American Journal of Law & Medicine (2023), 49: 2-3, 205–233
doi:10.1017/amj.2023.28

American Society of Law, Medicine & Ethics
Where Multidisciplinary Education Improves Practice

ARTICLE

"The Timeless Explosion of Fantasy's Dream": How State Courts Have Ignored the Supreme Court's Decision in *Panetti v. Quarterman*

Michael L. Perlin[1], Talia Roitberg Harmon[2] and Maren Geiger[2]

[1]American Bar Association Center for Human Rights & Justice Defenders Program, Chicago, IL, USA
[2]Niagara University, New York, NY, USA
Corresponding author: Michael L. Perlin; Email: Michael.Perlin@nyls.edu

Abstract

Multiple states have enacted statutes to govern procedures when a state seeks to execute a person who may be incompetent to understand why s/he is being so punished, an area of the law that has always been riddled with confusion. The Supreme Court, in *Panetti v. Quarterman*, sought to clarify matters, ruling that a mentally ill defendant had a constitutional right to make a showing that his mental illness "obstruct[ed] a rational understanding of the State's reason for his execution."

However, the first empirical studies of how *Panetti* has been interpreted in federal courts painted a dismal picture. Only a handful of defendants have ever been successful in federal courts in seeking to enforce the *Panetti* ruling, and the authors of this abstract have characterized the relief ostensibly offered by that case as nothing more than an "illusion" or a "mirage" in a federal context. The issues of believability of experts, allegations of malingering, and "synthetic competency" dominate these decisions.

In this paper, we seek to expand this inquiry to determine (1) how defendants in state courts seeking to assert *Panetti* claims have fared, and (2) the extent to which state statutes have made any meaningful difference in the way such cases have been decided. We also investigate the significance of the fact that the caselaw in this area has totally ignored the teachings of the school of legal thought known as therapeutic jurisprudence and offer some conclusions and recommendations (based on therapeutic jurisprudence principles) that, if implemented, can (at least partially) ameliorate this situation.

Keywords: Barefoot v. Estelle; expert testimony; death penalty; Fifth Circuit; Daubert v. Merrill Dow Pharmaceuticals Inc.; therapeutic jurisprudence; adequacy of counsel; criminal procedure

I. Introduction

Whenever the Supreme Court decides a case that makes instant national headlines, it is assumed that "the law has changed," and that, going forward, those changes will be reflected in both judicial and social behavior. The recent decision in *Dobbs v. Jackson Women's Health Organization,*[1] overruling *Roe v Wade*,[2] is an obvious example; within weeks of the overturn, thirteen state legislatures successfully implemented bans on abortion that would have been deemed unconstitutional if *Roe* had still been the law.[3] And, of course, those who opposed the *Dobbs* decision began strategizing ways to avoid its draconian impacts.[4]

[1]Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (finding that there is no constitutional right to abortion).

[2]Roe v. Wade, 410 U.S. 113 (1973) (finding, in contrast, that there is a constitutional right to abortion).

[3]*See* the report by the Brennan Center for Justice in Larissa Jiminez, *60 Days After Dobbs: State Legal Developments on Abortion* (Aug. 24, 2022).

[4]*Id.*; *see, e.g.,* Planned Parenthood South Atlantic v. State, 882 S.E. 2d 777, 785 (S.C. 2023) (finding that South Carolina anti-abortion statute violates South Carolina's state constitution).

But there are other areas of the law in which Supreme Court decisions have not had such an immediate impact. In many areas of law, Supreme Court decisions have turned out to be illusory.[5] A study of case law following such decisions in regulatory takings has demonstrated the tendency of lower federal courts and state courts to ignore or blunt Supreme Court's decisions.[6] A Supreme Court decision by no means constitutes a promise to clarify subsequent judicial behavior.

One such area of law is forensic mental disability law. In 1972, in *Jackson v. Indiana,*[7] the Court ruled unanimously that a person charged by a State with a criminal offense who is civilly committed solely on account of his incapacity to proceed to trial cannot be held "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[8] Yet this decision continues to be ignored by about half the states despite extensive scholarly literature calling attention to this deficit.[9] Some defendants—situated like the appellant in *Jackson*—are still institutionalized "for what equates to a life sentence."[10]

There is another area of forensic mental disability law that has fallen far beneath the radar and requires much more attention than it has yet received. This is the extent to which the Supreme Court's decision in *Panetti v. Quarterman*[11]—ostensibly ruling that a mentally ill defendant had a constitutional right to make a showing that his mental illness "obstruct[ed] a *rational understanding* of the State's reason for his execution"[12]—has been implemented in "real life." *Panetti* came down more than two decades after the Supreme Court's earlier decision in *Ford v. Wainwright,*[13] which, for the first time, held unconstitutional the execution of an "insane" person.[14]

---

[5]*See, e.g.,* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 420-29 (2d ed. 2008) (arguing that Supreme Court decisions often provide reformers symbolic victories and the illusion of substantive change); Christopher Smith, *Law and Symbolism*, 1997 Det. C.L. Mich. St. U. L. Rev. 935, 946 ("The series of Supreme Court decisions barring discrimination by race and gender in peremptory challenges to potential jurors created the *illusion* that constitutional law provided protection against discrimination in the jury selection process").

[6]*See, e.g.,* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?,* 6 Fordham Env't L. J. 523, 555-56 (1995) (discussing developments after Supreme Court decisions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and Dolan v. City of Tigard, 512 U.S. 374 (1994)).

[7]Jackson v. Indiana, 406 U.S. 715 (1972).

[8]*Id.* at 738.

[9]*See* Michael L. Perlin, *"Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 Mich. St. U. J. Med. & L. 343, 359 (2013) (discussing research around the poor implementation of *Jackson* as presented in Bruce Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 941 (1985)); *see also* Ellen C. Wertlieb, *Individuals with Disabilities in the Criminal Justice System: A Review of the Literature,* 18 Crim. Just. & Behav. 332, 336 (1991) (discussing similar deficiencies in the implementation of *Jackson*); Grant Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. Davis L. Rev. 1, 8-9, 33-78 (1993) (updating Winick's research comprehensively throughout Part II of the article and commenting in both the introduction and the conclusion that, a decade after Winick's article, *Jackson* remained "ignored [and] circumvented"); Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities,* 52 Alabama L. Rev. 193, 204 (2000) (discussing both Winick's research, and its thoroughly comprehensive update by Morris & Meloy); Andrew R. Kaufman, Bruce B. Way & Enrico Suardi, *Forty Years After* Jackson v. Indiana: *States' Compliance with "Reasonable Period of Time" Ruling,* 40 J. Am. Acad. Psychiatry & L. 261, 261-64 (2012) (updating the same body of literature around *Jackson's* poor implementation); Aaron J. Kivisto, Megan L. Porter Staats & Robert Connell, *Development and Validation of a Typology of Criminal Defendants Admitted for Inpatient Competency Restoration: A Latent Class Analysis,* 44 Law & Hum. Behav. 450 (2021) (discussing the empirical research update presented by the 2012 Kaufman, Way & Suardi article).

[10]Lauren Kois et al., *Combined Evaluations of Competency to Stand Trial and Mental State at the Time of the Offense: An Overlooked Methodological Consideration?*, 41 Law & Hum. Beahv. 217, 218 (2017).

[11]*See generally* Panetti v. Quarterman, 551 U.S. 930 (2007).

[12]*Id.* at 956; *see also id.* at 960 (noting defendant's submission "that he suffers from severe, documented mental illness that [was] the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced.

[13]*See generally* Ford v. Wainright, 477 U.S. 399 (1986).

[14]*Ford* was a fractured opinion that left multiple questions as to its scope and to the definition of "insane" in these situations. *See generally*, 3 Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil And Criminal (2017) (spring 2023 update), §§ 17-4.1.3 to 17-4.1.5, §§ 17-69 to 17-88.

Soon after *Panetti* was decided, Professor Peggy Tobolowsky noted that "[o]ver twenty years after the *Ford* decision, several states are still not in compliance with these minimum constitutional definitional and procedural requirements."[15] In two prior articles, these authors examined the implementation (or lack thereof) of *Panetti* in federal decisions,[16] concluding that *Panetti* has virtually never served as a protection upon which defendants could rely[17] and that the concerns raised by Professor Tobolowsky were almost never addressed.[18]

In this paper, we complete our trilogy of *Panetti* research[19] by examining the extent to which *Panetti* has been implemented in all state courts.[20] Our findings reveal that fewer than a handful of defendants have raised or have been successful in *Panetti* applications. [21] There were two successful cases (Banks and Staley), two threshold successful cases (Overstreet and Druery),[22] and two statute successes (Greene and Ward in Arkansas). There was a total of sixteen failures: mentally ill, but rational (six cases), defense expert concessions (seven cases), defense experts not credible (seven cases) and malingering (two cases).[23] First, we briefly discuss the *Panetti* case,[24] and what our prior studies have revealed.[25] Next, we examine how *Panetti* has been construed in those states which there is an active death penalty.[26] The following section examines the implications of these statistics. Finally, we investigate why the caselaw in this area has totally ignored the teachings of therapeutic jurisprudence[27] and offer some conclusions and recommendations based on therapeutic jurisprudence principles.

This article's title comes from a truly obscure Bob Dylan song, *Ballad in Plain D.* The song, recorded in 1964 and never performed live, is not a political song, but is about Dylan's relationship with his then-girlfriend, and his acrimonious relationship with her sister.[28] The full verse from which

[15]Peggy M. Tobolowsky, *To* Panetti *and Beyond—Defining and Identifying Capital Offenders Who Are Too "Insane" to Be Executed*, 34 Am. J. Crim. L. 369, 429 (2007).

[16]*See, e.g.,* Michael L. Perlin & Talia Roitberg Harmon, *"Insanity is Smashing up Against My Soul": The Fifth Circuit and Competency to be Executed Cases after* Panetti v. Quarterman, 60 U. Louisville L. Rev. 557, 558-60 (2022) (detailing the non-implementation of *Panetti* in the Fifth Circuit); Michael L. Perlin, Talia Roitberg Harmon & Haleigh Kubiniec, *"The World of Illusion Is at My Door": Why* Panetti v. Quarterman *is a Legal Mirage,* 59 Crim. L. Bull. 273, 274-75 (2023) (detailing the non-implementation of *Panetti* in all other federal circuits).

[17]*See* Perlin & Harmon, *supra* note 16, at 558 (concluding that, in the Fifth Circuit, *Panetti* "has been paid little more than lip service, and that persons with profound mental disabilities are still subject to execution (and in some cases, have been executed)"); *see also* Perlin, Harmon & Kubiniec, *supra* note 16, at 276 (noting that, in the other federal circuits, there was only *one* case (later vacated) in which *Panetti* had been successfully relied upon, namely Madison v. Commissioner, Alabama Dep't of Corrections, 851 F.3d 1173 (11th Cir. 2017), vacated, 879 F.3d 1298 (11th Cir. 2018)).

[18]*See* Tobolowsky, *supra* note 15, at 407-17.

[19]*See* Michael L. Perlin, *"Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow": Neuroimaging and Competency to be Executed after* Panetti, 28 Behav. Sci. & L. 671, 687-8 (2010) (predicting (incorrectly) that neuroimaging would become prevalent in *Panetti* cases). A recent search <"Panetti v. Quarterman" & neuroimaging /s panetti > revealed no such cases (search done, September 22, 2022).

[20]Our national federal survey revealed that only two defendants were successful in *Panetti* challenges in other levels of the court system: one in the Ohio state court system (*see* State v. Awkal, Memorandum of Opinion and Order, Case No. CR-276801 (Jun. 15, 2012) (unreported; copy at ECF No. 1574-1, Page ID, 69496-508), as cited in In re Ohio Execution Protocol Litigation, 2018 WL 3207419 (S.D. Ohio 2018), and one at the district court level in California, Stanley v. Davis, No. C-07-4727-EMC, 2015 WL 435077 (N.D. Cal. Feb. 2, 2015), discussing prior proceedings and ordering, at *6, "supplemental mental health examination of [defendant], focused on the issue of whether [defendant] is permanently incompetent to be executed."

[21]*See infra* Part III A(B)2(a).

[22]By "threshold success" we mean that the defendant met the "substantial threshold burden of establishing incompetency to be executed" that would require a hearing to determine competency under *Panetti. See, e.g.,* Druery v. State, 412 S.W.3d 523, 527 (Tex. Ct. Crim. App. 2013).

[23]In some cases, more than one reason was listed.

[24]*See, e.g.,* Perlin & Harmon, *supra* note 16, at 566-69; Perlin, Harmon & Kubiniec, *supra* note 16, at 280-82.

[25]*See* Perlin & Harmon, *supra* note 16, at 579-97; *see also* Perlin, Harmon & Kubiniec, *supra* note 16.

[26]"The total number of states without the death penalty is twenty-three. Additionally, three states have gubernatorial moratoria on the death penalty, *see State by State,* Death Penalty Info. Ctr., http://deathpenaltyinfo.org/state-and-federal-info/state-by-state (accessed on January 4, 2023).

[27]*See infra* Part IV for a discussion of the meaning and significance of this school of legal thought.

[28]Oliver Trager, Keys To The Rain: The Definitive Bob Dylan Encyclopedia 22-23 (2004).

it comes is this: And so it did happen like it could have been foreseen / The timeless explosion of fantasy's dream / At the peak of the night, the king and the queen / Tumbled all down into pieces.[29] Sadly, we now recognize that our hopes that the *Panetti* case would actually change practice, and that it would become less likely that profoundly mentally ill death row inmates would be executed was a "fantasy." What we report in this final paper of our *Panetti* trilogy, unfortunately, "explo[des]" the fantasy for good.

II. *Panetti* and its aftermath

In 1995, Scott Panetti—who had been hospitalized numerous times for serious psychiatric disorders—was convicted of capital murder in the slayings of his estranged wife's parents.[30] Notwithstanding his "bizarre," "scary," and "trance-like" behavior,[31] he was found competent to stand trial and competent to waive counsel.[32] The jury rejected his insanity defense, and he was sentenced to death.[33] Following the exhaustion of state remedies and the dismissal of an earlier habeas corpus petition, Panetti filed a subsequent petition alleging that he did not understand the reasons for his pending execution.[34] The Fifth Circuit affirmed the denial of the writ,[35] and the Supreme Court reversed,[36] finding that the defendant had a right to make a showing that his mental illness "obstruct[ed] a *rational understanding* of the State's reason for his execution."[37] It characterized the Fifth Circuit's position below as "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."[38]

Two of this Article's co-authors (Michael Perlin ("MLP") and Talia Harmon ("TRH")) examined in two prior articles how the Fifth Circuit had construed *Panetti* cases[39] and how *Panetti* was construed in the other circuits.[40] The Fifth Circuit research[41] revealed that there was not a single other case (other than

[29]*See Ballad in Plain D*, BOBDYLAN.COM [https://perma.cc/Y972-AUQF] (last accessed Apr 22, 2023).

[30]Panetti v. Quarterman, 551 U.S. 930, 936 (2007).

[31]*Id.* at 936-37.

[32]*Id.* at 936-37. At his trial, Panetti, who wore a purple cowboy outfit, applied for more than 200 subpoenas, requesting testimony from, amongothers, John F. Kennedy, the Pope, and Jesus Christ. Brief for Petitioner at 11-16, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407), as quoted in Katie Arnold, *The Challenge of "Rationally Understanding" a Schizophrenic's Delusions: An Analysis of Scott Panetti's Subsequent Habeas Proceedings*, 50 TULSA L. REV. 243, 251 (2014).

[33]*Panetti*, 551 U.S. at 937.

[34]*Id.*

[35]Panetti v. Dretke, 448 F. 3d 815 (5th Cir. 2006), *aff'g* 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004).

[36]*Panetti,* 551 U.S. at 962.

[37]The Court reviewed the testimony that demonstrated the defendant's "fixed delusion" system. *Id.* at 954-55. It also approved of expert testimony that had pointed out that "an unmedicated individual suffering from schizophrenia can 'at times' hold an ordinary conversation and that 'it depends [whether the discussion concerns the individual's] fixed delusional system'). *Id.* at 955.

[38]*Id.* at 956–57. In an additional holding in *Panetti*, the Court found error in the trial court's failure to provide the defendant an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts, *id.* at 949, thus depriving him of his "constitutionally adequate opportunity to be heard," *Id.* at 952.

[39]Perlin & Harmon, *supra* note 16. This piece, the first of the trilogy being completed here, was also the third in a trilogy of articles by two of the co-authors here (MLP & TRH) with different third authors on how the Fifth Circuit applied Supreme Court precedent in cases involving the application of the adequacy-of-counsel doctrine of *Strickland v. Washington,* 466 U.S. 668 (1984), *see* Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, "*'A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM 261 (2020), and the decision barring execution of persons with intellectual disabilities, in Atkins v. Virginia, 536 U.S. 304 (2002), *see* Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, *Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J.L.& POL'Y 451 (2021).

[40]*See* Perlin, Harmon & Kubiniec, *supra* note 16.

[41]Important background: prior to *Panetti,* we know that that the Fifth Circuit had not found a single death row defendant (of an *n* of at least 360) to be incompetent to be executed in the two decades since the court had decided *Ford v. Wainwright,* 477 U.S. 399 (1986). *See* Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1534-35 (2016)

in *Panetti* on remand)[42] during the fourteen-plus years since the Supreme Court decided *Panetti* in which the Fifth Circuit found that a defendant was incompetent to be executed, and only two such cases were decided by a district court within the Circuit.[43] And, when we expanded our search to the entire nation, we found only one case—later vacated—that found a *Panetti* violation in a federal circuit court decision.[44] In the Fifth Circuit article, MLP and TRH concluded that *Panetti* was "an illusion, little more than a paper victory for defendants with serious mental illness."[45] In the article on the other circuits, MLP and TRH similarly concluded that "*Panetti* has been given virtually no life whatsoever by the federal courts of appeal."[46] This paper turns to the "death penalty states" to check for similar findings.

In the course of our research, we excluded cases that cited *Panetti* but did not consider the issues that are at the heart of this paper: cases including issues of ripeness,[47] cases that involved issues of intellectual disabilities and interpretations of *Atkins v. Virginia*,[48] cases that were not death penalty cases,[49] and cases that dealt with procedural reasons and/or unrelated legal issues.[50] In the future, even more pressure will exist on defense counsel in representing this cohort of defendants in state court, following the Supreme

(quoting Petition for Writ of Certiorari, *Panetti*, No. 06-6407, 2006 WL 3880284, at *26). As noted above in note 14, *Ford* was its earlier incompetency-to-be-executed case, where it concluded, for the first time, that the Eighth Amendment did prohibit the imposition of the death penalty on an "insane" prisoner. *Ford,* 477 U.S. at 405-10.

[42]Panetti v. Stephens, 863 F.3d 366 (5th Cir. 2017). Litigation in *Panetti* continues. *See* Ex parte Panetti, No. WR-37,145-05, 2021 WL 2560138 (Tex. Ct. Crim. App. 2021), denying his then-most recent application for a writ of habeas corpus.

[43]Perlin & Harmon, *supra* note 16, at 579-80. *See* Billiot v. Epps, 2010 WL 1490298 (S.D. Miss. 2010) (*Panetti* claim granted), and Aldridge v. Thaler, No. H-05-608 WL 1050335 (S.D. Tex. 2010) (same).

[44]*See* Madison v. Commissioner, Alabama Dep't of Corrections, 851 F.3d 1173 (11th Cir. 2017), vacated, 879 F.3d 1298 (11th Cir. 2018), discussed in this context in Perlin, Harmon & Kubiniec, *supra* note 16, at 276. Defendants were also successful in two other cases discussed here in which there was federal system litigation: Stanley v. Davis, 2015 WL 435077 (N.D. Cal. 2015), and State v. Awkal, Memorandum of Opinion and Order, Case No. CR-276801 (Jun. 15, 2012) (unreported; copy at ECF No. 1574-1, Page ID, 69496-508), as cited and discussed in *In re* Ohio Execution Protocol Litigation, 2018 WL 3207419 (S.D. Ohio 2018).

[45]Perlin, Harmon & Kubiniec *supra* note 16, at 277, referring to research reported on in Perlin & Harmon, *supra* note 16.

[46]Perlin, Harmon & Kubiniec, *supra* note 16, at 302.

[47]*E.g.*, Nooner v. State, 438 S.W.3d 233, 237 (Ark. 2014); Roberts v. State, 592 S.W.3d 675, 685 (Ark. 2020); Taylor v. State, 262 S.W.3d 231,254 (Mo. 2008); State v. Neyland, No. WD-12-014 2013 WL 3776602, *24 (Ohio Ct. App. 2013). The ripeness doctrine teaches that there is a constitutional limitation on the power of the judiciary; it prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. *See, e.g.*, New York Civil Liberties Union v. Grandeau, 528 F.3d 122, 130-31 (2d Cir. 2008).

[48]536 U.S. 304 (2002). *See, e.g.*, Williams v. Cahill ex. rel. County of Pima, 303 P.3d 532, 534 (Ariz. Ct. App 2013) (Eckerstrom, J., dissenting); Lard v. State, 595 S.W.3d 355, 359 (Ark. 2020); King v. State, 23 So.3d 1067, 1071 (Miss. 2009); Murphy v. State, 54 P.3d 556, 1293 (Okla. Crim. App. 2002); Commonwealth v. Sanchez, 36 A.3d 24, 57 (Pa. 2011).

[49]These are the twenty-five non-death penalty cases: (1) People v. Martin, 272 Cal.Rptr.3d 363 (Cal. Ct. App. 2020); (2) People v. Strike, 258 Cal.Rptr.3d 482 (Cal. Ct. App. 2020); (3) People v. Barba, No. B185940, 2012 WL 172449 (Cal. Ct. App. 2012); (4) People v. Barba, 155 Cal.Rptr.3d 707 (Cal. Ct. App. 2013); (5) People v. Cormier, No. B2213193, 2011 WL 3525408 (Cal. Ct. App. 2011); (6) People v. Rios, 101 Cal.Rptr.3d 713 (Cal. Ct. App. 2009); (7) People v. Zayas, No. E048865, 2010 WL 3530426 (Cal. Ct. App. 2010); (8) People v. Hernandez, No. F057090, 2010 WL 3506888 (Cal. Ct. App. 2010); (9) People v. Miller, 114 Cal.Rptr.3d 629 (Cal. Ct. App. 2010); (10) People v. Colon, No. F056334, 2010 WL 612245 (Cal. Ct. App. 2010); (11) Ford v. U.S., 931 A.2d 1045 (D.C. Ct. App. 2007); (12) Book v. Doublestar Dongfend Tyre Co., Ltd., 860 N.W.2d 576 (Iowa 2015); (13) University of Michigan Regents v. Titans Ins. Co., 794 N.W.2d 570 (Mich. 2010); (14) Willbanks v. Department of Corrections, 522 S.W.3d 238 (Mo. 2017); (15) State v. Gaw, 285 S.W.3d 318 (Mo. 2009); (16) State v. Hughes, 272 S.W.3d 246 (Mo. 2008); (17) State v. Ruiz, 179 A.3d 333 (N.H. 2018); (18) Willemsen v. Invacare Corp., 282 P.3d 867 (Or. 2012); (19) Adams v. State, No. 03-14-00180-CR, 2016 WL 110627 (Tex. Ct. App. 2016); (20) Crenshaw v. State, No. 02-08-00304-CR, 2011 WL 3211258 (Tex. Ct. App. 2011); (21) Crenshaw v. State, 424 S.W.3d 753 (Tex. Ct. App. 2014); (22) Crosby v. Commonwealth, No. 0847-08-2,2009 WL 3819217 (Va. Ct. App. 2009); (23) Ferguson v. Commonwealth, 663 S.E.2d 505 (Va. Ct. App. 2008); (24) State v. AU Optronics Corp., 328 P.3d 919 (Wash. Ct. App. 2008); (25) State v. Venegas, 228 P.3d 813 (Wash. 2010).

[50]Most of these dealt with the principle that, when there is no majority opinion, the narrower holding controls. *See e.g.*, Book v. Doublestar Dongfend Tyre Co., Ltd. 860 N.W.2d 576, 592 (Iowa 2015), citing *Panetti,* 551 U.S. at 949; Willemsen v. Invacare Corp., 282 P.3d 867, 873 (Or. 2012) (same); State v. AU Optronics Corp, 328 P.3d 919, 927 n. 19 (Wash. App. 2014) (same). *See also* University of Michigan Regents v. Titans Ins. Co., 794 N.W.2d 570, 571 (Mich. 2010) (on the difference between incompetency and insanity in a case dealing with the tolling of statutes of limitations in tort actions). Other cases dealt with issues such as the law of "successor petitions" and a defendant's right to expert testimony. *See infra* notes 80-81.

Court's recent (and virtually-totally unheralded)[51] opinion in *Shinn v. Ramirez*.[52] *Shinn* limited the scope of *Strickland* inquiries that could be made in cases involving federal habeas corpus filings following state court convictions, ruling that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel.[53] This will make it far "more difficult for defendants to be successful in *Strickland* claims."[54]

As MLP and TRH discussed in a prior paper, "[t]he story of how the Fifth Circuit has dealt with *Strickland* appeals in cases involving defendants with mental disabilities facing the death penalty [on applications for writs of habeas corpus following state court convictions] is bizarre and frightening."[55] The track record of counsel in death penalty cases in many of the "death belt" states[56] is appalling. As Professor Stephen Bright has famously and ruefully observed, "The death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer."[57]

III. Our findings

In combining the state court findings discussed extensively in this paper with the findings reported on in the two prior papers about the federal courts (one solely on the Fifth Circuit[58] and one on the other federal circuits[59]), we are able to confront these appalling results: since the Supreme Court decided *Panetti* fifteen years ago, in the aggregate, only eight defendants have been found to be incompetent to be executed by *any* court (and one of those decisions was later vacated).[60] On the merits, *Panetti*

[51]At the time of this writing (autumn-early winter 2022), *Shinn* has only been cited in two law review articles: one anticipatorily (noting the grant of *certiorari*, and adding that the then-upcoming decision "will reveal much about the current Court's attitude towards habeas proceduralism," Cal Barnett-Mayotte, *Beyond* Strickland *Prejudice:* Weaver, Batson*, and Procedural Default*, 170 U. Pa. L. Rev. 1049, 1086 n. 225 (2022), and one subsequent to the decision, ominously noting the court's language, that "[T]he attorney is the petitioner's agent when acting, or failing to act, In furtherance of the litigation, and the petitioner must bear the risk of attorney error." Shinn v. Ramirez, 142 S.Ct. 1718, 1733 (2022), *see* Marco Maldonado et al., *You Have the Right to Remain Powerless: Deprivation of Agency by Law Enforcement and the Legal and Carceral Systems*, 95 St. John's L. Rev. 999, 1009 n. 27 (2021).

[52]*Shinn,* 142 S. Ct. at 1718.

[53]*Id.* at 1727. This opinion has been excoriated in a recent bar journal article. *See* Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel,* 94 N.Y. St. B.J.17, 17 (Oct. 2022).

[54]Michael L. Perlin & Heather Ellis Cucolo, *"Take the Motherless Children off the Street": Fetal Alcohol Syndrome and the Criminal Justice System,* 77 U. Miami L. Rev. 561, 586 (2023).

[55]Perlin, Harmon & Kubiniec, *supra* note 16, at 308.

[56]*See e.g.*, Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 Wis. L. Rev.1, 18 (2001).

[57]Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679, 695 (1990)). One of the co-authors (Perlin) discusses this at greater length in Mental Disability and the Death Penalty: The Shame of the States 124-27 (2013).

[58]Perlin & Harmon, *supra* note 16.

[59]Perlin, Harmon & Kubiniec, *supra* note 16.

[60]Thus, as we discuss subsequently, five defendants were found incompetent by state courts (Steven Kenneth Staley, George Banks, Marcus Druery, Michael Dean Overstreet and Abdul Akwal), and only two in published opinions (Staley v. State, 420 S.W.3d 785 (Mo. 2013); Commonwealth v. Banks, 29 A.3d 1129 (Pa. 2011)), and four in federal courts (see Madison v. Commissioner Alabama Department of Corrections, 851 F.3d 1173 (11th Cir. 2017), vacated, 879 F.3d 1298 (11th Cir. 2018), in light of the Supreme Court's decision in Dunn v. Madison, 138 S.Ct. 9 (2017); Stanley v. Davis, 2015 WL 435077 (N.D. Cal. 2015); Aldridge v. Thaler, 2010 WL 1050335 (S.D. Tex. 2010); Billiot v. Epps, 2010 WL 1490298 (S.D. Miss. 2010). *See* Overstreet v. State, 877 N.E.2d 144 (Ind. 2007), further proceedings at Overstreet v. State, 993 N.E.2d 179 (Ind. 2013); Druery v. State, 412 S.W.3d 523 (Tex. Crim. App. 2013); Staley v. State, 420 S.W.3d 785 (Tex. Crim. App. 2013); State v. Awkal, Memorandum of Opinion and Order, Case No. CR-276801 (Jun. 15, 2012) (unreported; copy at ECF No. 1574-1, PageID 69496-508), as discussed in In re Ohio Execution Protocol Litigation, 2018 WL 3207419 (S.D. Ohio 2018)); Commonwealth V. Banks, 943 A.2d 230 (Pa. 2007), further proceedings at Commonwealth v. Banks, 29 A.3d 1129 (Pa. 2011).

was rejected as a basis for avoiding execution in sixteen state cases[61] and in twenty-eight federal cases.[62] Beyond this, the underlying question was not reached in 5480 cases in which the reported opinion cited the *Panetti* case.[63]

To gather data for this Article, an extensive search of all substantive incompetency-to-be-executed claims based on the Supreme Court's decision in *Panetti v. Quarterman*[64] in all state courts was conducted using the Westlaw database and the Nexis Uni database. After filtering the initial results of the key term "Panetti v. Quarterman" to only state case opinions, Westlaw and Nexis Uni provided a list of eighty-five case opinions that cited *Panetti.*[65] Additionally, another state case opinion citing *Panetti*[66] was found during the research of federal case opinions for the second paper of this trilogy and was added to this analysis.[67] Of the eighty-six case opinions found, twenty-eight of them included "valid"[68] *Panetti*-based claims, and one made an incompetency-to-be-executed claim but did not directly cite *Panetti* in the state case opinion.[69] Within this cohort, Panetti himself was the subject of one of the case opinions,[70] nine case opinions had repeat defendants,[71] and nineteen case opinions involved defendants (other than Panetti) who appeared in only one case.[72] In total, twenty-four defendants made valid *Panetti*-based claims in the twenty-nine case opinions.[73] Four from the remaining fifty-five case opinions were removed because, although they argued a competency-to-be-executed claim, they were not ripe[74] and

[61] *See infra* text accompanying notes 85-89.

[62] *See* Perlin, Harmon & Kubiniec, *supra* note 16, at 292.

[63] This number was obtained by adding the 2748 cases we found in the Fifth Circuit (*see* Perlin & Harmon, *supra* note 16, at 578) the 2554 cases we found in the other circuits (*see* Perlin, Harmon & Kubiniec *supra* note 16, at 282) and the fifty-seven we found in state courts (*see infra* text accompanying notes 65-89).

[64] Panetti v. Quarterman, 551 U.S. 930 (U.S. 2007).

[65] Westlaw provided a list of eighty-two case opinions that cited *Panetti*; Nexis Uni provided eighty-six. One of the four case opinions not cited by Westlaw was a duplicate of another in that cohort (Powers v. State, 2022 Miss. LEXIS 179 (Miss. 2022)). As a result, three case opinions by Nexis Uni were added to the results provided by Westlaw: Powers v. State, 2022 Miss. LEXIS 179 (Miss. 2022); Tex. v. Robertson, 2013 Tex. Dist. LEXIS 21143 (Tex. 2013); and Colo. v. Holmes, 2013 Colo. Dist. LEXIS 1625 (Colo. 2013).

[66] State v. Awkal, 2012 WL 3776355 (Ohio Ct. App. 2012) (defendant's finding of incompetency by a state court citing *Panetti* was only recorded in the federal case opinion of In re Ohio Execution Protocol Litigation, 2018 WL 3207419 (S.D. Ohio 2018)).

[67] *See* Perlin, Harmon & Kubiniec, *supra* note 16, at 275 n.9.

[68] "Valid" in this instance refers to case opinions where the court considered *Panetti* on the merits. It does not suggest that the court found the claim to be substantively valid.

[69] State v. Awkal, 2012 WL 3776355 (Ohio Ct. App. 2012) (defendant was found incompetent to be executed by the Cuyahoga County Court of Common Pleas in 2012 but did not cite *Panetti* in this state case opinion. *Awkal* could only be found to have cited his incompetency claim to *Panetti* in the federal case opinion of *In re Ohio Execution Protocol Litigation*, 2018 WL 3207419 (S.D. Ohio 2018). This is why *Awkal* was not found in the lists provided by Westlaw and Nexis Uni.).

[70] Panetti v. State, 2014 WL 6764475 (Tex. Crim. App. 2014).

[71] Overstreet v. State, 877 N.E.2d 144 (Ind. 2007), further proceedings at Overstreet v. State, 993 N.E.2d 179 (Ind. 2013); Commonwealth v. Banks, 943 A.2d 230 (Pa. 2007), further proceedings at Commonwealth v. Banks, 29 A.3d 1129 (Pa. 2011); *ex parte* Green, 2010 WL 11566377 (Tex. Crim. App. 2010), further proceedings at Green v. State, 3744 S.W.3d 434 (Tex. Crim. App. 2012); Mays v. State, 2015 WL 1332834 (Tex. Crim. App. 2015), further proceedings at Mays v. State, 476 S.W.3d 454 (Tex. Crim. App. 2015); Mays v. State, 2019 WL 2361999 (Tex. Crim. App. 2019).

[72] Ferguson v. State, 112 So.3d 1154 (Fla. 2012); Greene v. Kelley, 2018 WL 5668890 (Ark. 2018); Ward v. Hutchinson, 558 S.W.3d 856 (Ark. 2018); Gore v. State, 120 So.3d 554 (Fla. 2013); State ex rel. Clayton v. Griffith, 457 S.W.3d 735 (Mo. 2015); State ex rel. Middleton v. Russell, 435 S.W.3d 83 (Mo. 2014); State ex rel. Cole v. Griffith, 460 S.W.3d 349 (Mo. 2015); State ex rel. Barton v. Stange, 597 S.W.3d 661 (Mo. 2020); State v. Brooks, 2011 WL 5517300 (Ohio Ct. App. 2011); Bedford v. State, 957 N.E.2d 336 (Ohio Ct. App. 2011); Cole v. Trammell, 358 P.3d 932 (Ok. Crim. App. 2015); Allen v. State, 265 P.3 754 (Ok. Crim. App. 2011); State v. Haugen, 266 P.3d 68 (Or. 2011); State v. Irick, 320 S.W.3d 284 (Tenn. 2010); Battaglia v. State, 537 S.W.3d 57 (Tex. Crim. App. 2017); Druery v. State, 412 S.W.3d 523 (Tex. Crim. App. 2013); Basso v. State, 2014 WL 467514 (Tex. Crim. App. 2014); Staley v. State, 420 S.W.3d 785 (Tex. Crim. App. 2013); State v. Awkal, Memorandum of Opinion and Order, Case No. CR-276801 (Jun. 15, 2012) (unreported; copy at ECF No. 1574-1, PageID 69496-508).

[73] Two other cases found the Arkansas statute governing competency-to-be-executed determinations to be unconstitutional under *Panetti.* See *infra* text accompanying notes 143-47, discussing Ward v. Hutchinson, 558 S.W.3d 856 (Ark. 2018), and Greene v. Kelly, 2018 WL 5668890 (Ark. 2018).

[74] On the meaning of "ripeness" for constitutional purposes, *see supra* note 48.

thus there was no discussion of the substantive aspects of *Panetti*.[75] Seven case opinions were excluded due to involving claims related to *Atkins v. Virginia*[76] and lacked any substantive discussion of *Panetti*.[77] Ten case opinions were removed because they did not make incompetent-to-be executed claims and cited *Panetti* for procedural reasons,[78] such as for discussions on the state's ability to execute an individual,[79] the extent of a defendant's right to expert testimony,[80] successor petitions,[81] or when the narrower holding should control.[82] Of the remaining thirty-six case opinions, twenty-five were removed because they were not death penalty cases, and thus substantive *Panetti* claims could not be made.[83]

The eleven remaining case opinions for eleven separate defendants do not have a standard incompetency-to-be-executed *Panetti*-based claim but rely on *Panetti* to argue for a categorical exemption[84] from the death penalty for defendants whose serious mental illnesses make their execution unconstitutional on the grounds that such punishment is excessive and cruel and unusual.[85] Included in this analysis are seven of these eleven case opinions where the defendant relied on *Panetti* to argue for a categorical exemption for offenders who are either seriously mentally ill or were seriously mentally ill at the time of their scheduled execution. The defendants and concurring/dissenting judges support this claim either with reasons parallel to those articulated in *Atkins* or by arguing that a person who is "seriously mentally ill" has, by definition, an impaired comprehension rendering them ineligible for the

[75]Nooner v. State, 438 S.W.3d 233 (Ark. 2014); Taylor v. State, 262 S.W.3d 231 (Mo. 2008); State v. Neyland, 2013 WL 3776602 (Ohio Ct. App. 2013); Powers v. State, 2022 Miss. LEXIS 170 (Miss. 2022).

[76]Atkins v. Virginia, 536 U.S 304 (U.S. 2002) (violation of Eighth Amendment to subject persons with intellectual disabilities to the death penalty). Two of the co-authors (MLP & TRH) and a third co-author have previously examined interpretations of *Atkins* in the Fifth Circuit. *See* Perlin, Harmon & Wetzel, *supra* note 41.

[77]Williams v. Cahill ex. Rel. County of Pima, 303 P.3d 532 (Ariz. Ct. App. 2013); Lard v. State, 595 S.W.3d 355 (Ark. 2020) (this case also cited Moore v. Texas, 139 S.Ct. 666 (U.S. 2019), a case that expanded and clarified *Atkins*); King v. State, 23 So.3d 1067 (Miss. 2009); Murphy v. State, 281 P.3d 1283 (Ok. Ct. App. 2012); Commonwealth v. Sanchez, 36 A.3d 24 (Pa. 2011); Texas v. Robertson, 2013 Tex. Dist. LEXIS 21143 (Tex. 2013); Lizcano v. State, 2010 WL 1817772 (Tex. Crim. App. 2010).

[78]Foley v. Beshear, 462 S.W.3d 389 (Ky. 2015); Colorado v. Holmes, 2013 Colo. Dist. LEXIS 1625 (Colo. 2013); State v. Turnidge, 374 P.3d 853 (Or. 2016); Hugueley v. State, 2011 WL 2361824 (Tenn. Crim. App. 2011); Turner v. State, 422 S.W.3d 676 (Tex. Crim. App. 2014); Secret v. Commonwealth, 619 S.E.2d 234 (Va. 2018); State v. Motts, 707 S.E.2d 804 (S.C. 2011); Reid v. State, 2011 WL 3444171 (Tenn. Crim. App. 2011) and Reid ex rel. Martiniano v. State, 396 S.W.3d 478 (Tenn. 2013); In re Friend, 489 P.3d 309 (Cal. 2021). Notably, *Friend* relied on *Panetti* for successive petitions in this case opinion, but one of his unexhausted claims in his state habeas corpus petition argued it is unconstitutional to execute someone with organic brain damage; on the relationship between traumatic brain injury and *Panetti*-based claims, see *infra* text accompanying notes 295-98.

[79]Colorado v. Holmes, 2013 Colo. Dist. LEXIS 1625 (Colo. 2013); State v. Turnidge, 374 P.3d 853 (Or. 2016); Reid v. State, 2011 WL 3444171 (Tenn. Crim. App. 2011), further proceedings at Reid *ex rel.* Martiniano v. State, 396 S.W.3d 478 (Tenn. 2013); State v. Motts, 707 S.E.2d 804 (S.C. 2011).

[80]Hugueley v. State, 2011 WL 2361824 (Tenn. Crim. App. 2011); Turner v. State, 422 S.W.3d 676 (Tex. Crim. App. 2014).

[81]*In re* Friend, 489 P.3d 309 (Cal. 2021).

[82]Foley v. Beshear, 462 S.W.3d 389 (Ky. 2015); Secret v. Commonwealth, 619 S.E.2d 234 (Va. 2018).

[83]People v. Martin, 272 Cal.Rptr.3d 363 (Cal. Ct. App. 2020); People v. Strike, 258 Cal.Rptr.3d 482 (Cal. Ct. App. 2020); People v. Barba, 2012 WL 172449 (Cal. Ct. App. 2012), further proceedings at People v. Barba, 155 Cal.Rptr.3d 707 (Cal. Ct. App. 2013); People v. Cormier, 2011 WL 3525408 (Cal. Ct. App. 2011); People v. Rios, 101 Cal.Rptr.3d 713 (Cal. Ct. App. 2009); People v. Zayas, 2010 WL 3530426 (Cal. Ct. App. 2010); People v. Hernandez, 2010 WL 3506888 (Cal. Ct. App. 2010); People v. Miller, 114 Cal.Rptr.3d 629 (Cal. Ct. App. 2010); People v. Colon, 2010 WL 612245 (Cal. Ct. App. 2010); Ford v. U.S., 931 A.2d 1045 (D.C. Ct. App. 2007); Book v. Doublestar Dongfend Tyre Co., Ltd., 860 N.W.2d 576 (Iowa 2015); University of Michigan Regents v. Titans Ins. Co., 794 N.W.2d 570 (Mich. 2010); Willbanks v. Department of Corrections, 522 S.W.3d 238 (Mo. 2017); State v. Gaw, 285 S.W.3d 318 (Mo. 2009); State v. Hughes, 272 S.W.3d 246 (Mo. 2008); State v. Ruiz, 179 A.3d 333 (N.H. 2018); Willemsen v. Invacare Corp., 282 P.3d 867 (Or. 2012); Adams v. State, 2016 WL 110627 (Tex. Ct. App. 2016); Crenshaw v. State, 2011 WL 3211258 (Tex. Ct. App. 2011), further proceedings at Crenshaw v. State, 424 S.W.3d 753 (Tex. Ct. App. 2014); Crosby v. Commonwealth, 2009 WL 3819217 (Va. Ct. App. 2009); Ferguson v. Commonwealth, 663 S.E.2d 505 (Va. Ct. App. 2008); State v. AU Optronics Corp., 328 P.3d 919 (Wash. Ct. App. 2008); State v. Venegas, 146 Wash.App.1053 (Wash. Ct. App. 2008).

[84]See *infra* Part III B 2 c. (6) for further discussion on this important issue.

[85]The Eighth Amendment of the United States Constitution forbids the imposition of cruel and unusual sentences. *See generally* Michael J.Z. Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. Cin. L. Rev. 819 (2006).

death penalty under *Panetti*.[86] Two of the remaining four case opinions were removed because they argued for a categorical exemption different from the one that is the subject of this analysis, (e.g., a defendant who suffers from chronic PTSD but not a serious mental illness[87] or a defendant whose age and mental illness -- in combination -- make the death penalty excessive in his case.[88] The last two case opinions were excluded because, although they argued for a categorical exemption for persons who are seriously mentally ill, their reliance on *Panetti* was deemed to be premature, and thus their argument was rejected on those grounds.[89]

After all exclusions, this Article analyzes twenty-nine case opinions for twenty-four defendants who made valid incompetency-to-be-executed claims and seven case opinions for seven defendants who do not make incompetent-to-be-executed claims under *Panetti* but argue for a categorical exclusion for defendants who are seriously mentally ill.

A. Findings

Of the cohort of "valid" *Panetti* claims (meaning the court considered the substantive issue decided by the Supreme Court in *Panetti* in the case before it in a published opinion)—an *n* of 24[90](one of which was Panetti himself)[91]—there were *five* cases that could be considered "successes," meaning that the defendant was found incompetent to be executed under *Panetti*.[92] In two of these cases,[93] the defendant was successful in the state court systems in a published opinion.[94] In two, the reported court opinion ordered further proceedings, and in both cases, in unreported opinions the defendant was found incompetent to be executed.[95] In one, the defendant was successful at the trial court level in an

[86]State v. Kahler, 410 P.3d 105 (Kan. 2018); State v. Kleypas, 382 P.3d 373 (Kan. 2016); State v. Jenkins, 931 N.W.2d 851 (Neb. 2019); State v. Lang, 954 N.E.2d 596 (Ohio 2011); Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2008); People v. Mendoza, 365 P.3d 297 (Cal. 2016); State ex rel. Strong v. Griffith, 462 S.W.3d 732 (Mo. 2015).

[87]*See* Breton v. Warden, No. TSRCV034261S, 2011 WL 4424356, at *33 (Super. Ct. Conn. Aug. 15, 2011).

[88]*See* State v. Myers, 114 N.E.3d 1138, 1178 (Ohio 2018).

[89]People v. Ghobrial, 420 P.3d 179 (Cal. 2018); Roberts v. State, 592 S.W.3d 675 (Ark. 2020).

[90]We refer here only to cases with published opinions. It is possible there are other cases in which compliance with *Panetti* was urged (in which defendants may have been successful or unsuccessful) in which there were no published opinions.

[91]To this date, the Panetti argument has never been successful in a state court case. In 2017, the 5th Circuit remanded to the state court for a hearing on this question. *See* Panetti v. Davis, 863 F.3d 366 (5th Cir. 2017)), and the only reported *state* case after that. *See Ex parte Panetti,* 2021 WL 2560138 (Tex. Ct. Crim. App. 2021)) (denying a habeas writ based on different arguments).

[92]Later, we discuss other cases in which there were concurrences or dissents urging a finding of incompetency under *Panetti* (or calling for further proceedings on that question) in addition to the Michael Overstreet case (discussed *infra* notes 95 & 116-22,). *See, e.g.*, *State* v. Haugen, 266 P.3d 68 (Or. 2011) (discussed *infra* notes 130-36). We also discuss other cases that found state statutes governing incompetency determinations to be unconstitutional. *See, e.g.*, Ward v. Hutchinson, 558 S.W.3d 856 (Ark. 2018) (discussed *infra* text accompanying notes 141-45).

[93]Commonwealth v. Banks, 29 A.3d 1129 (Pa. 2011); Staley v. State, 420 S.W.3d 785 (Tex. Ct. Crim. App. 2013).

[94]Banks remains in prison, as does Dreury. *See 40 Years ago, George Banks became the first spree killer in Pa. to use an AR-15 when he killed his family in Luzerne County*, McCall (Sept. 25, 2022), https://www.mcall.com/news/pennsylvania/mc-nws-george-banks-mass-killing-anniversary-20220925-5vywssomo5dgtbugkgdy6ajigy-story.html [https://perma.cc/6F8K-L6N7]; *Marcus Druery Texas Death Row*, MyCrimeLibrary (Apr. 14, 2021), https://mycrimelibrary.com/marcus-druery-texas-death-row/ [https://perma.cc/D5US-UUNL]. Presumably, Staley does, as well, though there has been neither reported litigation nor discoverable press references since October 2015. *See Texas Court of Criminal Appeals Holds Forcible Medication for Death Row Prisoner Unauthorized*, Prison Legal News (Oct. 19, 2015), https://www.prisonlegalnews.org/news/2015/oct/19/texas-court-criminal-appeals-holds-forcible-medication-death-row-prisoner-unauthorized/ [https://perma.cc/ZG9Q-ZYED].

[95]*See* Druery v. State, 412 S.W.3d 523 (Tex. Ct. Crim. App. 2013). There was another hearing in Druery's case three years later, at which he was found to be incompetent (but which yielded no written materials available for view). *See Texas Court Finds Marcus Druery mentally Incompetent, Spares Him From Execution*, Death Penalty Information (Apr. 7, 2016), https://deathpenaltyinfo.org/news/texas-court-finds-marcus-druery-mentally-incompetent-spares-him-from-execution [https://perma.cc/E65P-92SK]. Druery was still on death row as of April 2021. *See Marcus Druery Texas Death Row*, MyCrimeLibrary (Apr. 14, 2021), https://mycrimelibrary.com/marcus-druery-texas-death-row/ [https://perma.cc/D5US-UUNL]. Indiana Supreme Court Justice Rucker wrote that he would find the defendant's execution to be a violation of the

unpublished opinion, but the fact of that success was subsequently noted in a *federal* case dealing with that defendant.[96] As a result, we were only able to analyze and code for the following number of cases where published state court opinions were available.

B. Examining individual cases

This section examines the two cases that were successes, two cases that were threshold successes, and then considers cases in which there were strong dissents and/or concurring opinions urging *Panetti*-based relief and cases holding state laws governing *Panetti* determinations unconstitutional. It then discusses *Panetti* failures.

1. Successes

In two cases, courts found that the planned execution violated the *Panetti* standards. In *Staley v. State,*[97] after the defendant had initially been found incompetent to be executed, he was then involuntarily medicated;[98] as a result of the medication, he was subsequently classified as competent to be executed.[99] After this, however, the court found that such "involuntary medication of [Staley] was not permitted under the competency-to-be executed statute," and that the "evidence conclusively shows that [Staley] is incompetent to be executed."[100] It concluded**:** "We hold that the evidence conclusively shows that appellant's competency to be executed was achieved solely through the involuntary medication which the trial court had no authority to order under the [Texas] competency-to-be-executed statute."[101]

In *Commonwealth v. Banks,*[102] the state's witnesses had agreed with the defense witnesses as to the defendant's psychosis.[103] Banks suffered from fixed delusions that he was "being poisoned in prison as part of a Department of Corrections conspiracy, that he was currently incarcerated as part of a government conspiracy and that his sentences of death had been vacated by God, Jesus, the Governor, George Bush or some combination of the same."[104] In finding that the defendant was incompetent to be executed under the rule established in *Panetti,*[105] the court specifically pointed out the similarities between the *Banks* case and the *Panetti* case itself: "Banks does not have a rational understanding of the

Indiana *state* constitution's "cruel and unusual punishment" clause on the theory that he saw "no principled distinction between the diminished capacities exhibited by Overstreet and the diminished capacities that exempt the mentally retarded from execution. Overstreet v. State, 877 N.E.2d 144, 175 (Ind. 2007). No other justice joined in this opinion, so the lower court decision denying post-conviction relief was affirmed. *Id.* In a subsequent proceeding, the defendant was given permission to file a successive petition for relief, as the court found that a forensic report submitted to it was "sufficient to permit [defendant to assert the claim that he is not currently competent to be executed." Overstreet v. State, 993 N.E.2d 179, 180 (Ind. 2013). This decision was modified in a subsequent unreported decision, granting his petition and is noted in a subsequent Indiana case, *In re Cooper*, 78 N.E.3d 1098, 1099 (Ind. 2017) ("*Overstreet*'s successive PCR petition was litigated in St. Joseph County in 2014, and in November 2014 Judge Miller granted the petition").

[96]*See* In Re: Ohio Execution Protocol Litigation, 2018 WL 3207419 (S.D. Ohio 2018) (Ohio Execution). That case is subtitled, "This Order relates to Plaintiff Abdul Awkal." Awkal was found incompetent to be executed in *State v. Awkal*, Memorandum of Opinion and Order, Case No. CR-276801 (Jun. 15, 2012) (unreported; copy at ECF No. 1574-1, PageID 69496-508). See *Ohio Execution,* 2018 WL at *1. No copy of the state court opinion could be found.

[97]Staley v. State, 420 S.W.3d 785 (Tex. Ct. Crim. App. 2013).

[98]On what is called "synthetic competency" in the *Panetti* context, *see* Perlin & Harmon, *supra* note 16, at 592 & 602-03; Perlin, Harmon & Kibiniec, *supra* note 16, at 284-85.

[99]*Staley*, 420 S.W.3d at 786-7.

[100]*Id.* at 787.

[101]*Id.* at 801. The court was split. *See id.* at 801 (Keller, J., dissenting for himself and two others), and 802 (Meyers, J., dissenting for himself and two others).

[102]Commonwealth v Banks, 29 A.3d 1129 (Pa. 2011).

[103]*Id.* at 1136.

[104]*Id.*

[105]The state's experts agreed that the defendant was not malingering and did suffer from fixed delusions. *See id.* at 1136. This conclusion is virtually unheard of in this area of litigation.

death penalty or the reasons for it, as required by *Panetti.*"[106] It concluded in this manner: "**WHAT IS INESCAPABLE**, is that experts generally agreed that Banks had a significant number of fixed delusions relating to his crime and punishment and five of the six experts agreed that his delusions extended to his penalty."[107]

*a. Threshold successes[108] and other cases with "Pro-*Panetti*" opinions* In two cases, defendants who were unsuccessful at their initial *Panetti* hearings were ultimately found incompetent to be executed. In one,[109] the defendant was found incompetent at a subsequent *Panetti* hearing three years after the published decision,[110] but there are no other details available. The other,[111] a subsequent unreported decision, granted the defendant's petition as noted in a subsequent case.[112]

There were, in addition to the cases referenced above, cases in which: concurring/dissenting judges conclude—in cases in which *Panetti* was unsuccessfully argued—that there should be categorical exemptions from execution for defendants with serious mental illness;[113] cases in which there were concurring or dissenting opinions concluding that, under *Panetti,* the defendant was incompetent to be executed, and cases assessing the constitutionality of state laws governing potential execution incompetence.

(1) Arguing for categorical exemption[114]. The most thorough of these opinions was Part VIB of Justice Rucker's opinion in *Overstreet v. State.*[115] There, in an otherwise-unanimous opinion in which the Court rejected the defendant's *Strickland v. Washington* adequacy-of-counsel claims[116] (at the pretrial, trial, penalty and appellate levels)[117] as well as multiple evidentiary claims,[118] Justice Rucker relied on the *state* constitution's "cruel and unusual" punishment clause, noting that the "underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill."[119] He cited U.S. Supreme Court decisions finding that a state is free as a matter of its own constitutional law to confer rights above the floor of constitutional safeguards found in the United States Constitution.[120] He concluded:

[106] *Id.* at 1146.

[107] *Banks*, 29 A.3d at 1146. The bold-face, all-caps font is in the opinion, a rare device in any published opinion.

[108] In this cohort, the court found in both cases that the defendants met the substantial threshold standard of incompetency to necessitate a hearing under *Panetti. Id.*

[109] Druery v. State, 412 S.W.3d 523 (Tex. Ct. Crim. App. 2013).

[110] *See Marcus Druery Texas Death Row*, MyCrimeLibrary (Apr. 14, 2021), https://mycrimelibrary.com/marcus-druery-texas-death-row/ [https://perma.cc/D5US-UUNL].

[111] Overstreet v. State, 877 N.E.2d 144, 175 (Ind. 2007).

[112] *See* In re Cooper, 78 N.E.3d 1098, 1099 (Ind. 2017).

[113] On other cases simply rejecting the categorical exemption argument, see *infra* Part III B 2 c (6).

[114] The categorical exemption argument has been specifically rejected in multiple *Panetti* cases. *See, e.g.*, People v. Mendoza, 365 P.3d 297 (Cal. 2016); State v. Jenkins, 931 N.W.2d 851 (Neb. 2019); People v. Ghobrial, 420 P.3d 179 (Cal. 2018).

[115] Overstreet, 877 N.E.2d at 175. *See also supra* note 97, explaining the unique circumstances of that part of Justice Rucker's opinion that supports a finding of incompetency.

[116] 466 U.S. 668 (1984). *See generally* Perlin, Harmon & Chatt, *supra* note 41.

[117] Overstreet, 877 N.E.2d at 152-67.

[118] *Id.* at 168. Here, the defendant had argued that certain evidence was erroneously admitted, other was erroneously excluded, that there were errors in a rial transcript, and a subpoena was erroneously quashed.

[119] *Id.* at 175. He relied in part on the fact that Indiana had, eight years before the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 305 (2002), barred such executions, excepting the executions of persons with what was then referred to as "mental retardation." *Id., citing* I.C. § 35–36–2–5(e) (1997 Supp.). Since its decision clarifying and supplementing *Atkins* in Hall v. Florida, 572 U.S. 701, 704-05 (2014), the Court has used the phrase "intellectual disability" rather than "mental retardation" in all subsequent future cases to conform with changes in the U.S. Code and in the then-most recent version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5).

[120] Overstreet, 877 N.E.2d at 174, *citing* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) and Cooper v. California, 386 U.S. 58, 62 (1967). In the context of mental disability law, on the question of reliance on state constitutional provisions in cases in which identical federal provisions have been rejected as grounds for relief, *see* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier*? 20 Loyola L.A. L. Rev. 1249 (1987).

> Because I see no principled distinction between the diminished capacities exhibited by Overstreet and the diminished capacities that exempt the mentally retarded from execution, I would declare that executing Overstreet constitutes purposeless and needless imposition of pain and suffering thereby violating the Cruel and Unusual Punishment provision of the Indiana Constitution.[121]

In at least three other cases, concurring and dissenting judges articulated a strong "categorical exemption" rationale in support of reversing convictions and sentences.[122] In *State v. Lang*,[123] a case in which the death penalty was upheld, a three-justice concurrence discussed *Atkins* and *Roper v. Simmons,*[124] and then made this argument:

> Although it is unconstitutional to execute someone who is incompetent at the time of his or her execution, see *Ford v. Wainwright* … and the United States Supreme Court has not yet decided whether it is unconstitutional to execute someone who suffered from a serious mental illness at the time of the crime. If executing persons with mental retardation/developmental disabilities or executing juveniles offends "evolving standards of decency," *Roper,* 543 U.S. at 563, …, then I simply cannot comprehend why these same standards of decency have not yet evolved to also prohibit execution of persons with severe mental illness at the time of their crimes.[125]

Similarly, dissenting in *State v. Kahler*,[126] Justice Johnson concluded on this point:

> *Atkins* spoke about mentally retarded offenders being less morally culpable because of their "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," as well as not being amenable to deterrence. 536 U.S. at 320… I fail to grasp how a severely mentally ill person possessing those same characteristics is not in the same less-morally-culpable category as the mentally retarded offender. If a person is incapable of understanding the nature and quality of their murderous act and/or did not know that the act was wrong, does it matter whether the cause of the cognitive deficiency is labeled mental retardation or chronic mental illness? The point is that, when executing a severely mentally ill person will not "measurably advance the deterrent or the retributive purpose of the death penalty," it becomes "nothing more than the purposeless and needless imposition of pain and suffering." 536 U.S. at 319, 321…[127]

And, finally in *Commonwealth v. Bauhammers,*[128] Justice Todd concurred, specifically endorsing the *Lang* concurrence:

> [A]s with mentally retarded defendants, it is not clear that either purpose of capital punishment—retribution or deterrence—is served by imposing that punishment on defendants who are severely mentally ill at the time of their crimes…An individual with a serious mental illness may be just as

[121] *Id.*at 175. This opinion paralleled Justice Rucker's dissent some five years earlier in *Corcoran v. State,* 774 N.E.2d 495, 503 (Ind.2002) ("A sentence of death for a person suffering from severe mental illness violates the Cruel and Unusual Punishment provision of the Indiana Constitution").

[122] In a fourth case, State *ex rel.* Strong v. Griffith, 462 S.W.3d 732 (Mo. 2015), Judge Teitelman dissented: "I would hold that the reasoning in *Ford v. Wainwright,* „ *Atkins v. Virginia*, …, and *Roper v.* Simmons … applies to individuals who, like Mr. Strong, were severely mentally ill at the time the offense was committed. Therefore, I would grant habeas relief and appoint a special master to more fully address Mr. Strong's claims."

[123] State v. Lang, 954 N.E.2d 596 (Ohio 2011).

[124] Roper v. Simmons, 543 U.S. 551, 578 (2005) (forbidding imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

[125] *Lang,* 954 N.E.2d at 649 (Lundberg Stratton, J., concurring).

[126] 410 P.3d 105 (Kan. 2018), *aff'd on other gds.,* 140 S.Ct. 1021 (2020).

[127] *Id.* at 138.

[128] 960 A.2d 59 (Pa. 2008).

> seriously impaired in his ability to "understand and process information" as an individual with a diminished IQ or an individual who has not yet reached the age of legal majority.[129]

(2) Other cases with *Panetti*-focused dissents. The most complex case in this array is that of *State v. Haugen*,[130] in which the defendant at one point sought to discharge his attorneys and waive future appeals.[131] The majority here rejected the argument that *Panetti* was violated by the trial court's determination that due process was not violated by allowing the execution to proceed,[132] in the face of two dissents. In one, per Justice Walters,[133] the dissenters relied on *Panetti* in focusing on the trial judge's failure to consider a report by a neuropsychologist who had concluded that Haugen was incompetent to be put to death.[134] In the other, per Justice De Muniz,[135] the dissenters concluded that "the trial court, however, was not authorized to simply ignore evidence relevant to Haugen's competence to be executed, whether that was Haugen's wish or not."[136] There were other cases in which dissents relied, at least in part, on *Panetti*, to support the position that the defendant was entitled to a new hearing at which he can demonstrate his incompetency to be executed.[137] In one of these cases,[138] the dissent took sharp issue with the majority's holding on what process was due in a *Panetti* hearing:

> Rather, the majority concludes it simply can take the evidence Mr. Cole presents to this Court to support his threshold showing and use that evidence to make credibility determinations as to whom to believe and whose reports are entitled to more weight in the first instance and then itself decide the ultimate factual issue of whether Mr. Cole is incompetent.[139]

(3) Cases declaring state statutes unconstitutional under *Panetti*[140]. In *Ward v. Hutchinson,*[141] the Arkansas Supreme Court – relying in significant part on *Panetti* – found the state statute governing determinations of incompetency to be executed to be unconstitutional as not "comport[ing] with the fundamental principles of due process."[142] That statute – which had authorized the state corrections director to initiate a determination of competency when he was satisfied that "there were reasonable

[129] *Id.* at 106, 107 (Todd, J., concurring). In his opinion, Justice Todd cited Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness,* 33 N.M. L. Rev. 293 (2003) (arguing the effects of mental retardation and serious mental illness are so similar as to eliminate a rational basis for distinguishing between the two categories of defendants), an article relied on by two of the authors in one of their prior *Panetti* articles. *See* Perlin, Harmon & Kubiniec *supra* note 16, at 303.

[130] 266 P.3d 68 (Or. 2011). *Haugen* is discussed critically in Tung Yin, *The Death Penalty Spectacle,* 3 U. Denver Crim. L. Rev. 165, 166 (2013) ("[*Haugen*] goes beyond the theoretical into an actual absurdity") (discussing presence of multiple teams of lawyers and the state's role).

[131] *Haugen,* 266 P.3d at 71. On the question of execution "volunteers," see e.g., John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency,* 103 Mich. L. Rev. 939 (2005).

[132] *Haugen*, 266 P.3d at 79.

[133] This dissent was joined in by Justices De Muniz and Durham.

[134] *Id.* at 82.

[135] This dissent was joined in by Justices Walters and Durham.

[136] *Id.* at 86

[137] *See, e.g.*, State *ex rel* Clayton v. Griffith, 457 S.W.3d 735, 754 (Mo. 2015) (Stith, J., dissenting) (for herself; Justices Draper and Teitelman concurring in her opinion) (defendant had a traumatic brain injury that resulted in the loss of 20 percent of his frontal lobe, *id.*).

[138] In the other, the dissenters concluded, "I believe Middleton's right to due process is being grossly violated by this Court's order summarily denying him a right to a hearing pursuant to … *Panetti,*" State ex rel. Middleton v. Russell, 435 S.W.3d 83, 87 (Mo. 2014), concluding that the majority "denied Middleton even a bare modicum of due process." *Id,* (Draper, J., dissenting for himself, Justice Stith and Justice Teitelman). Here, the defendant maintained his innocence, although there was a dispute as to whether this was part of a delusional thought system, *see id.* at 85.

[139] State ex rel. Cole v. Griffith, 460 S.W.3d 349, 362 (Mo. 2015) (Stith J., dissenting).

[140] We follow this section with a brief discussion of recent state-level statutory developments and initiatives.

[141] 558 S.W.3d 856 (Ark. 2018).

[142] *Id.* at 865.

grounds for believing that death-row inmate was not competent to understand nature and reasons for punishment of death"[143] was found to be "devoid of any procedure by which death-row inmate had opportunity to make initial substantial threshold showing of insanity to trigger hearing process,"[144] and further failed to provide for an appropriate evidentiary hearing.[145]

(a) Statutory developments elsewhere. The developments in *Panetti*-based litigation in state courts must be considered in the context of the state statutes that govern *Panetti* proceedings in those venues. As noted above, the Arkansas Supreme Court has found a state statute governing such proceedings to be unconstitutional.[146] What, though, about other jurisdictions? Research reveals that at least two other jurisdictions (Texas[147] and Oklahoma[148]) have changed their statutes since *Panetti* was decided, and that two states (Kentucky[149] and Ohio[150]) prohibit the death penalty in cases involving defendants with serious mental illnesses.[151] In addition, legislation has also been introduced in at least seven states arguing for a categorical exemption from the death penalty for offenders who are seriously mentally ill.[152]

[143]Ark. Code Ann. § 16-90-506(d)(1).

[144]*Ward,* 558 S.W.3d at 865, citing *Ford*, 477 U.S. at 426.

[145]*Id.,* citing *Ford* and *Panetti.* On the same day, the Court also decided Greene v. Kelly, 2018 WL 5668890 (Ark. 2018), in which it relied on its opinion in *Ward,* holding that the statute in question was facially unconstitutional under both the Arkansas and US constitutions, *id.* at *7. The Arkansas legislature subsequently rewrote the statute in question so as to comport with the *Panetti* standard. See Ark. Code Ann. § 16-90-506(d) and (d)(1)(A)(i)(a) (2019):

When an individual under sentence of death, whose execution date has been set by the Governor, believes that he or she is not competent to be executed, the individual or his or her attorney may inform the Director of the Division of Correction in writing and shall provide any supporting evidence he or she wishes to be considered. (b) The Director of the Division of Correction shall consider any evidence offered by the individual or his or her attorney in making a determination of competency under subdivision (d)(1)(A)(ii) of this section. (ii) When the Director of the Division of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to rationally understand the nature and reasons for that punishment, the Director of the Division of Correction shall notify the Deputy Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services. (iii) The Director of the Division of Correction shall also notify the Governor of this action. (iv) The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification. (v) The attorney of record of the individual shall also be notified of this action, and reasonable allowance will be made for an independent mental health evaluation to be made. (vi) A copy of the report of the evaluation by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall be furnished to the Mental Health Services Section of the Division of Health Treatment Services of the Division of Correction, along with any recommendations for treatment of the Introduction individual. (vii) All responsibility for implementation of treatment remains with the Mental Health Services Section of the Division of Health Treatment Services of the Division of Correction.

[146]See *supra* text accompanying notes 146-47, discussing Ward v. Hutchinson, 558 S.W.3d 856 (Ark. 2018), and Greene v. Kelly, 2018 WL 5668890 (Ark. 2018) (finding, as it existed at that time, to be unconstitutional).

[147]*See* Tex. Crim. Pro. Art. 46.05. It does not appear that this statutory change had any impact on the judges in the *Battaglia* case.

[148]*See* Okla Stat. 22 § 1005.1 (repealing a law that had made the prison warden—in effect, the executioner—"the gatekeeper who decides whether to seek a competency trial." *See* Cole v. Farris, 54 F.4th 1174, 1182 (10th Cir. 2022).

[149]*See* Ky. Stat. § 532.140.

[150]Ohio Stat. § 2929.025 (A) and (D)(1).

[151]Ohio's law is limited to those defendants with such mental illnesses that "significantly impaired their judgment, capacity, or ability to appreciate the nature or their conduct." *Id.,* (A)(1)(b)(i) & (ii). Connecticut had enacted a similar law, Conn. Gen. Stat. § 53a-46a(g), but that statute was recognized as invalid after Connecticut abolished its death penalty. *See* State v. Coltherst, 266 A.3d 838 (Conn. 2021).

[152]Indiana, South Dakota, Texas, Tennessee, Florida, Indiana, North Carolina and Virginia. *See At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness*, Death Penalty Information Ctr. (Feb. 3, 2017), https://deathpenaltyinfo.org/news/at-least-seven-states-introduce-legislation-banning-death-penalty-for-people-with-severe-mental-illness [https://perma.cc/T6MZ-XXAG]. For discussion of the progress of such bills in Indiana, Texas, Tennessee, South Dakota and Florida, *see* Rebecca Beitsch, *States Consider Barring Death Penalty for Severely Mentally Ill*, PEW (Apr. 17, 2017), Pew Trusts, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/17/states-consider-barring-death-penalty-for-severely-mentally-ill [https://perma.cc/9Q4W-XEJR]. Most recently, such bills have been

On the other hand, two states fail to expressly authorize or require the decision-makers to allow the offender to be heard and share their evidence or argument.[153] Lastly, six states do not require decision-makers to consider testimony from independent experts.[154]

C. Rejections of defendants' claims

(1) Introduction

The vast majority of *Panetti* cases in state courts rejected defendants' claims. These cases can be categorized into these groupings: cases where the court believed the defense expert had conceded that the *Panetti* standard was not met, cases where the court found the defense expert(s) to be less credible than the state expert, cases where the court believed the defendant was malingering,[155] cases where the court found the defendant to be severely mentally ill, but still had a rational understanding of linking the crime and impending execution, and cases in which the defendant sought a categorical exemption from the death penalty because of serious mental illness.[156]

(2) Concessions by defense experts

In seven of the sixteen cases in this grouping, the court determined that there were such concessions.[157] In *Mays v. State,*[158] defense expert Dr. George Woods[159] had concluded that the defendant was

---

approved by the Kentucky House of Representatives and the South Dakota Senate. *See Kentucky and South Dakota Advance Bills to Bar Death Penalty for People with Severe Mental Illness,* Death Penalty Information Ctr. (Feb. 23, 2022), https://deathpenaltyinfo.org/news/kentucky-and-south-dakota-advance-bills-to-bar-death-penalty-for-people-with-severe-mental-illness [https://perma.cc/FG3N-ERBD].

[153]Tobolowsky notes that "neither the judicial 'inquiries' in Missouri…nor the jury proceedings in…Oklahoma expressly include presentation of evidence or argument by the offender." Tobolowsky, *supra* note 15, at 413-14. Since Missouri's statute has remained unchanged and the changes to Oklahoma's statute still do not expressly state a right for the offender to be heard, her finding that Missouri and Oklahoma do not meet the constitutional requirement of *Ford* and *Panetti* still appears to be accurate.

[154]There is a wide range of statutes (and non-statutes). Missouri allows any of the individuals notified of an offender believed to be incompetent-to-be executed to appoint a physician to conduct an examination of the offender prior to the circuit courts inquiry. *See* Vernon's Ann. Mo. Stat. § 552.060. Those parties entitled to notification listed in the statute are the Governor, the Director of the Department of Mental Health, the state attorney, and the attorney general. (Note that the defense is not once expressly stated they are entitled to appointing their own mental health expert to conduct an examination.); Fla. Stat. § 922.07 names the Governor as the decision-maker, who relies on the testimony of three psychiatrists that he appoints. Fla. R. Crim. P. 3.811, 3.812 permits the offender to file another incompetent-to-be-executed claim to the circuit court in the even the Governor makes a finding of competency, and no experts are appointed in these proceedings. In Arkansas, the Division of Aging, Adult, and Behavior Health Services of the Department of Human Services is required to inquire into the mental health condition of the offender. An independent mental health evaluation is "reasonable allow[ed]," but not required. Ark. Code Ann. § 16-90-506 (2006). At common law, Tennessee requires the court to appoint an expert for both the defense and the state. *See* Van Tran v. State, 6 S.W.3d 257, 269 (Tenn. 1999), *abrogated on other grounds,* State v. Irick, 320 S.W.3d 284 (Tenn. 2010). Indiana, Pennsylvania, and Oklahoma do not clearly state how experts should be appointed.

[155]In our article on *Panetti* cases in the Fifth Circuit, we found that allegations of malingering played a far greater role. *See* Perlin & Harmon, *supra* note 16, at 585-90.

[156]See *infra* Part III(B)(2)(c)(6).

[157]State ex rel. Clayton v. Griffith, 457 S.W.3d 735 (Mo. 2015); State ex rel. Cole v. Griffith, 460 S.W.3d 349 (Mo. 2015);State ex rel. Barton v. Stange, 597 S.W.3d 661 (Mo. 2020); Cole v. Trammell, 358 P.3d 932 (Ok. Crim. App. 2015);Ex parte Green, 2010 WL 11566377 (Tex. Crim. App. 2010), *further proceedings,* Green v. State, 3744 S.W.3d 434 (Tex. Crim. App. 2012); Mays v. State, 2015 WL 1332834 (Tex. Crim. App. 2015); Mays v. State, 476 S.W.3d 454 (Tex. Crim. App. 2015), *further proceedings,* Mays v. State, 2019 WL 2361999 (Tex. Crim. App. 2019); Battaglia v. State, 537 S.W.3d 57 (Tex. Crim. App. 2017).

[158]Mays v. State, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019).

[159]Woods is the president of the of the International Academy of Law and Mental Health, teaches mental health and the law at University of California Berkeley Law School, is a member of the San Francisco District Attorney Post Conviction Unit Innocence Committee, and has also taught at the University of California, Davis, Morehouse School of Medicine, the University of Washington-Bothell, and California State University- Sacramento. *See George* Woods, Berkeley Law, https://www.law.berkeley.edu/our-faculty/faculty-profiles/george-woods/#tab_profile [https://perma.cc/K7BU-Z6Y8].

incompetent for execution because he lacked "a rational understanding of the connection between his crime and punishment."[160] Yet, the court focused on what it perceived as a concession by Woods: he "acknowledged at the competency hearing that Mays did not articulate that particular belief [regarding the state executing him regarding his delusional belief related to his energy invention] to anyone until this legal issue came up."[161] The other defense expert, Dr. Bhushan S. Agharkar, concluded that Mays was not competent to be executed, noting that, although he understood he was to be executed, he lacked a "rational understanding of the reason he is being executed."[162] However, Agharkar had noted that he solely "conducted screenings and he admitted he would never diagnose someone based on his screenings."[163] When placed in the context of Mays' other statements to defense experts,[164] it defies credulity to conclude that those experts' opinions are invalidated by these alleged concessions.[165]

[160]*Id.* at *9.

[161]*Id.* at *17.

[162]*Id.* at *6. The opinion recounts some of the more salient aspects of Agharkar's interview with Mays: Mays believed that his "food was being poisoned," that "pepper gas" was being pumped through the vents in his cell, and that "ozone in the atmosphere" was making him tired and unable to think clearly. Mays complained of arm pain, headaches, and stomachaches. He reported that he had been hearing the voice of God speaking directly to him since he was an infant. He said that he did not take medication given to him in prison because it made him hallucinate. When Mays noticed during the interview that some numbers were printed on Agharkar's shirt, he thought they represented "some hidden message or code that [Agharkar] was not sharing with him." Mays told Agharkar that he had been awarded a patent on his design for an invention, which he described as a "renewable energy source" that would be delivered "directly to consumers" and "would essentially put the big gas or electric companies out of business." Mays stated that the prison warden was being pressured by the power companies to execute him because they would lose "billions of dollars" if his idea came to fruition. He also believed that the State wanted to execute him to save money on his medical expenses. *Id.* at *5.

[163]*Id.* at *14.

[164]See *supra* text accompanying note 164 (findings by Dr. Agharkar), and *Mays*, 2019 WL 2361999, at *9 (defendant suffered from "a Major Neurocognitive Disorder, dementia form in nature" as well as a "psychotic disorder," findings by Dr. Woods).

[165]There are two other aspects of the *Mays* case that are worthy of further consideration. First, to some extent, the trial court discredited Dr. Woods because he "noted concerns" about the witness's objectivity because he observed him passing notes to counsel during the hearing. *Id.* at *15. But this is directly contrary to the teaching of *Ake v. Oklahoma*, that mandated that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1975); McWilliams v. Dunn, 137 S.Ct. 1790, 1792 (2017) (expert witness must "help … the defense evaluate the [assigned doctor's] report [and defendant's] medical records and translate these data into a legal strategy." It should be noted that there is a spirited debate in the forensic *psychology* community as to whether this conflicts with the Specialty Guidelines for Forensic Psychologists (*see e.g.*, Kirk Heilbrun & Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 Psychol. Pub. Pol'y & L. 219 (2010)), discussed at length in a thread that one of the authors (MLP) initiated on the PsyLaw List listserv ("Looking for some thoughts," all emails and postings on file with the author). However, Dr. Woods is a psychiatrist, and, in any event, these Guidelines would be inapplicable to him. Second, there was significant discussion in the *Mays* opinion as to the significance of a checklist that appeared in this article: Patricia A. Zapf, Marcus T. Boccaccini & Stanley L. Brodsky, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci.& L. 103 (2003). Although the trial judge had "ordered the experts to use Sections I, II, and III of the checklist 'to assist [them] in conducting their evaluations and as the basis for framing the conclusions that shall be set forth in their written reports," *Mays,* 2019 WL 2361999, at *4 (quoting trial court transcript in part), Dr. Arghakar testified that "although he utilized the checklist provided by the trial judge, he did not ask Mays every question contained within it… [as h]e did not think it was 'a good idea clinically' or 'useful forensically' to ask closed-ended questions." *Id.* at *5. Dr. Woods also expressed criticism of some aspects of the checklist, believing that "anything that derives from that checklist may be problematic because it had been peer-reviewed but not researched or validated." *Id.* at * 8. On the other hand, the state's witness, Dr. J. Randall Price, believed that it was the "best practice" to use checklists in evaluations. *Id.* A close reading of the opinion makes it clear that the court believed that deviation from this checklist made the defense witnesses less credible. One of the creators of the checklist had written in an email to one of the authors (MLP) that her "main argument" would be "that there should not be a lower standard for competency for execution than there is for competence to stand trial." (Email, Dr. Patricia Zapf to author, Dec. 15, 2022; on file with author). It should be noted that this checklist has *not* been updated since it was created in 2003 (four years before the *Panetti* decision; *see* Zapf email), and has been cited one other time. *See* Madison v. Commissioner, Alabama Department of Corrections, 851 F.3d 1173 (11th Cir.2017), vacated in 879 F.3d 1298 (11th Cir. 2018), following the Supreme Court's reversal in Madison v. Alabama, 138 S.Ct. 943 (2018). In short, nothing about this checklist should have led the court to devalue the defense experts' partial use of it.

In *Battaglia v. State,*[166] three of the four experts who testified had concluded that the defendant was incompetent to be executed; however, the Court privileged the testimony of the one expert whose opinion was contrary. In this case, Dr. Diane Mosnik, Dr. Timothy Proctor, and Dr. Thomas Allen agreed that Battaglia "suffer[ed] from Delusional Disorder" and as a result, was incompetent to be executed because he lacked a rational understanding of the reason for his execution.[167] Nonetheless, the court rejected the defendant's *Panetti* application, accepting the testimony of the fourth witness, Dr. James Womack (court appointed), who concluded that he had a personality disorder and not a mental illness, and was a "malingerer, not credible."[168] Significantly, the court put great weight on the fact that Dr. Womack had worked for the Federal Bureau of Prisons for 21 years.[169]

In this case, the court saw as a concession the fact that Dr. Mosnik "admitted" that [Battaglia was] aware of his execution date and of the fact that he had committed the murders for which he was convicted,[170] notwithstanding the fact that he "lack[ed] a rational understanding of the connection between the crime and impending execution,"[171] along with Dr. Proctor having "admitted …that it is possible for an intelligent person to feign delusions."[172] A blistering dissent criticized the majority for its "overly restrictive view of the standard for evaluating a defendant's competency to be executed that imposes a more onerous burden on the defense in order to establish incompetency,"[173] concluding:

> This Court should not permit the execution of a person who may be categorically exempt from the death penalty due to his severe mental illness in the name of deference to the lower court's ruling, where that ruling appears to have been based on a flawed interpretation of the law. Under these circumstances, I cannot agree with the majority opinion's decision to uphold the trial court's ruling without first giving the trial judge the opportunity to clarify his findings and conclusions in light of the proper standard.[174]

In minimizing the value of Dr. Mosnik's testimony, the court noted that she had "never testified in support of the State's position regarding execution competency."[175] How can this observation be reconciled with the Court privileging Dr. Womack' status as a long-time employee of the state department of corrections?[176]

In *State ex rel. Barton v. Stange,*[177] a case in which the defense expert testified that the defendant was unable to "provide rational assistance to counsel and … engage in consistent, logical, and

[166]537 S.W.3d 57 (Tex. Ct. Crim. App. 2017). Two of the authors (MLP & TRH) have previously written about the subsequent federal cases in *Battaglia,* in which the Fifth Circuit affirmed a district court ruling denying the defendant expert funding for a mitigation specialist who would have offered evidence to show that the defendant was not malingering. *See* Perlin & Harmon, supra note 16, at 583-84. In those cases, the Fifth Circuit affirmed a district court ruling denying the defendant expert funding for a mitigation specialist who would have offered evidence to show that the defendant was not malingering. *See, e.g.*, Battaglia v. Davis, No. 3:16-CV-1687-B, 2018 WL 550518, at *2 (N.D. Tex. Jan. 24, 2018)(stay of execution denied). This application was rejected because it, allegedly, came "too late to produce evidence that may be presented to the state court in making the adjudication in question." *Id.* at *6.

[167]*Battaglia,* 537 S.W.3d at 82. Further, all three experts also agreed that they "found no evidence of malingering." *Id.*

[168]*Id.* at 83.

[169]*Id.* at 86.

[170]*Id.* at 84.

[171]*Id.*

[172]*Id.*

[173]*Id.* at 97 (Alcala, J., dissenting).

[174]*Id.* at 109 (Alcala, J., dissenting).

[175]*Id.* at 91.

[176]*Id.* at 86.

[177]597 S.W.3d 661 (Mo. 2020).

rational decision making,"[178] the Court found that the witness's focus on the brain injuries (causing a major neurocognitive disorder)[179]—rather than on mental illness—made *Panetti* inapplicable.[180] Further, although the Court concluded that the witness "admits this [his brain injury impairment does] not meet the standard set out in *Ford*,"[181] this ignores the witness's testimony that "Barton was incompetent under the standard set forth in …Justice Marshall's plurality opinion in *Ford.*"[182] And, in *State ex rel Clayton v. Griffith,*[183] a case in which a defense expert testified that Clayton was incompetent to be executed as a result of the defendant's expressed feeling that he "is called to preach the gospel and will be released from prison by a miraculous act of God…," [184] the value and weight of that testimony was minimized as "the witness had *conceded* Clayton seemed aware of his current prison status."[185]

(3) Defense witness credibility

In seven of the cases in this cohort,[186] the court's decision rejected *Panetti* applications relying, at least in part, on what it perceived as a lack of credibility on the part of defense witnesses.[187] Of interest is the fact that three of the cases involved the same witness – Dr. William Logan – whose testimony was at the heart of three Eighth Circuit cases that had come to the same conclusion.[188] In our prior paper that considered those cases, we came to this conclusion, to which we adhere today:

> The trilogy of cases just discussed can only be interpreted in one way: that the Circuit's intuitive feeling that Dr. Logan was not a credible witness in spite of the thoughtful dissents [in the cases in question] overcame all evidence that was offered on behalf of the defendants. It is, to us, otherwise inexplicable.[189]

What we will characterize as the "Dr. Logan cases" in state court followed the same pattern as those in federal court. By way of example, in *State ex rel. Middleton v. Russell,*[190] Dr. Logan testified that the defendant "believe[ed] his conviction was the result of a conspiracy which included his associates, law enforcement, the courts, prosecutors and his defense attorneys" and he that "he [would] not die while

[178] *Id.* at 666.

[179] On the interrelationship between traumatic brain injury and the death penalty, see Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 Rutgers L. Rev. 215 (2021).

[180] *Barton,* 666 S.W.2d at 666.

[181] *Id.* at 667.

[182] *Id.* at 666.

[183] State *ex rel* Clayton v. Griffith 457 S.W.3d 735 (Mo. 2015).

[184] *Id.* at 745.

[185] *Id.* at 746 (emphasis added). For other cases that focused on what the courts considered concessions by defense experts, *see* State v. Irick, 320 S.W.3d 284 (Tenn. 2010), and Cole v. Trammel, 358 P.3d 932 (Okla. Ct. Crim. App. 2015).

[186] *See Clayton*, 457 S.W.3d 735; Cole v. Griffith, 460 S.W.3d 349 (Mo. 2015); Middleton v. Russell, 435 S.W.3d 83 (Mo. 2014); Green v. State, 374 S.W.3d 434 (Tex. Ct. Crim. App. 2012); Gore v. State, 120 So.3d 554 (Fla. 2013); Mays v. State, 2019 WL 2361999 (Tex. Ct. Crim. App. 2019); Battaglia v. State, 537 S.W.3d 57 (Tex. Ct. Crim. App. 2017).

[187] In four of the Fifth Circuit cases (including one involving the same defendant as in this grouping, *see* Green v. Thaler, 699 F.3d 404, 407 (5th Cir. 2012)), this was a prevailing issue, as it was in seven of the cases from the other circuits. *See* Perlin, Harmon & Kubiniec, *supra* note 16, at 285.

[188] *See id.*, at 289-92.

[189] *Id.* at 307. Dr. Logan is a member of the American Academy of Psychiatry and Law, former chief of staff of the Division of Law and Psychiatry at the Menninger Clinic in Kansas, and a published author in a pre-eminent law/behavioral science journal. *See* Perlin, Harmon & Kubiniec, *supra* note 16, at 289, citing email from Karl Menninger, Esq., to co-author MLP), July 19, 2022 (on file with author), and William Logan, *The Description and Classification of Presidential Threateners,* 2 Behav. Sci. & L. 151 (1984).

[190] 435 S.W.3d 83 (Mo. 2014).

incarcerated but [would] be cleared on charges and return to the community,"[191] and that Middleton "lack[ed] a rational understanding of the reason for his execution and is therefore not competent to be executed" because of his delusional disorder, a psychotic mental illness.[192] Yet here, the court found Dr. Logan to not be credible because, apparently, he did not find Middleton to be as delusional as Scott Panetti, the defendant in the *Panetti* case.[193] There is nothing in the *Panetti* cases – or elsewhere in any of the cases – that finds that, to meet the threshold of the *Panetti* decision, the defendant need to be as mentally ill as was Panetti himself.[194]

Similarly, in *State ex. rel Cole v. Griffith*,[195] the court found Logan to not be a credible witness, in part, because he had not interviewed his ex-wife (a victim of an assault at the time of the murder for which Cole was convicted) or "her family of their description of the marital discord."[196] The court came to this conclusion notwithstanding the fact that Logan had diagnosed the defendant as evidencing "symptoms of psychosis with gross delusions" that prevent[ed] him from "comprehending or forming a rational understanding of the reason for the execution."[197] The majority found the witness to not be credible because he testified for the defense in two other Missouri death penalty cases.[198] This allegation was rebutted firmly in Justice Stith's dissent:

> Finding experts willing to get involved in death penalty litigation is exceedingly difficult, and it will be all the more so if experts must be "one and done"—if they can testify only in a single case before being discounted as just a defense shill. This is particularly true here where defense counsel indicate that Dr. Logan, in fact, testifies for both the prosecution and the defense—but if this is in question, then it could be explored in cross-examination at the hearing that the majority refuses to permit.[199]

In the final case of the Dr. Logan trilogy, the court, in *State ex rel. Clayton v. Griffith,*[200] again rejected the witness's testimony as not credible.[201] There, Dr. Logan testified that the defendant 'firmly believe [d that] God [would] intervene and his execution [would] not occur,"[202] and that these delusions "are fixed and unchangeable," as a result of his head trauma (that had been documented by MRI tests).[203] But the court ruled that his opinions about Clayton "are not credible" for the same reasons that it refused to "credit the substantially similar opinions he offered in *Middleton.*"[204] Again, Justice Stith dissented, arguing that this testimony (as well as that by Dr. Foster, another defense expert) provided a threshold

[191] *Id.* at 84.

[192] *Id.* Logan had concluded that the defendant showed symptoms of "psychosis" and "cognitive disorder, panic disorder, depression, anxiety and bipolar disorder." *Id.* at 88.

[193] "Nothing in Dr. Logan's statement even approaches a substantial threshold showing that Middleton suffers from such delusions" [similar to the ones from which *Panetti* was suffering]. *Id.* at 85. The dissent in *Middleton* notes pointedly that Dr. Logan's opinion was "a preliminary one… due in large part to the absence of additional materials and input from DOC staff directly familiar with Middleton's behavior." *Id.* at 87 (Draper, J., dissenting).

[194] Panetti was a profoundly mentally ill defendant with "severe, documented mental illness."551 U.S. at 960. He represented himself at trial in a purple cowboy suit, subpoenaed figures such as Jesus Christ and John F. Kennedy, and inhabited a delusional world in which various actors in the system conspired against his alter-ego, "Sarge." Hannah Robertson Miller, *A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas,* 87 Tex. L. Rev. 267, 298 (2008).

[195] 460 S.W.3d 349 (Mo. 2015).

[196] *Id.* at 352.

[197] *Id.* at 359.

[198] *Id.* at 358-59.

[199] *Id.* at 368.

[200] 457 S.W.3d 735 (Mo. 2015).

[201] *Id.* at 748.

[202] *Id.* at 747.

[203] *Id.* at 748.

[204] *Id.*

showing that Clayton "should be allowed the opportunity to convince the special master[205] that he "does not have a rational understanding of the reasons for his execution."[206]

As we have previously noted, the court – in *Mays* and in *Battaglia* – found defense witnesses to not be credible (focusing in *Mays* on what it saw as the witness improperly passing notes to defense counsel,[207] and in *Battaglia*, to a significant extent, because the witness had heretofore only testified on behalf of defendants in death penalty cases).[208] The courts also found defense witnesses to not be credible in *Green v. State.*[209] In *Green,* where the defense expert concluded that the defendant was "not aware…that he is responsible for a crime for which he's being executed,"[210] the Court was instead persuaded by the testimony of the state's expert witness who found that the defendant "exhibited signs of symptom magnification, the intentional exaggeration of symptoms in an effort to achieve secondary gain."[211] Because the defendant "[knew he was] to be executed by the State, [knew he was] convicted of killing the victim … [knew] the execution date, and then … proclaimed [his] innocence which shows a rational understanding of [the] imminent date and … the charges … against [him]," the trial court thus accepted the state witness's testimony and found the defendant competent to be executed. However, as we (MLP & TRH) noted in our earlier article about the federal court aspects of the *Green* case:

> Nothing here, however, goes to a critical prong of *Panetti*: did the defendant have a "rational understanding of the State's reason for his execution"? Although the issue of "rational understanding" was addressed, it appeared only to be considered in the context of the fact that the defendant was able to proclaim his innocence, a far cry from what is demanded by *Panetti.*[212]

(4) Malingering

Given the extent to which allegations of malingering dominated many of the federal post-*Panetti* cases,[213] it is rather surprising that this issue was raised in only two of the state cases: *Battaglia*[214] and *Gore.*[215] One of these cases – *Battaglia*[216] – is a clear example of what we have previously discussed as the

[205]The defendant had requested such a hearing, which was turned down by the majority. *See id.* at 754 (Stith, J., dissenting).

[206]*Id.* at 759 (Stith, J., dissenting). The dissent also argued that the defendant had shown reasonable grounds to believe he was intellectually disabled, and thus entitled to a separate hearing under the rule of Atkins v. Virginia, 536 U.S. 304 (2002); *see* Perlin, Harmon & Wetzel, *supra* note 41. *Clayton,* 457 S.W.3d at 755 (Stith, J., dissenting).

[207]See *supra* note 165.

[208]See *supra* text accompanying notes 117-23.

[209]374 S.W.3d at 434 (Tex. Ct. Crim. App. 2012). For later developments in Green's case in the federal courts, *see* Perlin & Harmon, *supra* note 16, at 582-83.

[210]*Green*, 374 S.W.2d at 437.

[211]*Id.*

[212]Perlin & Harmon, *supra* note 16, at 583. On the issue of witness credibility, *see also* Gore v. State, 120 So.3d 554 (Fla. 2013). There, the court discredited the defense expert for not conducting a thorough review of the defendant's medical records, and for relying too heavily on the defendant's self-reporting of symptoms. *Id.* at 557. The expert had focused in his report on statements by the defendant regarding organ harvesting and Satan worshippers in coming to his conclusion, *id.*

[213]In our research that was limited to the Fifth Circuit *Panetti* cases, we found that malingering was the reason raised for rejecting the defendant's arguments in three of nine cases.

[214]Battaglia v. State, 537 S.W.3d 57 (Tex. Ct. Crim. App. 2017). *Battaglia* was one of the cases in the Fifth Circuit cohort as well. *See* Perlin & Harmon, *supra* note 16, at 583, on the question of the right to have a mitigation expert funded.

[215]Gore v. State, 120 So.3d 554 (Fla. 2013).

[216]The litigation path in this case was long and winding. In a district court decision in *Battaglia* that preceded the litigation on the *Panetti* issue discussed here, the defendant unsuccessfully argued a *Strickland* claim on the merits. *See* Battaglia v. Stephens, No. 3-09-CV-1904-B, 2013 WL 5570216 (N.D. Tex. 2013). Subsequently, the Fifth Circuit did find that the defendant's counsel had "abandoned" him in the context of a state competency proceeding, and then appointed new counsel and stayed execution. Battaglia v. Stephens, 824 F.3d 470, 473-75 (5th Cir. 2016). There was no discussion of counsel adequacy in the context of the defendant's *Panetti* claims. Later, after a further stay of execution, the state court ruled that the defendant was competent to be executed in the case under discussion here. *See* Battaglia v. State, 537 S.W.3d 57 (Tex. Crim. Ct. App. 2017). Two of the co-authors (MLP & TRH) discuss this in Perlin & Harmon, *supra* note 16, at 505-06 n. 312.

confirmation heuristic: the court (through its flawed "ordinary common sense")[217] *believed* that Battaglia was malingering, so it chose to privilege the testimony of the one expert who disagreed, notwithstanding the subsequent rebuttal of this testimony by one of the defense experts.[218]

In this case, three witnesses – a defense expert, a state's expert and an expert appointed by the court[219] -- agreed that the defendant "suffer[ed] from Delusional Disorder" and as a result, was incompetent to be executed because he lacked a rational understanding of the reason for his execution.[220] Importantly, all three experts also agreed that they "found no evidence of malingering."[221] Moreover, in response to the state's witness's testimony that the defendant was malingering,[222] one of the defense witnesses testified in rebuttal that the tests she administered showed "no indication of malingering or feigning [on the part of the defendant],"[223] and that his "beliefs appear[ed] to be the product of a vast and complicated delusional system."[224]

In choosing to endorse the conclusions of the one expert who found the defendant to be malingering, the court accepted the finding of the trial court that had relied heavily on the fact that that expert—Dr. James Womack – *had* worked for the Federal Bureau of Prisons, thus making him the "most qualified" of all the experts in the case.[225] There is no evidence that this conclusion was supported by any valid or reliable research.

There was also no indication that the court ever considered such research on the question of the validity of malingering findings in general. It is well known to those who study this field of thought and practice that even "*clinicians* working in forensic settings, who are familiar with malingering, have a high misidentification rate."[226] By way of examples, one well-known study reports that only 8% of defendants studied actually malingered,[227] whereas another study tells us that only *1.5%* met the criteria for malingering.[228]

(5) Mentally ill but rational

Multiple cases in the cohort concluded that the defendant was mentally ill but nonetheless rational enough to understand the reason for his execution, thus bringing them out of the scope of the *Panetti*

[217] *See infra* note 280.

[218] Womack was, for many years, an employee of the Federal Bureau of Prisons (as discussed in the opinion in question, *see* Battaglia, 537 S.W.3d at 86. *See Curriculum Vitae James R. Womack Ph.D.*, BALANCE: Forensic & General Psychological Servs. Inc., http://www.balanceforensic.com/jw_cv.htm [https://perma.cc/MQS2-ZAE2].

[219] *Battaglia,* 537 S.W. 3d at 64, 82

[220] *Id.* at 82.

[221] *Id.*

[222] *Id.* at 89.

[223] *Id.* at 84

[224] *Id.*

[225] *Id.* at 93-94.

[226] John Parry & Eric Y. Drogin, Mental Disability: Law, Evidence, and Testimony 243 (2007). This category, of course, includes Dr. Womack.

[227] Dustin B. Wygant et al., *Association of the MMPI-2 Restructured Form (MMPI-2-RF) Validity Scales with Structured Malingering Criteria*, 4 Psych. Inj. & L. 13, 18 (2011).

[228] Tayla T. C. Lee et al., *Examining the Potential for Gender Bias in the Prediction of Symptom Validity Test Failure by MMPI-2 Symptom Validity Scale Scores*, 24 Psych. Assessment 618, 621 (2012). Both the Wygant study (*see* Wygant, *supra* note 229) and the Lee study are discussed in this context in Gerald Young, Malingering, Feigning, and Response Bias in Psychiatric/Psychological Injury: Implications for Practice and Court 44-45 (2014), and in Gerald Young & Eric Drogin, *Psychological Injury and Law I: Causality, Malingering, and PTSD*, 3 Mental Health L. & Pol'y J. 373, 408 (2013). *See* Perlin & Harmon, *supra* note 16, at 601-02 and n. 351-53 (discussing this exact issue). In the other malingering case, the court discredited the defense expert, finding that the defendant's delusional-appearing statements regarding "organ harvesting and the illuminati were a goal oriented attempt…to feign a delusion to avoid execution." *Gore,* 120 So.3d at 558. Interestingly, while the court also relied on the state's witnesses use of the Miller Forensic Assessment of Symptoms Test and the Mini–Mental State Examination–2 test to support their conclusion that the defendant was malingering, *id.,* there is no indication in the reported opinion that defense counsel ever challenged these findings or offered any evidence as to the over-reporting of malingering discussed *supra.*

case. This finding did not appear in any of the federal cases researched for these authors' prior *Panetti* articles. In these cases,[229] patterns emerge. Although the courts concede that the defendants are delusional, they nonetheless find them rational enough to take them out of the category of defendants who cannot be executed under the *Panetti* case. Thus, in what had been characterized as paranoid schizophrenia,[230] individuals will adhere to persistent false beliefs and will generally not change their mind even when faced with strong evidence to the contrary.[231] By way of example, where the defendant believed he was the "Prince of God,"[232] and the court conceded that there was evidence of mental illness,[233] the court rejected his *Panetti* argument on the grounds that he was "aware that the State is executing him for the murders he committed and that he will physically die as a result of the execution."[234] Elsewhere, the Tennessee Supreme Court found the defendant competent to be executed in spite of testimony that the "capacity of his brain to work in forming a rational understanding is in that of a pre-adolescent child."[235] Notwithstanding this testimony, it concluded he had "a rational understanding of his pending execution."[236] And, in yet another case, the court found that the defendant's delusions did "not prevent him from rationally understanding the connection between the underlying conviction and his sentence of execution"[237]

Finally, in *State ex rel. Cole v. Griffith* (discussed previously in the context of concessions made by defense experts),[238] the court paid no attention to testimony that the defendant had "symptoms of psychosis with gross delusions" that prevented him from "comprehending or forming a rational understanding of the reason for the execution."[239]

(6) Seeking a categorical exemption

Courts reject claims by defendants that there should be categorical exemptions in cases in which the defendant is seriously mentally ill at the time set for execution. In ten cases, courts rejected arguments that there should be a categorical exemption making the death penalty inapplicable to defendants with serious mental illnesses. In our previous article on *Panetti* cases in all federal circuits but the Fifth, two of the co-authors (MLP & TRH) concluded that "the theoretical protections of *Atkins v. Virginia*—prohibiting execution of persons with intellectual disabilities – needs to be extended to persons with major mental illnesses, thus obviating many of the problems inherent in most post-*Panetti* decisions."[240] Although we noted that academic interest in this position "has

[229]Ferguson v. State, 112 So.3d 1154 (Fla. 2012); State ex rel. Clayton v. Griffith, 457 S.W.3d 735 (Mo. 2015); State ex rel. Cole v. Griffith, 460 S.W.3d 349 (Mo. 2015); State v. Brooks, 2011 WL 5517300 (Ohio Ct. App. 2011); Cole v. Trammell, 358 P.3d 932 (Ok. Crim. App. 2015); State v. Irick, 320 S.W.3d 284 (Tenn. 2010).

[230]Significantly, the American Psychiatric Association removed this category from its Diagnostic and Statistical Manual-5 in 2013. The major symptoms of schizophrenia (which is the classification in use today) are delusions, hallucinations, disorganized or incoherent speech, disorganized or unusual behavior, and negative symptoms.

[231]*See*, for a helpful lay description, *Paranoid Schizophrenia*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/23348-paranoid-schizophrenia [https://perma.cc/SLZ4-KDYQ]. Such delusions suggest "a disordered reasoning process especially likely to generate irrational and impulsive judgments." *See* E. Lea Johnston, *Delusions, Moral Incapacity, and the Case for Moral Wrongfulness*, 97 Ind. L.J. 297, 344 n. 324 (2022).

[232]Ferguson v. State, 112 So.3d 1154, 1157 (Fla. 2012).

[233]*Id.*

[234]*Id.*

[235]State v. Irick, 320 S.W.3d 284, 288 (Tenn. 2010).

[236]*Id.* at 292.

[237]State v. Brooks, 2011 WL 5517300, *4 (Ohio Ct. App. 2011). The opinion tells us only that the defendant had "persecutory delusions that he has been framed." *Id.* at *2.

[238]460 S.W.3d 349 (Mo. 2015).

[239]*Id.* at 359.

[240]Perlin, Harmon & Kubiniec, *supra* note 16, at 303, relying on arguments previously advanced in, inter alia, Leona Deborah Jochnowitz, *Whether the Bright-Line Cut-Off Rule and the Adversarial Expert Explanation of Adaptive Functioning Exacerbates Capital Juror Comprehension of the Intellectual Disability,* 34 Touro L. Rev.377 (2018); Marla Sandys et al., *Capital Jurors, Mental Illness, and the Unreliability Principle: Can Capital Jurors Comprehend and Account for Evidence of Mental Illness?*,

diminished significantly in recent years,"[241] these arguments continue to be made – albeit to this point, unsuccessfully—in state courts.

By way of example, in *State ex rel. Strong v. Griffith,*[242] the defendant asked the court to extend the logic and holdings of *Roper v. Simmons*[243] and *Atkins v. Virginia*[244] (barring the imposition of the death penalty on individuals who were juveniles at the time of the crime or who were intellectually disabled), arguing that such a person "is similar to a person [in these groups whom the Supreme Court has determined not to] possess the capability … require[d] in order to impose the death penalty."[245] He noted that such severely mentally ill persons "risk an unjust death sentence" because they are less able to assist counsel, may be poor witnesses, and may "create an unwarranted impression of lack of remorse for their crimes" by their demeanor.[246] The Court rejected this argument, concluding that "because Mr. Strong fails to present a cognizable claim for habeas corpus relief," his arguments and supporting evidence need not be considered.[247] Dissenting, Judge Teitelman disagreed, applying *Ford, Atkins* and *Roper* to Mr. Strong and other severely mentally ill individuals.[248] Elsewhere, in *State v. Jenkins,*[249] the defendant argued that "the same rationale for exempting the intellectually disabled from the death penalty should apply to exempt defendants who are seriously mentally ill from that punishment."[250] The Court dismissed the argument tersely: "We decline to vary from the principle articulated in *Panetti.*"[251]

The court in *State v. Kleypas*[252] gave the issue more attention. It rejected the defendant's argument that "[t]he culpability of the severely mentally ill is diminished in the same manner as juveniles and the mentally retarded," by distinguishing the classification of mental illness from that of (as then referred to) mental retardation or age:

> Mental illnesses present less discernable common characteristics than age or mental retardation. Caselaw relating to the implementation of *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman,* 551 U.S. 930 (2007), illustrates the difficulty in defining a discernable standard relating to mental illness. See *Panetti v. Quarterman*, 2008 WL 2338498 (W.D. Tex. 2008). As the [American Bar Association] standard[253] recognizes, case-by-case evaluations would be necessary; it follows that the level of culpability will vary on a case-by-case basis. While we recognize that some mental illnesses may make a defendant less culpable and less likely to be deterred by the death penalty, often such illnesses can be treated and may not manifest in criminal behavior.[254]

---

36 Behav. Sci. & L. 470, 479 (2018); Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 St. Louis U. Pub. L. Rev. 283, 283–84 (2006); John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing:* Atkins*, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. Rev. 93 (2003); Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293, 313 (2003), and Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 Hous. L. Rev.1493, 1552–55 (2009).

[241] Perlin et al., *supra* note 16, at 303.

[242] 462 S.W.3d 732 (Mo. 2015).

[243] 543 U.S. 551 (2005).

[244] 536 U.S. 304 (2002).

[245] *Strong,* 462 S.W.3d at 736-37.

[246] *Id.* at 737.

[247] *Id.* at 738.

[248] *Id.* at 739. The full dissent can be found *supra* note 124. Judge Teitelman's dissent is noted in the discussion of other dissents in categorical exemption cases *supra,* at text accompanying notes 177-85.

[249] 931 N.W.2d 851 (Neb. 2019).

[250] *Id.* at 881.

[251] *Id.*

[252] 382 P.3d 373 (Kan. 2016).

[253] *See* ABA Recommendation Number 122A, at 671, discussed in *Kleypas,* 382 P.2d at 336.

[254] *Kleypas,* 382 P.2d at 336. *See also* State v. Kahler, 410 P.3d 105, 130 (Kan, 2018), a*ff'd on other gds,* 140 S.Ct. 1021 (2020) ("We find this issue controlled by our decision in *Kleypas* and see no reason to revisit that holding").

And, in yet another case, the court tasked the state legislature with the duty to classify: "We leave it to the Legislature, if it chooses, to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty."[255]

In addition to *Strong,* other putative categorical exemption cases exist, containing extensive concurring or dissenting opinions.[256] In *Overstreet v. State,*[257] the Court rejected the defendant's argument (endorsed in that portion of Justice Rucker's majority opinion that had support from no other members of the court) that the Indiana state constitution should be read to create a categorical exemption:

> Although I can certainly understand why the legislature might choose to prohibit the execution of all persons suffering from severe mental illness, that has not occurred in this state, and I cannot read Article I, Section 16 more expansively than the Eighth Amendment.[258]

(7) Conclusion

There have been perilously few cases in which courts have taken seriously the teachings of *Panetti.* What appears to be overwhelming testimony of defendants' serious mental illness – prohibiting them from rationally understanding the reasons for their impending executions – is regularly minimized or outright rejected. Most, although not all, of the state courts hearing these cases take *Panetti* no more seriously than do federal courts.[259]

IV. Therapeutic jurisprudence[260]

Therapeutic jurisprudence ("TJ") recognizes that the law is potentially a therapeutic agent, with either therapeutic or anti-therapeutic consequences; it considers whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[261] It asks how the law "actually impacts" people's lives,[262] by supporting "an ethic of

[255]People v. Mendoza, 365 P.3d 297, 337 (Cal. 2016).

[256]In addition to the cases discussed below, *see also supra* notes 254-56, discussing *Kleypas,* and *Kahler*. In at least one of these other cases, *see* State v. Lang, 954 N.E.2d 596, 640 (Ohio 2011), the majority merely said: "Lang attacks the constitutionality of Ohio's death-penalty statutes. This claim is summarily rejected." And in Commonwealth v. Bauhammers, 960 A.2d 59 (Pa. 2008), there is no mention of the categorical exemption argument.

[257]877 N.E.2d 144 (Ind. 2007).

[258]*Id.* at 178 (Boehm, J., concurring in result).

[259]*See* Perlin & Harmon, *supra* note 16; Perlin, Harmon & Kubniec, *supra* note 16.

[260]*See generally* Michael L. Perlin., *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 Cardozo J. Equal Rts. & Soc'l J. 81, 93-95 (2018) [hereinafter Perlin, *Mind Made Up*]; Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 Va. J. Crim. L. 304, 357 (2016), for fuller expositions. It also distills the work that one of the co-authors (MLP) has done on this topic for the past 30 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?,* 10 N.Y.L. Sch. J. Hum. Rts. 623 (1993). Two of the authors (MLP & TRH) discuss the implications of therapeutic jurisprudence in their earlier articles on implementation of *Strickland v. Washington* (*see* Perlin, Harmon & Chatt, *supra* note 41), *Atkins v. Virginia* (see Perlin, Harmon & Wetzel, *supra* note 41), and *Panetti* (see Perlin & Harmon, *supra* note 16), all in the Fifth Circuit, as well as on *Panetti* in all other federal circuits (see Perlin, Harmon & Kubiniec *supra* note 16).

[261]Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 San Diego L. Rev.735, 751 (2005); *see also* David Wexler, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. Sch. J. Hum. Rts. 759 (1993).

[262]Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 Nova L. Rev. 535, 535 (2009); *see* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, *in* Dennis P. Stolle et al., Practicing Therapeutic Jurisprudence: Law as a Helping Profession 45 (2000).

care."[263] It seeks "to bring about healing and wellness,"[264] and values psychological health.[265] Further, adherence to the principles and tenets of therapeutic jurisprudence "maximiz[es] the likelihood that voice, validation and voluntariness[266] will be enhanced."[267]

Its guiding principles are commitments to dignity[268] and to compassion.[269] It believes that people "possess an intrinsic worth that should be recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth."[270] The dignity-enhancing principles of TJ "enhance the likelihood that shame and humiliation will diminish and that greater dignity will be provided."[271] And, on compassion, consider the words of Professors Anthony Hopkins and Lorana Bartels:

> The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it. The "other" in the context of TJ is any person upon whom the law acts or any actor within the legal process.[272]

On the same point, Professor Nigel Stobbs has added;

> Compassion is a virtue, value, or disposition to act which can be held by individuals or groups …. Compassion is generally defined as having two elements. First is empathy--the capacity to sense

[263]Perlin, *Mind Made Up*, *supra* note 262, at 94 (citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 Clinical L. Rev. 605, 605-07 (2006)).

[264]*Id.* (citing Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in* Involuntary Detention & Therapeutic Jurisprudence: International Perspectives on Civil Commitment 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003)).

[265]*See generally* Michael L. Perlin, *"Pistol Shots Ring Out in the Barroom Night": Bob Dylan's "Hurricane" as a Course (or Exam) in Criminal Procedure,* 48 Am. J. Crim. L. 253, 279 (2021).

[266]*See* Amy Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 Touro L. Rev. 601, 627 (2008).

[267]Michael L. Perlin & Naomi M. Weinstein, *"Said I, 'But You Have No Choice'": Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 Cardozo Pub. L. Pol'y & Ethics J. 73, 115 (2016-17).

[268]*See* Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law*, 117 Penn St. L. Rev. 1159, 1186 (2013); Heather Ellis Cucolo & Michael L. Perlin *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 Fla J. L. & Pub. Pol'y 291 (2017); Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z.U. L. Rev. 1135 (2017) [hereinafter Perlin, *Have You Seen Dignity*], for a discussion on the relationship between dignity and therapeutic jurisprudence in general.

[269]Michael L. Perlin, *"Who Will Judge the Many When the Game is Through?": Considering the Profound Differences between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts,* 41 Seattle U. L. Rev. 937, 962 (2018). On dignity and compassion in this context in particular, *see* Michael L. Perlin, "*In These Times of Compassion When Conformity's in Fashion": How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process*, 10 Texas A&M L. Rev. 219, 228 (2023).

[270]Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 Colum. J. Gender & L. 409, 415 (2009), as quoted in Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process,* 82 U. Pitt. L. Rev. 585, 617-18 (2021).

[271]Michael L. Perlin & Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles,* 56 Fam. Ct. Rev. 79, 88-89 (2018).

[272]Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence*, in The Methodology and Practice of Therapeutic Jurisprudence 107 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019). *See also*, in the context of TJ, Nigel Stobbs, *Compassion, the Vulnerable and COVID-19*, 45 Alt. L.J. 81, 81 (2020) (also quoted in David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. Miami L. Rev. 660, 682 (2021) ("Compassion is a virtue, value, or disposition to act which can be held by individuals or groups …. Compassion is generally defined as having two elements. First is empathy—the capacity to sense that another is suffering, and to know what it might feel like to be subjected to that kind of suffering …. The second element of compassion is a felt need to try and alleviate that sensed suffering of others.").

> that another is suffering, and to know what it might feel like to be subjected to that kind of suffering …. The second element of compassion is a felt need to try and alleviate that sensed suffering of other.[273]

These authors' previous articles about interpretations of *Panetti* in federal cases carefully examined the TJ implications of relevant decisions, focusing on issues related to expert believability,[274] expert funding,[275] malingering,[276] and synthetic competency.[277] Analysis of these cases in the Fifth Circuit concluded that;

> These decisions reflect an abject level of *stereotyping* on the part of the court, and this stereotyping starkly reflects how this bias, coupled with judges' use of false "ordinary common sense,"[278] has a significant impact on their decision-making processes. On the other hand, if the court had embraced TJ principles, each of these decision-making "pressure points" could have been invigorated with new options and individualized decision-making.[279]

These articles further consider the TJ implications of courts' failures to acknowledge the severity of defendants' mental illnesses[280] and of the pervasive inadequacy of counsel,[281] and concluded here that judges treat evidence of mental illness in criminal cases "so as to conform to the judges' pre-existing positions,"[282] in teleological ways that utterly violate TJ principles.[283] Here, courts fall prey to the allure of the confirmation bias heuristic through which we focus on information that confirms our preconceptions,[284] especially over disconfirming information.[285] Valid and reliable evidence shows that

---

[273]Nigel Stobbs, *Compassion, the Vulnerable and COVID-19*, 45 Alt. L.J. 81, 81 (2020).

[274]Perlin & Harmon, *supra* note 16, at 599-600.

[275]*Id.* at 600-01.

[276]*Id.* at 601-02

[277]*Id.* at 602-03.

[278]"Ordinary common sense" is "a powerful unconscious animator of legal decision making that reflects 'idiosyncratic, reactive decision-making,' and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities." Perlin, Harmon & Chatt, *supra* note 41, at 281 (citing, inter alia, Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Reasoning*, 69 Neb. L. Rev. 3, 22–23, 29 (1990), *and* Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. Pa. L. Rev. 729, 737–38 (1988)).

[279]Perlin & Harmon, *supra* note 16, at 604.

[280]Perlin, Harmon & Kubiniec, *supra* note 16, at 300.

[281]*Id.* at 50-51. *See generally* on a closely related question, Perlin, Harmon & Chatt, *supra* note 41 (discussing the Fifth Circuit's global failure to correct violations of Strickland v. Washington, 466 U.S. 668 (1984) (on adequacy of counsel)).

[282]Perlin, Harmon & Kubiniec, *supra* note 16, at 301, citing Perlin & Lynch, *supra* note 262, at 333-34 (discussing, inter alia, the research reported in Nicholas Scurich & Adam Shniderman, *The Selective Allure of Neuroscientific Explanations,* 9 Plos One (Sep. 10, 2014), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107529 [https://perma.cc/97DW-X F85]).

[283]*See generally* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 Iowa L. Rev. 1375, 1419 (1997)("The legal system selectively, teleologically, either accepts or rejects social science evidence depending on whether or not the use of that data meets the system's a priori needs. In cases where fact-finders are hostile to social science teachings, such data often meets with tremendous judicial resistance, evidenced by the courts' expression of their skepticism about, suspicions of, and hostilities toward such evidence.")

[284]Heuristics are a cognitive psychology constructs that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, the use of which frequently leads to distorted and systematically erroneous decisions and causes decision-makers to "ignore or misuse items of rationally useful information. Perlin & Weinstein, *supra* note 269, at 86, citing, inter alia, Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics,* 15 Law & Soc'y Rev. 123 (1980-81). The confirmation bias causes us to focus on information that confirms our preconceptions. Perlin, *supra* note 43, at 1524 n. 94, *citing* Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 Temp. Pol. & Civ. Rts. L. Rev. 1, 38-39 (2012) (quoting Eden B. King, *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 Psychol. Pub. Pol'y & L. 54, 58 (2011)).

[285]Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science,* 47 Wm. & Mary L. Rev. 1587, 1594 (2006)).

judges thus focus on information that confirms their preconceptions (i.e., confirmation bias), to recall vivid and emotionally charged aspects of cases (i.e., the availability heuristic), and to interpret information that reinforces the status quo as legitimate (i.e., system justification biases).[286] A judicial proceeding cannot be "fair" if the judge decides cases in such teleological manners.[287]

The vast majority of the state cases considered in this article replicate these failings that we found in the federal cases. As discussed below, with a very small handful of important exceptions, this case cohort ignores all therapeutic jurisprudence principles and is rife with examples of the confirmation bias. Judges "believe" a case should be decided in a certain way, and thus "teleologically privilege evidence of mental illness" (where that privileging serves what they perceive as a socially beneficial value) and "subordinate [such evidence]" (where that subordination serves what they perceive as a similar value).[288] Per Professor David Faigman, "[s]ome commentators suggest that the court's use of science is disingenuous; these critics believe that the court cites empirical research when it fits the court's particular needs but eschews it when it does not."[289]

A stark example of this is the *Mays* case. There, the court chose to ignore the testimony by the two defense experts that the defendant lacked "a rational understanding of the connection between his crime and punishment"[290] and that he lacked a "rational understanding of the reason he is being executed,"[291] in large part, it appeared, because one of the defense witnesses passed notes to counsel during the hearing.[292] Additionally, consider *Battaglia* where the three experts who found him to be incompetent to be executed were discredited one by one and the fourth expert was the victor because the court really seemed to believe he was malingering.[293] Again, this appears to perfectly reflect the meretricious use of the conformation bias heuristic.

Related is the way that the courts ignore the significance of the impact of traumatic brain injury on defendants' behavior.[294] Generally, courts have not been sympathetic to *Panetti* claims made by defendants with traumatic brain injuries,[295] and most courts have been "unresponsive to TBI claims at this juncture of the proceedings."[296] In one case, a federal court specifically rejected a death-row

---

[286]King, *supra* note 286, at 58; *see also* John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33

Brit. J. Soc. Psych. L. 1 (1994); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psychol. 207 (1973).

[287]Perlin, *supra* note 262, at 95.

[288]Perlin & Lynch, *supra* note 262, at 344. *See generally* Perlin, *supra* note 285, at 1419. The legal system selectively, teleologically, either accepts or rejects social science evidence depending on whether or not the use of that data meets the system's a priori needs. In cases where fact-finders are hostile to social science teachings, such data often meets with tremendous judicial resistance, evidenced by the courts' expression of their skepticism about, suspicions of, and hostilities toward such evidence.

[289]David L. Faigman, *"Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, 549 (1991).

[290]2019 WL 2361999. *9 (Tex. Ct. Crim. App. 2019).

[291]*Id.* at *6. See *supra* note 164 for a full recounting of the defendant's delusional thoughts.

[292]*Id.* at 15, discussed *supra* note 167.

[293]Elsewhere, one of the authors (MLP) has concluded that courts' teleological decisions in the area of malingering law--employing outcome-determinative reasoning, in which social science that enables judges to satisfy predetermined positions is privileged, while data that would require judges to question such ends are rejected--violate TJ. Perlin, *supra* note 262, at 82.

[294]Traumatic brain injury (TBI) is "a disruption in the normal function of the brain that can be caused by a bump, blow, or jolt to the head, or penetrating head injury." *Injury Prevention & Control: Traumatic Brain Injury Prevention*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/injury/stateprograms/topic_traumatic-brain-injury.html (last visited Dec. 24, 2022) [PERMA CC]. The effects of such an injury may be lifelong. *Concussion and Traumatic Brain Injury Prevention Program*, Ct.gov, https://portal.ct.gov/DPH/Health-Education-Management--Surveillance/The-Office-of-Injury-Prevention/Concussion-and-Traumatic-Brain-Injury-Prevention-Program [https://perma.cc/P5BC-K87R] (last visited Dec. 19, 2022). The effects "can include [impairments related to] thinking or memory, movement, sensation (e.g., vision or hearing), or emotional functioning (e.g., personality changes, depression)." *Id.*; *see generally* Lynch, Perlin & Cucolo, *supra* note 181, at 220. On TBI in the death penalty context, *see id.* at 245-46.

[295]*Id.* at 245.

[296]*Id.*

defendant's argument that the Florida Supreme Court denied a death row petitioner's claim that the Eighth Amendment categorically exempted him from execution because he suffered from severe traumatic brain injury and severe mental illness.[297]

In the cohort of the cases discussed here, the results are similar. In *State ex rel. Barton v. Stange,*[298] the Court found that the witness's focus on the defendant's TBI (causing a major neurocognitive disorder) – rather than on mental illness – made *Panetti* inapplicable.[299] In *State ex rel. Clayton v. Griffith,*[300] where a traumatic brain injury caused the loss of "nearly eight percent of Clayton's brain and 20 percent of his frontal lobe,"[301] the court gave this evidence no value in coming to its conclusion that the defendant was competent to be executed.

These authors believe that, using the principles of therapeutic jurisprudence, "introduction of a defendant's TBI could prove to be an effective tool during mitigation, in order to provide a clue as to why he may have performed the crime with which he was charged."[302] "[R]ecognition of a physical component of the defendant's] disability could help to comport with therapeutic jurisprudence principles of dignity, voice and validation,"[303] but this has not happened.

Many of the cases discussed here that reflect conformation bias shroud a deep-seeded bias against the defendants before the court. Professor Colleen Berryessa has urged that the therapeutic jurisprudence literature "may also be instrumental in crafting 'therapeutic interventions' that promote judges' cognitive awareness related to … biases and how such biases in cases involving mental disorders may result in anti-therapeutic outcomes by hindering an offender's potential treatment opportunities."[304] That "the entire body of scholarship [on neuroimaging evidence and TJ] has fallen on deaf ears in the contexts of criminal sentencing,"[305] in no arena more so than in death penalty cases.[306] There are, of course, exceptions. As noted above, Justice Rucker's opinion in *Overstreet*[307] is a stand-alone example of how therapeutic jurisprudence (although he never refers to it by name) can animate a thoughtful, validating dignity-granting decision. Both *Staley* and *Banks* fall into this category as well. But such cases are, sadly, few and far between.

V. Conclusion

Although the "track record" of the state courts is not quite as woeful as that of the federal courts, it remains dispiriting. Depending on the categorization of cases, either only two defendants or five defendants were successful in their *Panetti* arguments,[308] and many of the *Panetti* losses involved profoundly mentally ill defendants. The continued reliance on cognitive-simplifying heuristics and false "ordinary common sense" – along with a failure to recognize the significance of TJ principles – taint this

[297]Long v. State, 271 So.3d 938, 947 (Fla.), *cert. denied*, 139 S.Ct. 2635 (2019).

[298]597 S.W.3d 661 (Mo. 2020). *See supra* text accompanying notes 179-84.

[299]*Barton,* 666 S.W. 2d at 666.

[300]457 S.W. 3d 735 (Mo. 2015).

[301]*Id.* at 737.

[302]Perlin & Lynch, *supra* note 262, at 354 n. 171.

[303]*Id.* at 354.

[304]Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing,* 53 Law & Soc'y Rev. 202, 209 (2019), as discussed in Lynch, Perlin & Cucolo, *supra* note 181, at 268.

[305]Perlin & Lynch, *supra* note 262, at 352-53. *See also* Michael L Perlin & Alison J. Lynch, *"My Brain Is So Wired": Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities,* 27 B.U. Pub. Int. L.J. 73, 88-95 (2018).

[306]*See* Lynch, Perlin & Cucolo, *supra* note 181.

[307]See *supra* text accompanying notes 117-23.

[308]If the universe is reported cases, then the only successes were *Staley* and *Banks*. If including cases in which defendants were ultimately successful (although not in reported opinions: *see Overstreet*, *Druery*, and *Akwal*), then the number changes from two to five.

entire area of law.[309] In the Fifth Circuit, not a single decision for a defendant exists on *Panetti* grounds at the circuit level;[310] in all other federal circuits, there was but one *Panetti* victory for a defendant, and *that* was subsequently vacated.[311] This pattern has been replicated in the state courts.

When considering the results from these authors' trilogy of papers, the minute number of *Panetti* claims deemed to be valid by the courts, coupled with the fact that this current paper discussed many cases in which defendants were found severely mentally ill, but not irrational (under the *Panetti* standard), it underscores that it is time to reconsider the propriety of a categorical exemption of persons who are severely mentally ill from the death penalty. This opinion – currently the law in a few states and under consideration in others – is the most favorable solution to this otherwise intractable problem.

This paper concludes by returning to the Bob Dylan song which gives it its title. The couplet that begins with the line "the timeless explosion of fantasy's dream" ends with "… the king and queen/ tumbled all down into pieces."[312] This area of forensic mental disability law has so tumbled.

Michael L. Perlin is Professor of Law Emeritus at New York Law School. He was the founding director of NYLS's International Mental Disability Law Reform Project in its Justice Action Center. He is also the co-founder of Mental Disability Law and Policy Associates. He has written 35 books and 350 articles on all aspects of mental disability law, many of which deal with the overlap between mental disability law and criminal law and procedure. His most recent books are *Justice Outsourced: The Therapeutic Jurisprudence Implications of Judicial Decision-Making by Non-Judicial Officers*, co-edited with Prof. Kelly Frailing (Temple University Press, 2021); *Advanced Introduction to Mental Health Law* (Elgar Publ.) (2021); *Mental Disability Law: Cases and Materials* (Carolina Academic Press, 2017) (3d ed.) (with Prof. Heather Ellis Cucolo & Alison J. Lynch, Esq.); *Sexuality, Disability And The Law: Beyond The Last Frontier?* (co-authored with Alison Lynch, Esq.) (Palgrave Macmillan, 2016); Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation (Temple Univ. Press, 2017); *International Human Rights and Mental Disability Law: When the Silenced are Heard* (Oxford University Press, 2011); *Mental Disability and the Death Penalty: The Shame of The States* (Rowman & Littlefield, 2013); *and A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (Routledge, 2013). His three-volume treatise, *Mental Disability Law: Civil - and Criminal* (3d ed., Lexis-Nexis, 2016, co-authored with Heather Ellis Cucolo) updated semi-annually), is universally seen as the standard text in the area. An earlier book, *The Jurisprudence of the Insanity Defense* (Carolina Academic Press, 1995) won the Manfred Guttmacher award of the American Psychiatric Association and the American Academy of Psychiatry and Law as the best book published that year.

Dr. Talia Harmon is a professor and Chair of the Criminology & Criminal Justice department at Niagara University. She attended the State University of New York at Albany where she received her undergraduate degree (B.A.) as well as her graduate degrees (master's and Ph.D.). Dr. Harmon has authored numerous articles that address issues involving capital punishment including exonerations and wrongful convictions in capital cases, racial discrimination in death penalty cases, and capital commutations in New York State. She has recently published additional papers that focus on capital punishment issues such as: the dramatic decline of death sentences throughout the country, botched executions, mental health issues, and tests of the Marshall hypothesis.

Maren Geiger is a graduate student in the Niagara University Master of Science Criminal Justice Administration program; Bachelor of Arts (Dual Degree) in Political Science & International Studies and Graduate Assistant for the Niagara University Office of Violence Prevention & Education.

[309]It is also important to consider the pernicious way that "sanism" (prejudice of the same quality and character of other irrational prejudices that bear upon racism, sexism, homophobia and ethnic bigotry) infects the entire death penalty process. *See e.g.,* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence,* 8 Notre Dame J. L., Ethics & Pub. Pol'y 239, 257 (1994); John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 Mental & Physical Disability L. Rep. 667 (2005).

[310]*See* Perlin & Harmon *supra* note 16, at 579-80 (noting that there were just two such cases finding for defendants in the district courts in the states that comprise the Fifth Circuit).

[311]*See* Perlin, Harmon & Kubiniec, *supra* note 16, at 276.

[312]*See Ballad in Plain D*, bobdylan.com, https://www.bobdylan.com/songs/ballad-plain-d/ [https://perma.cc/6NR5-9BN4].

Cite this article: Perlin, M.L., Harmon, T.R. and Geiger, M. (2023), '"The Timeless Explosion of Fantasy's Dream": How State Courts Have Ignored the Supreme Court's Decision in *Panetti v. Quarterman*', *American Journal of Law & Medicine*, **49**, pp. 205–233. https://doi.org/10.1017/amj.2023.28