First, the relevancy standard at penalty trials is capacious: Any significant limitations on the defense’s ability to present, or the sentencer’s ability to consider and give independent mitigating weight to, mental health evidence will void the resulting death sentence. Second, the standards for waiving appeals are more stringent in capital cases, and the attorney’s ethical obligations triggered by such waivers are more vague and complicated. Third, the Constitution forbids executing the presently insane. Although these three doctrines are related, I will focus here on the last.

I want to begin with a bit of transparency. I oppose capital punishment. I was cocounsel for convicted cop killer Alvin Ford in 1983 and 1984 when his case was on

the way to the Supreme Court to establish the constitutional prohibition against executing the insane. So assume the accuracy of an empirical proposition confirmed by my own experience representing those on death row: Mental illness is pervasive among the congregation of the condemned. Prisoners who are crazy to begin with become worse on death row. Prisoners who appear comparatively healthy upon arrival on the row succumb to the despair and the dull hell of waiting—boredom punctuated by frenetic terror when an execution date is set and then stayed and then set again.

Most of my death row clients suffered from some form of mental illness, which ran the bandwidth from gentle neuroses to full-blown talking-to-spaceships delusional psychoses, crippling mental retardation, and severe depression, and, in more than one instance, organic brain damage so severe that we exhorted the courts to “just look at the MRI. Part of his brain is *missing*.”

Acknowledging the factual pervasiveness of death row mental illness only begs the real questions. What should we do about it? If the mentally ill shouldn't be put to death, what is the correct standard for measuring execution competency; what kinds of mental illness “count”? Who should set that standard? Who—employing what procedural vehicles—should decide whether a particular prisoner is sane enough to die?

On one level, these are narrow doctrinal questions. On another level, these questions go to the core of our legal system of death: Who, and why, do we execute? The problem of the intersection between mental illness and capital punishment isn't rocket science. It's much harder than that. (See generally Symposium, *The Death Penalty and the Mentally Ill*, 54 CATHOLIC U. L. REV. 1113 (2005).)

Twenty-one years ago, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the U.S. Supreme Court provided some answers. The experience of the two decades after *Ford* suggested that more clarity was needed. In 2007 in *Panetti v. Quarterman*, the Court tried again.

Alvin Ford's delusions—and our own

The best resource on the story of Alvin Bernard Ford—his case as well as the legal and ethical issues it raised—is the 1993 book *Executing the Mentally Ill* by Kent Miller and Michael Radelet in which they wrote, “Alvin Ford made history as the man who forced the criminal justice authorities, lawyers, judges, politicians, and a host of others to seriously debate the question of what types of mental illness should exempt condemned prisoners from execution and how (and by whom) these life-and-death determina-

tions should be made.”

Death row prisoners are Rorschach blots. In 1983 I looked at Alvin Ford and saw a profoundly ill, self-tortured soul for whom execution might well have been a blessed release from the inferno inside his head. The prosecutor looked at the selfsame Alvin Ford and saw a cold-as-ice cop killer who conveniently went insane just as he was running out of appeals. The judges saw Alvin Ford as either an annoyance or as a man forcing them to make excruciatingly difficult constitutional choices.

He wasn't always crazy. When Alvin Ford murdered Police Officer Dimitri Walter Ilyankoff, who was attempting to prevent Ford from robbing a Red Lobster Restaurant in Fort Lauderdale, Florida, he was sane as can be. He was still sane when he was tried and sentenced to death. It was living on death row that drove him mad.

The Florida Supreme Court denied Ford's direct appeal in 1980. The U.S. Supreme Court declined to hear the case, after which no lawyer represented Ford for about a year. Then Larry Wollin agreed to prepare Ford's executive clemency proceeding and to represent him in collateral proceedings. Wollin, a criminologist and faculty member at Florida State University in Tallahassee, had not actively practiced law for a number of years. When Ford's death warrant was signed in November 1981, no postconviction proceeding litigation had been developed. A handful of issues had been identified, but that was all. Consulting with other lawyers, Wollin developed and filed a postconviction pleading. Less than one week before Ford's scheduled execution, when state remedies had been exhausted and the federal district court proceedings had begun, Wollin's was the sole representative for Ford.

The issues raised in Ford's case were complicated, and it took the courts years to sort it all out. Meanwhile, Alvin Ford was going unquietly insane. Ford had been on death row for nearly seven years by the end of 1981. Up to that point, there had been no indication of serious mental illness, and no question concerning his competency had been raised before, during, or after his trial. But gradually, from December 1981 on, Ford began to lose touch with what the rest of us know as reality. This process began in an almost imperceptible fashion. First he indicated a belief that personalities talked to him over the radio. He believed that he had the power to see things outside the prison that no one else could see. He also claimed that the Ku Klux Klan had placed several of its members as prison guards whose task it was to drive Ford to suicide. Ford believed these guards held women hostage in the “pipe alley” behind his cell, raped them, put dead bodies in the concrete enclosure under his bunk, and put semen on his food.

Long-time friends and people providing Ford support over the years suddenly became enemies in Ford's disor-

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dered mind. All were joined with the Klan in a giant conspiracy to drive him crazy. Ford had interludes of clarity, but, as time passed, these interludes became fewer and much shorter. By the summer of 1982, Ford seemed unable to regain contact with reality. For several months, he desperately wrote everyone he could think of who had the power to assist him and begged for help in ending “the hostage crisis” that in his mind now involved his mother, other family members, his lawyers, politicians, world leaders, and television and radio personalities. Ford repeatedly wrote for help to President Reagan, the director of the FBI, the state attorney in Jacksonville, and numerous assistant attorneys general in the State of Florida, and numerous judges. As his descent into madness progressed, his pleas became ever more bizarre, less logical, and more nonsensical. A fellow death row prisoner reported that Ford often argued with himself, answering in different voices. The arguments would escalate to physical violence in which Ford would punch himself, struggle, and roll on the floor and end with him exhausted and panting. Despite his written pleas for help, he threw his mail around his cell and refused to read it. He made odd marks on the walls of his cell and touched them with different parts of his body. He threatened to kill the guards and then asked them for cigarettes. He walked around his cell as if he were a robot, banged his head on the cell walls, and had fits. According to the fellow inmate, these were not isolated incidents. Ford repeated this behavior daily, incessantly, through every waking hour.

By 1983, though, Ford’s position in his delusional world shifted from victim to master. He believed he was resolving the hostage situation with the aid of the governor and the president. Referring to himself as Pope John Paul III, he wrote that he had appointed nine new justices to the state supreme court. And most significantly, he now believed his case had been won and he could not be executed.

In a November examination by psychiatrist Harold Kaufman, the doctor and Ford carried on the following colloquy:

Kaufman: Are you on death row?

Ford: Yes.

Kaufman: Does that mean that the state intends to execute you?

Ford: No.

Kaufman: Why not?

Ford: Because *Ford v. State* prevents it. They tried to get me with the FCC tape, but when the KKK came in it was up to CBS and the governor. These prisoners are rooming back there raping everybody. I told the governor to sign the death warrants so they stop bothering me.

In December 1983, communication with Ford became virtually impossible. In an interview with paralegal Gail Rowland, he spoke in a fragmented, code-like fashion:

Rowland: Have you seen any newspapers or anything in awhile?

Ford: Yes one.

Rowland: Did you read about the pope?

Ford: Looking one.

Rowland: And Bob Sullivan and the pope. . .

Ford: Looking one.

Rowland: He made a nice statement. You saw it. I was very moved.

Ford: Hello one, need you one. (pause) Gail one, threaten one, kill one. (pause) Remember one, letter one? Say one, God one, blind one, Klan one, destiny one? (pause) Mine one. Stab one, say one crazy one. (pause) Need one, love one. (pause) But one, starve one, damn one. (pause) Damn one, say one.

Rowland: I see.

Ford: Excuse one, need you one. (pause) Tell him one. Hello one.

Rowland: I see what you’re saying . . .

Ford: Review one, law one. Dead one.

Four psychiatrists evaluated Ford’s competency during November and December 1983. Three of the four psychiatrists determined that Ford was psychotic. One of these three determined that Ford’s psychosis was of such severity “that he cannot sufficiently appreciate or understand either the reasons ‘why the death penalty was imposed upon him’ or ‘the purpose’ of this punishment.” Two others, who were appointed by Florida’s governor, determined that Ford was competent despite their finding that he was psychotic. One psychiatrist appointed by the governor found Ford to be suffering from no genuine illness.

None of these facts could save Ford’s life, however, unless the Constitution forbade execution of the presently insane. So, in October 1983, while Dick Burr, Ford’s lead attorney, put together the factual bases of Ford’s descent into mental illness, I was given the job of fashioning a constitutional argument that would make these facts matter in court. I had a lot of materials to work with. The Legal Defense Fund, Inc., of the NAACP had researched the issue, as had lawyers in Atlanta. The Florida lawyers for Gary Alvord had raised a similar claim. Students at Yale Law School and Stanford Law School had published outstanding law review articles on the issue of executing the insane.

The 1984 death warrant. On October 3, 1983—three weeks before I learned I had passed the bar—I was

assigned to research and write a memo on why execution of the insane might offend the Constitution. One obstacle to such an argument was a U.S. Supreme Court decision from 1950 that held that the Due Process Clause of the Fourteenth Amendment did not prohibit execution of the insane. Because it predated the Court's modern capital punishment jurisprudence, however, there was a way around it. The modern jurisprudence was grounded in the Eighth Amendment's ban on "cruel and unusual" punishments, rather than the Fourteenth Amendment's guarantee of "due process of law."

More hopefully, every capital punishment state in America exempted the presently insane from the ultimate penalty. This legislative consensus allowed us to argue that the nation as a whole had reached a consensus that executing the insane offended a constitutional provision grounded, as the Court had said, in "the evolving standards of decency that mark the progress of a maturing society."

But this legislative agreement was a double-edged sword for our argument. The same national consensus against executing the insane also vested the governor—not the courts—with the power to decide whether a particular death row prisoner was too crazy to execute. Florida law was typical; the law prohibited execution of the insane, but it allowed the governor total discretion in deciding who was or wasn't insane. We needed to argue that, while the national consensus recognized a constitutional right not to be executed while insane, the *courts* had a duty to ensure that the process of determining execution competency be fair and reliable.

The argument that the Constitution forbids executing the presently insane appeared straightforward, but land mines abounded. The Eighth Amendment prohibits "cruel and unusual" punishments. Yet, was it not *less* cruel to execute those who had descended into a world of delusions? Those with no idea where they were or that they were about to be killed would be free of the terror of waiting for it. Was it not crueler to execute the lucid, because they would appreciate the full horror of what was going to happen to them?

Then there was the problem of what to do with people who had been found too insane to be executed. Couldn't the state psychiatrists simply "treat" such people until they were sane enough to be executed? This might pervert medical ethics, but such perversion probably would not offend the Constitution.

Florida Governor Robert Graham signed Alvin Ford's death warrant in May 1984. We filed the stay papers by phone in the state trial court at noon on May 21. In our description of Ford's mental state, we wrote:

In the two-and-one-half years which have passed since December, 1981, Alvin Ford has been a roller

coaster ride which has led him into a world that none of us can know. He now lives in a world in which, as best we can tell, he thinks that he is on death row at Florida State Prison only because he chooses to be there. He lives in a world in which he thinks that the case of *Ford v. State* has ended capital punishment in Florida and, in particular, has deprived the State of Florida of the right to execute him. He is unable to tell us, in words that we can understand, anything more about the world that he now inhabits. He now mutters softly to himself, making gestures in which there seems to be a message, but a message that none of us can decipher. . . .

[W]e believe that Mr. Ford's condition is the product of illness and is genuine. We have seen Mr. Ford gradually lose touch with reality over the past two-and-one-half years. We have seen his delusions grow until they took over every aspect of his life. We have seen him gradually losing interest in his case, then becoming angry with us because of our failure to listen to and present information in the "FCC tapes," then becoming convinced that he had won his case and could not be executed. Finally, we have seen him become utterly unable to communicate with us about any subject—concerning his case or anything else. Our experience has convinced us—beyond any doubt—that Mr. Ford is not only genuinely ill but is grossly incompetent. We believe he understands nothing about his current circumstances. We know that he can do nothing to assist us in representing him. Having said this, we do not make these representations lightly.

At 4 p.m. the same day our stay application was denied.

I did not expect to win Ford's case. Dick Burr decided that honor and duty required him to witness Ford's execution and to ask for clemency literally until the bitter end. Meanwhile, Alvin Ford himself refused to see anyone and was "banging his head against the wall of his prison cell all day." On Wednesday, May 23, while Burr spent the day with Ford, supervising psychiatric evaluations, the stay papers were filed in the Florida Supreme Court, which set oral argument for 9 a.m. on Friday.

On Thursday we got more bad news. When Ford's case reached the federal trial court—and we had scant hope that we'd win in the Florida Supreme Court—it would come before the same judge who had blasted it through the last time around. Judge Norman Roettger was unsympathetic to Ford's first habeas appeal; we were on notice that the judge was less than happy about seeing the case again. The judge's law clerk told Burr, "I think [the judge's] done all he's going to do for Alvin Ford."

First, though, we had to go through the Florida

Supreme Court. Five of the seven justices heard oral argument on Friday, May 25. Burr called to say the argument went badly and that all five justices were hostile. Oral argument lasted an hour and less than two hours after it ended the court issued its opinion. We lost. On to the federal trial court. We filed that afternoon.

Saturday and Sunday were days of waiting and preparing. Waiting for the federal trial judge and preparing to go to the Eleventh Circuit Court of Appeals and then the U.S. Supreme Court. We strategized and drafted legal papers.

On Monday we put papers on a plane to Atlanta to be “lodged” in the Eleventh Circuit. I left my office at 4:30 p.m. At 9 p.m. Burr called me at home. The federal district judge had set a hearing for 1:30 p.m. the following day and Burr wanted me to argue the merits of the execution competency issue. I was fresh out of law school and in my diary I wrote: “This will be the first time I will be arguing any issue, in any case, capital or non-capital, in federal court, and [Dick] wants me to argue one of the most important constitutional issues—and one of the longest shots, legally and factually complex constitutional claims—in a successive habeas corpus case filed by a Ft. Lauderdale cop killer, in front of judge whose nickname is ‘Stormin’ Norman; I think I will be learning to swim by being thrown into the deep end of the pool. . . .” I got no sleep that night. I read cases, wrote notes for my argument, and paced.

Through his impressive handlebar mustache, Judge Roettger barraged me with questions about why he should rule that the Constitution forbids executing the insane. He clearly thought our claim was procedurally barred: We should have raised it in Ford’s first habeas petition. I argued that the claim simply didn’t exist then—Ford was perfectly sane at the time of his first habeas petition. As soon as we finished the argument, the judge ruled from the bench as we expected—procedural bar, abuse of the habeas writ. Using a courthouse hallway pay phone, we called the Eleventh Circuit Court of Appeals in Atlanta to activate the papers we had lodged the previous day.

Burr and I arrived back at the office at 5 p.m. and 30 minutes later received a phone call from the Eleventh Circuit. Oral argument would be held in Atlanta the next day.

That was good news, and, on its face, there was more good news: The three appellate judges assigned to the *Ford* case were the same three judges who had recently stayed the execution of another of our clients. However, in that case, the U.S. Supreme Court, by a 5-4 vote, had dissolved the stay, and the client was executed. How would those same three judges respond to Ford’s case? Would they stay the execution, we wondered, or would the Supreme Court reversal of their earlier stay make them gun-shy?

We thought it unlikely that the Eleventh Circuit would stop Ford’s execution, so while Dick Burr flew to Atlanta, I and another lawyer rewrote the papers for the U.S. Supreme Court. I left the office at midnight, but was unable to sleep and returned to the office at 2 a.m. While the other lawyer typed, I made copies and punched holes. By 6 a.m. the papers were ready and we sent them on a 7 a.m. flight to Washington, D.C., Alvin Ford was scheduled to be executed in exactly 24 hours.

At 1 p.m. that afternoon, Burr called from Atlanta. The argument had been hard to gauge. The judges had asked about procedural bars, along with the merits of the execution competency claim. At 4:20 p.m. Burr called again. The Eleventh Circuit had stayed the execution—14 hours before Ford’s date with death—but it was a split decision. Two judges voted to grant the stay, but the third had voted to deny it.

Now it was the prosecutors’ turn to activate their papers with the U.S. Supreme Court. We scrambled to throw together a reply to the state’s motion to dissolve the Eleventh Circuit’s stay. We had to write and file the reply blind, since we had not yet seen the Eleventh Circuit’s opinion explaining the stay. We finally got the Eleventh Circuit’s opinions at 7:30 p.m. The majority opinion didn’t need us to defend it; it seemed bulletproof. But Supreme Court justices can be an unpredictable lot. Maybe it was fatigue and fear, but the longer we looked at the Eleventh Circuit’s stay opinion, the shakier it seemed. During our third all-nighter, we wrote papers like automatons. They were on a plane to D.C. by 6:30 a.m.

By 7 a.m. on Friday, June 1, 1984—when Ford was to have been electrocuted—there were no more papers to write, nothing left to do. At 5:12 p.m. we got a call. The rumor among reporters was that the Supreme Court would lift the stay any minute. At 7 p.m. I called the office: still no word. My diary: “8:10 p.m.: The Supreme Court *upheld* the stay, by a vote of 6-3; so the competency-to-be-executed issue *is* a real, live issue, and Alvin Ford will live long enough to litigate it.”

The Eleventh Circuit put Ford’s case on an expedited briefing and oral argument schedule. Because we were swamped with death warrant cases, we didn’t have as much time as we’d wanted to work on the briefs. We were in the midst of another client’s death warrant when Dick Burr headed out to the oral argument in *Ford*.

The Eleventh Circuit panel in *Ford* consisted of Judges Vance, Clark, and Stafford. Burr thought the argument went well. He said Judge Vance thought the Eighth Amendment to the Constitution created a right not to be executed while insane. It was a good sign. It meant Vance knew how to get around that 1950 Supreme Court precedent. Still, Judge Vance had tried to clear Alabama’s death row, and his attempt brought him a stinging rebuke from

the High Court. I didn't think Judge Vance would take that gamble again, not in Alvin Ford's case.

We lost Ford's case, 2-1, in the Eleventh Circuit. Judge Clark wrote a 19-page dissent; Judge Vance wrote a seven-page opinion for the majority. The majority opinion teed up the execution competency issue perfectly for Supreme Court review. It invited the Supreme Court to decide whether the old 1950 case remained good law, or whether the evolving standards of decency required a different constitutional rule today.

The Court's bait-and-switch. In fact, the Supreme Court did decide to decide Ford's case, and then the Court held that the Constitution today forbids execution of the presently insane. It was a close thing, however. Initially, the justices refused the case until Justice Thurgood Marshall circulated a dissenting draft opinion that persuaded them otherwise. Marshall, who wrote the majority opinion, was the only justice in history whose law practice before joining the Court had involved regularly representing condemned people. And his experiences led him to vote to overturn every death sentence to reach his chambers. For that reason, Marshall wrote only one capital opinion for the Court—*Ford v. Wainwright*.

Justice Marshall's plurality opinion began by burying the old 1950 precedent based on the Due Process Clause. Ford's claim was based on the Eighth Amendment's ban on cruel and unusual punishments. The Court's jurisprudence of death had evolved substantially since 1950.

Marshall then reached back much further than 1950. The Eighth Amendment "embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." Even in 1789, when the Framers of the Bill of Rights wrote the Eighth Amendment, it was well-settled law that the government was forbidden to execute the insane.

"This ancestral legacy has not outlived its time," Marshall continued. "Today, no state in the Union permits the execution of the insane." Marshall explained:

It is clear that the ancient and humane limitation upon the state's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition

that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

But what was the constitutional standard for execution competency? Justice Marshall's plurality opinion had advocated a test that included consideration of the prisoner's ability to assist counsel. The concurring opinion of Justice Lewis Powell, which added the crucial fifth vote to the four-justice plurality, articulated a two-prong test under which the Constitution "forbids the execution only of those who [1] are unaware of the punishment they are about to suffer, and [2] why they are to suffer it." A person can be profoundly mentally ill and delusional and still not satisfy Powell's *Ford* test. One must be delusional in just the right way to count under *Ford*: The delusions must render the prisoner unaware of the death penalty.

Marshall then turned to the specifics of Florida's statutory procedure for determining execution competency. Marshall found Florida's procedure constitutionally inadequate. Because Florida's procedure failed, Alvin Ford was entitled to an evidentiary hearing in the federal trial court—unless Florida adopted a procedure for determining execution competency that did pass constitutional muster. That was where things got more dicey. For Marshall, only a full-blown minitrial would suffice. But on this point Marshall was not speaking for a majority of the Court.

The key Powell concurrence would give the states a great deal of latitude in designing a state procedure for determining competency. Although Powell found Florida's procedure inadequate, he would require far less than Marshall's minitrial.

Neither Powell's nor Marshall's opinions adequately identified precisely *why* executing the insane violates evolving standards of decency. As quoted above, Marshall explained that executing this class of individuals would not serve the values of deterrence or retribution. (*But see* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation, in Support of Petitioner, *Panetti v. Quarterman*, No. 06-6407.) Marshall's plurality opinion also recognized that the focus of the inquiry shouldn't be on the prisoner. In some ways, the execution of someone like Alvin Ford—whose delusional system would have immunized him from the terror that so paralyzed "saner"

CURING TO KILL: MEDICINE'S DILEMMA

By Michael Mello

The discussion of the Nollie Martin case suggests that mentally ill clients can pose excruciating ethical dilemmas for their lawyers. Mental illness also confronts members of the healing professions with intractable ethical conundrums.

Claude Matunana. Claude Matunana was sentenced to death for murder. As described in Nina Rivkind and Steven Shatz's 2001 capital punishment casebook, Matunana was subsequently found to be a paranoid schizophrenic and mentally incompetent to be executed. He was "convinced he was an agent of the 'world police' and spoke frequently in numbers and initials whose meaning was known only to him. Matunana was placed under the care of Dr. Jerry Dennis, the Arizona State Hospital's chief medical officer."

Dennis visited Matunana "periodically to monitor his condition and treated him with a regimen of tranquilizers which maintained his equilibrium but did not improve his mental state." Such an improvement would have rendered the doctor's patient mentally competent to be executed, and the doctor believed that the Hippocratic Oath precluded him from treating a patient in such a way that would make him eligible for execution. Dennis "could have treated Matunana more aggressively and restored him to the point where he understood that he was going to be executed for committing a crime, but Dr. Dennis refused citing his ethical obligations" to his patient.

The Arizona prosecutors ordered Dennis to treat his patient until he was competent to be executed. The doctor refused. The prosecutors threatened the doctor with contempt of court. He still refused. Hospital administrators then attempted to find a replacement for Dennis, sending a mailing to all Arizona psychiatrists and nurse practitioners, placing classified ads, and making calls to professionals in

other death penalty states. Not a single Arizona psychiatrist, psychologist, or nurse practitioner was willing to take on the case. But a psychiatrist in Georgia was. That psychiatrist found Matunana sane enough to die. In 2002 Matunana did die, during surgery.

Martin Long. Even by Texas standards, the 1999 execution, by lethal injection, of a man requiring oxygen and continuous medical care (following a drug overdose) was notable in its weirdness. As reported in a December 9, 1999, article by Jim Yardley in the *New York Times*, two days prior to his scheduled execution, Martin Long, 46 years old, was found unconscious in his cell by death row guards. Long had hoarded and then "ingested an overdose of anti-psychotic drugs." Doctors "placed him on life support . . . in intensive care and [on] a ventilator."

On the day before his scheduled execution by lethal injection, Long was taken off the respirator and upgraded from critical to serious condition. Long remained in intensive care, where he would have stayed for another two or three days were it not for his scheduled execution.

Long's doctor in Galveston was asked by the state "to sign an affidavit saying Mr. Long could be safely transported to Huntsville [for execution], a request he said he refused." However, the doctor "did sign an affidavit stating that Long's health had improved, that he suffered no seizures, and was responding to questions—but that transporting him could be risky without appropriate medical care."

So Long was transported—on oxygen and with continuous medical care—by airplane from Galveston to Houston, a 25-minute trip. He was then executed.

Healers' Participation in Executions

The collisions between medical ethics and the machinery of death discussed above are indirect. Physicians and other mental health professionals who "cure to kill" can

clients—seems more humane than executing the lucid. The *Ford* rule isn't about those we execute. It's about us and about our law. We ought not to be the sort of culture that kills the mentally ill.

The Supreme Court did not hold that Alvin Ford was exempt from execution because he was insane. Rather, the Court held that *if* Ford was, in fact, mentally ill in such a way that he was mentally incompetent to be executed, then and only then would Ford be out from under the immediate threat of execution. Before Ford could leave death row, we must prove, at a minitrial, that he was actually as ill as we claimed.

The evidentiary hearing in Judge Roettger's court did not go well. The judge found that Ford was malingering and that he was competent to be executed. Ford's lawyers

were in the process of appealing Judge Roettger's decision when Alvin Ford died of "natural causes."

I would have liked for *Ford* to have held that the Constitution forbids executing the mentally ill. That was never in the cards, because such a holding would have cleared much of death row. If all of the diagnoses listed in the *Diagnostic and Statistical Manual* would render an inmate incompetent for execution, there would be few souls left on death row. That is why commentators like the American Psychiatric Association and the American Bar Association suggest banning the execution only of the "severely" mentally ill.

Ford v. Wainwright has always seemed to me a bait-and-switch. The Court recognized a constitutional right in the abstract, but left it to the states to define and protect

rationalize that their involvement in the capital assembly line is separated by time and place from the actual executions. There is some distance.

Healers who participate in executions themselves have no such distance. In a May 2007 working paper, *The Lethal Injection Quandary*, Professor Deborah Denno has demonstrated that such participation occurs more frequently than one might suppose. Denno wrote:

On February 14, 2006, a federal district court rendered a ruling that would transform this country's views of capital punishment. For California to conduct the lethal injection execution of Michael Morales, the state had to choose one of two court-mandated options: provide qualified medical personnel who would ensure Morales was unconscious during the procedure, or alter the Department of Corrections' execution protocol so that only one kind of drug would be given, rather than the standard sequence of three different drugs. Evidence suggested that, of the eleven inmates lethally injected in California, six may have been conscious and tormented by the three-drug regimen, potentially creating an "unnecessary risk of unconstitutional pain or suffering" in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. In a captivating legal moment, the state chose to have medical experts present at Morales' execution, setting the stage for a showdown between law and medicine.

Immediately, medical societies protested the *Morales* court's recommendation and the ethical quandaries it posed. Three stalwart groups—the American Medical Association, the American Society of Anesthesiologists, and the California Medical Association—united in their opposition to

doctors joining executioners. Even bigger surprises from *Morales* were yet to come. It took just one day for prison officials to find two anesthesiologists willing to take part in Morales' execution, assured they would remain anonymous. It soon became clear, however, that these doctors had not been fully informed of their roles. In a stunning blow to the *Morales* court's directive, both anesthesiologists resigned mere hours before the scheduled execution time. Because of their ethical responsibilities, they could not accept the Ninth Circuit Court of Appeals' interpretation that they personally would intervene and provide medication or medical assistance if the inmate appeared conscious or in pain. The doctors' reasons for refusing to participate spotlight a crucial predicament states face in the administration of lethal injection.

The *Morales* case unearthed a nagging paradox. The people most knowledgeable about the process of lethal injection—doctors, particularly anesthesiologists—are often reluctant to impart their insights and skills. This very dilemma moved Judge Jeremy Fogel, who presided over Morales' hearings, to assume unprecedented involvement in an area that had been controlled primarily by legislatures and department of corrections personnel. In response to the doctor pullout and questions about lethal injection's viability, Judge Fogel organized the longest and most thorough evidentiary hearing ever conducted on any execution method. The homework paid off: Examinations and testifying experts opened a window into the hidden world of executions. (Deborah Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, Fordham Legal Studies Research Paper No. 983732, (May 1, 2007).)

that right. The Court took the same approach with respect to mental retardation: The justices held that the Constitution forbids executing the mentally retarded, but the Court allowed the states to define mental retardation for purposes of the prohibition. (For a thoughtful argument against a categorical exemption for mental retardation, see Barry Latzer, *Misplaced Compassion: The Mentally Retarded and the Death Penalty*, 38 CRIM. L. BULL. 327 (2002).)

The Nollie Lee Martin case

Ford all but guaranteed that severely mentally ill people would continue to be executed in America. And they have been. There was Ricky Ray Rector in Arkansas in 1992 who shot himself in the forehead at the time of his arrest,

destroying a three-inch section of his frontal lobe. This self-inflicted lobotomy, and subsequent surgery, left Rector with the mental capacity of a 10-year-old: As he left his cell for the death chamber, Rector said he was saving a piece of pecan pie to eat after his execution. There was Johnny Frank Garrett in Texas, a client of mine, who survived a childhood of severe physical torture, physical abuse, and chronic psychosis. (He was 17 at the time of the crime, which, had he lived a few more years, would have rendered him ineligible for execution.) And there was Nollie Lee Martin, a man whose execution haunts me to this day.

Alvin Ford's victory in the U.S. Supreme Court established the principles that executing the presently insane offends the Constitution and that Florida's procedures for

determining execution competency were constitutionally insufficient. Yet the *Ford* case left open more questions than it answered. Chief among them was the standard of competency. But also two other questions were also left open: If a prisoner was presently incompetent to be executed, could the state psychiatrists forcibly mediate him or her back to sufficient sanity so that the individual could be executed during a “lucid interval”? And, could Florida execute an allegedly insane prisoner prior to the state’s adoption of a constitutionally valid procedure for determining execution competency?

Both issues were presented in the Nollie Lee Martin case. Martin was convicted of killing twice. In North Carolina, he torched a house and three people died. In West Palm Beach, Florida, he robbed a convenience store and raped and murdered the clerk—an honors student working during her summer vacation. The Florida crime made Martin infamous in Palm Beach County. On my second day as a capital public defender, I was assigned to research the legal issues in a case that brimmed with legal issues. Martin twice confessed to the Florida police, but his *Miranda* rights had been violated. And he was mentally ill. As a child he had suffered profound brain damage. CAT scans of Martin’s brain told the tale. Part of his brain was damaged or missing.

When Governor Graham signed Martin’s first death warrant, the case flew through the state courts and the federal trial court. The Eleventh Circuit Court of Appeals stayed the execution, throwing out Martin’s first confession. It didn’t matter, though, because the judges held that the second confession was OK, and so the legal error in admitting the first confession into evidence was “harmless.” Martin’s murder conviction and death sentence would stand.

Martin took the news hard, as I knew he would. Later I received a phone call from his brother. Martin had attempted suicide by slitting his wrists and taking an overdose of pills. However, it turned out that the precipitating event that led to the suicide attempt wasn’t the court loss. Martin was in despair over a prison disciplinary report for possession of contraband—a small plastic container of fruit cocktail.

A few months later the governor signed a new death warrant on Nollie Lee Martin. The only real issue that remained was Martin’s mental competency to be executed. Dick Burr and I would serve as Martin’s lawyers. In prison he was being treated with antipsychotic drugs, and, so long as he was medicated, Martin could maintain and cope with life on death row. But he was also much less crazy, which undermined our claim that Martin was too ill to execute. As I wrote in my diary:

Terrible moral dilemma: Should I instruct the prison to stop medicating Lee’s mental illness? That would

cause his mental health to deteriorate even more, which improves his execution competency claim, and thus his chances of getting a stay. But that would come at a fearful price: Taking Lee off his meds would descend him into hell. . . . And it’s my choice . . . [h]e’s not mentally competent to decide whether or not to refuse medical/psychiatric treatment: Even with medication, he’s very crazy. . . . Burr and I talked about the ethics of appearing not to “be making him crazy,” as opposed to simply removing impediments to make his craziness apparent and identifiable as such by a neutral observer. . . .

I knew that Martin was at risk for another suicide attempt. I wanted to warn the prison to keep a closer eye on him, but I didn’t warn the prison for a coldly calculating reason. In a week I had an oral argument in the Florida Supreme Court on my application for a stay of execution. I would be arguing that Martin was mentally incompetent to be executed, and a recent suicide attempt would strengthen my argument.

It gets worse. I ordered the prison to stop medicating Martin. The prosecutors could seek a psychiatric exam of Martin at any time. When that happened, I wanted my client to be as crazy as possible. I didn’t want his mental illness masked by drugs.

My Machiavellian scheme worked, in a manner of speaking. Off his medication, Martin again tried suicide. He cut his wrists. He descended further into his private hell of madness. I would be able to tell the courts that my client really was mentally incompetent to be executed. I would not tell them about my own contributions to that illness.

But simply being crazy would not be enough to win a stay of Martin’s execution. I would also argue that, in light of the *Ford* decision’s invalidation of Florida’s procedure for determining execution competency, Florida had to create a procedure that passed constitutional muster. It would be the core of my oral argument before the Florida Supreme Court.

Ten minutes before I began, I received the court’s new *Ford* rules on execution competency; and the justices made plain they did not want to hear any procedural challenges to these rules. We were not optimistic. Dick Burr suggested we trigger the old clemency statute, even though it was clearly unconstitutional under *Ford*. In a 6-1 decision, the court announced that night that it was denying the stay. At the same time we received a call from Governor Graham’s clemency aide, who assured us the governor would grant a stay if we filed the letter to have the governor determine Martin’s competency.

We proceeded on two tracks. We appealed the Florida Supreme Court’s stay denial directly to the U.S. Supreme Court. We also triggered the old procedure for the gover-

nor to determine execution competency, and we asked the governor to stay the execution until the dust settled. By that evening, the governor had issued a stay. Further, Graham said he didn't intend to rush the psychiatric exams; that process would take at least two weeks, which would take Martin beyond the time limit specified in this death warrant. It was a real stay. But it seemed too good to be true. I worried that Graham might wait until we withdrew Martin's court papers, then reinstate the warrant, ram through a psychiatric exam, and execute Martin before we could respond properly in court.

I did not trust the governor. Graham was a master at the chess game of capital punishment politics. In my opinion, he had built a political career on the corpses of my clients. I would not trust him now. I called the U.S. Supreme Court and told the clerk that I was not withdrawing the stay papers in Martin's case. I wasn't pushing the justices to act on the papers, but I wanted to keep them in place in case Governor Graham changed his mind on short notice about his stay.

I returned to other cases during that weekend. At 7:30 p.m. on Monday I received a call from the U.S. Supreme Court. The justices had unanimously issued an indefinite stay of Martin's execution, notwithstanding the stay we already had from Governor Graham. Perhaps, I thought, the U.S. Supreme Court had as little faith in the governor's motivation as did I.

That Supreme Court stay kept Nollie Lee Martin alive for the next six years. He was profoundly mentally ill until the moment he died in the electric chair, but he wasn't crazy in precisely the proper way to render him incompetent to be executed under *Ford*. As of May 2007 the United States had executed 1,075 men and women since the death penalty was resurrected in 1977. Nollie Lee Martin was number 173.

Beyond bedlam: Scott Panetti

Alvin Ford was sane enough to be executed. So was Nollie Lee Martin. When it was Scott Panetti's turn, the outlook seemed bleak.

During the 21 years since *Ford* was decided, the U. S. Court of Appeals for the Fifth Circuit has never found a death row prisoner too mentally ill to die. The story of Scott Panetti suggests why.

Scott Panetti had a long history of mental illness before committing the double murder that landed him on Texas's death row. In 1992, Panetti, who had been previously hospitalized 14 times for mental illness, forced his way into the home of his estranged wife and, with Panetti's young daughter watching in horror, shot his wife's parents to death.

At his 1995 trial, Panetti fired his lawyers and argued his own insanity in a cowboy outfit. Dressed in a Tom

Mix hat and cowboy garb, Panetti rambled incoherently and tried to subpoena Jesus Christ, John F. Kennedy, and Anne Bancroft. He went into trances, nodded off, and gestured threateningly to jurors. One didn't need a medical degree to appreciate that Panetti suffered from delusions. Unless he was faking, of course.

In his first round of habeas corpus litigation, Panetti did not raise a *Ford* claim. He did on his successive petition. Panetti asserted that his delusional architecture rendered him incompetent to be executed. Panetti believed he was to be executed for preaching the gospel, not for murder. The Fifth Circuit held that *Ford's* prohibition against executing prisoners who don't have sufficient mental capacity to understand that they will be put to death and why does not require that inmates have a "rational understanding" of why they have been condemned to die. Applying the "awareness" standard set out in Justice Powell's *Ford* concurrence, the Fifth Circuit explained that Panetti's delusional belief that his murder conviction was a mere pretense to put him to death did not render him mentally incompetent to be executed. Panetti was aware that he would be executed, that he had committed the two murders for which he was sentenced to die, and that the prosecution's stated reason for executing him was that he committed two murders.

Thus, Panetti understood the state's proffered reason for seeking his execution. He just didn't believe those reasons were true. In Panetti's mind, Texas wanted to kill him for preaching the gospel. Scott Panetti was sane enough to be executed, concluded the Fifth Circuit.

The Supreme Court granted certiorari in January 2007. Briefs were filed, including an amicus brief by the ABA in support of Panetti. Shortly before the scheduled oral argument, the Court asked the parties to file supplemental briefs addressing whether Panetti's *Ford* claim should be barred in his second habeas because he didn't raise the issue in his first. (Recall that Alvin Ford himself hadn't raised the issue until a successive habeas petition because, at the time of his first, Ford was not mentally ill.) Much of the *Panetti* oral argument was devoted to this procedural question.

When is a second habeas petition not a "second habeas petition"?

The Court decided *Panetti v. Quarterman* on June 28, 2007, the last day of the first full term of the Roberts/Alito Court. The decision was 5-4. The majority opinion, written by Justice Anthony Kennedy, held that a *Ford* claim brought in an application filed when the claim was first ripe cannot be "second or successive" for purposes of gatekeeping criteria of the habeas statute. The Court reasoned that to hold that Panetti's claim should have been brought sooner would undermine the statute's purposes of promoting comity, finality, and federalism by

encouraging prisoners to file unripe claims lest they be forfeited. It noted that all prisoners are at risk of deteriorations in their mental state and, therefore, all “conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every [habeas] application” in order to preserve the claim.

The Court held that it had statutory authority to adjudicate the claims raised in Panetti’s second federal habeas application. Because the habeas statute required that “[a] claim presented in a second or successive . . . [habeas] application . . . that was not presented in a prior application . . . be dismissed,” the state maintained that the failure of Panetti’s first habeas application to raise a *Ford*-based incompetency claim deprived the district court of jurisdiction. The results this argument would produce show its flaws. Were the state’s interpretation of “second or successive” correct, a prisoner would have two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application even though it is premature. The dilemma would apply not only to prisoners with mental conditions that, at the time of the initial habeas filing, were indicative of incompetency, but also to all other prisoners, including those with no early sign of mental illness. Because all prisoners are at risk of deteriorations in their mental state, conscientious defense lawyers would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every habeas application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the states, with no clear advantage to any.

The more reasonable interpretation of the statute was that Congress did not intend the provisions of the habeas statutes addressing “second or successive” habeas petitions to govern a filing in the unusual posture presented by Panetti: a habeas petition raising a *Ford*-based incompetency claim filed as soon as that claim was ripe. This conclusion was confirmed by the habeas statute’s purposes of “further[ing] comity, finality, and federalism promot[ing] judicial efficiency and conservation of judicial resources, . . . and lend[ing] finality to state court judgments within a reasonable time.” These purposes, and the practical effects of the Court’s holdings, should be considered when interpreting the habeas statute, particularly where, as here, habeas petitioners “run the risk” under the proposed interpretation of “forever losing their opportunity for any federal review of their unexhausted claims.” There was, finally, no argument in this case that Panetti proceeded in a manner that could be considered an abuse of the writ. To the contrary, the Court has suggested that it is generally appropriate for a prisoner to wait before seeking the resolution of unripe incompetency claims.

The Court also held that the state court unreasonably

applied clearly established federal law by failing to afford the petitioner the procedures mandated in *Ford*. The Court explained that, under *Ford*, once a prisoner seeking a stay of execution has made “a substantial threshold showing of insanity,” procedural due process principles require that he or she be granted a “fair hearing.” “This means,” the court said, “that the prisoner must be given an opportunity to be heard.”

One of the reasons that the plurality in *Ford* found the state procedures reviewed in that case to be deficient was that a determination of sanity appeared to have been made solely on the basis of examinations by state-appointed psychiatrists. This means, the Court said in *Panetti*, that due process requires that a prisoner who has made a threshold showing of incompetency be provided an opportunity to submit evidence and argument, including expert psychiatric evidence that may differ from that provided by the state’s witnesses.

Texas officials did not contest that Panetti made a substantial showing of incompetency. Thus, the Court said, the petitioner was entitled under *Ford* to an adequate means by which to submit expert psychiatric evidence to the state court. He did not get that, the Court found. It also concluded that, due to the inadequacy of the state’s procedure, the state court’s holding that Panetti was competent to be executed was not entitled to the deference that the habeas statute ordinarily requires.

The state court failed to provide the procedures to which Panetti was entitled under the Constitution. *Ford* identified the measures a state must provide when a prisoner alleges incompetency to be executed. Justice Powell’s opinion concurring in part and concurring in the judgment in *Ford* controls. As Justice Powell elaborated, once a prisoner seeking a stay of execution has made “a substantial threshold showing of insanity,” the Eighth and Fourteenth Amendments entitle the individual to a fair hearing, including an opportunity to submit “expert psychiatric evidence that may differ from the state’s own psychiatric examination.”

The procedures the state court provided Panetti were so deficient that they cannot be reconciled with any reasonable interpretation of the *Ford* rule. It was uncontested that Panetti made a substantial showing of incompetency. It was also evident from the record, however, that the state court reached its competency determination without holding a hearing or providing petitioner with an adequate opportunity to provide his own expert evidence. Moreover, there was a strong argument that the court violated state law by failing to provide a competency hearing. If so, the violation undermines any reliance the state might now place on Justice Powell’s assertion that “the states should have substantial leeway to determine what process best balances the various interests at stake.”

The standard for execution competency

This led the Court to the ultimate issue of whether the Eighth Amendment permits the execution of individuals who, due to mental illness, do not understand that they are truly being executed as punishment for their crimes. The Court ruled that it does not, concluding that “[t]he principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the state’s announced reason for a punishment or the fact of an imminent execution, . . . as opposed to the real interests the state seeks to vindicate.” It explained:

Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the state has identified the link between his crime and the punishment to be inflicted.

The Fifth Circuit employed an improperly restrictive test when it considered petitioner’s claim of incompetency on the merits. The Fifth Circuit’s incompetency standard was too restrictive to afford a prisoner Eighth Amendment protections. Panetti’s experts in the district court concluded that, although he claimed to understand that the state said it wants to execute him for murder, his mental problems had resulted in the delusion that the stated reason is a sham, and that the state actually wants to execute him to stop him from preaching. The Fifth Circuit had held, based on its earlier decisions, that such delusions were simply not relevant to whether a prisoner can be executed so long as the prisoner is aware that the state has identified the link between the crime and the punishment to be inflicted. This test ignored the possibility that even if such awareness exists, gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose.

It was also inconsistent with *Ford*, for none of the principles set forth therein were in accord with the Fifth Circuit’s rule. Although the *Ford* opinions did not set forth a precise competency standard, the Court did reach the express conclusion that the Constitution “places a substantive restriction on the State’s power to take the life of an insane prisoner,” because such an execution serves no retributive purpose. It might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of the crime and

to allow the community as a whole, including the victim’s surviving family and friends, to affirm its own judgment that the prisoner’s culpability is so serious that the ultimate penalty must be sought and imposed. Both the potential for this recognition and the objective of community vindication are called into question, however, if the prisoner’s only awareness of the link between the crime and the punishment is so distorted by mental illness that awareness of the crime and punishment has little or no relation to the understanding shared by the community as a whole. A prisoner’s awareness of the state’s rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter. To refuse to consider evidence of this nature is to mistake *Ford*’s holding and its logic.

The state had identified the link between the crime and the punishment to be inflicted. In the end, the Court declined to set down a rule governing all competency determinations. It said it simply did not have enough information to make the determination in this case to enable the lower courts to make the determination in the first instance.

Although the Court rejected the Fifth Circuit’s standard, it did not attempt to set down a rule governing all competency determinations. The record was not as informative as it might be because it was developed by the district court under the rejected standard, and, thus, the Court finds it difficult to amplify its conclusions or to make them more precise. It is proper to allow the court charged with overseeing the development of the evidentiary record the initial opportunity to resolve Panetti’s constitutional claim.

Justice Clarence Thomas filed a dissent, and he was joined by Chief Justice John G. Roberts, Jr., and Justices Antonin Scalia and Samuel A. Alito, Jr. The dissenters complained that the majority had imposed “a new standard for determining incompetency” without conducting “even a cursory” Eighth Amendment analysis. They also accused the majority of bending over backward to allow Panetti to make his claim “despite no evidence that his condition has worsened—or even changed—since [he was found competent to stand trial in] 1995.” Additionally, they said, the state court’s determination was entitled to deference.

Conclusion

We execute the mentally ill in the United States of America. We executed the mentally ill before *Ford* in 1986. We did it after *Ford* and before *Panetti*. If you think we will cease executing the mentally ill after *Panetti*, then you haven’t been paying attention. Or you’re as delusional as Alvin Ford. ■