CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Ten - Part Two:
Competency to be Executed

Alvin Bernard FORD, etc., Petitioner
v.
Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections.

Supreme Court of the United States
477 U.S. 399, 106 S.Ct. 2595 (1986).

Justice Marshall delivered the opinion of the Court, with respect to Parts I and II, which was joined by Brennan, Powell, Blackmun, and Stevens, JJ., concluding that the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane.

Justice Marshall, joined by Brennan, Blackmun, and Stevens, JJ., concluded in Parts III, IV, and V, that Florida's statutory procedures for determining a condemned prisoner's sanity were inadequate to satisfy due process and the "full and fair hearing" required by 28 U.S.C. § 2254(d)(2);

Justice Powell filed an opinion concurring in part and concurring in the judgment.

Justice O'Connor filed an opinion concurring in the result in part and dissenting in part in which Justice White joined.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

Justice MARSHALL announced the judgment of the Court, which was joined by Brennan, Powell, Blackmun, and Stevens, JJ., joined and delivered the opinion of the Court with respect to Parts I and II and an opinion with respect to Parts III, IV, and V, in which Brennan, Blackmun, and Stevens, JJ., joined

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family

were being held hostage in the prison, and that only he could help them. By "day 287" of the "hostage crisis," the list of hostages had expanded to include "senators, Senator Kennedy, and many other leaders." In a letter to the Attorney General of Florida, written in 1983, Ford appeared to assume authority for ending the "crisis," claiming to have fired a number of prison officials. He began to refer to himself as "Pope John Paul, III," and reported having appointed nine new justices to the Florida Supreme Court.

Counsel for Ford asked a psychiatrist who had examined Ford earlier, Dr. Jamal Amin, to continue seeing him and to recommend appropriate treatment. On the basis of roughly 14 months of evaluation, taped conversations between Ford and his attorneys, letters written by Ford, interviews with Ford's acquaintances, and various medical records, Dr. Amin concluded in 1983 that Ford suffered from "a severe, uncontrollable, mental disease which closely resembles `Paranoid Schizophrenia With Suicide Potential'" – a "major mental disorder . . . severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life."

Ford subsequently refused to see Dr. Amin again, believing him to have joined the conspiracy against him, and Ford's counsel sought assistance from Dr. Harold Kaufman, who interviewed Ford in November 1983. Ford told Dr. Kaufman that "I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed." When asked if he would be executed, Ford replied: "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over." These statements appeared amidst long streams of seemingly unrelated thoughts in rapid succession. Dr. Kaufman concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves. Dr. Kaufman found that there was "no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance. . . ." The following month, in an interview with his attorneys, Ford regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word "one," making statements such as "Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one."

Counsel for Ford invoked the procedures of Florida law governing the determination of competency of a condemned inmate. Following the procedures set forth in the statute, the Governor of Florida appointed a panel of three psychiatrists to evaluate whether, Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." At a single meeting, the three psychiatrists together interviewed Ford for approximately 30 minutes. Each doctor then filed a separate two- or three-page report with the Governor, to whom the statute delegates the final decision. One doctor concluded that Ford suffered from "psychosis with paranoia" but had "enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed on him." Another found that, although Ford was "psychotic," he did "know fully what can happen to him." The third concluded that Ford had a "severe adaptational disorder," but did "comprehend his total situation including being sentenced to death, and all of the implications of that penalty." He believed that Ford's disorder, "although severe, seem[ed] contrived and recently learned." Thus, the interview produced three different diagnoses, but accord on the question of sanity as defined by state law.

The Governor's decision was announced on April 30, 1984, when, without explanation or statement, he signed a death warrant for Ford's execution. Ford's attorneys unsuccessfully sought a hearing in state court to determine anew Ford's competency to suffer execution. Counsel then filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on the question of Ford's sanity, proffering the

conflicting findings of the Governor-appointed commission and subsequent challenges to their methods by other psychiatrists. The District Court denied the petition without a hearing. The Court of Appeals * * * stayed Ford's execution * * * and a divided panel affirmed the District Court's denial of the writ. * * *

II

* * *

There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted. * * *

Moreover, the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the "evolving standards of decency that mark the progress of a maturing society." * * *

A

We begin, then, with the common law. The bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded "savage and inhuman." Blackstone explained: "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

Sir Edward Coke had earlier expressed the same view of the common law of England: "[B]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others." Other recorders of the common law concurred.

As is often true of common-law principles, the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it." It is also said that execution serves no purpose in these cases because madness is its own punishment: furiosus solo furore punitur. More recent commentators opine that the community's quest for "retribution" – the need to offset a criminal act by a punishment of equivalent "moral quality" – is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished. Unanimity of rationale, therefore, we do not find. "But whatever the reason of the law is, it is plain the law is so." We know of virtually no authority condoning the execution of the insane at English common law.[1]

Further indications suggest that this solid proscription was carried to America, where it was early observed that "the judge is bound" to stay the execution upon insanity of the prisoner.

B

This ancestral legacy has not outlived its time.

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1. At one point, Henry VIII enacted a law requiring that if a man convicted of treason fell mad, he should nevertheless be executed. This law was uniformly condemned. The "cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law...."

Today, no State in the Union permits the execution of the insane. * * * For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

III

*** * ***

Florida law directs the Governor, when informed that a person under sentence of death may be insane, to stay the execution and appoint a commission of three psychiatrists to examine the prisoner. "The examination of the convicted person shall take place with all three psychiatrists present at the same time." After receiving the report of the commission, the Governor must determine whether "the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him." If the Governor finds that the prisoner has that capacity, then a death warrant is issued; if not, then the prisoner is committed to a mental health facility. The procedure is conducted wholly within the executive branch, *ex parte*, and provides the exclusive means for determining sanity.

Petitioner received the statutory process. The Governor selected three psychiatrists, who together interviewed Ford for a total of 30 minutes, in the presence of eight other people, including Ford's counsel, the State's attorneys, and correctional officials. The Governor's order specifically directed that the attorneys should not participate in the examination in any adversarial manner. * * *

After submission of the reports of the three examining psychiatrists, reaching conflicting diagnoses but agreeing on the ultimate issue of competency, Ford's counsel attempted to submit to the Governor some other written materials, including the reports of the two other psychiatrists who had examined Ford at greater length, one of whom had concluded that the prisoner was not competent to suffer execution. The Governor's office refused to inform counsel whether the submission would be considered. The Governor subsequently issued his decision in the form of a death warrant. [T]his most cursory form of procedural review fails to achieve even the minimal degree of reliability required for the protection of any constitutional interest * * *

IV

A

The first deficiency in Florida's procedure lies in its failure to include the prisoner in the truth-seeking process. Notwithstanding this Court's longstanding pronouncement that "[t]he fundamental requisite of due process of law is the opportunity to be heard," state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." And we have forbidden States to limit the capital defendant's submission of relevant evidence in mitigation of the sentence. * * *

Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is

necessarily inadequate. * * *

* * *

B

A related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions. "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent. The failure of the Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted.[3]

C

Perhaps the most striking defect in the procedures of as noted earlier, is the State's placement of the decision wholly within the executive branch. Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing. The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.

* * * In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal.

V

A

* * * We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.[4] * * *

Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that "evidence" be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability

3. The adequacy of the factfinding procedures is further called into question by the cursory nature of the underlying psychiatric examination itself. While this Court does not purport to set substantive guidelines for the development of expert psychiatric opinion, we can say that the goal of reliability is unlikely to be served by a single group interview, with no provision for the exercise of the psychiatrists' professional judgment regarding the possible need for different or more comprehensive evaluative techniques. The inconsistency and vagueness of the conclusions reached by the three examining psychiatrists in this case attest to the dubious value of such an examination.

4. Instructive analogies may be found in the State's own procedures for determining whether a defendant is competent to stand trial, or in the comprehensive safeguards that Florida ensures to those subjected to involuntary commitment proceedings. The parties' interests are of course somewhat different in those contexts; nevertheless, all such inquests share the common goal of reaching a fair assessment of the subject's mental state.

to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

* * *

Justice POWELL, concurring in part and concurring in the judgment. I join Parts I and II of the Court's opinion.

As Justice MARSHALL ably demonstrates, execution of the insane was barred at common law precisely because it was considered cruel and unusual. * * *

That conclusion leaves two issues for our determination: (i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of de novo review in federal courts under [the habeas corpus statutes]. The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from Justice MARSHALL's. I therefore write separately.

* * *

The more general concern of the common law – that executions of the insane are simply cruel – retains its vitality. It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally. * * *

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

* * *

While the procedures followed by Florida in this case do not comport with basic fairness, I would not require the kind of full-scale "sanity trial" that Justice MARSHALL appears to find necessary. Due process is a flexible concept, requiring only "such procedural protections as the particular situation demands." * * *

First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not whether, but when, his execution may take place.[5]

* * *

Second, petitioner does not make his claim of insanity against a neutral background. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.

Finally, the sanity issue in this type of case does not resemble the basic issues at trial or sentencing. Unlike issues of historical fact, the

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5. It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him.

question of petitioner's sanity calls for a basically subjective judgment. And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with "subtleties and nuances." This combination of factors means that ordinary adversarial procedures – complete with live testimony, cross-examination, and oral argument by counsel – are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity.

We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake.

* * *

Justice O'CONNOR, with whom Justice WHITE joins, concurring in the result in part and dissenting in part.

I am in full agreement with Justice REHNQUIST's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. Accordingly, I do not join the Court's reasoning or opinion. Because, however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. * * *

* * *

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

* * * [T]he Court proceeds to cast aside settled precedent and to significantly alter both the common-law and current practice of not executing the insane. It manages this feat by carefully ignoring the fact that the Florida scheme it finds unconstitutional, in which the Governor is assigned the ultimate responsibility of deciding whether a condemned prisoner is currently insane, is fully consistent with the "common-law heritage" and current practice on which the Court purports to rely.

The Court places great weight on the "impressive historical credentials" of the common-law bar against executing a prisoner who has lost his sanity. What it fails to mention, however, is the equally important and unchallenged fact that at common law it was the executive who passed upon the sanity of the condemned. So when the Court today creates a constitutional right to a determination of sanity outside of the executive branch, it does so not in keeping with but at the expense of "our common-law heritage."

* * *

Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his

execution.

Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity. * * * I find it unnecessary to "constitutionalize" the already uniform view that the insane should not be executed, and inappropriate to "selectively incorporate" the common-law practice. I therefore dissent.

Alvin Ford's competency was never determined. He died on Florida's death row on February 26, 1991, two days after being found unconscious in his death row cell at the Florida State Prison near Starke. Prison officials said only that Ford had been experiencing respiratory problems.

Faking Incompetency?

In his dissenting opinion in *Ford*, Justice Rehnquist, joined by Chief Justice Burger, warned that the majority decision "offers an invitation to those who have nothing to lose ... to advance entirely spurious claims of insanity." However, a study examined cases between 1986 and 2013 in which death row inmates filed claims of mental incompetence and found that the deluge of spurious claims has not materialized. Of the 1,307 people the study considered "*Ford*-eligible," that is, those whose cases reached the point at which a Ford claim could be filed, only 6.6% (86) filed claims of incompetency to be executed. Of the cases decided on the merits, 22% were successful, a high success rate when compared to other post-conviction claims in capital cases. A large majority (62.6%) of inmates whose claims of insanity were decided in court had a well-documented history of mental illness, indicating that raising an insanity claim was legitimate, even in many of the unsuccessful cases. John H. Blume, Sheri Lynn Johnson, & Katherine E. Ensler, *Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation,* 74 UMKC L. REV. 1 (2013).

Jurisdiction to Consider *Ford* Claims in Federal Habeas Proceedings

Because the mental health of a condemned person may deteriorate while that person is on death row, a claim of competency to be executed may not be raised initially in state post-conviction and federal habeas corpus proceedings. Under the Antiterrorism and Effective Death Penalty Act, a person is prohibited from filing a "second or successive" federal habeas corpus application, unless allowed to do so by the circuit court of appeals on the grounds that the petition, if true, establishes actual innocence. 28 U.S.C. § 2244(b)(3)(A).

The Supreme Court addressed whether such a claim could be considered after initial habeas review in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).

Ramon Martinez-Villareal filed three federal habeas corpus petitions which were dismissed for failure to exhaust state remedies. He filed a fourth petition raising a *Ford* claim for the first time. The district court dismissed the *Ford* claim as premature, but granted the writ on other grounds. The Ninth Circuit reversed the grant and remanded to the district court. On remand, Martinez-Villareal moved to reopen his petition, but the district court denied the motion, finding that it did not have jurisdiction over the *Ford* claim § 2244(b). On appeal, the Ninth Circuit held that the claim was not a successive claim and, therefore, § 2244(b) did not apply. The Supreme Court affirmed in a decision by Chief Justice Rehnquist for seven members of the Court. Observing that "[t]his may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications," the Court stated:

> We believe that respondent's *Ford* claim here – previously dismissed as premature – should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies.

> True, the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

Id. at 644-45.

The Court applied *Martinez-Villareal* in deciding whether a petition filed by Scott Panetti was successive. Panetti had been convicted and sentenced to death for the murders of his in-laws, Joe and Amanda Alvarado, on September 8, 1992. Before the crimes, Panetti had been hospitalized at least 11 times; he was released from his last hospitalization just two months before the killings.

Panetti had taken antipsychotic drugs intermittently prior to the murders. He was found competent in September 1994. However, by the time the trial began in the fall of 1995, he had stopped taking his medication. Panetti was allowed to represent himself at his trial. Dressed in a purple cowboy outfit, he sought to subpoena nearly 200 witnesses – including Jesus Christ, John F. Kennedy, and Anne Bancroft.

When Texas prepared to execute Panetti, questions arose with regard to his competency. However, he had unsuccessfully sought habeas relief. The State argued that his new petition was "successive" and barred by § 2244(b). After addressing that question, the Court, as in *Ford*, considered the adequacy of the state court procedures and the meaning of "insane."

Recommended: A 30-minute film about Panetti describes his mental illnesses, his trial and includes interviews with his parents, http://www.youtube.com/watch?v=0WTn78SIRvc.

Scott Louis PANETTI, Petitioner,
v.
Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

Supreme Court of the United States
551 U.S. 930, 127 S.Ct. 2842 (2007).

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed a dissenting opinion, in which Roberts, C.J., Scalia and Alito, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

* * *

Scott Louis Panetti, referred to here as petitioner, was convicted and sentenced to death in a Texas state court. After the state trial court set an execution date, petitioner made a substantial showing he was not competent to be executed. The state court rejected his claim of incompetency on the merits. Filing a petition for writ of habeas corpus in the United States District Court[,] * * * petitioner claimed again that his mental condition barred his execution[.] * * * [The District Court and the Court of Appeals rejected his claims.]

We conclude we have statutory authority to adjudicate the claims petitioner raises in his habeas application; we find the state court failed to provide the procedures to which petitioner was entitled under the Constitution; and we determine that the federal appellate court employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits. * * *

I

On a morning in 1992 petitioner awoke before dawn, dressed in camouflage, and drove to the home of his estranged wife's parents. Breaking the front-door lock, he entered the house and, in front of his wife and daughter, shot and killed his wife's mother and father. He took his wife and daughter hostage for the night before surrendering

to police.

Tried for capital murder in 1995, petitioner sought to represent himself. The court ordered a psychiatric evaluation, which indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations. The evaluation noted that petitioner had been hospitalized numerous times for these disorders. Evidence later revealed that doctors had prescribed medication for petitioner's mental disorders that, in the opinion of one expert, would be difficult for a person not suffering from extreme psychosis even to tolerate. ("I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out"). Petitioner's wife described one psychotic episode [in which] petitioner had become convinced the devil had possessed their home and that, in an effort to cleanse their surroundings, petitioner had buried a number of valuables next to the house and engaged in other rituals. Petitioner nevertheless was found competent to be tried and to waive counsel. At trial he claimed he was not guilty by reason of insanity.

During his trial petitioner engaged in behavior later described by his standby counsel as "bizarre," "scary," and "trance-like." According to the attorney, petitioner's behavior both in private and in front of the jury made it evident that he was suffering from "mental incompetence," and the net effect of this dynamic was to render the trial "truly a judicial farce, and a mockery of self-representation." There was evidence on the record, moreover, to indicate that petitioner had stopped taking his antipsychotic medication a few months before trial, a rejection of medical advice that, it appears, petitioner has continued to this day with one brief exception. According to expert testimony, failing to take this medication tends to exacerbate the underlying mental dysfunction. And it is uncontested that, less than two months after petitioner was sentenced to death, the state trial court found him incompetent to waive the appointment of state habeas counsel. It appears, therefore, that petitioner's condition has only worsened since the start of trial.

* * *

* * * Among the issues petitioner raised in the course of * * * state and federal [post- conviction] proceedings was his competency to stand trial and to waive counsel. Petitioner did not argue, however, that mental illness rendered him incompetent to be executed.

On October 31, 2003, [Texas District Court] Judge Stephen B. Ables * * * set petitioner's execution date for February 5, 2004. On December 10, 2003, counsel for petitioner filed with Judge Ables a motion [in which] [p]etitioner claimed, for the first time, that due to mental illness he was incompetent to be executed. The judge denied the motion without a hearing. When petitioner attempted to challenge the ruling, the Texas Court of Criminal Appeals dismissed his appeal for lack of jurisdiction, indicating it has authority to review * * * only when a trial court has determined a prisoner is incompetent.

Petitioner returned to federal court, where he filed another petition for writ of habeas corpus pursuant to § 2254 and a motion for stay of execution. On February 4, 2004, the District Court stayed petitioner's execution to allow the state court a reasonable period of time to consider the evidence of [petitioner's] current mental state.

The state court had before it, at that time, petitioner's Renewed Motion To Determine Competency To Be Executed (hereinafter Renewed Motion To Determine Competency). Attached to the motion were a letter and a declaration from two individuals, a psychologist and a law professor, who had interviewed petitioner while on death row on February 3, 2004. The new evidence, according to counsel, demonstrated that petitioner did not understand the reasons he was about to be executed.

* * *

The state trial court * * * instruct[ed] counsel to submit, by February 20, the names of mental health experts the court should consider appointing * * *, gave the parties until February 20 to submit any motions concerning the

competency procedures and advised it would hold another status conference on that same date.

On February 19, 2004, petitioner filed 10 motions related to the * * * proceedings. * * *

On February 20 the court failed to hold its scheduled status conference. Petitioner's counsel called the courthouse and was advised Judge Ables was out of the office for the day. Counsel then called the Gillespie County District Attorney, who explained that the judge had informed state attorneys earlier that week that he was cancelling the conference he had set and would appoint the mental health experts without input from the parties.

On February 23, 2004, counsel for petitioner received an order, dated February 20, advising that the court was appointing two mental health experts. * * *

The court-appointed experts returned with their evaluation on April 28, 2004. Concluding that petitioner "knows that he is to be executed, and that his execution will result in his death," and, moreover, that he "has the ability to understand the reason he is to be executed," the experts alleged that petitioner's uncooperative and bizarre behavior was due to calculated design: "Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation," they claimed. They maintained that petitioner "could answer questions about relevant legal issues . . . if he were willing to do so."

The judge sent a letter to counsel, including petitioner's attorney, Michael C. Gross, dated May 14, 2004. It said:

> Dear Counsel:
>
> It appears from the evaluations performed by [the court-appointed experts] that they are of the opinion that [petitioner] is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.
>
> * * *

Petitioner responded with a filing entitled "Objections to Experts' Report, Renewed Motion for Funds To Hire Mental Health Expert and Investigator, Renewed Motion for Appointment of Counsel, and Motion for Competency Hearing" (hereinafter Objections to Experts' Report). In this filing petitioner criticized the methodology and conclusions of the court-appointed experts; asserted his continued need for a mental health expert as his own criticisms of the report were "by necessity limited," again asked the court to rule on his outstanding motions for funds and appointment of counsel; and requested a competency hearing. Petitioner also argued, as a more general matter, that the process he had received thus far failed to comply with [the Texas statute] and the procedural mandates set by *Ford*.

The court, in response, closed the case. On May 26, it released a short order identifying the report submitted by the court-appointed experts and explaining that "[b]ased on the aforesaid doctors' reports, the Court finds that [petitioner] has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." The order made no mention of petitioner's motions or other filings. * * *

This background leads to the matter now before us. Petitioner returned to federal court, seeking resolution of the § 2254 petition he had filed on January 26. The District Court granted petitioner's motions to reconsider, to stay his execution, to appoint counsel, and to provide funds. The court, in addition, set the case for an evidentiary hearing, which included testimony by a psychiatrist, a professor, and two psychologists, all called by petitioner, as well as two psychologists and three correctional officers, called by respondent. * * *

On September 29, 2004, the District Court denied petitioner's habeas application on the merits. * * * It found petitioner had not shown incompetency as defined by Circuit precedent. "Ultimately," the court explained, "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." The Court of

Appeals affirmed and we granted certiorari.

II

We first consider our jurisdiction. * * *

The State maintains that, by direction of § 2244, the District Court lacked jurisdiction to adjudicate petitioner's § 2254 application. Its argument is straightforward: "[Petitioner's] first federal habeas application, which was fully and finally adjudicated on the merits, failed to raise a *Ford* claim," and, as a result, "[his] subsequent habeas application, which did raise a *Ford* claim, was a "second or successive application" under the terms of § 2244(b)(2) [and therefore must be dismissed]. * * *

* * *

The phrase "second or successive" is not self-defining. * * * The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application. * * *

Our interpretation of § 2244 in [*Stewart v.*] *Martinez-Villareal*, [523 U.S. 637 (1998),] is illustrative. There the prisoner filed his first habeas application before his execution date was set. In the first application he asserted, *inter alia,* that he was incompetent to be executed, citing *Ford*. The District Court, among other holdings, dismissed the claim as premature; and the Court of Appeals affirmed the ruling. When the State obtained a warrant for the execution, the prisoner filed, for the second time, a habeas application raising the same incompetency claim. The State argued that because the prisoner "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) . . . requires his new petition to be treated as successive.'"

We rejected this contention. * * * The Court instead held that, in light of the particular circumstances presented by a *Ford* claim, it would treat the two filings as a single application. The petitioner "was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief."

* * * We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.

* * *

III

A

* * *

* * * The state court's failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process[.] * * *As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.

Ford identifies the measures a State must provide when a prisoner alleges incompetency to be executed. The four-Justice plurality in *Ford* concluded as follows:

> * * * [T]he ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.

Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. Under this rule Justice Powell's opinion constitutes "clearly established" law for purposes of § 2254 and sets

the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.

Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. * * *

The[] basic requirements [of Due Process] include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination."

Petitioner was entitled to these protections once he had made a "substantial threshold showing of insanity." He made this showing when he filed his Renewed Motion To Determine Competency – a fact disputed by no party, confirmed by the trial court's appointment of mental health experts pursuant to [the Texas statute], and verified by our independent review of the record. * * *

In light of this showing, the state court failed to provide petitioner with the minimum process required by *Ford*.

* * *

* * * The [Texas trial] court mailed the experts' report to both parties in the first week of May. The report, which rejected the factual basis for petitioner's claim, set forth new allegations suggesting that petitioner's bizarre behavior was due, at least in part, to deliberate design rather than mental illness. Petitioner's counsel reached the reasonable conclusion that these allegations warranted a response. On May 14 the court told petitioner's counsel, by letter, to file "any other matters you wish to have considered" within a week. Petitioner, in response, renewed his motions for an evidentiary hearing, funds to hire a mental health expert, and other relief. * * *

* * *

But at this point the court simply ended the matter.

* * *

IV

A

This brings us to the question petitioner asks the Court to resolve: whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of "the mental capacity to understand that [he] is being executed as a punishment for a crime."

A review of the expert testimony helps frame the issue. Four expert witnesses testified on petitioner's behalf in the District Court proceedings. One explained that petitioner's mental problems are indicative of "schizo-affective disorder," resulting in a "genuine delusion" involving his understanding of the reason for his execution. According to the expert, this delusion has recast petitioner's execution as "part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light." As a result, the expert explained, although petitioner claims to understand "that the state is saying that [it wishes] to execute him for [his] murder[s]," he believes in earnest that the stated reason is a "sham," and the State in truth wants to execute him "to stop him from preaching." Petitioner's other expert witnesses reached similar conclusions concerning the strength and sincerity of this "fixed delusion."

While the State's expert witnesses resisted the conclusion that petitioner's stated beliefs were necessarily indicative of incompetency, particularly in light of his perceived ability to understand certain concepts and, at times, to be "clear and lucid," they acknowledged evidence of mental problems. Petitioner's rebuttal witness attempted to reconcile the experts' testimony:

> Well, first, you have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability . . . . Instead, you have a situation where – and why we call schizophrenia thought disorder [–] the logical integration and reality connection of their

> thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way. That's the essence of somebody being schizophrenic . . . . Now, it may be that if they're dealing with someone who's more familiar . . . [in] what may feel like a safer, more enclosed environment . . . those sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

* * * There is, in short, much in the record to support the conclusion that petitioner suffers from severe delusions.

The legal inquiry concerns whether these delusions can be said to render him incompetent. * * *

The Court of Appeals stated that competency is determined by whether a prisoner is aware "'that he [is] going to be executed and why he [is] going to be executed.'" To this end, the Court of Appeals identified the relevant District Court findings as follows: first, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question. Under Circuit precedent this ends the analysis as a matter of law; for the Court of Appeals regards these three factual findings as necessarily demonstrating that a prisoner is aware of the reason for his execution.

The Court of Appeals concluded that its standard foreclosed petitioner from establishing incompetency by the means he now seeks to employ: a showing that his mental illness obstructs a rational understanding of the State's reason for his execution. * * *

In our view the Court of Appeals' standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment. The opinions in *Ford,* it must be acknowledged, did not set forth a precise standard for competency. * * * Yet in the portion of Justice Marshall's discussion constituting the opinion of the Court (the portion Justice Powell joined) the majority did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner." The Court stated the foundation for this principle as follows:

> [T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life . . . . Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Writing for four Justices, Justice Marshall concluded by indicating that the Eighth Amendment prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." Justice Powell, in his separate opinion, asserted that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."

The Court of Appeals' standard treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware [ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

* * *

Whether *Ford's* inquiry into competency is formulated as a question of the prisoner's ability to "comprehen[d] the reasons" for his punishment or as a determination into whether he is "unaware of . . . why [he is] to suffer it," then, the approach taken by the Court of Appeals is inconsistent with *Ford*. * * * A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.

This is not to deny the fact that a concept like rational understanding is difficult to define. * * * Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered.

The flaws of the Court of Appeals' test are pronounced in petitioner's case. Circuit precedent required the District Court to disregard evidence of psychological dysfunction that, in the words of the judge, may have resulted in petitioner's "fundamental failure to appreciate the connection between the petitioner's crime and his execution." To refuse to consider evidence of this nature is to mistake *Ford's* holding and its logic. Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. * * *

B

Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations. The record is not as informative as it might be, even on the narrower issue of how a mental illness of the sort alleged by petitioner might affect this analysis. * * *

The underpinnings of petitioner's claims should be explained and evaluated in further detail on remand. The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent.

It is proper to allow the court charged with overseeing the development of the evidentiary record in this case the initial opportunity to resolve petitioner's constitutional claim. These issues may be resolved in the first instance by the District Court.

* * *

Justice THOMAS, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice ALITO join, dissenting.

* * * While Panetti's mental illness may make him a sympathetic figure, state and federal courts have repeatedly held that he is competent to face the consequences of the two murders he committed. * * *

This case should be simple. Panetti brings a claim under *Ford v. Wainwright* that he is incompetent to be executed. Presented for the first time in Panetti's second federal habeas application, this claim undisputedly does not meet the statutory requirements for filing a "second or successive" habeas application. As such, Panetti's habeas application must be dismissed. Ignoring this clear statutory mandate, the Court bends over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened – or even changed – since 1995. Along the way, the Court improperly refuses to defer to

the state court's finding of competency even though Panetti had the opportunity to submit evidence and to respond to the court-appointed experts' report. Moreover, without undertaking even a cursory Eighth Amendment analysis, the Court imposes a new standard for determining incompetency. I respectfully dissent.

* * *

II

* * * Even if Justice Powell's concurrence in *Ford* qualifies as clearly established federal law on this point, the state court did not unreasonably apply *Ford*.

A

The procedural rights described in *Ford* are triggered only upon "a substantial threshold showing of insanity." * * * [T]he majority finds that Panetti has made a satisfactory threshold showing. That conclusion is insupportable.

Panetti filed only two exhibits with his Renewed Motion to Determine Competency in the state court. The first was a one-page letter from Dr. Cunningham to Panetti's counsel describing his 85-minute "preliminary evaluation" of Panetti. Far from containing "pointed observations," Dr. Cunningham's letter is unsworn, contains no diagnosis, and does not discuss whether Panetti understood why he was being executed. Panetti's other exhibit was a one-page declaration of a *law professor* who attended Cunningham's 85-minute meeting with Panetti. * * *

Panetti's Renewed Motion attached no medical reports or records, no sworn testimony from any medical professional, and no diagnosis of any medical condition. * * * It is absurd to suggest that this quantum of evidence clears the "high threshold," entitling claimants to the procedural protections described by the plurality and Justice Powell in *Ford*.

B

* * *

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* * *

* * * Given Panetti's meager evidentiary submissions, it is unsurprising that the state court declined to proceed further. * * *

3

* * *

* * * The record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence – because, at that time, he had no further evidence to submit – but state funding for his pursuit of more evidence. * * * This Court has never recognized a constitutional right to state funding for counsel in state habeas proceedings – much less for experts – and Texas law grants no such right in *Ford* proceedings.

In short, there is nothing in the record to suggest that Panetti would have submitted any additional evidence had he been given another opportunity to do so. * * *

C

* * *

Applying Justice Powell's substantive standard for competency, the state court determined that Panetti was competent to be executed, a factual determination that is "presumed to be correct." § 2254(e)(1). That factual determination was based on an expert report by two doctors with almost no evidence to the contrary. Hence, Panetti is not entitled to federal habeas relief under § 2254.

III

* * *

Because the issue before the Court in *Ford* was actual knowledge, not rational understanding, nothing in any of the *Ford* opinions addresses what to do when a prisoner knows the reason for his execution but does not "rationally understand" it.

* * * [T]he Court cobbles together stray language from *Ford's* multiple opinions and asserts that the Court of Appeals' test is somehow inconsistent with the spirit of *Ford*. Because that result does not follow naturally from *Ford,*

today's opinion can be understood only as holding for the first time that the Eighth Amendment requires "rational understanding."

* * *

Developments in *Panetti* After the Decision

The U.S. Fifth Circuit Court of Appeals remanded the case on August 15, 2007, to the District Court for the Western District of Texas "for further proceedings consistent with the opinion of the Supreme Court."

A hearing was held on February 6, 2008, before Federal District Court Judge Sam Sparks. The medical and scientific evidence presented before the Court consisted of expert opinions from psychiatrists, psychologists and neuropsychologists on behalf of both the State and Panetti. The Court heard testimony from fellow inmates, the prison guards and the chaplain who had contact with Panetti on death row and reviewed the extensive documentation of Panetti's mental illness as contained in medical, social security and prison records. Finally the Court also listened to eleven hours of taped conversations between Panetti and his relatives and visitors as recorded by the state during his visitation hours between December 2007 and January 2008.

Judge Sparks found on March 26, 2008, that Panetti was competent to be executed:

> Panetti was mentally ill when he committed his crime and continues to be mentally ill today. However, he has both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two. Therefore, if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti.

Panetti v. Quarterman, 2008 Westlaw 2338498, (W.D.Tex., Mar. 26, 2008).

Panetti appealed, but before the Fifth Circuit could address his claim, he filed a motion to stay and abate the proceedings so he could return to Texas state court to raise a claim under *Indiana v. Edwards*, 554 U.S. 164, 178 (2008), in which the Supreme Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial * * *, but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." The District Court rejected the claim, holding that *Edwards* did not apply to Panetti's case because it was not retroactive, and that, even if *Edwards* was retroactive, the state court was not required to appoint counsel for Panetti. *Panetti v. Thaler*, 2012 Westlaw 290115 (W.D. Tex. Jan. 31, 2012).

The Court of Appeals for the Fifth Circuit upheld the District Court's determination that Panetti was competent to be executed and that *Edwards* did not apply to the case because it was not retroactive. *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013).

The difficulty of assessing competency to be executed is illustrated by the case of John Ferguson, a black man, who suffered from schizophrenia, who was executed by Florida in 2013, even though he believed that he was the Prince of God and that after execution, he would be resurrected and return to earth in that capacity. The Court of Appeals for the Eleventh Circuit treated this as nothing more than an unusual religious belief:

> While Ferguson's thoughts about what happens after death may seem extreme to many people, nearly every major world religion – from Christianity to Zoroastrianism – envisions some kind of continuation of life after death, often including resurrection. Ferguson's belief in his ultimate corporeal resurrection may differ in degree, but it does not necessarily differ in kind, from the beliefs of millions of Americans.

Ferguson v. Secretary, 716 F.3d 1315, 1342 (11th Cir. 2013). The court warned against treating unusual religious beliefs as proof of mental illness, but religious delusions and obsessions are

frequent manifestations of mental illness as illustrated by the case that follows:

VARNELL WEEKS
v.
STATE OF ALABAMA

Circuit Court of Macon County, Alabama
Excerpts from hearings on April 7 and 14, 1995

A Motion for Post-conviction Relief was filed on behalf of Varnell Weeks asserting that he was incompetent for execution because he suffered from schizophrenia, was delusional, and did not fully understand and appreciate death and the relationship between death as a punishment and the murder for which he had been convicted. The assertion of incompetency was based on Weeks' behavior in prison and prison records detailing his psychotic episodes.

Lawyers for Weeks tried unsuccessfully to have the Court allow their psychologist and psychiatrist evaluate Mr. Weeks (discussed in the testimony which follows). The Court scheduled a hearing for April 7, and began the hearing by conducting an examination of Weeks over the objection of counsel for Weeks.

Counsel: Barry Fisher for Varnell Weeks; Clayton Crenshaw, Assistant Attorney General, for Alabama.

Examination of Varnell Weeks by the Court:

Q. Okay. Good morning.

A. Good morning.

Q. What is your name, please, sir?

A. Varnall Weeks.

Q. All right. Where were you born?

A. In Macon County .

Q. Born here in Macon County ?

A. (nods in affirmative)

Q. Tell me about your family. Do you have brothers and sisters?

A. I have brothers. I don't have no sisters.

Q. All right. Who is your brother?

A. I got one under me which is Lester Weeks, and myself, and you got Shenard Weeks, which is above me. And then you got Calvin Weeks, and I got one deceased, which is Jerome Weeks.

Q. Okay. And what about your parents? Who were they or who are they? Are they still living?

A. No, they're both deceased. My mother was – she come – her hometown was Georgia . And my father was – come from Carolina, South Carolina.

Q. What are their names?

A. My father's name is Luster Weeks, and my mother's name is Annie Mae Weeks.

Q. Okay.

A. They made their home here in Macon County when they got married.

Q. When you lived here in Macon County – incidentally, how long have you been gone from Macon County ?

A. I guess around about thirteen or fourteen years.

Q. Okay. Where have you been since you left Macon County ?

A. Well, I been incarcerated, really.

Q. You've been in custody ever since then?

A. Right.

Q. What was the date of your birth?

A. April the 10th.

Q. Of what year?

A. '52.

Q. You was born April the 10th, 1952. Do you know where you are today?

A. What you mean?

Q. Well, where are you right now?

A. I don't understand the question.

Q. Well, I'm just asking you if you know where you are today?

A. Speaking about location, right?

Q. Just location, yeah.

A. Yeah, I know where I'm at.

Q. All right. Where are you?

A. In Macon County courtroom.

Q. In the courtroom in Macon County ?

A. Right.

Q. All right. What are we doing here?

A. Having a hearing.

Q. All right. What is this hearing about?

A. Some psychology evaluation type of thing.

Q. All right. Who are the people seated over – who were seated over at the table with you?

A. That's my defense counsel.

Q. All right. And what are they supposed to be doing here?

A. Counteracting the defense.

Q. Well, the State. You were pointing at the State, but you said defense. You mean counteracting the State?

A. Yes, sir.

Q. All right. What is the State trying to do here?

A. They trying to take my life.

Q. They're trying to get you executed?

A. Right.

Q. Well, what is the date when you understand it when you're due to be executed?

A. May the 11th.

Q. Okay. How many fingers am I holding up?

A. Four.

Q. All right. And what – can I ask you about that domino?

MR. FISHER [counsel for Mr. Weeks]: Your Honor, I'm sorry to interrupt. I couldn't see how many fingers were you holding up?

THE COURT: I had four. I had four held up. I had my thumb tucked under and was holding up four fingers.

Q. All right. How many fingers am I holding up now?

A. Three.

THE COURT: All right. Let the Record show that I was, indeed, holding up three fingers.

Q. What color is my robe?

A. It's what y'all call black, negro, or whatever.

Q. My robe is negro?

A. Well, okay. I can't say that it's black because black is definition of negro. So negro is the definition of black. So what you said, what color is your robe. You say, well, either it's negro or it's black.

Q. All right. Well, what color is this file right here that I've got my finger on right here? Can you see it?

A. Yes.

Q. And what color is it?

A. It seems to be – (pause).

Q. Is it blue?

A. No. It's a particular type of red.

Q. Okay, You have a domino [tied with string] * * * around your head. Tell me what the significance of that domino is?

A. It's a criterion.

Q. For what?

A. For what?

Q. Yeah. A criterion for what?

A. Judgment.

Q. All right. And what does that mean?

A. Well, it's like a mediator. Just like your position, Judge.

Q. All right. What about it is significant? Are the numbers on it significant?

A. The numbers are seven –

Q. All right. Seven on each end. Double sevens.

A. Right. And that's my name because you've got seven days in a week, and that's my name.

Q. That's your name?

A. Yeah.

Q. Okay. Your name is Weeks?

A. Right.

Q. And so you've got two sevens, so that's weeks and you're Weeks?

A. Right.

Q. All right. Is there any significance to the color of the domino? A lot of dominos are black with white spots on then, and that domino is white with black spots on it.

A. It really doesn't have anything to do with it. Just a white background with a – a black front with a white background. That's all it is.

Q. Okay. And you're a black man; is that right?

A. No, sir.

Q. How would you categorize that?

A. I'm an Ethiopian man.

Q. Ethiopian?

A. Right.

Q. All right. Dark skin?

A. That's what you said.

Q. Okay. Do you think there's any significance to that particular thing as far as these proceedings are concerned to the color of your skin?

A. Always have been, sir.

Q. Okay. Now, let's go back to the trial in this case. What were you accused of in this case? What was this trial about that occurred some thirteen or fourteen years ago that resulted in you being incarcerated?

A. Well, the D.A. accused me of robbery and murder.

Q. And you denied that, I believe?

A. Yes, sir.

Q. But a jury found you guilty of it?

A. Yes, sir.

Q. And they said that you were guilty of robbery and murder and therefore of a capital offense?

A. Yes, sir.

Q. Now, did the jury also set your death penalty in this case?

A. They didn't set the death penalty, but –

Q. Who did?

A. If they found me guilty, that was the result. So I waived the mediating circumstances with the jury, and the Judge gave me –

Q. Do you remember who that Judge was?

A. Judge Byrd I think it was.

Q. Judge Byrd?

A. Right.

Q. And shortly after that trial, Judge Byrd was defeated and I was elected to this office. You understand that? So that's the reason Judge Byrd is not here today doing this. And, of course, I suspect that by now Judge Byrd would have been in retirement, anyway. He would be seventy years old or older by now. Do you remember being convicted?

A. Um – hum, yes.

Q. They said you were guilty?

A. Yes.

Q. All right. What was the sentence that was imposed by Judge Byrd?

A. The death penalty.

Q. Why did Judge Byrd impose the death penalty?

A. Well, that's because that's what they charged me with.

Q. All right. And it was a death penalty case?

A. Yes.

Q. All right. The [Alabama] Supreme Court has set an execution date. If you are executed on May the 12th, do you know why you will be executed?

A. Do I know why I'm being executed?

Q. Yeah. Do you know? Do you understand? Can you tell me today what it is that you're being executed for?

A. Well, I can tell you this. There's two reasons. You got a political reason, and you got a religious reason.

Q. Do you think religion has got anything to do with this execution?

A. Yes, sir.

Q. Tell me what you think it's got to do with it.

A. Well, if it wasn't religion, sir, we wouldn't have a reproduction.

Q. Okay. All right. Let me see if I understand that. Now, if I state – you're a little bit reticent about stating fully certain things, I've noticed. And so if I supply the wrong words, now, you tell me. Are you saying that maybe because others regard your skin as being dark that you're being executed because of that and for reproductive reasons? Or does it have to do with your religion?

A. You're stating two things, right?

Q. Is it because – are you saying that this – that you're being executed so that you can't reproduce? Is that what you're saying?

A. Well, no, sir.

Q. Okay. Well, tell me again. I misunderstood what you were saying.

A. You asked me what this has to do with it. I said that religion have everything to do with it. The State is based on religion. But the State got grown, so to speak, and throwed off its parents. And so therefore, you understand, I mean the State has a whole new ball game, see. Now you have got a separation of State and church, see.

Q. Yeah.

A. So this is why I say that you've got which was, like, which definition do you want? Like is it a political thing or a religious thing?

Q. Okay. I'm interested in pursuing that a little bit more. But you said something about reproduction, though, and I never did quite understand what you were telling me about that. Can you – do you remember saying that?

A. Yeah.

Q. What were you talking about? I tried to figure it out, but I – right now I don't know what you mean.

A. Well, see, you've got scientific terms for like evolution.

Q. Well, let me ask you this. Are you being executed because of the conviction of murder?

A. No, sir.

Q. Okay. Well, why are you being executed?

A. Because of the D.A.'s opinions.

Q. Well, it was the jury's opinion, wasn't it?

A. No, sir.

Q. They didn't come to the conclusion that your were guilty of capital murder?

A. That's the impression that the jury received from the D.A., sir.

Q. Okay. Is there anything else you can tell me about the thing of religion having something to do with your execution?

A. Well, this is on a fulfillment or promise that I should die.

Q. Religion has to do with what people believe, doesn't it?

A. No, sir.

Q. It doesn't have to do with beliefs?

A. No, sir.

Q. Well, what does it have to do with?

A. Creation.

Q. Creation?

A. Yes, sir.

Q. Who created the world?

A. Yes, sir.

Q. And who created people?

A. Yes, sir.

Q. Well, what is your religion? You mentioned that. Is there any particular significance to some

religious belief that you hold that you think has got to do with this?

A. Religion is people.

Q. Humanism?

A. Well, no, sir. That's one of the technical terms of denominations or worldly – some kind of segregation type of thing among man. That's not – see, religion among God and religion among man is two different things. You see, we interpretate things different.

Q. Okay. What is your date of execution?

A. May the 12th.

Q. Okay. How do you feel about your own competency? Do you feel like that what you're telling me today is right and that you are competent and know what you're talking about?

A. Well, yeah, I know what I'm talking about.

Q. Do you feel like you're incompetent?

A. No, sir.

THE COURT: All right. Now, at this point in time, everything that I've asked him so far has been strictly non-evidentiary. It simply is probing into his mind and how he views the world and what he knows and who how he perceives things. At this point in time I would propose to ask him about medication, and that has certain evidentiary value, perhaps. Is there any objection to asking him about when he's taken medication?

MR. FISHER [counsel for Mr. Weeks]: Your Honor, briefly, we would reiterate the same objections we made before to the court questioning him. But, in addition, we point out that the court is interrupting Mr. Weeks and putting words in his mouth in the course of his questioning. In addition, the fact that, with all due respect, Your Honor is not a psychologist. And for that reason also we don't feel that this questioning is appropriate or reliable. The courtroom, which I would just note for the record, has at least twenty people here, if not more, is not an appropriate setting for this for a number of reasons.

THE COURT: You don't feel that this should be a public hearing?

MR. FISHER: No, Your Honor, I think it should be a public hearing. I don't think we should be trying to determine –

THE COURT: You don't think that the ultimate decision, you know, the person with the ultimate decision-making responsibility should attempt to come to an understanding of the person with whom he's dealing?

MR. FISHER: Your Honor –

THE COURT: Let me ask you this. Have you consulted with your experts as to what their opinion is about whether the person who has that ultimate decision should do confronted with this – the responsibility that I obviously have in the case?

MR. FISHER: Your Honor, I have not had a chance to consult with them about that. But I'll be happy to have them address that when they testify.

THE COURT: Okay. I would think that unless they have an adversarial stance that they would affirm the common sense notion that whoever has the ultimate responsibility for making the decision, that there's nothing wrong with the Court attempting to engage the mind of the defendant and to see exactly what sort of presentations he makes, what sort of images can be extracted, and how his mind is operating as of today.

[THE COURT, returning to questioning of Mr. Weeks:]

Q. You've said that you felt that the State was out to get you, so to speak. Is anybody else out to get you?

A. I didn't say that, sir.

Q. How is that?

A. I didn't say that.

Q. You didn't say that the State is out to get you?

A. No, sir.

Q. That's not what you meant?

A. No, sir.

Q. Well, tell me what you meant.

A. I said, the State is out to execute me, take my

life.

Q. All right. Well, that's what I mean. The State is out to get you executed. Is there anybody else that you know of who's trying to get you executed?

A. Well, probably the devil, you know.

Q. Probably the devil?

A. Yes, sir.

Q. All right. Now, tell me about how the devil would do that?

A. Well, he would, just like my lawyer said, you know, he would put words in your mouth and he would twist the truth and he would poison, you know, and lie, and stuff of this nature.

Q. Well, do you think that I'm doing that at this point in time?

A. Well, with all due respect, sir, I believe you're doing a little twisting, now, sir.

Q. All right. Tell me what I've twisted so that I can straighten that out.

A. So far you said that somebody was out to get me, you see. It's not so much as what's being said but what is being meant.

Q. Um-hum.

A. See what I'm saying? And, for instance, the situation about the color of the robe. Now, it all depends on your what definition you use and what language you using when you said, "What color is my robe?" Now, if I was using modern English, the robe would be black. If I was using Spanish, the robe would be negro, and so forth. And matters and so forth and always boil down to, you know, a primitive.

Q. Now, when you used the word "negro" earlier, you were referring not to race but to a different language; is that right?

A. Yeah. Yes, sir.

Q. Okay. Okay. Are there other ways that you feel that I'm twisting the things that you say? Give me other examples.

A. Well, just say, for instance, sir, that this – just take a car, for instance. Okay. In the military, a car would be a vehicle. But, in the civil situation, it probably would be an automobile. And, if you get on down to the ghetto, you understand, I mean, it would probably be a ride.

Q. So we use words different ways. Let me ask you this. Can you use that same – can you tell me how the word "rifle" or "gun" or "weapon" would be – show me how that would relate to what you've just said.

A. Well, in the military we call it a weapon.

Q. Okay.

A. Okay. The – No. I think it's the other way around. I think it's a weapon in the court of law. It's a weapon.

Q. Okay.

A. But in the military, it's a firearm.

Q. Okay.

A. Or either I may have it crossed up. Either – either one way or the other.

Q. Who would call it a gun, reckon?

A. Well, that's ghetto slang. You know, that's more or less slang or something of this nature.

Q. Less formal?

A. Yes, less formal. So it's not really recognized as – it has no honorable respect using that term like nigger, you know. It's offensive. See what I'm saying?

Q. I understand exactly what you're saying.

A. So as you go down the what you call different classes or what they call – (pause).

Q. They're different. Are you saying that there are different levels of formality in language and that the same term can be used to – I mean, different terms can be used to describe the same thing sometimes with respect and dignity and some without respect and dignity?

A. Right. It's dealing with the cast. Do you understand?

Q. You've studied this a good bit, haven't you?

A. Pardon me?

Q. You've studied about this sort of thing a good bit, haven't you?

A. No. I didn't have the slightest idea what these people were talking about, sir. God –

Q. God told you about it?

A. Showed me things, see.

Q. Okay. Tell me about that. How did God tell you this? Did you hear voices or what?

A. Well, a light come from the sky, you see, and I was in jail at the time, see.

Q. On these charges?

A. No.

Q. On other charges?

A. On other charges.

Q. All right. And a light came from the sky?

A. Right.

Q. What happened next?

A. And the light come from the sky, you know. It fell upon a book on, and this book was the Bible. It was a little Bible in the cell, you know, but it wasn't none of mine, see. And so I seen this happen, you know, and I was observing it. And from this light, you know, I kind of questioned it, you know. And it told me it was God, right? So I accepted that, you know. And at that time I couldn't read, you see, and – but I knew that was a Bible, you know. And it told me, you know, to observe the Bible and pick it up and try to read it and stuff, you know. But I couldn't do that. And after –

Q. Let me ask you this. How far did you go in school?

A. Well, I really went to the eighth grade in the retarded, see. But, see, going to the eighth grade in the retarded, you understand, means like going nowhere.

Q. Why would you have been in retarded? It seems to me that you – that you think at a rather good level of abstraction. I mean, you understand things that other people might not understand as well. Why what caused you to be in a special group of any kind?

A. Okay. Now, I was looking at it from a normal point of view when I was – I couldn't read and couldn't write and stuff and was retarded and stuff.

Q. Can you read and write now?

MR. FISHER: Your Honor, I'm going to object to your interrupting Mr. Weeks. If you're going to question him, I'd urge you to allow him to finish his answers and not put words in his mouth.

THE COURT: The record will speak for itself in that regard, I believe. And, at this point in time, I will caution counsel that counsel is attempting to create an impression in the record that is not accurate. And that there has been no undue interruption. There's been some small amount when we began to move away from a point to redirect the conversation, but I would have to say that the record will be its own best evidence. And that is what I'm doing. And counsel has miscategorized the actions of the Court at this point in time, and the Court is making that necessary correction in the record. There is no interruption of any flow of thought pattern taking place in this conversation.

* * *

THE COURT: I feel like that I'm getting some insight into it, and I don't mind at this point in time communicating the fact that he obviously knows where he is now, he knows what he's doing. He has an awareness of his immediate surroundings. He's got an awareness of the purpose of what this hearing is about and what we're doing here. He has a rather good level of general intelligence, it appears to me. He's not a stupid person. He's not, you know, that particular malady doesn't affect him. And he's able to communicate at a pretty high level of abstraction.

There may be other thought patterns that are delusional in nature. The communication with the Divine, some of those things. There are those who question whether that is – whether a person is really on the beam in having those kinds of impressions about things. So that gets into areas where I'll have to have some degree of expertise in helping to comprehend it.

But, Mr. Fisher, I want you to know I'm serious

about evaluating whether this man is competent or not. I've got that ethical, moral, and legal responsibility, and I'm discharging it. And I don't care who disagrees with me later on. I'm not going to make the decision without personally discharging that responsibility and peering as deeply as I can into his mental processes.

Q. That's a good idea, isn't it, Mr. Weeks?

A. Yes, sir.

Q. Okay. Now, where were we?

A. Well, we were about the school.

Q. Yeah. You were telling me about your school background. You said you went to the eighth grade and that for some reason you were treated in a special education class or something of this nature or retarded was, I believe, the word that you used. Do you know anything about why you would have been in special education?

A. Well, I assume that at the rate the other children were catching on to education, I wasn't adapting. Just like, you know, I wasn't adapting to the society's rules either, you know, as a criminal.

Q. Well, let me ask you this. Have you experienced what you believe to be mental difficulties in your lifetime? Do you feel like you've had mental illness?

A. Well, it all depends upon how you judge a mental illness, sir.

Q. Well, I'm asking you for whatever judgment you have about it.

A. Well, see, now, if you was in a different continent, sir – We over in America it's apple pie and Chevrolet, you know. But I imagine in Japanese, you understand, I mean, it's rock char and snake or something, you know. And, you know, so it all depends on, you know, how you judging it.

Q. In other words, what you're saying is what might be normal in America might be abnormal somewhere else, and what might be abnormal somewhere else might be normal in America ?

A. Right.

Q. Is that what –

A. Right. But, you know, you're doing the judging here, and I'm doing the judging, also. So what I'm saying is, what are we going to base normal and abnormal on.

Q. Yeah. Well, what would you base it on?

A. On the truth.

Q. On the truth?

A. Yes, sir.

Q. And how do you arrive at truth?

A. By facts.

Q. All right. And how do you arrive at what facts are?

A. By discussion and opinions.

Q. By different people sharing the way they look at it and if enough of them agree on it, then even though somebody might show that they're wrong later on, then they as a group they arrive at some perception of reality? Is that sort of what you're saying?

A. So you're saying the majority wins on the discussion, right?

Q. I don't know. What do you think? Do you think that the majority determines what reality is?

A. So two wrongs make a right. Is that what you're saying?

Q. No. I'm asking you.

A. No, sir. I'm asking you.

Q. Well, that's not the way this system is going to work. I'm going to ask the questions. And, see, we're creating a record.

A. That's my problem, sir. That's my problem.

Q. Let me say, now –

A. That's a conflict.

Q. The world doesn't need to know what I think about reality. The world does need to know what you think.

A. We started off with respect for one another, and now we're fixing to end up, you understand, me falling out. Because, see, you want to dictate, you understand me, your opinions, you understand

me, and don't want to accept my compromising. And, see, that's the whole thing, sir. Now, that's what we started off, and now you're going to renege. I told you, you was twisting it.

Q. All right. Now, tell me how I'm twisting it again.

A. You're welching on the agreement, sir.

Q. What agreement was that?

A. (No response)

Q. What agreement am I welching on?

A. Well, you're welching on the agreement that we made about a discussion.

Q. Well, let me ask you this. What is my job here today? We talked about what other people are doing. What is my job?

A. To make a decision.

Q. And to make a decision about what?

A. About a decision.

Q. Well, no, it's not a decision about a decision is it? What is it? What have I got to decide?

A. Just like I said, sir, you've got to decide – you've got to make a decision about a decision. You see, like you said at the beginning of this case, you understand me, it comes – it was handed down to you.

Q. Um-hum.

A. Okay. So now what I'm saying is you've got to make a decision, you understand me, of something that you did not create.

Q. That's right. But, now, you told me earlier that this was about psychology. All right. Do you remember telling me that?

A. We talked about that.

Q. All right. Now, what have I got to decide about psychology?

A. Well, you've got to decide if I'm accepted as competent or uncompetent in your court, sir.

Q. Okay. Well, since that's the purpose, do you understand sort of why I've got to inquire – it's got to be sort of a one-directional thing? It can't be – you know, there would be no purpose served in you examining me, particularly, at this point, would there?

A. That's right.

Q. I've got to make the decision.

A. Right.

Q. And that's the way the system is set up, and I didn't set the system up. I just happen to be here. Do you understand all of that?

A. I understand that, sir. But, like I said, you got to make a decision here. You are a judge, and I'm a judge.

Q. Okay. Are you a judge?

A. We have got to make a decision here.

Q. All right. Explain to me as fully as you can what you mean when you say that you're a judge?

A. Well, I told you about the – what you call the domino effect here, right?

Q. I don't remember using the term "domino effect."

A. Well –

Q. I asked about the domino.

A. Okay. Well, it's a chain reaction here, right, about the dominos and my appearance and stuff of this nature, right? And I explained to you what it was.

Q. Okay.

A. And you understand what it is, right?

Q. I do. I understand what you explained.

A. So, then, you understand what I am, and I understand what you is.

Q. Okay.

A. And we are trying to compromise, because we have been the victims of somebody else's situation. Like, the case was handed to you. Well –

Q. I'm not a victim. They pay me to do this, actually.

A. Regardless of what you get, sir, that's immaterial. What I'm saying is that you got a situation that you did not create, see. Like you didn't ask to come in this world, right? Okay. Well, the same thing about our situation here. We got a situation that we got to deal with, see. And due to the fact that your life is in my hands and my life is in your hands.

Q. Okay. I understand a little bit about your life being in my hands, even though I don't really think that it is. I didn't make that decision, and all I've got to do is decide whether you're competent or not. And then whatever happens happens. But, now, how is my life in your hands?

A. Well, you see; I'm God.

Q. Oh, you are?

A. Yes, sir.

Q. Okay. Tell me more about that.

A. Well, as creation is desired, you got the adults and you got children. You've got two adults, and you've got a child. And you've got a man on one side and a woman on the other side, and you've got the child which would be the one in the center. Okay? But as creation is concerned, it is the child that causes the parents to cone together. You see? I haven't – The child is causing the parents to create, you know, the child. Well, in the creation of God, it works the same way. The parents – the child is the creator of the parents, but the parents is to bring forth the child, you see.

Q. That's the reason that they come together is to do that. In other words, it's sort of, shall we say, goal-oriented? That they might not even know why they're called on to do that?

A. Right.

Q. But it happens anyway?

A. It's the child that motivates the whole situation. Do you understand what I'm saying?

Q. Um-hum.

A. So it's God motivates the whole situation, because, see, the child, that's God.

Q. What you're saying is that the final causes have a part of what makes things happen? That the ultimate goal is sort of what makes things happen? Is that what –

A. Well, basically, yes, sir. Yes, sir.

Q. So it's not just a matter of cause and effect of a man seeing a woman and them wanting to get together?

A. No, sir.

Q. There's something out there, the end result. But, now, what has that got to do with you?

A. Because I'm God, sir.

Q. You're the one that causes that to happen?

A. Yes, sir.

Q. Okay. I don't believe that there's – Is there anything else that you feel like you need to tell me about at this point in time?

A. Well, there is really nothing that I probably could say, sir, that would make any difference to you, you know, because you've got your own opinion about this.

Q. I never have talked with you before, though, have I?

A. Sir?

Q. I never have talked with you before, have I?

A. Not verbally. But you have read some of my work, sir. And, you know, like I say, you know, it's nothing I really could say that would really change your mind or anything, you know. Or is it something that I could say that would change your mind? That's the question, sir.

Q. I've got an open mind. I'm just listening. You know, what I've got to decide is whether you're competent or not. Is there anything else that you can tell me? And, at this point in time, I'm going to listen to everything else that is said before I make up my mind about it. Is there anything else that you can think of that you need to tell me? Anything that's happened in the past that you think would have to do – Were you ever committed to any sort of an institution other than the penitentiary? Have you ever been treated for any mental health problems?

A. Like you said, sir, all you've got to do is to decide whether I'm incompetent, you know.

Q. Um–hum. Okay. You can rejoin the people over at the table.

A. Thank you.

* * *

THE COURT: Earlier I recorded my impression of the witness as to his awareness of surroundings and general awareness of what's going on, and I don't think it's necessary for me to elaborate on that any further. I would make the – just for the record my impression that some of his insights into philosophical matters and religious matters are fairly remarkable. They are not that far out of keeping with what people have received a great deal of credit for what they thought have said about some things. What the significance of that is, you know, I'm not prepared to say. But his insight into final causes, his insight into word associations and that sort of thing is – He's operating at a remarkable of mental operation there. Now, whether that is abnormal or not, I'm not prepared to say. I'm not convinced that he is actually God or anything, but –

MR. FISHER: Excuse me, Your Honor?

THE COURT: I said, I'm not convinced that he's actually God. But, still, his insights into religious matters is thought provoking. I should think that this record of this conversation would be a matter of some interest for some time to come. * * *

* * *

The State later presented the testimony of Dr. Harry McClaren, Ph.D, who testified as follows in response to questions from Mr. CRENSHAW:

* * *

Q. How are you employed?

A. I'm a in the full time private practice of psychology. I'm also employed as a senior psychologist on a part-time basis at the Corrections Mental Health Institution in Chattahoocee, Florida.

[Dr. McClaren was qualified as an expert and asked to identify the records he reviewed.]

* * *

A. Bryce Hospital records, Taylor Hardin Secure Medical Facility records, prison records from Holman prison. I've seen the affidavits that have been previously discussed, all of them. I've interviewed Sergeant Fuqua at Holman Prison who told me that he had had nearly daily contact on his duty days during the past sixteen months with Hr. Weeks. He was also a man that Mr. Weeks told me that he would recommend to me as a person that knew him well. I briefly interviewed Dr. Crum, and I also briefly interviewed a masters level psychologist, a Mr. Goldtree, who had interactions with Mr. Weeks during his employment at Holnan Prison.

Q. Did you say you had reviewed the [state post-conviction hearing] testimony?

A. I haven't read it yet, but I did review it.

Q. Any other records that you reviewed?

A. There were various transcripts of legal proceedings, including sentencing hearing. I believe I read a transcript of a statement of Shanoy Weeks in regard to the particulars of the homicide for which Mr. Weeks was convicted. Those are the main documents that come to mind.

Q. Have you personally conducted an interview with Mr. Weeks?

A. Three separate ones.

Q. And you mentioned that the total amount of time that you visited with Mr. Weeks in those three meetings was twelve hours?

A. That's right. Approximately twelve hours.

* * *

Q. Dr. McClaren, did you conduct any kind of psychometric testing?

A. Yes, I did.

Q. What tests did you conduct?

A. The Wecasler Adult Intelligence Scale-Revised, the Minnesota Multiphasic personality Inventory, and the Rotter Incomplete Sentences Blank.

Q. What is the Wechsler test?

A. It's the most-often used individual test of intelligence in the country. As far as I know in the world.

* * *

Q. And you said you gave him an MMPI test?

A. Yes, sir.

Q. What does that measure?

A. That measures personality and psychopathology.

Q. And you said you gave him Incomplete Sentences Blank test: is that correct?

A. Yes.

Q. And what does that measure?

A. That's a brief projective technique that sometimes yields information for further discussion. It involves the patient finishing incomplete sentences such as "I like ___". Some people might say strawberries. Some people might say a walk on the beach. I'm sure everybody is thinking of the things they like.

Q. What were the results of the IQ test?

A. That Mr. Weeks appears to have an IQ of approximately eighty.

Q. What is the significance of the IQ of eighty?

A. Well, that he's not mentally retarded is the biggest significance to me. He declined to do one subtest involving arithmetic saying that the Lord had taught him about letters but not yet about numbers. So he would not work on that with me.

* * *

Q. Is Mr. Weeks mentally ill?

A. Clearly.

Q. All right. What is the diagnosis that you have made regarding that mental illness?

A. In my opinion the most probable diagnosis is paranoid schizophrenia. I think that there is some possibility that the correct diagnosis may be the schizoaffective disorder that –

THE COURT: Say that again.

THE WITNESS: The schizoaffective disorder.

THE COURT: What is that?

THE WITNESS: That's where the person has symptoms of a thought disorder at the same time that they have symptoms of a mood disorder, and there have been some notations in the medical records that have been admitted that point to him possibly having a mood disorder. So it's hard to tell. The important thing is he's got a chronic mental illness.

THE COURT: What is a mood disorder?

THE WITNESS: Like depression, bipolar disorder, organic mood disorders.

THE COURT: Chemical-type imbalance?

THE WITNESS: I think that most of the major mental illnesses are clearly related to changes in brain function. You can call them chemical imbalances.

Q. Do you have an opinion whether the paranoid schizophrenia is in remission?

* * *

A. It's in a poor state of remission.

Q. All right. Do you have an opinion on why?

A. Best of my belief is because of not taking psychotropic medications for at least sixty days and possibly as long as a year.

* * *

Q. All right. Based on your observations of Mr. Weeks, based on your conversations with Mr. Weeks and based on the testing that you did with Mr. Weeks and also the records that have been admitted into evidence here today, what is your assessment of Mr. Weeks in regard to his mental status?

A. Well, I believe that he's functioning in the low average – toward the lower limits of the low average range of intelligence. Possibly it could even be within the borderline retarded range, but he is not mentally retarded.

THE COURT: Were you present this morning when he responded to my questions?

THE WITNESS: No, sir. I believe that he has an

IQ somewhere in the eighties.

THE COURT: Do you think that IQ is a valid quantity that could – What do you think about IQ's? You know, people that wrote the Bell Curve think that it's a real good idea and that you can compare people based on that. And then there's a fellow after that that wrote the Multiple Intelligences and some other things like that didn't seem to think that there is such a thing as a G-factor. Now, is that really – how much does an IQ tell us about a person's abilities?

* * *

THE WITNESS: Well, that's a complex question. I've read some things about it recently.

THE COURT: Seems to me that IQ is an awful good thing when it's low and you're wanting somebody not to be executed. But it's not a very good thing when it comes to certain other uses of social science evidence these days. That you don't want to figure out whether somebody ought to get a job based on it, but you might want to figure out whether they can be executed based on it.

THE WITNESS: Well, I think there are some occupations where a certain basis applies like with police officers, firefighters. Clearly –

THE COURT: What do you think about the concepts of multiple intelligence?

THE WITNESS: Well, I think that what the intelligence tests like Wechsler test measures is not all that there is in the concept of intelligence, because it doesn't, perhaps, measure creativity.

THE COURT: Some of the things that the defendant Mr. Weeks testified under that he stated when I had questions with him indicate a remarkable degree of abstraction in his thinking. And he was able, for instance, to make an absolutely correct analogy and word usage between – what was it? He used colors like black, Negro, and those type things to create and to distinguish between different levels that we in American language call codes, which is a remarkable insight for a person that has an IQ of eighty. And, in order to test that particular thing, I asked him to make the same kind of comparison for the use of rifle, gun, and weapon. And he made a letter perfect analysis of those that would fit well within the intelligence or – He correctly drew the analogies for those words. That represents a remarkable degree of verbal skills.

THE WITNESS: Well, as you mentioned, there were some use of language like the word "ludicrous" that I would not expect for someone with an IQ of eighty to use. Also, in some of the past mental health records, the word "fallopian tubes" emerged in response to an ink blot.

THE COURT: Do those things work?

THE WITNESS: I don't use them anymore, Judge.

THE COURT: Okay.

Q. (Mr. Crenshaw continuing:) What is his understanding of his current legal situation?

A. He knows that he's set for execution on May the 12th. He knows that his attorneys are working to stop it. He knows that the Attorney General's Office is working to accomplish it. He told me that he knew that his body would die if he were executed and talked about how the physical body left behind would be like a shell.

Q. And does he know that he's going to be executed because a jury convicted him of capital murder and the judge sentenced him to death?

A. He believes that it was an unjust verdict, but he realizes that his execution is related to the jury finding him guilty of capital murder.

Q. How does he think it was unjust?

A. Basically, that he had a poor lawyer to begin with, that a lot of things were not brought out that should have been about his upbringing and background.

Q. Did he tell you specifically anything?

A. Yes. He talked about things that would commonly be called mitigators.

Q. Go ahead and tell us specifically.

A. * * * The first one was the State gave me a sorry lawyer. He termed him a "lemon. He said there was racism involved. He said that he had upbringing without his mom's full attention. He talked about how he and his brother had both been Bryce [mental hospital] patients. He talked about

how his father died when he was a little toddler, how the house where they grew up didn't have electricity, no running water, but it had a well and an outhouse. Said that they were living in poverty. The mother was uneducated. The mother would get drunk for two or three weeks and spells about once a year. And then we, quote, had to foot it for ourselves during those times. He said that at the time that this homicide happened that he had not been long out of prison and how hard that was to get along. He talked about how they just kicked you out in the street with thirty dollars, no social security card, no education. He said, what you going to do? Go out and buy yourself a pistol. And then he went on to say that both his mom and dad are both dead.

Q. Did he tell you about any arrangements that he had made regarding his personal effects?

A. Yes.

Q. What did he tell you about that?

A. He told me that he was going to give some books to one man that he believed needed to read. He was going to give his rosary to a man that he thought needed spiritual –

THE COURT: Did you by any chance investigate any of his reading materials?

THE WITNESS: Well, I went to his cell. Sure did, yes.

THE COURT: What has he been reading?

THE WITNESS: Well, clearly, he been reading American History. Because when I saw him for the last time he brought a fairly new American history with the Jim Crow section very clearly being highlighted at places. And we talked at some length about the Jim Crow laws. That was one thing. When I went to the cell, I noticed that there was a –

THE COURT: Has he studied any Hinduism or Buddhism or anything of that nature?

THE WITNESS: I don't know. I did See a Quran and a Bible on his toilet. And, of course, he spoke to me quite a bit about religious issues. And he gave me a New Testament.

THE COURT: Okay.

Q. (Mr. Crenshaw continuing:) Do you place any significance in the fact that he has made arrangements regarding his personal effects?

A. Yes.

Q. And what is that?

A. That he is putting his affairs in order.

Q. And on the days that you visited with him, did he show any kind of sense of humor regarding his pending execution date?

A. Yes.

Q. And what was that?

A. The meeting that we had on the 4th was in an office that had some kind of an antlered animal, looked like an elk to me, but I can't be sure. And, when Varnall came in, he looks at the elk head with the antlers and says. Looks like the deer is not the only thing with its neck on the block. And I thought it was –

Q. And you have reviewed the Department of Corrections' records, haven't you?

A. Yes.

Q. Tell the Court a little bit about the latest entry in the corrections records. I believe they were entered in March of 1995.

A. Okay. On March the 15th of 1995, Dr. Crum notes, Varnall is stable today. He was rational and responsive. He wanted a change of clothes. No signs of – I believe it is – thought confusion today or of erratic behavior pattern.

On 3/17 again by Dr. Crum. He was rational and responsive today. Will continue to follow.

On March the 28th of 1995, by Dr. Williams, psychiatrist – or I understand to be a psychiatrist. I have not met Dr. Williams. He continues to function without a thought disorder. On no psychotropic meds. Was argumentative and taciturn. Wanted to end session. Did not talk about his execution date. Was more tense than usual but not irrational. A/P, assessment and plan, no change. Follow up one month.

3/31/95. Varnall was responsive today. He was subdued but okay. Will follow. That by Dr. Crum. Those are the latest entries that I have.

MR. CRENSHAW: No more questions.

MR. FISHER: Your Honor, I just would note that we received about twenty-five pages worth of testing and notes. I would like a half an hour.

THE COURT: At this point in time, I am going to on my own motion declare about a five to ten minute recess. Dr. Lyman has been present during this testimony. You complained earlier that you had not had that they had not had the opportunity to do the investigation. Since Dr. Lyman has had the opportunity to hear this presentation, I'm going to allow you to consult with him before proceeding with cross examination.

MR. FISHER: Your Honor, I can't consult with Dr. Lyman and review all these materials in five minutes particularly because Dr. Lynan hasn't evaluated Mr. Weeks.

THE COURT: All right. You may proceed.

MR. FISHER: I would ask for a half an hour.

THE COURT: You may proceed now.

Cross-examination of Dr. McClaren by Mr. FISHER:

Q. Good afternoon, Dr. McClaren.

A. Good afternoon.

Q. You and I have never met is that correct?

A. I don't believe so.

Q. You said that you interviewed Mr. Weeks on three separate days for a total of twelve hours?

A. That's right. That was the amount of time that I spent around him, talking with him, observing him.

Q. Can you break it down day by day how many hours you spent with him?

A. Yes. Approximately six hours on the first day, approximately three hours on the second day which would have been the 31st, and approximately three more hours on the 4th of April. So that's a total of twelve. Six, three and three.

Q. And, during those encounters, how much of the time were you interacting with Mr. Weeks in the sense of questioning him, having him respond to questions?

A. All of the time except when, he was in the bathroom, I believe.

Q. What about when he took the MMPI?

A. I was interacting with him because he appeared to have difficulty reading, and it was an orally administered MMPI. So I interacted with him during that time.

Q. So you administered the entire MMPI orally?

A. Yes. He did not answer ten questions. But up to thirty is permissible.

THE COURT: Up to thirty that's not answered?

THE WITNESS: Is permissible.

THE COURT: Okay.

MR. FISHER: Your Honor, perhaps I wasn't clear before. If you were giving me a choice between no time and five minutes, I'd like five minutes to look over these materials.

THE COURT: Well, let the record show that I'm looking at the clock. It's 3 o'clock in the afternoon. I don't know how much more time we really can allocate today. I felt that I was being generous by giving you the opportunity to at least quickly compare notes with Dr. Lyman. You immediately wanted to use most of the balance of the afternoon for the purpose of conferring with the expert, which I find to be out of line. But I will be happy to give five minutes as I offered initially.

MR. FISHER: As I said, Your Honor, I think there are –

THE COURT: I would have thought that Dr. Lyman who has heard the testimony could quickly point you in the direction of any glaring problems that might exist in the testimony. And at this point in time we will be in recess for five minutes.

MR. FISHER: Okay. Thank you, Your Honor.

[a brief recess was taken]

MR. FISHER: Your Honor, again, I'll begin. I just feel I need to say for the record I'm not ready to cross examine Dr. McClaren, but I'll do my best

given –

THE COURT: It appears to me that you're doing an admirable job and that there does not appear to be any reason for an attorney who is trained in the art of cross examination to have any difficulty proceeding with this cross examination at this point.

Q. (Mr. Fisher continuing:) Dr. McClaren, why did you evaluate Mr. Weeks on three separate days?

A. By doing that, I thought it enhanced the chances that I would get a correct formulation of his mental condition.

* * *

Q. Would you regard Mr. Weeks as someone who's mental state seems to shift or change from week-to-week or month-to-month based on the review that you did as you were discussing with Mr. Crenshaw when he was questioning you?

A. He clearly goes through better and worse times of adjustment. He goes through relatively long periods of senility, and then has other periods of severe regression and disorganization.

Q. And these changes are often quite significant, wouldn't you agree?

A. Yes.

Q. He has a history of going from being not psychotic to being actively psychotic; is that correct?

A. Of course.

Q. Now, when we talk about psychotic, what does psychotic mean?

A. Well, it's a very global term. I guess the most frequent definition if you were to ask would be a distorted view of consensual reality.

Q. Someone who's psychotic and someone who's not in touch with reality, there's a break with reality? Is that accurate?

A. I think many people would say that. I see it as a distortion. I mean, most psychotic people I've ever observed in my life had some appreciation for the reality around them but was impaired.

THE COURT: What is reality?

THE WITNESS: That's the problem. Your reality may be different from mine, and what we observe is filtered throughout experience and –

THE COURT: Does it have to do with sharing of perceptions by a group?

THE WITNESS: Well, that's consensual reality.

THE COURT: Are there other forms of reality?

THE WITNESS: I think that there may be separate realities for different people of different cultures at different times that mankind has been on this earth.

THE COURT: Some people might put a different meaning on a particular event or transaction than another person might. That doesn't necessarily mean that they're not intact with reality any longer, does it?

THE WITNESS: Of course not.

* * *

Q. So it's correct that he suffers from paranoid schizophrenia that is in a poor partial remission?

A. Yes. It is not in a complete remission. He is not as bad off as he has been in the past. So he has some partial –

THE COURT: Not entirely normal to think that he's God?

THE WITNESS: Clearly not.

THE COURT: But at the same tine he hasn't ordered any thunder today? I don't mean to make light at the problem. But today he seems to be in touch with his surroundings all right. And did you see him that way?

THE WITNESS: Most of my interaction with him was reality based, pleasant. There were times when we began to discuss delusional sounding ideas where he would become rambling and disorganized in his conversation. It was fairly easy to draw him back. If I let him go, I would get more details of his delusional thinking.

THE COURT: Let no ask you this. What is schizophrenia? What does that mean? What does schizophrenia mean? Just tell me what this is and

how you came to the conclusion that this guy has got it?

THE WITNESS: Well, part of the reason is genetic. I understand that his father was a mental patient that was treated at the Veterans Hospital here, somewhere in Alabama. I understand he has a brother, Shanoy, that's been repeatedly hospitalized. So that makes me think that he has the genetic predisposition for it. He's been –

THE COURT: What is the genetic predisposition for it? Is it chemical?

THE WITNESS: I wish I knew.

THE COURT: Is that something that nobody knows?

THE WITNESS: As far as I know, the genetics of the mental illnesses are not well understood. I mean, I think it's well accepted that there's a genetic component to these illnesses like heart disease or diabetes or anything else.

THE COURT: How does schizophrenia evidence itself?

THE WITNESS: The most frequent symptoms that you see are – or that I've seen – involve delusional thinking, false beliefs that the person holds despite any kind of argument or persuasion. Frequently auditory hallucinations and sometimes other eccentric hallucinations.

THE COURT: What all did you detect in your conversations with him that would cause you to conclude that he's schizophrenic?

THE WITNESS: That he's God. That his reports that were documented over many years that he at times would hear the voice of God, that a light that he believes is God has come to his cell or he has observed in other places. These sorts of things are common in my experience among people that have this illness. At times his speech became disorganized. For example, I asked him something like to tell me the meaning of the proverb – a rolling stone gathers no moss. And his response to me, I thought, showed disorganized thinking. As an example, he says, That's a racist saying, but I'll say it, anyway. Moss is based on fungus. Fungus is Moors. The Europeans said Moors were inferior. The stone was like the Christians. We don't mingle with Moors. Whites don't gather with blacks. It's segregation, you know. That sounded disorganized to me.

THE COURT: Did it bother you any where he might have learned about Christians not associating with Moors and Moors are dark-skinned people, et cetera, et cetera? Did it occur to you that that represents a rather strange collection of information?

THE WITNESS: Very much so. I haven't thought of the word "Moors" myself for a very long time, since western civ class. And I was surprised that someone who I got a measured IQ of eighty talking about Moors, using the word "ludicrous" and in the past using the word "fallopian tubes."

THE COURT: How do you explain the broad gap between some of his correct applications of analogy, which as I understand it have a great deal to do with intelligence at a very high abstract level, and then your IQ test of eighty?

THE WITNESS: Well, one possibility is that he didn't get very much formal education, so that lowers his test – his number scores to some extent. He has been in essentially solitary confinement for a long time. That probably lowered his score a little bit.

THE COURT: Did you by any chance check out whether moss and Moors have any etymology?

THE WITNESS: No, sir. But I will.

THE COURT: I bet you will now.

THE WITNESS: He at times would say "Amen" at inappropriate times. But at other times –

THE COURT: How do you know that it was inappropriate?

THE WITNESS: Because I went to Sunday School when I was a little boy and people sitting in the Amen corner that would say Amen at times that I thought were proper. And at the times that he said Amen wasn't like the gentlemen that were in my church when I was a little boy.

THE COURT: Okay. So your church sets the standard for when you're supposed to say Amen?

THE WITNESS: No. Of course not, Judge. What I was saying was in the course of conversation

when I'm interviewing somebody it's rare that a person intersperses that many Amens.

THE COURT: Okay. And it probably had some religious significance, but it didn't tie in and make sense in the immediate situation that you were into?

THE WITNESS: Like many people that I know that are not psychotic, he would do it for emphasis. Say something, "Amen," like that. But at times it was odd. Put it that way.

THE COURT: How much time have you spent in Macon County, Alabama where he grew up?

THE WITNESS: This is my first visit.

THE COURT: How many black churches have you been in in this county?

THE WITNESS: None.

THE COURT: Do you know when they say Amen?

THE WITNESS: Without being in there, I don't, Judge.

THE COURT: Do you know whether they use that word to emphasize a particular point or not?

THE WITNESS: Many of my black friends and co-workers do more than I do.

* * *

Q. Now, in most of the situations during his incarceration at Holman where Mr. Weeks has become psychotic, he's brought out of that psychoses by antipsychotic medication; is that correct?

A. There were a number of places in his corrections records where I noticed that he was given medicine and he quickly improved.

* * *

Q. You said Mr. Weeks suffers from chronic paranoid schizophrenia. When you say chronic, Dr. McClaren, would it be correct to say you mean longstanding?

* * *

A. Yes. He has been perceived at different points and times during approximately the past two decades as being chronically psychotic. Sometimes not.

* * *

Q. Is it your opinion that Mr. Weeks has since, however clear it might be of his legal situation or the imminence of his execution, causing him stress at the present time?

A. It is a source of stress for him that he is coping with, yes.

Q. Is it your opinion that the degree of that stress is likely to increase over the next few weeks?

MR. CRENSHAW: I object. I don't think this witness is real competent to testify as to the increasing of a level of stress of Mr. Weeks.

THE COURT: Oh, I think he would be. I overrule the objection. I bet he's going to have more stress the closer he gets to May 12th, isn't he?

THE WITNESS: I think most people would.

THE COURT: I take that as given.

* * *

THE COURT: Let me ask you this. Based on review of all of the records, based on your personal visit with him, is it your opinion that at any time during the last twelve years that he has been so incompetent that he should not be executed?

THE WITNESS: I don't know, Judge. All I know is –

THE COURT: All I'm asking you is what you know about it. Do you know of any such time at all?

THE WITNESS: There – I don't know of any for sure. There are a number of questionable times where I see him described as psychotic. And I don't know because I wasn't there at those tines in the past.

THE COURT: And psychotic is the only thing that you're basing it on?

THE WITNESS: Psychotic, saying he's naked, saying he's Pharaoh, talking about various types of religious delusional sounding things. Possibly, but it's not spelled out what his understanding of

his legal situation was.

THE COURT: How could I be sure, you know? I would estimate that today based on everything that I've seen that he's probably competent to be executed as he sits here today and his responses to my questions. How can the judicial system be sure that on the date of May the 12th that he is going to be competent then?

THE WITNESS: I suppose you could have a hearing within a short period of time before. That might be one way.

THE COURT: Well, let me ask you this. Do you think that it would be advisable for the Supreme Court of Alabama to order that you or some other qualified person be close by him to evaluate him within a matter of hours before his execution so as to – And if you observe anything that leads you to believe that he's not competent at that point in time so that you could transmit that information to someone and get a stay of execution? Is that something that the Supreme Court – I'm not going to do it because that's just not my role. I don't set executions and I don't defer them. But is that something that the State ought to do?

THE WITNESS: I don't know how that could be practically accomplished. I'd have to give that some thought. I'm sorry.

THE COURT: Whoever did that would have a right smart of responsibility, wouldn't they?

THE WITNESS: Awful heavy, Judge.

THE COURT: Tell me about it. Go ahead.

* * *

Q. Did Varnall tell you his lawyer was James McWilliams?

A. At the time that I wrote that he did. Later he told me you were his lawyer.

Q. I see. Do you know who James McWilliams is?

A. I understand that he's a prison inmate at Holman Prison.

THE COURT: Let the record show that the Court is well aware of the propensity of inmates to practice law. And I would not doubt for a second that James McWilliams has given legal advice to lots of inmates. There's some that are very good at it.

Q. You say that he later said that I was his lawyer. Is that reflected in your notes on this form?

A. No.

Q. And next to where it says James McWilliams, there's an arrow. And, if you would, read the paragraph on the right of the arrow.

A. Yes. It says, on the State's side, that he's fronting to be on the court side. He's fronting – he's a front for me. They're going through the motions.

* * *

Q. Do [Weeks's] delusions tend to focus on a particular subject matter? Is there some degree of consistency to them? Can you tell the Court a little bit about that?

A. Yes. He tends to focus on religious ideas involving hearing the voice of God, being God, the Divine.

Q. Were there – can you elaborate any further on that?

A. Well, I mean, there were places in the records where he was talking about being the Pharaoh. He talked about believing that he was God, sort of related in a Messiah-like way at one point talking about how he was being killed for the sins of man. He says, that's the bottom line there. "They say murder is wrong and then they murder me. What kind of shit is that?" Racism was another kind of theme that emerged.

* * *

HEARING OF APRIL 14, 1995

A second hearing was held before the Circuit Court on April 14. The judge again – over the objection of counsel for Mr. Weeks – asked Varnall Weeks to take the witness stand. Weeks went to the wrong aide of the bench from where the witness stand was.

THE COURT: Now, at this point in time, when I

asked Mr. Weeks to come forward, there are two sides to the bench. There's a witness stand and there's also a place where the clerk's sits and maintains papers. Mr. Weeks tried to insist on going to the clerk's position rather than going to the witness stand. I redirected and eventually directed a deputy to escort him to the witness stand. I think that it's important for a Court reviewing this record to understand that that's what was going on when I asked the deputy to take him around to the witness stand.

MR. FISHER: Your Honor, I don't mean to interrupt you. I don't think entirely complete or accurate, and I'd just like to briefly address the record on that. What I observed Mr. Weeks do was he approached the court reporter who's sitting in front of the bench, he bowed to the court reporter, then he walked to the right side of where Your Honor is sitting. And the way the bench was constructed, for the record, is there are two seats in which – on either side which are witness boxes, and apparently one has some papers on it. And the Court asked Mr. Weeks to move to the witness box to the left of Your Honor, and Mr. Weeks for a reason that's unknown to me and I don't think it's clear from the record did not want to do that and stood near the other witness box. And then you asked the deputies to approach him, and they did. And without any physical touching of him, they asked him to move to the witness box you desired him to sit in, and he did. And he's sitting there now.

THE COURT: I'll adopt your recitation of the facts. I think that's accurate. Certainly, you can't tell from looking at it that the witness box, as you referred to it, is customarily used in this court as a place for the clerk to have access to the Court.

Examination of Varnell Weeks by the Court:

Q. Okay. What kind of week have you had?

MR. FISHER: Your Honor, I'm sorry. One other matter. Mr. Weeks brought up with him certain items that he left in front of the court reporter. I would ask that he be able to have those items with him.

THE COURT: Yes. I'll give him a place right on the corner of the bench right here where he can have those matters.

MR. FISHER: For the record, Your Honor, there is a Holy Bible, a Holy Quran, a piece of glass, a domino, and a notebook.

THE COURT: Okay. Put them right there.

MR. FISHER: Thank you, your Honor.

Q. Okay. What kind of week have you had?

A. Fabulous week. It's been cool, raining, you know. But I like rainy weather. You know, I like to make hay when it's raining. So I like rainy weather. How about yourself?

Q. You like to make hay when it's raining?

A. Yeah. How about yourself?

Q. Everything has been busy this week.

A. Yes, sir.

Q. All right. Now, when you say you like to make hay when it's raining, tell me a little bit more about that.

A. Well, that's a sexual expression, sir.

Q. That's a sexual expression?

A. Yes, sir.

Q. Okay. Tell me how it's a sexual expression. Well, back when the roots had tin on it, you could hear the rain. And the rain had a smell to it, you know, and had a real earthly smell, you know.

Q. Okay.

A. And, due to the fact that you couldn't work because it was raining, you know, and you couldn't work in the field, so you did your pleasurely chores around the house, you know, so to speak.

Q. Okay. I notice that you brought these books with you today.

A. Yes, sir.

Q. Now, tell me about those books.

A. With all due respect, sir, those books are the tortoise. These are the laws.

Q. Okay.

A. And, as we have said in the court, a judgment, sir, I went to my side of the judgment seat, sir, laid, with all due respect, you directed me to the opposite side. So in honor of your –

Q. Well, what's the significance of the sides? Tell me more about that.

A. Well, sir, that's the clerk's side, as you stated, sir.

Q. But it's to my right.

A. Yes, sir.

Q. And where you are is to my left.

A. Yes, sir.

Q. Well, what's the difference? I mean, what's that about?

A. Well, sir, one is stationery, sir, and one is changeable.

Q. Okay. One is stationery and one is changeable?

A. Yes, sir.

Q. Which one is changeable?

A. Well, God don't change, sir. Man does, sir.

Q. Okay. Let's change the subject and talk about some other things. Have you had an opportunity to talk with the doctors this week?

A. Well, I spoke with quite a few of the professional people this week.

Q. Okay.

A. Yes, sir.

Q. Has there been any change in your execution date that you know of?

A. Not that I know of, sir.

Q. Do you remember what that date is?

A. The 11th of May, sir.

Q. The 11th of May?

A. No, 12th, sir.

Q. 12th of May?

A. Yes, sir, 12th of May.

Q. All right. What do you understand is going happen on that day?

A. Well, execution, sir.

Q. Okay. And what does it mean to be executed?

A. To be executed as God's children, sir, you will change from a soul to a spirit, sir.

Q. Okay. What will happen to your physical body?

A. Well, the physical shell, sir, which is the body, sir, will decay and return unto the materials that it was made of. And the spirit will return, you understand, to His source.

Q. Okay. Now, do you know why you're being executed?

A. Well, political and – (pause).

Q. Well, let me ask you this. Do you remember being tried?

A. I remember being summoned to the court, sir. I don't really remember being tried with an impartial jury or anything of this nature, sir.

Q. Okay. So you don't think that your conviction was fair?

A. No, sir.

Q. Okay. But were you – Did they say you were guilty or not?

A. Yes, sir. They found me guilty, sir.

Q. Who did they say that you killed?

A. Marcus Batts, sir.

Q. All right. How long has it been since they found you guilty?

A. How long has it been, sir?

Q. Yes.

A. I imagine it was about thirteen years, sir.

Q. About thirteen years ago?

A. Yes, sir. Around thirteen years ago.

Q. And you've been on death row ever since then?

A. Yes, sir.

Q. Have you heard from your attorneys this week?

A. This week, sir? Not direct but indirect.

Q. Okay. Who are your attorneys?

A. Mr. Fisher and, sir, Mr. McMillan.

Q. Okay. Now, in an affidavit that I heard about last week, you identified somebody else as an attorney who was helping you. Who was that? Do you remember about that?

A. Are you speaking about jailhouse lawyers?

Q. Yes, sir. Do you know who that is?

A. It was a guy named McWilliams, Inmate McWilliams.

Q. Does he give legal advice?

A. Yes. He's over the law books of the institution on death row. The legal library, he's the clerk. So, therefore, he has that authority to issue out books and advise about the citations of the Court.

Q. Is he also an inmate?

A. Yes.

Q. Is he on death row himself?

A. Yes, sir.

Q. What is this hearing about?

A. Pardon me, sir?

Q. What have I got to determine as a result of this hearing?

A. The Judge is to determine the hypocrisy of competence and incompetence to be executed.

Q. Okay. What's your understanding of the standard that would be required? Do you feel like you're competent to be executed?

A. Well, to be executed, competency to be executed –

Q. Well, let's not use the term "executed." What they're talking about is putting you in the electric chair and turning the switch on and killing you.

A. Just say that, for instance, what are you really asking me is do I feel that I should be instituted or do I understand execution?

Q. No, that's not what I mean. If you will lust hold the thought, I'll let you finish answering the question.

[THE COURT took a brief recess to take a telephone call; after discussing the telephone call with counsel, the hearing proceeded as follows]

Q. You were answering a question. Go ahead.

A. May I?

Q. What do you need to tell me?

A. See, Your Honor, these are – these laws, do you see what I'm saying.

Q. Yes, sir.

THE COURT: Let the record reflect that he's referring to religious books.

A. Right, for the record. These are the laws we live by, sir. Okay? Now, I have a position to participate in my situation. And, with all due respect, that when I approached Your Honor's bench, you see, I have an obligation to participate in my position.

Q. Yes, sir.

A. So my position is that I took the position that was granted me, which is the Nation's position which is on your right, sir.

Q. Yes, sir.

A. So I took that position.

Q. Okay.

A. But you instructed me to leave that position and come to the State's position.

Q. Yes, sir.

A. So, now, sir, I am in your court.

Q. Yes, sir, you are.

A. But when I was over in the Nation's position, I was in my court.

Q. Okay.

A. Do you see what I'm saying?

Q. I think I do.

A. So I stands for heaven's court, you see.

Q. Okay.

A. I stand for the generation of man which is the nation of man and the nation of God. So my name is A La.

Q. Okay.

A. Do you see what I'm saying? And I have been – I have gone by many names down through my descend, you see? And, as I complete my mission as a God, a man, and a person, and a angel when I die, sir, see. So, as I stand here before Your Honor now, you understand me, I am prepared to descend from this earth, you understand me, into the heavenly realm.

Q. Are you telling me that you're ready to die?

A. Sir, we have a mission, sir. And death is passed along from generation to generation, sir. As you cannot evade your office, I cannot evade mine, you see. And, if you do not fulfill your duties as a judge, then you dishonor your bench, sir, and your calling and your obligation. So, as the mace is handed to the king, he got to bear the burden of that mace.

Q. What does the King do with mace?

A. Well, that is the authority, sir.

Q. That's that big old ax that they have?

A. No, sir.

Q. What's a mace?

A. A mace –

Q. It's not the stuff you squirt in somebody's face that you're talking about?

A. No, sir. A mace is a little staff that a king is carrying as a sign or symbol of the authority of his office.

Q. Okay.

A. Okay. That goes back down into these books, sir. Well, the first king which was Abel killed his brother Cain, you see.

Q. Okay.

A. And that was handed down that we carry from that killing of Cain, we are carrying the mark of carrying the cane, which is a rod, see? Which goes back into the ancient – well, the serpent which is the Egyptian sign of the serpent which is a rod. Well, Adam and Eve as far as the serpent is concerned, the – what they call it? The unforbidden fruit, you see.

Q. Was it unforbidden?

A. Yes, sir. Murder is unforbidden, sir.

Q. Or forbidden?

A. Yes, sir. No, sir. No, sir. It's unforbidden. But man does that stuff or man is a rebel, sir.

Q. So it's forbidden not unforbidden?

A. Okay. Forbidden, sir. I appreciate that, Okay. Forbidden.

Q. You had the wrong word there, You said unforbidden.

A. Thank you, sir.

Q. Okay.

A. We seem to get off on the wrong foot with God, sir, you know. And that's where this situation come to me and what I took up, my correct position and you directed me to this position, you see.

Q. Okay.

A. So this is what we call the marquis.

Q. The what, now?

A. Marquis sign.

Q. Okay.

A. Okay. And this is the sign of incorrect, what you call the Board of Corrections, see. And incorrect citing or incorrect operational or incorrect understanding which goes into the cybernetics or intelligence of man becoming more or less based upon the cyborg machines. Instead of being man, he becomes more thinking on the basis of materialized machines. And by thinking on the ground of a machine and not of man, this is what they call the extinction, extinct. Am I saying that right, sir?

Q. Let me ask you this. Can you tell me where you learned about cybernetics?

A. Well, like I said, sir, the teaching of God is on

me, you see. And he taught me that, sir.

Q. Have you ever read any stuff about the Buddhist religion or Hindu religion?

A. Have I read – my attorney was in the process of delivering that document to me. I have read –

Q. You read the Quran?

A. I read different versions of it, you know, in the Bible and stuff, but I have never had a Buddhist document.

Q. Let me ask you this. Is today, does it have any specific value on the religious calendar? What is today?

A. What you mean? Oh, you speaking about the calendar day?

Q. Well, what is Sunday?

A. You kind of – Okay. What you –

Q. Is it a religious holiday?

A. Okay. You done changed the subject, right, to a calendar? Because you was speaking about the Buddhist, right?

Q. Yeah, I'm changing the subject. What is today in the Christian religion?

A. Okay. It's got something to do with the Passover and the, you know.

Q. What happened on Friday?

A. Oh, okay. Okay. Good Friday. All right. This is good Friday.

Q. Good Friday. And what happened on Good Friday?

A. Good Friday is one of the feast, breaking of the body of Christ.

Q. And what happened on Sunday after Good Friday?

A. After Good Friday, that's resurrection, you see.

Q. What did they do to Jesus on Friday?

A. Well, that's crucifixion day, see.

Q. It wasn't all that good, was it?

A. Well, in order for something to live, something have to die, sir. So it all depends upon how you look at it. You see, either it was good that I died that you might live, because better you than me, right? It would be good for you; bad for me, right?

Q. I don't know about that.

A. So how do you look at it? It all depends on how you - look at it, sir.

Q. Okay. Anything else that you feel like you can share with me? I don't have any other specific questions to ask you, but is there anything else that you would have me know at this point in time?

A. Yes. Alabama, the word "Alabama," the word "Alabama" is albino. Alabama means albino. Alabama means albino. Albino means white. White is the Caucasian name for the Egyptian side of the family. This is the white side of the Egyptian family. The black side of the family is considered what the European definition of how they pronounce the word Nairobi. Nairobi is the pronunciation of the European Negro. Negro is the European vocabulary of Nairobi. Nairobi is the word that the European called black. That is the black side of the Egyptian family. The Egyptian family goes back into the Aztec ending where we originated from the Aztec and Anchors and all types of Indians as you go down through the Aztec and then you go over into the – what they call the Seminoles. This is the Creek.

Q. Okay. Well, let's sort of stick with the discussion about the – about what we're doing here and about the possibility that you're going to be executed. Is there anything else that you want to tell me about those things?

A. Well, this is what we –

Q. Are you scared?

A. Pardon me?

Q. Are you scared of dying?

A. Scared of dying?

Q. Yes.

A. It's an adventure, sir. But, in order to know my purpose and your purpose, you have to have a complete understanding of what your purpose is.

Q. Okay. Well, listen, I appreciate you coming up and sharing with me, and I've enjoyed visiting with you. You can take a seat back at counsel table now.

MR. FISHER: Your Honor?

THE COURT: Yes, sir.

MR. FISHER: I'd like to ask Mr. Weeks some questions if that's permissible with the Court. Let me preface it by saying again I have the same concern I had last week which is that neither Your Honor nor myself are psychologists, and I think anything elicited in the courtroom is reliable in the sense of what's elicited by a professional, trained psychologist in an appropriate setting is. But, to the extent that Your Honor has indicated he's going to rely on what is said in the courtroom, I'd like to –

THE COURT: I will not allow that.

Judge Segrest found Weeks competent to be executed. *See Weeks v. Jones*, 52 F.3d 1559 (11th Cir. 1995) (appending Judge Segrest's order finding Weeks competent). Alabama executed Varnell Weeks on May 12, 1995.

Forced Medication to Restore Competency

The Louisiana Supreme Court held that its state constitution did not permit forced medication to restore an inmate to competency so that he could be executed. *State v. Perry*, 610 So.2d 746 (1992). The South Carolina Supreme Court has also refused to allow forced medication to restore competency in *Singleton v. State*, 437 S.E.2d 53 (S.C. 1993). A majority of the en banc Eighth Circuit reached the opposite conclusion in *Singleton v. Norris*, 319 F.3d 1018 (8th Cir 2003) (en banc). It held that Arkansas could forcibly administer antipsychotic medication to Charles Singleton to make him competent for execution.

The Eighth Circuit held that involuntary medication was allowed by the Supreme Court's decision in *Washington v. Harper*, 494 U.S. 210 (1990), holding that prison officials may not force antipsychotic drugs on a prisoner absent a finding of overriding justification, (*i.e.*, the inmate is a danger to himself or others) and a determination of medical appropriateness. The Eighth Circuit majority held that Arkansas' "essential interest in carrying out a lawfully imposed sentence" outweighed Singleton's interest in being free of unwanted antipsychotic medication. The Court also found the forced medication was "medically appropriate" even though it would bring about Singleton's death because it was in his "short-term medical interest."

Judge Heaney, joined by three other members of the Court, dissented, expressing the view that "drug-induced sanity is not the same as true sanity. Singleton is not 'cured;' his insanity is merely muted, at times, by the powerful drugs he is forced to take. Underneath this mask of stability, he remains insane." Judge Heaney also observed that the "majority holding will inevitably result in forcing the medical community to practice in a manner contrary to its ethical standards." Judge Murphy, joined by Judge McMillan, also dissented.

After forcibly medicating Charles Singleton, Arkansas executed him by lethal injection on January 6, 2004.

For a discussion of the ethical issues presented by the case, see Alan A. Stone, M.D., *Condemned Prisoner Treated and Executed*, PSYCHIATRIC TIMES, Vol. XXI, Issue 3 (March 2004).