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## *Panetti v. Davis*: The Judicial Plunge into the Dark Forest of Insanity and Death

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### I. OVERVIEW

Scott Panetti's pro-bono counsel learned of his client's execution date from a newspaper.<sup>1</sup> The next day, he filed an emergency motion seeking additional time, appointed counsel, and funds for expert assistance in order to develop an article 46.05 motion of incompetency to be executed.<sup>2</sup> Because Texas did not provide notice of the December 3, 2014, execution date, Panetti faced a quickly approaching deadline. By the time the trial court held a teleconference on November 6, he had six days to file his motion before losing the right to appeal the trial court's judgment.<sup>3</sup> At the court's suggestion, Panetti filed a "skeletal Article 46.05 petition" and later amended the motion.<sup>4</sup> The renewed motion contained the expert opinion of Dr. Diane Mosnik, acting on a limited basis, who "determined that Panetti had exhibited worsening signs of acute

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1. Panetti v. Davis, 863 F.3d 366, 370 (5th Cir. 2017).  
2. *Id.* at 370-71.  
3. *Id.*  
4. *Id.* at 371.

psychosis in the year prior.”<sup>5</sup> Panetti once again sought funds for counsel and expert assistance to develop his article 46.05 motion.<sup>6</sup>

The trial court denied the motion and the Texas Court of Criminal Appeals (TCCA) affirmed.<sup>7</sup> In federal court, Panetti once again sought funds for appointed counsel and expert assistance.<sup>8</sup> The court denied his motions “for want of an adequate showing of incompetence” because Panetti “failed to show that his mental health had substantially changed since the court’s detailed inquiry seven years earlier.”<sup>9</sup> Since that prior decision, Panetti displayed signs of mental illness in several ways:

- (1) [E]scorting officers have noticed that Panetti often acts in an irrational and delusional manner;
- (2) despite having refused mental health treatment for nearly two decades, Panetti has, in the last few years, begun requesting mental health assistance and medication;
- (3) Panetti has expressed the belief that Texas has implanted a listening device in his tooth that sends command messages to his brain;
- (4) Panetti reads the Gospel to help drown out the voices he hears;
- (5) Panetti has expressed the belief that CNN anchor Wolf Blitzer displayed Panetti’s stolen TDCJ ID card during a report; and
- (6) Panetti has claimed to be the father of actress and singer Selena Gomez.<sup>10</sup>

The United States Court of Appeals for the Fifth Circuit *held* that Panetti received inadequate process in the Texas courts and that a petitioner must be granted appointed counsel and funds for expert assistance to prepare for a federal habeas petition under a theory of incompetency. *Panetti v. Davis*, 863 F.3d 366, 376 (5th Cir. 2017).

## II. BACKGROUND

### A. *Ford and Panetti: Eighth Amendment Restriction on States’ Ability to Execute an Insane Prisoner*

In *Ford v. Wainwright*, the United States Supreme Court recognized that the Eighth Amendment bars the states from executing an insane prisoner.<sup>11</sup> The Court found that this restriction held true under both principles of common law<sup>12</sup> and the “evolving standards of

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5. *Id.* at 371-72.

6. *Id.* at 372.

7. *Id.*

8. *Id.*

9. *Id.* at 373.

10. *Id.* at 378.

11. 477 U.S. 399, 410 (1986).

12. *Id.* at 406-08.

decency that mark the progress of a maturing society.”<sup>13</sup> Justice Powell, in an opinion concurring in part and concurring in the judgment, stated the relevant standard for determining a prisoner’s sanity to be executed: “[T]he 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.”<sup>14</sup>

Where a prisoner seeks an incompetency determination prior to execution, he must be afforded a “fair hearing.”<sup>15</sup> For three reasons, Justice Powell determined that due process requirements can be met without a full trial.<sup>16</sup> First, by convicting a prisoner and sentencing him to death, the State has already established a “substantial and legitimate interest” in taking the prisoner’s life.<sup>17</sup> Thus, the heightened procedural standards required in capital trials and sentencing proceedings do not apply.<sup>18</sup> Second, the State may presume that the prisoner is sane because, to stand trial, the prisoner must have been judged competent.<sup>19</sup> To overcome this presumption, the State “may require a *substantial threshold showing of insanity* merely to trigger the hearing process.”<sup>20</sup> Finally, trials “are not necessarily the best means of arriving at sound, consistent judgments as to a defendant’s sanity” because a determination of sanity requires “a basically subjective judgment” and rests on nuanced expert analysis.<sup>21</sup> Justice Powell stopped short of defining exactly the limits that due process requires; however, he acknowledged that “a constitutionally acceptable procedure may be far less formal than a trial.”<sup>22</sup>

The Supreme Court in *Panetti v. Quarterman* found that the Texas courts failed to provide adequate process to Panetti.<sup>23</sup> Where a prisoner makes the substantial threshold showing of incompetency, a court must “allow a prisoner’s counsel the opportunity to make an adequate response to evidence solicited by the state court.”<sup>24</sup> The

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13. *Id.* at 406, 408-09 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

14. *Id.* at 422 (Powell, J., concurring); *see also* *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)) (stating that Justice Powell’s concurrence in *Ford* controls for the procedural requirements of a competency claim).

15. *Ford*, 477 U.S. at 424 (Powell, J. concurring).

16. *Id.* at 425-26.

17. *Id.* at 425.

18. *Id.*

19. *Id.* at 426.

20. *Id.* (emphasis added).

21. *Id.*

22. *Id.* at 427.

23. 551 U.S. 930, 952 (2007).

24. *Id.* (citing *Ford*, 477 U.S. at 424, 427 (Powell, J., concurring)).

Court once again stopped short of defining exactly what procedures a state must follow to avoid violating the Constitution; however, it described as “rudimentary process” the requirement that a prisoner must have the “opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts.”<sup>25</sup>

Additionally, the Supreme Court found the Fifth Circuit’s standard for competency overly restrictive.<sup>26</sup> To determine competency, the appeals court asked whether the prisoner “is aware ‘that he [is] going to be executed and why he [is] going to be executed.’”<sup>27</sup> Among the several reasons behind the prohibition against executing insane prisoners,<sup>28</sup> the test employed by the Fifth Circuit specifically failed to satisfy the retributive purpose behind death penalty sentences.<sup>29</sup> A prisoner may not be able to recognize the severity of his offense and the community’s objective of retribution may not be served if the “prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.”<sup>30</sup> Under *Panetti*, the test for competency must consider whether a prisoner’s “gross delusions” resulting from severe mental illness prevent the prisoner “from comprehending the meaning and purpose of the punishment to which he has been sentenced.”<sup>31</sup>

### B. *Incompetency Procedure in Federal Courts*

Generally, a federal court may not grant an application for a writ of habeas corpus unless the applicant has exhausted the available remedies in state court.<sup>32</sup> However, if the available state process is “ineffective to protect the rights of the applicant,” a court may grant the application.<sup>33</sup> Ordinarily, the federal court reviews the state court’s decision with a deferential standard of review;<sup>34</sup> however, where the

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25. *Id.*

26. *Id.* at 956-57.

27. *Id.* at 956 (alteration in original) (quoting *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006)).

28. *See Ford*, 477 U.S. at 407-08.

29. *Quarterman*, 551 U.S. at 958-59.

30. *Id.*

31. *Id.* at 960.

32. 28 U.S.C. § 2254(b)(1)(A) (2012).

33. *Id.* § 2254(b)(1)(B)(ii).

34. *Id.* § 2254(d).

state court has not reached the merits of the claim, the federal court reviews *de novo*.<sup>35</sup>

Under 18 U.S.C. § 3599, legal representation, expert, investigative, and other “reasonably necessary” services must be appointed for a defendant who is financially unable to obtain them.<sup>36</sup> Upon finding that “investigative, expert, or other services are reasonably necessary . . . the court may authorize the defendant’s attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor.”<sup>37</sup> Under Fifth Circuit precedent, the district court may deny a request for funds “when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence.”<sup>38</sup>

### C. *Incompetency Procedure in Texas Courts*

Under Texas Code of Criminal Procedure article 46.05, which “mirrors *Ford v. Wainwright* in several respects,”<sup>39</sup> an incompetent prisoner may not be executed.<sup>40</sup> A trial court considering an article 46.05 motion determines “whether the defendant has raised a substantial doubt of the defendant’s competency to be executed” by reviewing the motion, attached documents, and responsive pleadings.<sup>41</sup> Additionally, where a defendant has previously filed an article 46.05 motion, the defendant is not entitled to a hearing unless he “makes a *prima facie* showing of a substantial change in circumstances sufficient to raise a significant question as to the

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35. See, e.g., *Cone v. Bell*, 556 U.S. 449, 472 (2009) (“Because the Tennessee courts did not reach the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . . Instead, the claim is reviewed *de novo*.”); *Hoffman v. Cain*, 752 F.3d 430, 437 (5th Cir. 2014) (“For claims that are not adjudicated on the merits in the state court, we apply a *de novo* standard of review.”).

36. 18 U.S.C. § 3599(a)(2) (“In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).”).

37. *Id.* § 3599(f).

38. *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (citations omitted).

39. Holland Sergeant, Comment, *Can Death Row Inmates Just Say No?: The Forced Administration of Drugs to Render Inmates Competent for Execution in the United States and Texas*, 35 TEX. TECH L. REV. 1299, 1321 (2004).

40. TEX. CODE CRIM. PROC. art. 46.05(a) (2017).

41. *Id.* art. 46.05(d)(1).

defendant's competency to be executed at the time of filing the subsequent motion."<sup>42</sup>

If the defendant makes a "substantial showing of incompetency," the court must order at least two mental health experts to determine whether the defendant is incompetent.<sup>43</sup> A defendant who 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" is incompetent to be executed.<sup>44</sup> This standard has been held "unconstitutionally narrow" because it does not account for "the possibility [that] the defendant may suffer from delusional thought processes which interfere with his ability to rationally comprehend the *causal link* between his capital offense and his imminent execution."<sup>45</sup> The TCCA is barred from reviewing a trial court's determination of a defendant's competency under article 46.05(1-1) "if the motion is filed on or after the 20th day before the defendant's scheduled execution date."<sup>46</sup> In *Druery v. State*, the TCCA construed article 46.05(1-1) narrowly, finding that the court could review supplemental materials filed after the time limit where the original motion was timely filed.<sup>47</sup>

### III. COURT'S DECISION

In the noted case, the Fifth Circuit found that the Texas courts failed to protect Panetti's "right to be free from cruel and unusual punishment under *Ford* and its progeny" and described when, under 18 U.S.C. § 3599, a federal district court must appoint legal, expert, and investigative assistance.<sup>48</sup> First, the court addressed whether the court below erred by not appointing counsel for Panetti.<sup>49</sup> To deny a request for counsel under 18 U.S.C. § 3599(a)(2), habeas relief must be "indisputably" foreclosed by potential procedural bars.<sup>50</sup> The State argued that Panetti's failure to exhaust state remedies barred him from seeking habeas relief.<sup>51</sup>

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42. *Id.* art. 46.05(e).

43. *Id.* art. 46.05(f).

44. *Id.* art. 46.05(h).

45. *Wood v. Quarterman*, 572 F. Supp. 2d 814, 818 (W.D. Tex. 2008) (emphasis in original) (citing *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)), *stay vacated*, *Wood v. Thaler*, 787 F. Supp. 2d 458, 460 (W.D. Tex. 2011).

46. TEX. CODE CRIM. PROC. art. 46.05(1-1).

47. 412 S.W.3d 523, 536 (Tex. Crim. App. 2013).

48. *Panetti v. Davis*, 863 F.3d 366, 374, 376 (5th Cir. 2017).

49. *Id.* at 373-75.

50. *Id.* at 373 (quoting *Cantu-Tzin v. Johnson*, 162 F.3d 295, 300 (5th Cir. 1998)).

51. *Id.*

Where “circumstances exist that render [the state] process ineffective to protect the rights of the applicant,” the court may overlook exhaustion.<sup>52</sup> Undertaking this inquiry, the court found that the process under article 46.05 failed to protect Panetti’s rights.<sup>53</sup> The court reasoned that the combined actions of the state trial court judge, the State’s attorneys, and the TCCA caused the ineffective application of article 46.05.<sup>54</sup> The court described these events as follows: Initially, the State requested an execution date without giving notice to Panetti’s counsel.<sup>55</sup> When he discovered the execution date, counsel had ten days to file before losing the right to appeal under article 46.05.<sup>56</sup> The trial court suggested Panetti file a skeletal petition and later amend his petition to meet the twenty-day deadline in article 46.05.<sup>57</sup> Panetti did so, seeking additional funds for his case while the State opposed Panetti’s access to these resources.<sup>58</sup> Meanwhile, the State used its own resources to gather evidence to use against Panetti.<sup>59</sup> When his motions failed at the trial court, Panetti appealed to the TCCA, where the divided court contradicted its own precedent by finding that Panetti failed to file a proper article 46.05 motion and that the petition was not timely.<sup>60</sup> The Fifth Circuit found that, because this procedure ineffectively protected Panetti’s rights, he was therefore entitled to counsel to pursue his habeas claim.<sup>61</sup>

Next, the court explained that it saw no justification for denying Panetti’s request for funds for expert and investigative resources.<sup>62</sup> Under 18 U.S.C. § 3599(f), funds may be authorized for these purposes where they are “reasonably necessary for the representation of the defendant.”<sup>63</sup> The district court had “implicitly found that Panetti” did not meet the standard of reasonable necessity; however, the Fifth Circuit reasoned that new evidence addressing competency would not be merely “supplemental” because the last determination of competency occurred a decade previously.<sup>64</sup>

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52. 28 U.S.C. § 2254(b)(1)(B)(ii) (2012).

53. *Davis*, 863 F.3d at 374.

54. *Id.* at 373-74.

55. *Id.* at 373.

56. *Id.*; see TEX. CODE CRIM. PROC. art. 46.05(l-1) (2017).

57. *Davis*, 863 F.3d at 373-74.

58. *Id.* at 374.

59. *Id.*

60. *Id.*

61. *Id.* at 375.

62. *Id.*

63. 18 U.S.C. § 3599(f) (2012).

64. *Davis*, 863 F.3d at 375.

The court specified how Texas's procedure deprived Panetti of due process. Citing *Ford*, the court noted that "due process is breached when 'affected parties' are prevented 'from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.'"<sup>65</sup> The court, in agreement with Panetti, described how the State "sought to deny him a meaningful opportunity to do just that."<sup>66</sup> The State "deployed" capable death penalty lawyers, had a medical expert, and recorded Panetti with his family, filing this evidence with the TCCA and the federal district court.<sup>67</sup> Panetti, on the other hand, lacked funds to update his own decade-old competency evaluation. The Fifth Circuit agreed with Panetti's argument that the State went beyond merely responding to his claims but actively "generate[d] new evidence" while preventing Panetti from generating his own.<sup>68</sup> Further, Panetti and his counsel faced "an impossible deadline" resulting from the lack of notice to Panetti of his impending execution.<sup>69</sup>

The court concluded by finding that the district court's decision "was tainted by the inadequate due process protection provided to Panetti by the State."<sup>70</sup> The court did not discuss the merits of Panetti's competency claim, leaving that for the district court on remand.<sup>71</sup> The Fifth Circuit determined that the "decidedly adversarial opposition" taken by the State against Panetti created "deficiencies" in Panetti's evidence that the TCCA refused to overlook, contrary to its own precedent.<sup>72</sup> In turn, the district court issued its decision on Panetti's competency without allowing him the opportunity to remedy these deficiencies by producing new evidence.<sup>73</sup>

The Fifth Circuit acknowledged that death penalty jurisprudence leads to frustration and that courts "struggle to get it right."<sup>74</sup> However, in granting Panetti another round of litigation, the Fifth Circuit declared that "[p]rocess matters," and "[d]elivery of the process due protects the prisoner and in doing so protects us all."<sup>75</sup>

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65. *Id.* at 375 (quoting *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring)).

66. *Id.* at 375-76.

67. *Id.* at 376.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 377.

73. *Id.*

74. *Id.* at 378.

75. *Id.* at 378-79.

Judge Priscilla R. Owen dissented on the grounds that the majority should not have reversed the district court's decision to deny funds for expert and investigative assistance.<sup>76</sup> Judge Owen found that the district court properly denied funds because the facts supporting Panetti's most recent incompetency claim were "not different in kind" from his prior claim.<sup>77</sup> In Judge Owen's view, rather than being influenced by error in the state court, as the majority suggested, the district court conducted its own inquiry and acted within its discretion to deny the motion.<sup>78</sup> After comparing the new facts describing Panetti's alleged incompetency to evidence from previous competency proceedings, Judge Owen concluded that the new evidence merely supplemented prior evidence.<sup>79</sup> While each competency proceeding is discrete from the prior one, as Judge Owen explained, a defendant should not be entitled to a new *Ford* hearing when evidence is not different in kind.<sup>80</sup> Judge Owen found that Panetti did not make the "threshold showing" required by *Ford* and *Panetti v. Quarterman* because he did not present any evidence that his competency for execution was different from the prior proceeding.<sup>81</sup> In Judge Owen's view, Panetti was competent for execution and the court below properly denied funds for experts.<sup>82</sup>

#### IV. ANALYSIS

The Fifth Circuit in *Panetti v. Davis* pointed out that "a petitioner bringing claims under *Ford* and the State crafting a response must travel in uncharted water."<sup>83</sup> Since *Ford v. Wainwright*, the standard for incompetency has developed into a complex analysis where a court must determine whether a prisoner has a "rational understanding" of the reason for his execution, including a consideration of whether "[g]ross 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."<sup>84</sup> *Panetti v. Davis* presents

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76. *Id.* at 379 (Owen, J., concurring in part and dissenting in part).

77. *Id.* at 381.

78. *Id.* at 382.

79. *Id.* at 388-89 (citing *Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014)).

80. *Id.* at 389.

81. *Id.* at 390-91.

82. *Id.* at 391.

83. *Id.* at 376 (majority opinion).

84. *Panetti v. Quarterman*, 551 U.S. 930, 959-60 (2007); *see also* *Wood v. Thaler*, 787 F. Supp. 2d 458, 485-500 (W.D. Tex. 2011) (analyzing evidence and finding that the prisoner's claim under *Ford* and *Quarterman* lacked merit).

an additional struggle that courts must undertake to determine competency: the procedure required to protect a prisoner's right to be free from cruel and unusual punishment.<sup>85</sup>

The Supreme Court in *Ford* and in *Panetti v. Quarterman* declined to define the exact procedure required for competency claims.<sup>86</sup> The Fifth Circuit in *Panetti v. Davis* made a significant change to the law by requiring that funds for investigative and expert assistance be granted to a prisoner to make his competency claim.<sup>87</sup> In making this change, the court noted that “[w]e and our state court brethren struggle to get it right, an effort not always successful, for we yet are just lawyers, subject to error.”<sup>88</sup> The court described “error-producing frustration over the delay baked into our death penalty jurisprudence” as the cause behind the procedural error that the courts below made by refusing to grant Panetti counsel and funds.<sup>89</sup> The court's remedy does improve the procedural deficiencies in Panetti's case; however, it ignores an apparent flaw in death penalty jurisprudence pointed out by Justice Breyer, leading him to question the constitutional validity of the death penalty as a whole.<sup>90</sup>

Panetti committed his crime in September 1992 and was sentenced to death three years later on September 22, 1995.<sup>91</sup> Now in the third decade of his judicial proceedings, Panetti once again will argue his incompetency.<sup>92</sup> This delay creates two distinct constitutional problems.<sup>93</sup> First, delay subjects a prisoner to dehumanizing solitary confinement.<sup>94</sup> Second, the delay before execution undermines the “penological rationale” of the death penalty because actual executions are “rare” and a community must wait

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85. See *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986); see also *Green v. Thaler*, 699 F.3d 404, 413-14 (5th Cir. 2012) (finding that “the procedures at issue were not constitutionally defective” where a state court allowed the prisoner to retain his own expert and where its decision came after evaluating all evidence, including the prisoner's expert testimony).

86. See *Quarterman*, 551 U.S. at 952; *Ford*, 477 U.S. at 416-17.

87. See *Davis*, 863 F.3d at 378.

88. *Id.*

89. *Id.*

90. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755-78 (2015) (Breyer, J., dissenting). Of particular relevance to Panetti's case, Justice Breyer explained that “increasingly lengthy delays” in death penalty cases are the result of irreversible “procedural necessities.” *Id.* at 2764.

91. See *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*9, \*13 (W.D. Tex. Mar. 26, 2008), *aff'd sub nom. Panetti v. Stephens*, 727 F.3d 398, 400 (5th Cir. 2013), *rev'd sub nom. Davis*, 863 F.3d 366.

92. *Davis*, 863 F.3d at 378.

93. See *Glossip*, 135 S. Ct. at 2765.

94. See *id.* at 2765-66.

many years before vindication.<sup>95</sup> Of course, Panetti could not and did not raise these broader constitutional issues in this case, and the court resolved the issues before it by appropriately protecting Panetti's procedural rights. Unfortunately, the very process that "protects the prisoner"<sup>96</sup> may in fact cause the "cruel and unusual punishments"<sup>97</sup> that the court sought to avoid.

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95. *Id.* at 2767-69.

96. *Davis*, 863 F.3d at 379.

97. U.S. CONST. amend. VIII.

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