The Absence of Mercy: the Treatment of the Mentally Ill in Death Penalty Cases by the State of Texas Following *Ford v Wainwright*

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ABSTRACT

Taking inspiration from a work placement with the Texas Defender Service and the recent decision of the United States Supreme Court in Panetti v Quarterman 127 S. Ct. 2842 (2007), this discussion seeks to highlight the very real problem facing those on Texas Death Row who, despite having documented and extensive mental health problems, have seemingly failed to be protected by the Supreme Court decision prohibiting their execution. Despite the decision of the US Supreme Court in *Ford v Wainwright*, Texas has continued to expose mentally incompetent offenders to execution, which arguably serves no retributive value. This discussion explores how Texas has evaded this ruling for so long and the significance of the latest U.S. Supreme Court decision.

KEYWORDS: Death penalty, *Ford v Wainwright*, mental health, Texas, *Panetti v Quarterman*.

INTRODUCTION

In the summer of 2006 I visited Austin, Texas, for a ten-week placement with the Texas Defender Service (TDS). During this placement it became increasingly obvious to me that one issue in particular was common to many of the cases: that of mental health and the offenders' eligibility for execution. The decisions of the United States Supreme Court in *Ford v Wainwright* 477 U.S. 399 (1986) and *Atkins v Virginia* 536 U.S. 304 (2002) ban the execution of the insane and mentally retarded respectively. However, in both cases the court left the individual sovereign states to define the procedures for determining whether an individual is insane or 'mentally retarded' and to ensure that these definitions do not violate the constitutional rights protected by the United States Supreme Court. My experience in Texas has provoked me to question in particular, the authority that the *Ford* ruling has in Texas. Indeed in *Barnard v Collins* 13 F.3d 871 (5th Cir. 1994) the highest state court in Texas would appear to obliterate the earlier decision in *Ford* which prohibits the execution of the mentally insane.

Part One of this paper explains my inspiration for this discussion and identifies the research questions that will form the focus of the rest of the paper. Part Two is concerned with the current position in law and whether there is evidence that Texas upholds this position. Indeed the cases of Harold Barnard, James Colburn, Kelsey Patterson and the recent United States Supreme Court decision in *Panetti v Quarterman* 127 S. Ct. 2842 (2007) will be relied upon to support the proposition that Texas has little regard for the *Ford* ruling. Part Three then seeks to identify the significance of this and will highlight the controversy surrounding this issue. This discussion will focus on the issue of mental health at the post-conviction phases and

therefore the issue of competency to be executed, though inevitably some reference must be made to the issue of insanity at earlier stages.

PART ONE: INSPIRATION

The Texas Defender Service (TDS) is a not-for-profit firm which seeks 'to help improve the quality of representation afforded to indigent Texans charged with a capital crime or under sentence of death' (Texas Defender Service). TDS is motivated by a need for 'vigilant concern for procedural fairness and for the accuracy of fact-finding' in capital proceedings. To this end TDS is involved at all levels of the criminal process, including trial and appellate-level work.

Throughout the placement it became impossible for me to avoid the issue of mental health, particularly at post-conviction stages. Many of the assignments involved reviewing cases where one simply could not ignore the fact that the offender had a documented history of mental health problems, often dating back to his or her childhood. From concentrating on petitions of writs of *habeas corpus*, it was shocking to discover how often claims of 'ineffective assistance of counsel' are raised, and more troubling, perhaps, how often these claims relate to evidence of a mental health history that was never introduced at either the guilt/innocence or sentencing stages of trial. Established in *Strickland v Washington* 466 U.S. 668 (1984), ineffective assistance of counsel is a claim frequently raised by prisoners who assert that their lawyer did not provide the effective representation guaranteed to all defendants by the Sixth Amendment to the United States Constitution. This is a sensitive issue that is currently attracting much publicity. However, while it is a distinct and worrying problem in itself, it is perhaps inevitable that the issue of mental health becomes intimately linked with the notion of ineffective assistance of counsel. If nothing else, these claims highlight the extent to which mental health issues are ignored and the serious consequences this may have.

It was, however, the case of Scott Panetti that provided the motivation to address the issue of mental health and the death penalty. I found his case to be a striking example of the manner in which some such cases are handled in Texas.

On 22 September 1995, Scott Louis Panetti was sentenced to death by lethal injection for the murder of his parents-in-law, José and Amanda Alvarado, in 1992. Since then, his case has sparked furious debate around the globe. It is not his innocence that is in question. Instead, it is his eligibility for execution.

At the centre of the controversy is Panetti's extensive and well-documented history of mental health problems. Prior to the trial, two competency hearings were conducted. The first resulted in a hung jury; the second found Panetti competent to be tried. The judge in the case granted Panetti's decision to waive his right to counsel and represent himself at trial. Panetti did so dressed in full cowboy attire including a cowboy hat, which reports suggest was highly intimidating and inappropriate. His behaviour was equally worrying. It is reported that Scott 'rambled incoherently and tried to subpoena Jesus Christ, John F. Kennedy and Anne Bancroft. He went into trances, nodded off, and gestured threateningly at jurors' (Blumenthal, 2004). His questioning was irrational and he even cited from the bible on numerous occasions. Indeed an attorney who was

called as a witness at the trial said that 'the courtroom had the atmosphere of a circus. The judge just seemed to let Scott run free with his irrational questions and courtroom antics' (International Justice Project). Despite this, Panetti was sentenced to death.

There is irrefutable evidence that before the fatal shooting, Panetti had been hospitalised fourteen times for mental illness (Blumenthal, 2004), with worrying symptoms. Records recall that he was suffering from paranoia and hallucinations. In 1986 he 'buried furniture because he believed the Devil to be in the furniture' (The International Justice Project). It is also reported by the International Justice Project that later on, Panetti hallucinated that he saw the Devil on the walls on his house. He killed the devil, but then believed that he could see 'blood coming out of the walls' causing him to wash his entire house. Consequently he was repeatedly diagnosed with schizophrenia and schizoaffective disorder with three personalities at Kerrville Veterans Hospital.

After the trial some jurors indicated that they would not have imposed a death sentence had Panetti been represented by an attorney. Furthermore, 'one of them said that the jurors had voted for death out of their fear of his irrational behaviour at the trial' (The International Justice Project).

This has thrown up key questions that need to be answered in order to establish whether Texas has a blatant disregard for the *Ford* ruling. These include: what is the legal position of executing the mentally insane in the United States and what is the relevant legal position in the state of Texas particularly? Is there evidence to suggest that Texas does not conform to the precedent set by Ford and what are the consequences of this?

PART TWO: THE CURRENT LEGAL POSITION REGARDING THE EXECUTION OF THE MENTALLY INSANE IN THE UNITED STATES, AND THE POSITION OF TEXAS

Following the United States Supreme Court decisions in *Ford v Wainwright* and *Atkins v Virginia*, 'mental retardation' and mental illness are now recognised as special defences to the death penalty. This is very different to defences accepted at trial, which ultimately excuse the defendant from criminal liability. However, the treatment of these classes of offenders at law is very different and it is therefore important at the outset to distinguish between 'mental illness' and 'metal retardation'. Mental illness may be defined as 'any of various conditions characterised by impairment of an individual's normal cognitive, emotional or behavioural functioning, and caused by social, psychological, biochemical, genetic or other factors such as infection or head trauma' (Death Penalty Information Centre). A common illness is schizophrenia, which is characterised by symptoms involving a 'range of cognitive and emotional dysfunctions', which include 'affect, fluency and productivity of thought and speech, hedonic capacity, volition and drive and attention' (American Psychiatric Association, 2005: 274). Mental retardation is defined by the American Association on Mental Retardation (AAMR) and section 591.003(13) of the Texas Health and Safety Code, and is characterised by '"significantly sub-average" general intellectual functioning, accompanied by "related" limitations in adaptive functioning; the onset of which occurs prior to the age of 18' (*Ex parte Briseno*, 2004). Mental retardation is therefore viewed as a lifelong disability, and accordingly, the

Supreme Court recognises a simple categorical exemption from the sentence of death of anyone who meets the criteria for mental retardation. However, due to the fact that the symptoms of mental illness vary, often dramatically over time, mental illness is treated differently by the courts who consider its temporal effects at critical stages such as at the time of the offence and in the time approaching execution. The *Ford* ruling therefore only goes as far as to prohibit the execution of the insane and not the original sentence of death. This distinction is perhaps best described by the Texas Court of Criminal Appeals in the case of James Colburn which states that *Ford* and 'related authority proscribe the *execution* of an *insane* person, not the *imposition of sentence* on a *mentally ill* person' (*Colburn v State*, 1998: 513). Ultimately this means that despite mental illness, defendants may be convicted of the offence of capital murder and sentenced to death. However, as a result of their incompetence, the offenders may become ineligible for execution. This prohibition is the binding precedent set by *Ford v Wainwright.*

The 1986 decision of the United States Supreme Court in *Ford v Wainwright* banned the execution of the insane, reasoning that it is a contravention of the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment. The 2002 decision of the US Supreme Court in *Atkins v Virginia* also ruled the execution of those with mental retardation to be unconstitutional. One would perhaps assume therefore that American death penalty law regarding mental health is well developed. But in neither of these cases did the court continue in its decision to explore and define the notions of insanity or 'mental retardation.' This means that while *Ford* prohibits the execution of the insane, it has left the determination of competence to be executed for each state to decide. In response to this, the state of Texas enacted legislation. Article 46.05 of the Texas Code of Criminal Procedure addresses the issue of competency to be executed. This provision prohibits the execution of incompetent offenders and provides that:

> A defendant is incompetent to be executed if the defendant does not understand: that he or she is to be executed and that the execution is imminent; and the reason he or she is being executed. (Art. 46.05 (h)(1)(2))

This is a seemingly straightforward provision, especially as it is the duty of the courts and the Texas Court of Criminal Appeals to ensure that the death penalty is not 'wantonly or freakishly' imposed (*Ellason v State*, 1991: 660). It would appear however that Tex.C.Crim.P. Art 46.05 fails to incorporate the full reasoning of the court in *Ford v Wainwright*.

Alvin Bernard Ford was convicted of capital murder and sentenced to death in 1974. It is accepted that before then and at the material time of the offence, Ford did not suffer with any mental health problems. It was only later that Ford manifested behaviour indicative of mental illness. He became obsessed that he was the target of a conspiracy involving the Klu Klux Klan and that the female members of his family were being tortured. This delusion developed to the point that Ford reported 'that 135 of his friends and family were being held hostage in prison and that only he could help them' (*Ford v Wainwright*, 1986:402). Ford even began referring to himself as Pope John Paul III. After an extended period of evaluation, the psychiatrist concluded that Ford was suffering from 'severe, uncontrollable, mental disease, which closely resembles Paranoid Schizophrenia With Suicide Potential' (ibid.). This was deemed to be a 'major mental disorder serious enough to substantially affect Mr Ford's present ability to assist

in the defense of his life' (*Ford v Wainwright*, 1986: 402). Despite this, the Governor of Florida signed a death warrant for Ford's execution.

The U.S. Supreme Court decision in *Ford v Wainwright* explains why it is unconstitutional to execute the mentally incompetent. Justice Marshall comments that 'now that the Eighth Amendment has been recognised to affect significantly both the procedural and substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion' (1986: 402). Much of the judgment focuses upon the Eighth Amendment to the United States Constitution, which provides that 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.' In his concurrence, Justice Powell states that 'executions of the insane are simply cruel' (*Ford v Wainwright*, 1986: 422) and looks to the so-called retributive purpose of executions to substantiate his claim, arguing that there can be no retributive purpose if the defendant cannot understand the reason for his punishment. Indeed, he argues that 'the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it' (*Ford v Wainwright*, 1986: 422). Accordingly the standard for determining eligibility for the death penalty based on mental competence was established. This, however, is despite the dissenting opinion of Justice Rehnquist who felt that the decision 'needlessly complicates and postpones still further any finality in this area of law' (*Ford v Wainwright*, 1986: 435), and 'allows for numerous unsubstantiated claims regarding a condemned man's sanity' (Horstman, 2002: 834). The reasoning of the court will be dealt with later in this discussion. What needs to be considered at this stage is whether Texas appears to conform to this precedent. The case of *Barnard v Collins* suggests that in fact Texas does not.

Harold Amos Barnard was convicted of capital murder on 1 April 1981. The State Habeas Court held Barnard competent to be executed according to the *Ford* standard. This meant that in the opinion of the Court, Barnard understood the fact of his impending execution and the reason for it. This is despite testimony from two experts who found upon examination of Barnard that he suffered from delusions that he was being persecuted by minority groups. The Court did not accept claims by Barnard's experts that he was incompetent to be executed. Instead, the Court found that he was aware of his impending execution, although 'his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia' (*Barnard v Collins*, 1994: 876). The U.S. Court of Appeals for the Fifth Circuit upheld the decision of the lower court which held that 'Barnard knew that he was going to be executed and why he was going to be executed – precisely the finding required by the *Ford* standard of competency' (*Barnard v Collins*, 1994: 877). Barnard was executed on 2 February 1994.

Consequently one may argue that *Barnard* is indicative of the fact that Texas is interpreting the Supreme Court ruling of *Ford v Wainwright* so narrowly as to no longer be faithful to the spirit of the precedent. Indeed there is evidence that *Barnard* is not the only case where Texas has failed to adhere to the *Ford* ruling. The cases of Kelsey Patterson and James Colburn offer evidence to support this claim. Sadly, they bear remarkable similarities with the case of Scott Panetti.

Kelsey Patterson was convicted of a double murder in Texas 1992. As in the case of Scott Panetti, his guilt had never been contested. Instead the controversial issue is his

eligibility to be executed. Kelsey Patterson was diagnosed with schizophrenia in 1981. His hallucinations and behaviour proved to be problematic at trial, and his belief that he was a victim of a conspiracy made him uncooperative both in and out of court. This made proper psychiatric evaluation problematic as well as the trial itself. It is reported that during oral argument 'a federal judge on the US Court of Appeals for the Fifth Circuit […] asked the state prosecutor "What are we doing here? This is a very sick man"' (Amnesty International, 2004). Further, Amnesty International highlight that when Patterson was sentenced his trial counsel stated that

> it was the darkest moment of my professional life. This is a case that should never have happened. He should have been institutionalised a long time ago. The system failed him. But they don't indict the system.

Despite this, on May 18 2004, Kelsey Patterson was executed.

James Colburn is yet another example of a man convicted of capital murder and sentenced to death in Texas despite an extensive history of paranoid schizophrenia. He was first diagnosed at the age of seventeen. Despite such diagnoses James was held competent to stand trial. Amnesty International (2004) stress, however, that he was injected with 'Haldol, an anti-psychotic drug which can have a strong sedative effect'. Clearly this is difficult to reconcile with the notion that the defendant should be able to assist actively in his defence. It is not, however, the focus of this discussion. Indeed 'the fact that the appellant had a mental illness when he was tried and sentenced is not determinative of whether he will be sane at the moment of his execution' (*Colburn v State*, 1998: 513). His history of mental illness is of relevance here however because the courts declined to accept his case on appeal and therefore did not establish whether he was incompetent to be executed. James Colburn was executed in March 2003.

The cases of Barnard, Colburn, Patterson, Panetti and others are perhaps surprising when one has regard to the legislative history of Article 46.05 Texas Code of Criminal Procedure. Supporters of House Bill 245, which ultimately became Article 46.05, welcomed the new provision and saw it as the codification of the ruling in *Ford v Wainwright*. The House Committee Report (1999) noted that:

> Even though Courts throughout Texas now follow the Supreme Court's test for determining whether someone is competent to be executed, House Bill 245 would be an important policy statement that Texas would not execute persons who are not competent.

This is a seemingly powerful statement to make. Those in favour of the provision argued that codification was important and would mean that courts and attorneys could turn to the statute for guidelines. It was felt ultimately that this would result in more uniform treatment of offenders. What appears to have happened, however, is the confirmation of fears expressed by the opponents to the House Bill who argued that, like the ruling in *Ford*, the provision did not 'go far enough in establishing procedures for determining competency' (House Committee Report, 1999). Those opposed to the Bill suggested that more detailed procedures were required to ensure that the mentally ill are not executed. With regard to the cases highlighted above, they would appear to be right. So how did these mentally ill defendants fail to be protected by the system?

While Texas and the Fifth Circuit (which hears federal appeals from Texas, Louisiana and Mississippi) appear to have adopted Justice Powell's standard for execution

competency, the effect of this is weakened by the apparent disregard of *Ford*'s prohibition based on the retributive value of the death penalty. Indeed the question put to the court in the case of Scott Panetti is whether the Eight Amendment permits

> the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for the capital crime? (*Panetti v Quarterman*)

This goes to the heart of the issue. The Fifth Circuit has a 'bare factual awareness' standard for determining a defendant's competency to be executed. It creates a distinction between being 'aware' and reasonable understanding. Essentially the standard will be satisfied so long as the defendant recognises why he will be executed. It is predicated on the view that 'if the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied' (*Ford v Wainwright*, 1986: 422). This is a contentious issue. Indeed in the article 'The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to be Executed', John Farringer (2001) states that 'mere knowledge or awareness of an impending execution, without a rational understanding of the reasons for it, is not sufficient to find competency to be executed'. Allowing competency for execution to be determined on such a low standard is arguably not what Justice Powell in Ford intended. Keith Hampton, one of Panetti's lawyers, noted that 'the Fifth Circuit ruling all but erased the ban on executing the insane by reading the law in the most narrow conceivable way' (Robbins, 2007). He continued to say that so long as one has 'a pulse and can understand the state's trying to kill you – however muddled that understanding may be in your mind – that is sufficient to make you eligible to put you there on the gurney and be killed' (Robbins, 2007). Scott Panetti appears to be conscious that he will be executed and the stated reason for this, therefore the Court regards him as competent to be executed. Such a theory would also explain the unfortunate cases of James Colburn and Kelsey Patterson. Arguably part of the problem is that the test is so narrow that it focuses 'solely on the person's ability to understand the legal consequences of his actions, instead of the complexities of the mental illness from which the person suffers' (Horstman, 2002: 838).

This issue has since been addressed by the decision of the United States Supreme Court in the case of *Panetti v Quarterman*. The U.S. Supreme Court reversed the finding of competence by the Texas court and remanded the case back to the state of Texas. While perhaps the value of the decision concerns the proper procedure that should be adopted by states when determining competence, the U.S. Supreme Court uses the decision to express dissatisfaction with Texas's narrow interpretation of the Ford ruling. Writing the decision of the Court, Justice Kennedy claims that 'the Fifth Circuit's incompetency standard is too restrictive to afford a prisoner Eighth Amendment protections' and continues to argue that the test

> Ignores 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. (*Panetti v Quarterman*, 2007:2846)

This is aptly illustrated in the case of Scott Panetti who, while understanding that he is to be executed by the state, believes that his execution forms part of a conspiracy to stop him from preaching, rather than as a form of punishment. Indeed the testimony of

four experts highlighted the 'strength and sincerity of this fixed delusion' (*Panetti v Quarterman*, 2007:2859). Using the terminology adopted in the *Ford* precedent, Texas held that Scott Panetti could not be held incompetent to be executed because they held that '"awareness", as that term is used in *Ford*, is not necessarily synonymous with "rational understanding"' (*Panetti v Quarterman*, 2007: 2860). Justice Kennedy stated that this is too restrictive 'to afford a prisoner the protections granted by the Eighth Amendment' (ibid., 2860). Indeed he argues that the Texas Court of Appeals regards a prisoner's 'delusional belief system as irrelevant' (ibid., 2861) and that this appears inconsistent with the *Ford* ruling. This narrow interpretation is arguably not what the court in *Ford v Wainwright* intended and consequently one can see that it is feasible that the standard adopted by Texas will not rescue many of the mentally ill defendants sentenced to death in Texas. However, it is yet to be seen what effect the recent decision of the United States Supreme Court will have with regard to this issue as the Texas Legislature will not now convene until 2009.

PART THREE: THE SIGNIFICANCE OF THE POSITION ADOPTED BY TEXAS

The fact that mentally ill defendants are executed on Texas Death Row is a massive failing by the state, particularly because executing the mentally insane 'has been branded savage and inhuman'. Sir Edward Coke argued that

> By intendment of Law the execution of the offender is for example […] but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extream [*sic*] inhumanity and cruelty, and can be no example to others. (*Ford v Wainwright*, 1986: 406)

As discussed earlier, the prohibition of the execution of the mentally insane can be justified with regard to the objectives of the death penalty generally. 'The Supreme Court has identified deterrence and retribution as the two primary social purposes of capital punishment' (Schopp, 1991: 1005). However, principled on the phrase 'an eye for an eye' (the notion that there is a 'need to offset a criminal act by a punishment of equivalent "moral quality"' (*Ford v Wainwright*, 1986: 408) it may be hard to reconcile retributive justice with the execution of the mentally insane. One must question the value of such a punishment for those who do not fully understand or comprehend the reason why their execution is being carried out. Indeed Justice Powell has asserted that as a critical justification for the death penalty, retribution 'depends on the defendant's awareness of the penalty's existence and purpose' (*Ford v Wainwright*, 1986: 421). In line with this, the Texas statute specifically provides that the death penalty should not be inflicted on anyone who cannot comprehend that they are to be executed and the reasons why they are to be executed. In the decision of *Ford v Wainwright*, Justice Clark stated that 'the social goal of retribution is frustrated when the power of the state is exercised against one who does not comprehend its significance' (ibid., 421). He further argues that 'the execution of an insane person simply offends humanity'. Indeed in these cases the punishment can be regarded as a violation of the Eighth Amendment to the United States Constitution.

In his article, Robert Schopp (1991) recognises another argument which, rather than rejecting execution of the insane on moral ground, rejects such execution for being 'inadequate satisfaction of the public preference for revenge. This rationale arguably

serves to prescribe torture rather than to proscribe execution' (Schopp, 1991: 1008). It suggests that because the mentally ill defendant does not understand why he is being executed, the punishment is inadequate. Indeed in *Panetti v Quarterman*, Justice Kennedy argues that even if the purpose of capital punishment is to highlight to the prisoner the gravity of their offence, this purpose is hindered by their severe mental illness (*Panetti v Quarterman*, 2007: 2847). Nevertheless, both of these positions highlight the futility of capital punishment, suggesting that there is in fact no valid, justifiable purpose for its existence, and that it has no retributive or deterrent effect. Justice Powell supports this view and holds that as 'executing the insane is inconsistent with one of the chief purposes of executions generally', the execution of the insane 'remains a uniquely cruel punishment' (*Ford v Wainwright*, 1986: 421). It can be argued, therefore, that 'whether its [the Court's] aim was 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 very fact that Texas appears to disregard this reasoning is a great concern. (Theuman, 2003: 491).

Perhaps most worrying is that mentally disabled defendants may face 'a special risk of wrongful execution' (*Atkins v Virginia*, 2002: 305). This may be because of their 'lesser ability to give their counsel meaningful assistance, and the fact that they are typically poor witnesses and that their demeanour may create an unwarranted impression of lack of remorse for their crimes' (*Atkins v Virginia*, 2002: 305). These are thought to have been contributing factors in the sentencing of both Panetti and Patterson. Indeed it has been suggested that Patterson was in effect 'his own worst enemy' (Amnesty International, 2004). His hallucinations about a conspiracy prevented him from communicating with his counsel and it is reported that he was a very poor witness. Amnesty International (2004) also report that at the guilt phase of the trial, Kelsey Patterson took the witness stand, but kept interrupting the judge with ramblings about being persecuted. 'This led the judge to order him to be gagged with tape.' Panetti's behaviour in the courtroom was also reported as being disturbing. In an affidavit, Scott's standby lawyer claimed that the jury became hostile towards Scott when he treated his ex-wife, the daughter of the deceased, harshly on the stand. His lawyer claims that 'after that they were ready to give him the death penalty' (Blumenthal, 2004). One can appreciate therefore why these defendants have an increased risk of being sentenced to death.

Another factor which can affect the imposition of a sentence of execution for mentally insane offenders is an apparently motiveless crime. This was an issue for Kelsey Patterson. In order for a Texas jury to impose the death sentence, they must answer in the affirmative to the special issue concerning future dangerousness. This means that in order to sanction the death penalty, the jury must regard the defendant as likely to commit further acts of criminal violence. With an apparently motiveless murder and mental illness, it is perhaps easy to see why a jury is more likely to sentence the defendant to death, especially as Texas jurors are not informed that it only takes one juror to vote in the negative on the issue of future dangerousness to prevent a sentence of death. This stands in stark contrast to the reasoning in *Ford* and highlights the magnitude of the consequences of having a disregard for the Supreme Court ruling.

CONCLUSION

This discussion has outlined the current situation in Texas. Despite the decision of the U.S. Supreme Court to ban the execution of mentally ill offenders, Texas has continued to adopt a peculiar position with regard to this category of prisoners. Its codification into law of the *Ford* judgement in Tex.C.Crim.P. Art 46.05 now has little value as the state continually ignores the notion of retributive value outlined by Justice Powell and instead enforces a law based upon a very narrow interpretation of the ruling in *Ford.* As a result, there is irrefutable evidence that a number of mentally ill defendants have been executed by this conservative state, engaged in a rigorous preservation of the death penalty.

While the U.S. Supreme Court decision in *Panetti* is now binding across the United States with regard to procedures that should be implemented in determining competency to be executed, it has not established any new law. Though re-affirming the prohibition of execution for the insane as propounded by *Ford v Wainwright*, the Panetti decision fails to provide a more comprehensive definition of competence to be executed and adds very little to the *Ford* decision some twenty years ago. By reversing the finding of competence and remanding the case back to the Texas court, arguably what it does is express dissatisfaction with the way that Texas interprets the *Ford* ruling. Indeed it is perhaps unsurprising that lawyers for the state of Texas were adamant that Panetti's case was 'unworthy of the [Supreme] Court's attention' (Vicini, 2007). However, also noteworthy is the fact that this decision represents the fourth time this term that the United States Supreme Court has prevented Texas from proceeding with an execution. It will be interesting, therefore, to see how Texas will react in the 2009 Texas Legislative session and whether any laws will be introduced to bring increased certainty to this controversial area. Meanwhile, Scott Panetti waits as Texas will once again determine his competence to be executed.

REFERENCES

Atkins v Virginia 536 U.S. 304 (2002)

Barnard v Collins 13 F.3d 871 (5th Cir. 1994)

Colburn v. State 966 S.W.2d 511, (Tex. Crim. App., 1998)

Ellason v. State 815 S.W.2d 656, (Tex. Crim. App., 1991)

Ex parte Briseno 135 S.W.3d 1 (Tex. Crim. App., 2004)

Ford v Wainwright 477 US 399 (1986)

Ford v Wainwright 752 F.2d 526, 531 n.3 (11th Cir. 1985)

Monge v. California 118 S.Ct. 2246 (1998)

Panetti v Quarterman 127 S. Ct. 2842 (2007)

Strickland v Washington 466 U.S. 668 (1984)

American Psychiatric Association (2005), 'Diagnostic Statistical Manual of Mental Disorders, DSM-IV', Fourth edition, 274

Amnesty International (2004), *Another Texas Injustice: The case of Kelsey Patterson, mentally ill man facing execution*, AMR 51/047/2004 http://web.amnesty.org/library/index/engamr510472004

Amnesty International (2002), *James Colburn: mentally ill man scheduled for execution in Texas*, AMR 51/158/2002 http://web.amnesty.org/library/Index/ENGAMR511582002

Amnesty International (2006), *The execution of mentally ill offenders*, http://web.amnesty.org/library/print/ENGAMR510032006

Blumenthal, R. (2004), 'Insanity Issue Lingers as Texas Execution Is Set', *New York Times*, 4 February 2004

Death Penalty Information Centre, (5 October 2006), *Mental Illness and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?did=782&scid=66

Farringer, J. (2001), 'The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to be Executed', 54 *V. and. L. Rev*., 2441

Greenhouse, L. (2007), 'Justices to Consider Impact of Mental Illness on Death Penalty', *New York Times*, 6 January 2007

Honberg, J. (2005), 'The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses', 54 *Cath. U. L. Rev.*, 1153

Horstman, L. (2002), 'Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society', 36 *U.S.F.L. Rev*., 823

House Committee Report, 1999, 76th Legislature, Chapter 654, House Bill 245, www.irl.state.tx.us.

International Covenant on Civil and Political Rights

The International Justice Project, Scott Panetti, http://www.internationaljusticeproject.org/illnessSPanetti.com

Panetti V. Quarterman Decision:448 F3d 815 http://www.supremecourtus.gov/qp/06-06407qp.pdf

Parry, J. and Drogin, E. (2000), 'Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony', *The American Bar Association*

Robbins, M. (2007), 'High Court to Look at Death Row Case', *My San Antonio*, 6 January 2007

http://www.mysanantonio.com/news/metro/stories/MYSA010607.03B.Supreme_Court.2f9d2ca.html

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,

E.S.C. Res. 1984/50, http://www.ohchr.org/english/law/protection.htm

Schopp, R. (1991), 'Wake Up and Die Right: The Rationale, Standard and Jurisprudential Significance of the Competency to Face Execution Requirement', 51 *La. L. Rev.*, 995

Texas Code of Criminal Procedure: Art. 46.05

Texas Defender Service Website: www.texasdefender.org

Theuman, J. (2003), 'Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals', 111 *A.L.R.5th*, 491

United Nations High Commissioner for Human Rights, 'The Question of the Death Penalty, Commission on Human Rights Resolution', http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/cc0e2a6d48fbc470c1256d24003274d6?Opendocument

United States Constitution

Vicini, J. (2007), 'Court to hear delusional death row inmate's case', 5 January 2007. http://today.reuters.com/news/articlenews.aspx?type=domesticNews&storyID=2007-01-05T235259Z_01_N05302212_RTRUKOC_0_US-EXECUTION-COURT.xml&WTmodLoc=USNewsHome_C1_%5BFeed%5D-5

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