

The Supreme Court's Recent Criminal Mental Health Cases

Rulings of Questionable Competence

By Christopher Slobogin

Criminal mental health law—the intersection of criminal law and mental health issues—has long been a legal backwater. That lowly status may be changing, however. In the 40 years before 2003, the U.S. Supreme Court averaged only two important substantive criminal mental law opinions every decade; since the beginning of that year, the Supreme Court has decided three seminal cases relevant to the field, dealing with the right of incompetent defendants to refuse medication (*Sell v. United States*), the scope of psychiatric defenses (*Clark v. Arizona*), and the definition of competency to be executed (*Panetti v. Quarterman*).

Unfortunately, in the first two of these cases the Court demonstrated a limited grasp of both the theoretical principles underlying criminal mental health law and the nature of mental disorder and its treatment. In *Sell* the Court unnecessarily expanded the right to refuse treatment. In *Clark* it further confused the already confusing

law of criminal responsibility and its relationship to the rules of evidence. In *Panetti*, in contrast, the Court demonstrated a good comprehension of the relevant concepts. There it reversed, albeit by the narrowest of margins, a troubling trend in the lower courts that would have made a mockery of the requirement that those subject to the death penalty understand why they are being executed.

Sell v. United States

It has long been established that a criminal defendant must be able to understand the legal process and communicate with his or her attorney in order to plead and to undergo trial. This “competency-to-proceed” requirement is meant, in large part, to protect the defendant’s rights—the rights of confrontation and assistance of counsel under the Sixth Amendment and the right to a reliable and fair trial contemplated by the Due Process Clause. It is important to note, however, that the competency requirement

also stems from the need on the part of the government and society at large to ensure that criminal adjudications are reliable and avoid the ugly image of a proceeding against an individual who does not understand what is happening. (See generally GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 121 (2d ed. 1997).)

That is why until recently most lower courts held that the government could forcibly medicate a mentally ill defendant if the purpose was to restore the individual to competency. (See *Khiem v. U.S.*, 612 A.2d 160, 168 (D.C. Ct. App. 1992).) Explicitly or implicitly, these courts reasoned that the government's interest in adjudicating criminal charges accurately and in a dignified way trumped defendants' interest in controlling the injection of substances into their bodies. It is true that the medications used to restore competency, including even the new "atypical" drugs, can have powerful side effects ranging from drowsiness, restlessness, nausea, loss of appetite, and dry mouth to constipation, low blood pressure, weight gain, diabetes, and liver problems. (FDA Patient Information Sheet, April 2005, available at www.fda.gov/cder/drug/InfoSheets/patient/olanzapine/PIS.htm.) Nonetheless, for most people with serious mental illness, these drugs can alleviate the worst symptoms of psychotic disorder without significant side effects, at least over the short term. Furthermore, in recognition of the negative aspects of these medications, in *Riggins v. Nevada*, 504 U.S. 127 (1993), the Supreme Court made clear that forcible treatment must be "medically appropriate" and the least intrusive means of achieving the government's aim of competency restoration. In addition, the Court emphasized that the medication must be administered in a manner that does not compromise the defendant's ability to communicate with his or her attorney or to receive a fair trial.

At the same time, the *Riggins* Court seemed to assume that, on these conditions, forcible medication to restore competency was permissible. (*Id.* at 135.) Then came *Sell v. United States*, 539 U.S. 166 (2003). Charles Sell, a dentist, was charged with more than 60 counts of fraud connected with Medicaid, as well as two counts of attempted murder (of the FBI agent who arrested him and of a former employee who planned to testify against him). He was clearly psychotic at the time of his arrest and was found

incompetent to stand trial, yet refused to take drugs to treat the condition. The hospital review process and a federal magistrate found that Sell was in need of medication to treat his symptoms, reduce his dangerousness, and restore him to competency. The district court and the Eighth Circuit found that, at least while institutionalized, Sell was not dangerous, but that, given the severity of the charges, he could still be forcibly medicated in order to restore his competency to undergo adjudication.

Six members of the Court, in an opinion by Justice Breyer, voted to vacate this judgment. The most arresting statement in *Sell* was its assertion that permissible instances of involuntary medication for the purpose of restoring competency "may be rare." At the time *Sell* was decided, criminal defendants were routinely forcibly medicated for this purpose. But the Court laid out four predicates for forcible medication that it suggested would change that practice: (1) "important governmental interests" must be at stake; (2) the medication must "significantly further those . . . interests"; (3) the medication must be "necessary to further those interests"; and (4) the drugs must be medically appropriate. (*Id.* at 180-81.)

The last three conditions merely emphasized the Court's holding in *Riggins* 10 years earlier. It is the first prong of *Sell* that was new, at least at the Supreme Court level. Because it vacated the case for further proceedings, the Court did not indicate whether it thought the charges against Sell were "important" enough to warrant forcible medication. But it did state that prolonged confinement due to a failure to take drugs, either before or after the competency hearing, "may lessen" the significance of the government's interest in prosecuting criminal charges, and stated that on remand the lower courts should take into account the facts that Sell had already been confined for a long period of time and that his continued refusal might result in further lengthy confinement. (*Id.* at 186.)

It is hard to argue with the last three prongs of *Sell*. Government has no business forcing medication on an individual to restore competency unless it shows that the drugs are appropriate for that individual's condition and are necessary to effectuate restoration, without causing side effects that will visit significant harm or diminish the defendant's ability to communicate with the attorney, focus on witness testimony, or present an appropriate demeanor at trial. *Sell* rightfully emphasized these aspects of *Riggins*, and lower courts have, as a result, begun to pay much more attention to them. (See, e.g., *State v. Cantrell*, 132 Wash. App. 1038 (2006).)

The first prong of *Sell* makes much less sense, because it misconstrues both the individual and state interests involved. The incompetent defendant's interests do not vary with the charge. And those interests are given full recognition if *Sell's* other three prongs (the *Riggins* crite-

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ria) are met. Under *Riggins*, forcible medication should not occur unless it is medically appropriate and necessary and avoids detracting from the fairness of trial. The Court's suggestion that a right to refuse exists even under these conditions fails to recognize that even the strongest proponents of such a right concede it disappears when the person is incompetent to make treatment decisions. Because virtually every person who is incompetent to stand trial is seriously mentally ill, this exception to the right to refuse will virtually always apply in this context. (See Robert Schopp, *Involuntary Treatment and Competence to Proceed in the Criminal Process*, 24 BEH. SCI. & L. 495, 502-10 (2006).)

Unlike individual interests, the state's interests might vary in strength depending on the charge. But if *Riggins* is met, the state can plausibly argue that its concerns outweigh the individual's in all but the most trivial cases (which are usually diverted out of the system anyway when people with mental disability are involved). (See Geoffrey Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders*, 24 AMER. J. CRIM. L. 283, 292-93 (1997).) *Sell's* suggestion that the state's interest in more serious cases might be minimized by past or future confinement resulting from a defendant's refusal of treatment either ignores the true nature of the state's interest or encourages illegal confinement.

First, contrary to *Sell's* insinuation, the state's interest in prosecution in such cases is much broader than the incapacitation that might result from it. As one court stated, the argument that civil commitment can achieve the state's goals as adequately as forcible medication and trial "ignores the retributive, deterrent, communicative and investigate functions of the criminal justice system, which serve to ensure that offenders receive their just deserts, to make clear that offenses entail consequences, and to discover what happened through the public mechanism of trial." (*United States v. Weston*, 255 F.3d 873, 882 (D.C. Cir. 2001).) This is true whether the crime is murder or a low-level felony.

In any event, under modern jurisprudential principles, commitment should not be an option for those individuals whom the *Sell* majority indicated have a right to refuse medication. As the Court recognized in *Riggins* and in *Harper v. Washington*, 494 U.S. 210 (1990), and reiterated in *Sell*, the state has a compelling interest in pursuing forcible medication that is necessary to reduce dangerousness. Thus, incompetent defendants who are dangerous may be forcibly medicated even after *Sell* (and the Court intimated that, were it deciding the issue de novo, it would have found *Sell* himself to be dangerous). (*Id.* at 184.) That means that, at most, only *nondangerous* defendants may legitimately refuse medication. But even if, contrary to the discussion above, this right of refusal is meant to apply to *nondangerous* defendants who are incompetent to

make treatment decisions, the Court does not explain the grounds on which states may detain such defendants when they refuse. State commitment laws generally restrict involuntary confinement of people with mental illness to those who are dangerous to self or others. (See RALPH REISNER ET AL., *LAW AND MENTAL HEALTH* 668 (4th ed. 2004).) Unless the Court meant to hold, contrary to the law extant in most states, that treatment refusal in the absence of dangerousness is a ground for detention, pre- or posthearing confinement of such individuals cannot legitimately take place and thus cannot "lessen" the state's interest in their prosecution.

Sell is not only conceptually confused, it may also have perverse effects. Now that the circumstances under which forcible medication solely for the purpose of competency restoration "may be rare," defense lawyers and defendants are more likely to claim incompetency, and defendants are more likely to refuse treatment. In response, courts, prosecutors, and forensic clinicians are more likely to take advantage of the *Harper/Riggins* exception to the right to refuse and find that "dangerousness" exists in a greater number of cases, and prosecutors are more likely to bring the highest possible charge to ensure it is considered "serious." In short, all parties are more likely to act pretextually, with no deserved gain for anyone, since refusing defendants either will still be detained (illegitimately) or will be released without adjudication merely because they have refused treatment. The Court should have simply emphasized its holding in *Riggins* and otherwise kept quiet.

Clark v. Arizona

The insanity defense has been part of Western jurisprudence since medieval times. In contrast to competency doctrine, which focuses on a defendant's present mental fitness, the insanity defense is based on a reconstruction of the defendant's mental state at the time of the offense. The insanity inquiry involves an examination of whether mental disability affected the person's reasons or motivations for committing the crime to such an extent that he or she should be considered blameless.

Insanity must be distinguished not only from competency to stand trial but also from the mens rea determination. This determination, like the insanity defense, focuses on the defendant's mental state at the time of the offense but, in contrast to the insanity inquiry, is not concerned with the causes of the defendant's conduct. Rather, it looks solely at whether the individual evidenced the mental state element of the crime in question. As every criminal lawyer knows, typical mental state elements in modern statutes include "premeditation," "intent," "purpose," "knowledge," "recklessness," and "negligence." Less well understood is the fact that a person can easily be insane at the time of a crime and yet have the requisite mens rea.

For instance, John Hinckley and Andrea Yates both intended to kill and thus had the mens rea for some form of homicide, yet both were found insane because their reasons for killing were considered “crazy” by the jury. (See generally GARY B. MELTON ET AL., PSYCH. EVALUATIONS FOR THE COURTS, at 204-08.)

In *Clark v. Arizona*, 126 S. Ct. 2709 (2006), the Supreme Court addressed both the proper scope of the insanity defense and the role of mental disability in making the mens rea determination. Eric Clark, who had a long history of mental illness, shot and killed a police officer who had stopped him for playing loud music in his pickup truck. Tried in front of a judge after waiving his right to a jury trial, Clark asserted an insanity defense and also argued that, because his delusions at the time of the offense led him to believe the victim was an alien rather than a police officer, he lacked the specific intent associated with his first degree murder charge (which required proof that the accused intentionally or knowingly kill a police officer). The trial judge heard all of Clark’s psychiatric evidence, but refused to consider his mens rea defense on authority of *State v. Mott*, 931 P.2d 1046 (Ariz.1997), an Arizona Supreme Court case that had held that evidence of mental disorder is admissible only on the insanity issue. With respect to the latter issue, the judge concluded that Clark failed to provide, as required by Arizona law, clear and convincing proof that he was insane, and sentenced him to life without parole.

Clark raised two issues before the U.S. Supreme Court. He first challenged Arizona’s insanity test. Many states today follow a version of the M’Naghten test for insanity, a formulation devised by the English House of Lords in 1843 that recognizes an excuse if, as a result of mental disease or defect, the defendant either (1) did not know the nature and quality of the criminal act or (2) did not know the act was wrong. Arizona’s insanity statute does not include the first prong of M’Naghten, a modification that Clark argued violated due process. But Justice Souter, writing for the Court, noted that Arizona courts had construed the state’s insanity test to encompass those defendants who did not understand the nature of their act; in other words, the state courts assumed that such defendants would also be unaware that their act was wrong. Therefore, Souter concluded, Arizona’s insanity test does not in fact narrow the scope of the defense nor lead to the exclusion of evidence that would be relevant to the first prong of M’Naghten. (126 S. Ct. at 2722-23.) The Court

did not address whether a state could eliminate the first prong of M’Naghten and, in contrast to Arizona’s approach, *prevent* introduction of testimony (and thus an insanity finding) focused solely on whether the defendant understood the nature of the crime.

It intimated an answer to that question, however, in addressing Clark’s second claim, which was that *Mott*’s ban on expert evidence of mental disorder that is aimed at negating mens rea violates due process. Clark’s argument here was much stronger than his insanity defense claim because it was based on the Supreme Court’s decision in *In re Winship*, 397 U.S. 358 (1970), which requires that the prosecution prove every essential element of a criminal offense beyond a reasonable doubt. Clark argued that Arizona’s prohibition on psychiatric mens rea testimony unconstitutionally reduces the prosecution’s burden of proof on an essential element because it permits the prosecution to gain a conviction even when the effect of mental disability at the time of the crime creates a reasonable doubt about mens rea. As noted above, Arizona does allow

insanity testimony to address the mens rea issue in the course of assessing whether the defendant knew the nature of the act (an inquiry that, in Clark’s case, involved whether he intended or knew the victim was a law enforcement officer). But under Arizona law the *defendant* must prove this fact by clear and convincing evidence, which could easily be considered impermissible bur-

den-shifting under *Winship*.

The Court rejected this argument, however, in an opinion that is noteworthy for its opaqueness. Before explaining the Court’s reasoning, two alternative analyses that might have arrived at the same result are worth considering. Both are based on *Montana v. Egelhoff*, 518 U.S. 37 (1996), where the Court upheld a Montana statute that abolished the voluntary intoxication defense.

The first alternative rationale for *Clark* comes from the four-member plurality opinion in *Egelhoff*, which concluded that Montana’s intoxication rule did not violate due process because, although it resulted in exclusion of evidence possibly relevant to mens rea, that exclusion did not offend “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” (*Id.* at 43 *passim.*) Justice Scalia’s opinion for the plurality justified this conclusion largely on historical grounds, pointing out that at common law voluntary intoxication was neither an excuse nor a justification for crime. The modern-day intoxication defense, Justice Scalia stat-

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ed, is of “too recent vintage” and not widely enough adopted to require its recognition as a matter of due process. (*Id.* at 51.) Analogous to this reasoning, the *Clark* Court could have held that psychiatric evidence relevant to mens rea, sometimes called “diminished capacity” evidence (misleadingly so, because the term implies a mini-insanity defense), is of relatively recent vintage as well; indeed its pedigree is much younger, and less well accepted, than that of the intoxication defense. Therefore, the *Clark* Court could have said exclusion of such evidence would not offend fundamental principles of justice. The fact that this exclusion might “reduce” the prosecution’s burden would be irrelevant since, Scalia stated in *Egelhoff*, “[w]e have ‘reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions.’” (*Id.* at 55.)

Only four justices signed on to this analysis, however. Alternatively, the Court in *Clark* could have relied on Justice Ginsburg’s concurring opinion in *Egelhoff*, which provided a different rationale for the result in that case. Ginsburg reasoned that Montana’s intoxication statute had redefined the mens rea for first degree murder to include intoxication-related automatism, on the plausible ground that such a condition, which is often self-induced, entails sufficient culpability for murder. So interpreted, Ginsburg concluded, the Montana statute made *Egelhoff*’s proffer of evidence about this condition irrelevant. (*Id.* at 58-60.) Similarly, the *Mott* decision could be said to have redefined the mens rea for murder to include psychosis-related delusions, making Clark’s expert testimony relevant only on the insanity issue. The analogy between incapacity due to mental disability and incapacity due to intoxication is not perfect, since psychosis is much less likely to be culpably self-induced, but it is close enough that Arizona featured the argument in its brief in *Clark*.

The approach the Court took in *Clark* was different than both of these variants of *Egelhoff* and has much more potential for wreaking havoc within and outside of the criminal justice system. The Court’s rationale focused not on the substantive question of how states may define mens rea and defenses to it, as *Egelhoff* did, but on when states may restrict testimony about mens rea under the rules of evidence. Applying this evidentiary perspective, the Court concluded that a state may restrict expert testimony about mental disability to the insanity issue for two reasons: to preserve the presumption of sanity and to prevent unreliable and misleading evidence from infecting the trial. Neither of these reasons withstands scrutiny.

The first reason rests on a failure to understand that insanity and mens rea are distinct concepts, even though they may overlap to some extent. The Court correctly pointed out that Arizona could constitutionally establish a

presumption of sanity and place the burden of proving insanity on the defendant by clear and convincing evidence. (*See Leland v. Oregon*, 343 U.S. 790, 797-99 (1952).) It then stated that allowing the defendant to present evidence on mens rea would “undercut” this entitlement because, given *Winship*, it would enable a defendant to obtain acquittal simply by creating a reasonable doubt, a far cry from clear and convincing proof. (126 S. Ct. at 2733.) Yet, as pointed out above, most defendants whose mental illness affected their criminal behavior have the mens rea for the offense. Only a very small subgroup of defendants would benefit from the relaxed burden associated with a mens rea defense. More importantly, the presumption of sanity is only meant to ensure that the prosecution does not have to present evidence of mental capacity unless the defense does, and it does not absolve the prosecution from having to prove the elements of its case, a point that even the *Clark* majority recognized. (*See id.* at 2733-34.) Unfortunately, the Court’s analysis conflating the presumption of sanity and the mens rea inquiry will probably exacerbate the confusion that already exists on this topic.

The second reason the Court gave for upholding *Mott* was based on a straightforward evidentiary analysis, involving balancing the probative value of expert mens rea testimony against its prejudicial impact, as contemplated by Federal Rules of Evidence 401 and 403 and analogous state rules. The Court began by dividing evidence about mens rea into three categories: (1) “observation evidence” (including what the defendant said and did and expert testimony about the defendant’s “behavioral tendencies” and characteristic thought patterns); (2) “mental-disease evidence” (opinion testimony about test results and diagnosis); and (3) “capacity evidence” (opinion testimony as to whether the defendant had the capacity to form mens rea). (*Id.* at 2724-25.) It then held that *Mott* excluded only the latter two types of testimony and that this exclusion could be justified on the ground that “psychological classifications” are the subject of much controversy, yet can easily be misconstrued by the fact finder to equate with nonresponsibility for crime. (*Id.* at 2734-36.)

The Court is correct in its assertion that testimony about diagnostic categories and what it calls capacity testimony are often speculative (and, at least with respect to the latter type of testimony, is likely also inadmissible on alternative grounds, since it addresses the ultimate legal issue). (*See* FED. R. EVID. 704(b).) But the Court also exaggerates the gullibility of judges and juries about psychiatric evidence; research shows that laypeople are very skeptical about such evidence, especially when it is presented by the defense. (*See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research*, 7 PSYCH., PUB. POL’Y & L. 622, 689 (2001); Neil J. Vidmar

& Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 173 (1989).

Furthermore, as Justice Kennedy pointed out in dissent, the distinction between observation evidence and mental disease evidence is hard to sustain. (126 S. Ct. at 2738-40.) By construing *Mott* to allow the former type of evidence, the Court neatly avoided having to decide whether the state can restrict *all* mental disability testimony to the insanity issue (which is, in fact, what *Mott* held, contrary to the Court's description; see 187 P.2d at 541). But now the courts in Arizona have to permit expert testimony that is "observation evidence" describing the defendant's "behavioral tendencies." In the *Clark* case, that evidence presumably would include testimony about how often Clark believed other individuals were aliens, how often he played the radio loudly, and whether, why, and how often he was violent. But apparently the expert would not be permitted to explain that people with paranoid schizophrenia, Clark's acknowledged condition, often perceive other people to be from outer space, routinely play loud music to drown out hallucinatory "voices," and usually are only violent when they feel threatened by what they perceive to be dangerous beings. (See Dale McNeil, *The Relationship between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCH. 404, 405 (2003).) Without that testimony, which is based on well-accepted clinical wisdom, if not hard science, the credibility of someone like Clark and his expert witnesses is likely to suffer greatly.

The Court's response to these concerns was that the Constitution leaves fine-tuned evidentiary analysis up to the states. Certainly constitutionalizing the inquiry into whether particular testimony is probative and helpful or instead overly misleading and prejudicial would create an unadministrable system. (See Ronald Allen, *Clark v. Arizona, Much (Confused) Ado About Nothing*, 4 OHIO ST. J. CRIM. L. 135, 140-41 (2006).) But an alternative approach is suggested by the Court's holding in *Rock v. Arkansas*, 483 U.S. 44 (1987), which struck down a state statute that prohibited all hypnotically induced testimony. The *Rock* majority concluded that unless the state can show "that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial," due process and the Sixth Amendment mandate a case-by-case review of this evidence, at least when it is presented by the defense. (*Id.* at 61.)

In other words, *Rock* held that the states may not categorically ban evidence relevant to the defense's case. The case-by-case review *Rock* had in mind would not normally be carried out by the appellate courts, as a constitutional

matter, but by the trial court, as an evidentiary one. Since cross-examination and rebuttal evidence usually permit robust evaluation of a mental health expert's credibility, *Rock's* approach should result in the frequent admission of expert testimony on mens rea (assuming it is material, i.e., that it is truly focused on mens rea, rather than simply being an assertion that the defendant has a disability short of insanity).

Admittedly, the Court has vacillated between the position endorsed by *Rock* and the stance taken in *Clark* that categorical evidentiary exclusions should receive deference. (Compare *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967) with *Michigan v. Lucas*, 500 U.S. 145, 151 (1991), *Taylor v. Illinois*, 483 U.S. 400, 4100 (1988), and *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983).) A final reason *Rock's* approach, whatever its validity in other contexts, ought to be adopted in connection with expert mens rea testimony is based on simple equity. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court held that the prosecution is permitted to introduce expert clinical predictions of dangerousness in capital sentencing proceedings—despite recognizing that these predictions are wrong more often than they are right—based on the assumption that juries, aided by the adversarial process, "can separate the wheat from the chaff." (*Id.* at 901 n.7.) If juries can be trusted to treat highly prejudicial prediction testimony with appropriate caution in deciding whether to put someone to death, it is hard to see why states should be able to keep from the jury psychiatric testimony on mens rea that, in those rare situations where it is persuasive, will usually at most result in reduction of the charge (in *Clark's* case, probably to second degree murder).

Accordingly, the Constitution should be read to prohibit categorical exclusions of mental disability evidence relevant to mens rea. The Court's decision to the contrary in *Clark* is not only unfair, but will undoubtedly spawn tremendous confusion in the lower courts about the substantive doctrines of insanity and mens rea, the distinction between observation testimony and other types of expert testimony, and the admissibility of expert psychiatric testimony in other contexts. The Court would have been well advised to nullify *Mott* on the basis of *Rock* and let the trial courts deal with such testimony on a case-by-case basis under the rules of evidence. If, however, the Court was committed to finding against Clark, it might have done less damage by relying on *Egelhoff* and simply holding that the "diminished capacity" defense is insufficiently fundamental to require its adoption, which would have at least had the advantage of avoiding the conceptual morass *Clark* has created.

Panetti v. Quarterman

Given the confusion about criminal mental health law evidenced in *Sell* and *Clark*, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), decided at the end of this past term, was a surprise. *Panetti* attempted to define the standard for determining when an offender is competent to be executed, a requirement that the Court had established two decades earlier in *Ford v. Wainwright*, 447 U.S. 399 (1986), under the Eighth Amendment's Cruel and Unusual Punishment Clause. Like the competency-to-proceed issue referred to in *Sell*, and unlike the criminal-responsibility issue addressed in *Clark*, competency to be executed focuses on present mental state, but unlike competency to proceed, the inquiry depends almost entirely on whether the state's, rather than the defendant's, interests are met. The five-member majority opinion in *Panetti*, written by Justice Kennedy, not only recognized the latter point, but also understood its ironic implication that the state must refrain from executing individuals who have only a shallow understanding of why they are being executed.

To get to this substantive issue, the Court first had to dispose of two procedural objections to Panetti's claim under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). First, AEDPA normally bars successive habeas petitions in federal court (28 U.S.C. § 2254(b)(2)), and Panetti had already filed one habeas petition prior to the petition that raised his incompetency claim. The Court held, however, that requiring offenders who file a habeas petition attacking the legality of their conviction or sen-

tence to include incompetency claims when it might be years before their execution date is set and when they may not even evidence symptoms of mental disorder would not promote the aims of AEDPA, which include conserving judicial resources and avoiding piecemeal litigation. (127 U.S. at 2854.) The second procedural objection arose from AEDPA's requirement that federal courts give deference to state courts' reasonable findings of fact and law. (28 U.S.C. § 2254(d)(1).) The state courts (as well as the lower federal courts) had found Panetti competent to be executed. But the Court concluded that these findings were not entitled to deference, because the judge who declared Panetti competent had not acted reasonably: Contrary to the Court's holding in *Ford*—which in addition to establishing the execution competency requirement mandates a "fair hearing" on the competency issue (477 U.S. at 418)—the judge never convened any proceeding on the competency issue or provided defense counsel with an opportunity to present evidence or cross-examine the two mental health experts on whom the judge's competency judgment relied. Thus, the Court concluded, it could reach the merits of Panetti's claim despite the AEDPA's procedural restrictions. (127 U.S. at 2856-57.)

The place to start analysis of that issue, the Court indicated, was *Ford*. The plurality opinion in *Ford* did not provide a definition of competency to be executed, but Justice Powell, in his concurring opinion, had stated that the test should be whether offenders subject to execution "are unaware of the punishment they are about to suffer and why they are to suffer it." (*Id.* at 422, Powell, J., concurring.) Almost every lower court that has addressed the issue since *Ford* has referred to this language, and has also interpreted it very narrowly. (*See, e.g., Walter v. Angelone*, 321 F.3d 422, 456 (4th Cir. 2003); *Billiot v. State*, 655 So. 2d 1, 6 (Miss. 1995).) Thus the Fifth Circuit, whose standard was applied by the federal district court in *Panetti*, merely required the state to show that offenders are aware they committed a murder, that they will be executed, and that the reason the state gives for their execution is the commission of the murder. (*Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994).)

Scott Panetti essentially conceded that he met this narrow test, despite his long history of delusional psychosis. His experts asserted, however, that he suffered from a "genuine delusion" that led him to believe the state's justification for executing him was a "sham" and that the real motivation for seeking his death was "to stop him from

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preaching.” (127 S. Ct. at 2860.) Based on this and similar evidence, Panetti’s lawyers argued that he lacked a “rational understanding” of his execution and that this deficit should lead to a finding of incompetency.

The Court agreed. Kennedy first pointed out that “[a] prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” (*Id.* at 2862.) He hastened to add that a simple unwillingness to repent or express remorse would not constitute such a lack of rational understanding. Rather, it must stem from a psychotic disorder. But Kennedy emphasized that the Fifth Circuit’s test was too circumscribed to the extent it prevented full inquiry into whether the disorder puts “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.” (*Id.*)

Of most significance was the majority’s identification of what that purpose is. *Ford* had given a laundry list of reasons for its holding prohibiting execution of offenders who are incompetent, including (1) the possibility that the offender might, if competent, provide last-minute exculpatory information; (2) the notion that madness is punishment enough in itself; (3) the belief that mental disorder prevents the offender from making peace with God; (4) the small likelihood that execution of an incompetent person will deter others from committing capital crimes; (5) the “miserable spectacle” of such an execution; and (6) the minimal “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.” (477 U.S. at 406-08.) The *Panetti* majority focused on the latter rationale, stating that “it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.” (127 S. Ct. at 2861.) Under this rationale, an offender like Panetti, who purportedly believes he is being punished for his religion

rather than his crime, or an offender like Harold Barnard, who delusionally believed that conspiratorial entities other than the state were behind his execution, are probably not competent. (*But see* 13 F.3d. at 876, finding Barnard competent to be executed under the narrow Fifth Circuit test.)

The Court was right to settle on the retributive goal as the primary rationale for *Ford*’s competency requirement. The other rationales noted in *Ford* are not persuasive, for reasons I have described elsewhere and will not, given space limitations, rehearse here. (*See* CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 93-94 (2006); *see also* the joint resolution of the American Bar Association, the American Psychiatric Association, and the American Psychological Association endorsing the rational understanding test, cosponsored by the Criminal Justice Section and unanimously adopted by the House of Delegates, August 8, 2007.) If one agrees that retribution is the reason we require that capital defendants be competent to be executed, note that it not only requires, as *Panetti* held, a broader definition of execution competency than most lower courts have adopted, but also bases that requirement primarily on society’s interest in achieving a satisfying execution, rather than on any interest the offender might have in avoiding execution.

This retributive rationale could have interesting implications for the next criminal mental health issue the Court is likely to face, which is whether offenders who are found incompetent to be executed may be forcibly medicated to restore them to competency. When that case arises, the Court will probably have to decide whether *Sell*, which gives great weight to individual interests in the treatment refusal context, or *Panetti*, which minimizes those interests in the execution context, governs. Alternatively, the Court may conclude that some third-party interest, such as the ethical mandates governing the mental health professionals who are asked to ensure that offenders are competent to be executed, should be the deciding factor. (*See State v. Perry*, 610 So. 2d 746, 752-53 (La. Sup. Ct. 1992).) ■