FEDERAL HABEAS CORPUS — DEATH PENALTY — ELEVENTH CIRCUIT AFFIRMS LOWER COURT FINDING THAT MENTALLY ILL PRISONER IS COMPETENT TO BE EXECUTED. — *Ferguson v. Secretary, Florida Department of Corrections*, 716 F.3d 1315 (11th Cir.), *cert. denied*, 186 L. Ed. 2d 946 (2013).

While the common law has banned executing the insane for centuries,[1] the U.S. Supreme Court did not hold that the Eighth Amendment prohibits the capital punishment of incompetent prisoners until 1986.[2] Twenty-one years later, in *Panetti v. Quarterman*,[3] the Court held that the condemned need to have a "rational understanding" — as opposed to a mere "awareness" — of the connection between their crimes and their punishment in order to be deemed competent to be executed.[4] Recently, in *Ferguson v. Secretary, Florida Department of Corrections*,[5] the Eleventh Circuit denied habeas relief to mentally ill death row inmate John Ferguson,[6] holding that Florida's execution-competency standard is not inconsistent with clearly established federal law and that the state supreme court reasonably applied the state's standard when it found the petitioner competent.[7] This decision results from a troublesome dynamic central to the way in which federal courts currently conduct habeas review of execution-incompetency claims: the interaction between vague Supreme Court competency precedent and deferential Antiterrorism and Effective Death Penalty Act of 1996[8] (AEDPA) jurisprudence.

On July 27, 1977, Ferguson and two accomplices invaded a home, tied up and robbed the eight people inside, and shot all eight in the head.[9] Six of the victims died.[10] On January 8, 1978, Ferguson crossed

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[1] *See* Ford v. Wainwright, 477 U.S. 399, 406–08 (1986) (discussing the "impressive historical credentials," *id.* at 406, of the ban on executing the insane).

[2] *Id.* at 409–10.

[3] 551 U.S. 930 (2007). The Supreme Court has not heard a death penalty competency case since *Panetti*. *See* Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1318 (11th Cir.), *cert. denied*, 186 L. Ed. 2d 946 (2013) ("The decision not to decide more is, unfortunately, the last word from the Supreme Court on the 'question of this complexity' . . . ." (quoting *Panetti*, 551 U.S. at 961)).

[4] *See Panetti*, 551 U.S. at 959 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it.").

[5] 716 F.3d 1315.

[6] Evidence indicated that Ferguson was a paranoid schizophrenic who suffered from various delusions. *See id.* at 1338 (discussing Ferguson's belief that he was the "Prince of God," was immune to execution due to "special powers," was being targeted to prevent his ascension "to the right hand of God," and would "eventually return to Earth to wage war against Communism" (internal quotation marks omitted)).

[7] *See id.* at 1343–44.

[8] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[9] *Ferguson*, 716 F.3d at 1318–19.

[10] *See id.* at 1319.

paths with a teenage couple, shooting the boy before brutally raping and murdering the girl.[11] Following two separate trials, Ferguson was convicted of all eight murders and sentenced to death.[12] After a series of direct and collateral appeals, the convictions became final.[13]

On September 5, 2012, Governor Rick Scott of Florida signed a warrant for Ferguson's execution.[14] In response, Ferguson requested a competency hearing.[15] Pursuant to Florida law,[16] Governor Scott "temporarily stayed the execution and appointed a commission of three psychiatrists" to determine whether Ferguson understood "the nature and effect of the death penalty and why it [was] to be imposed upon him."[17] All three psychiatrists concluded that Ferguson was not then mentally ill and was able to comprehend the nature of and reasons for his impending execution.[18] Following receipt of the commission's report, Governor Scott deemed Ferguson competent and lifted the stay of execution.[19]

Ferguson subsequently petitioned the state trial court, claiming that (1) executing him would violate the Eighth Amendment because he did not rationally understand the reasons for and consequences of execution and (2) Florida's method of assessing competency under *Provenzano v. State*[20] contravened the U.S. Supreme Court's holding in *Panetti*.[21] In response, the trial court issued a temporary stay of execution and held an evidentiary hearing to determine Ferguson's competency.[22] After two days of testimony, the judge issued an order stating that Ferguson had "failed to meet his burden."[23] The court agreed with the defense that Ferguson was a paranoid schizophrenic with a "genuine delusional belief that he is the Prince of God"[24] but found the

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[11] *Id.* at 1320.

[12] *Id.*

[13] *Id.* The Florida Supreme Court affirmed Ferguson's convictions on appeal but remanded both cases for resentencing due to trial court error. *Id.* The trial court resentenced Ferguson to death, and the Florida Supreme Court affirmed on appeal. *Id.* Ferguson sought collateral relief from these convictions and sentences in both state and federal court, but all motions were denied, and denial was affirmed on appeal. *Id.*

[14] Ferguson v. State, 112 So. 3d 1154, 1155 (Fla. 2012) (per curiam).

[15] *See id.*

[16] *See* FLA. STAT. § 922.07 (2013) (specifying the procedures that the governor must follow when informed that a person on death row might be insane).

[17] *Ferguson*, 716 F.3d at 1322 (internal quotation mark omitted). The commission collectively interviewed Ferguson, reviewed his mental health records, and spoke with three prison employees who had regular contact with him. *Id.* at 1323.

[18] *Id.* at 1323.

[19] *Id.*

[20] 760 So. 2d 137 (Fla. 2000) (per curiam).

[21] *Ferguson*, 716 F.3d at 1323.

[22] *See id.*

[23] *Id.* at 1328; *see id.* at 1323.

[24] *Id.* at 1328.

testimony and opinions of the state experts "to be credible as to the limited question of Ferguson's competency to be executed."[25] The trial court ultimately found no evidence that Ferguson's "mental illness interfere[d] . . . with his 'rational understanding' of the fact of his pending execution and the reason for it."[26] In addition, the court rejected Ferguson's claim that *Panetti* had invalidated Florida's competency standard, noting that the Florida Supreme Court had considered whether the petitioner in *Provenzano* had "a factual and rational understanding" of his impending execution.[27]

The Florida Supreme Court affirmed,[28] holding that there was "competent, substantial evidence to support" the lower court's ruling that Ferguson had a rational understanding of the nexus between his crime and his approaching execution.[29] The court asserted that "the Eighth Amendment requires only that defendants be aware of the punishment they are about to receive and the reason they are about to receive it"[30] and thereby emphasized Ferguson's knowledge that "he ha[d] never before had a death warrant signed on his behalf and that he would be the first person to receive Florida's current protocol of medications for lethal injection."[31] Moreover, the court found that *Panetti* did not overturn *Provenzano* because "*Panetti* is a narrowly tailored decision" and "[t]he *Panetti* court explicitly declined to extend its ruling to all competency proceedings."[32]

Next, Ferguson filed a federal habeas petition claiming that he was mentally incompetent to be executed under the Eighth Amendment jurisprudence articulated by the U.S. Supreme Court in *Ford v. Wainwright*[33]

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[25] *Id.* (quoting State v. Ferguson, No. 04-2012-CA-000507, slip op. at 17 (Fla. Cir. Ct. Oct. 12, 2012)) (internal quotation mark omitted). The judge further commented that Ferguson's "belief as to his role in the world and what may happen to him in the afterlife is [not] so significantly different from beliefs other Christians may hold as to consider it a sign of insanity." *Id.* at 1329 (alteration in original) (quoting *Ferguson*, No. 04-2012-CA-000507, slip op. at 18) (internal quotation marks omitted).

[26] *Id.* at 1329 (quoting *Ferguson*, No. 04-2012-CA-000507, slip op. at 18) (internal quotation marks omitted).

[27] *Id.* (quoting *Ferguson*, No. 04-2012-CA-000507, slip op. at 4) (internal quotation marks omitted).

[28] On appeal to the Florida Supreme Court, Ferguson also raised the due process argument that he was deprived of a "full and fair hearing because: (1) the State did not give him forewarning of its theory that his delusions constituted mainstream Christian beliefs; (2) he was not permitted to cross examine an expert witness; and (3) he was forced to proceed without a key witness." Ferguson v. State, 112 So. 3d 1154, 1158 (Fla. 2012). The supreme court dismissed all three claims as lacking merit. *Id.*

[29] *Id.* at 1157.

[30] *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 422 (1986)).

[31] *Id.* Notably, however, the Florida Supreme Court disregarded the trial court's comment relating Ferguson's beliefs to "mainstream Christian principles." *Id.* at 1156.

[32] *Id.* at 1157. Even if *Panetti* altered the Court's competency jurisprudence, the state supreme court asserted that this alteration did not undermine *Provenzano*'s requirement "that Ferguson understand the connection between his crime and the punishment he is to receive for it." *Id.*

[33] 477 U.S. 399.

and *Panetti*.[34] Ferguson argued that the state courts had contravened "clearly established federal law" by using a "factual-awareness" standard rather than a rational-understanding standard.[35] Additionally, Ferguson asserted that the state courts' decisions were premised on "an unreasonable determination of the facts in light of the evidence presented."[36] The district court granted a temporary stay of execution, but the Eleventh Circuit vacated this stay two days later.[37] Less than an hour before Ferguson's scheduled execution, the district court released a summary order that denied his petition for a writ of habeas corpus but granted a certificate of appealability.[38]

The Eleventh Circuit affirmed.[39] Writing for the panel, Judge Carnes[40] held that Florida's current competency standard did not conflict with clearly established federal law and that the state court had reasonably applied Florida's competency standard to Ferguson.[41] The Eleventh Circuit indicated that under AEDPA, a federal court can grant habeas relief on collateral review only if the state court's decision "(1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,' or (2) 'was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.'"[42] Contrary to Ferguson's assertion that the state court had unreasonably applied clearly established federal law, Judge Carnes determined that the Florida Supreme Court had properly applied *Panetti*'s rational-understanding requirement by asking whether Ferguson lacked "the capacity to understand the nature of the death penalty and why it was imposed,"[43] was "aware of the punishment [he was] about to receive and the reason [he was] to receive it," and understood "the connection between his crime and the punishment he [was] to receive for it."[44]

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[34] *Ferguson*, 716 F.3d at 1330.

[35] *Id.*

[36] *Id.*

[37] *Id.* The Eleventh Circuit vacated the stay on the grounds that the district court had misapplied the legal standard for granting a stay and that Ferguson had failed to show that "he had a substantial likelihood of success on the merits of his claim." *Id.*

[38] *Id.* In light of the certificate of appealability, the Eleventh Circuit stayed Ferguson's execution temporarily. *Id.*

[39] *Id.* at 1344. Following the Eleventh Circuit's affirmance, the Supreme Court denied Ferguson's petition for a writ of certiorari. Ferguson v. Crews, 186 L. Ed. 2d 946 (2013). Ferguson was subsequently executed on August 5, 2013. Tamara Lush, *John Errol Ferguson Executed in Florida Despite Mental Illness Pleas*, HUFFINGTON POST (Aug. 5, 2013, 8:48 PM), http://www.huffingtonpost.com/2013/08/05/john-errol-ferguson-executed_n_3709871.html.

[40] Judge Pryor joined Judge Carnes in the majority.

[41] *Ferguson*, 716 F.3d at 1344.

[42] *Id.* at 1331 (quoting 28 U.S.C. § 2254(d) (2006)).

[43] *Id.* at 1335 (quoting Ferguson v. State, 112 So. 3d 1154, 1156 (Fla. 2012)) (internal quotation marks omitted).

[44] *Id.* (quoting *Ferguson*, 112 So. 3d at 1157) (internal quotation marks omitted).

Thus, the Eleventh Circuit concluded that the Florida standard is "an awareness-plus-rational-understanding test" and, as such, is consistent with clearly established federal law.[45]

Responding to Ferguson's claim that the state courts had nonetheless unreasonably applied this awareness-plus-rational-understanding test, Judge Carnes asserted that Ferguson had misconceived the Florida trial court's factual findings.[46] The trial court credited only part of the defense expert's testimony — that Ferguson was a paranoid schizophrenic — and had otherwise relied upon the opinion of two state experts to determine Ferguson's competency.[47] Though there was "some evidence" that Ferguson did not have a rational understanding of his impending execution, the trial court was not required to believe this evidence instead of the contrary testimony of the State's expert witnesses.[48]

Judge Wilson concurred in the result.[49] He argued that Florida's competency jurisprudence requires only awareness, and thus conflicts with the standard articulated in *Panetti*.[50] However, Judge Wilson agreed with the majority that the Eleventh Circuit should defer to the state supreme court's determination that "[t]here [was] no evidence that . . . Ferguson believe[d] himself unable to die or that he [was] being executed for any reason other than the murders he was convicted of in 1978."[51]

As the concurring opinion suggests, the majority deferred to the Florida Supreme Court's holding despite a possible conflict between Florida's competency case law and *Panetti*.[52] This result is unsurprising given the interplay between U.S. Supreme Court competency precedent and AEDPA jurisprudence in present-day federal habeas review of execution-incompetency claims. Specifically, in *Ferguson*, the vague language used by the Supreme Court in *Panetti* introduced uncertainty into the Eleventh Circuit's determination of what constitutes clearly established federal competency law. Given this uncertainty, the appellate court was bound by AEDPA to affirm the state supreme court's decision.

Though Judge Carnes's opinion concluded otherwise, it is not clear that Florida's competency law, as dictated by *Provenzano*, is consistent

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[45] *Id.* at 1336; *see id.* at 1335–36.

[46] *Id.* at 1339.

[47] *See id.*

[48] *Id.* at 1340 (emphasis omitted). Judge Carnes also agreed with the state trial court that Ferguson's delusions were "grandiose" manifestations of religious belief that did not impair his rational understanding. *See id.* at 1342 (internal quotation marks omitted).

[49] *Id.* at 1344 (Wilson, J., concurring in the result).

[50] *See id.*

[51] *Id.* (first alteration in original) (quoting Ferguson v. State, 112 So. 3d 1154, 1156 (Fla. 2012)) (internal quotation marks omitted).

[52] *See id.*

with *Panetti*.[53] In *Provenzano*, the Florida Supreme Court reviewed the trial court's determination that the petitioner was competent,[54] despite his belief that "he [was] Jesus Christ."[55] The state supreme court upheld the lower court's finding that the defendant had a "factual and *rational* understanding"[56] of the reason for his death sentence and the fact that "he will die once he is executed."[57] However, the court also maintained that "in this context, the Eighth Amendment only requires that defendants be *aware* of the punishment they are about to suffer and why they are to suffer it."[58] Given that *Panetti* struck down an *awareness* requirement as "too restrictive to afford a prisoner the protections granted by the Eighth Amendment,"[59] *Provenzano* may well conflict with *Panetti*.

Despite the potential discrepancy between *Provenzano*'s awareness language and *Panetti*'s rational-understanding requirement, the Eleventh Circuit found no conflict between the two in *Ferguson*.[60] This conclusion was foreseeable, however, given the purposefully ambiguous aspects of *Panetti*, which Judge Carnes noted in his opinion. Specifically, *Panetti* "expressly declined to 'set down a rule governing all competency determinations'"[61] and deliberately declined to define rational understanding.[62] In light of this limiting language, the court of appeals believed that *Panetti* merely rejected "an overly narrow interpretation of *Ford* that deems a prisoner's mental illness and delusional beliefs irrelevant to whether he can understand the fact of his pending execution and the reason for it."[63] Ultimately, these portions of the *Panetti* opinion created an air of uncertainty that led the Eleventh Circuit to conclude: "The bottom line of the *Panetti* decision is that there is not yet a well-defined bottom line in this area of the law."[64] In other words, the court of appeals found no *clearly* established federal law to conflict with the competency standard employed by Florida's courts.

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[53] *See id.*; *see also* Motion for Leave to File Brief and Brief of *Amicus Curiae* the American Bar Association in Support of Petitioner at 6–7, Ferguson v. Crews, 186 L. Ed. 2d 946 (2013) (No. 13-5507), 2013 WL 3930521, at *6–7.

[54] *See* Provenzano v. State, 760 So. 2d 137, 138 (Fla. 2000) (per curiam).

[55] *Id.* at 140.

[56] *Id.* (emphasis added).

[57] *Id.* (quoting trial court) (internal quotation mark omitted).

[58] *Id.* (emphasis added).

[59] Panetti v. Quarterman, 551 U.S. 930, 956–57 (2007).

[60] *See Ferguson*, 716 F.3d at 1335.

[61] *Id.* at 1334 (quoting *Panetti*, 551 U.S. at 960–61).

[62] *See id.* at 1318, 1334, 1336 ("In announcing [the rational-understanding] rule, however, the Court did not decide what rational understanding means in this context." *Id.* at 1318.).

[63] *Id.* at 1336.

[64] *Id.* at 1318.

Given its belief that federal competency law lacks a "well-defined bottom line," the Eleventh Circuit was compelled by AEDPA to defer to the Florida Supreme Court's rejection of Ferguson's execution-incompetency claim.[65] As Judge Carnes emphasized, the Supreme Court's AEDPA jurisprudence directs federal courts to defer to state court decisions except under the most egregious of circumstances.[66] Specifically, AEDPA does not allow a federal court to grant relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[67] The Court has held that an application of clearly established law is unreasonable when "the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case."[68] Moreover, the Court has required that application be "objectively unreasonable,"[69] which the Eleventh Circuit has said means that no "'fairminded jurist' could agree with the state court's determination or conclusion."[70]

In adhering to AEDPA's "principles of deference,"[71] the Eleventh Circuit afforded the lower courts "the benefit of the doubt" required by the Supreme Court's AEDPA jurisprudence.[72] Particularly, in light of Supreme Court precedent dictating "that some use of imprecise language does not render a state court decision inconsistent with clearly established federal law,"[73] the Eleventh Circuit reframed the portions of the state courts' opinions that could be deemed inconsistent with *Panetti*.[74] For example, the appellate court downplayed the Florida Supreme Court's use of the terms "awareness" and "understanding" by implying that the state supreme court used these words, albeit imprecisely, to refer to a *rational* understanding.[75] The Eleventh Circuit al-

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[65] *See id.* at 1337 ("The AEDPA principles of deference have special force here given the Supreme Court's recognition in *Panetti* that the Court itself did not know exactly what a 'rational' understanding requires.").

[66] *See id.* at 1331–32 (describing the highly deferential guidelines for federal habeas review pursuant to AEDPA).

[67] 28 U.S.C. § 2254(d) (2006).

[68] Bell v. Cone, 535 U.S. 685, 694 (2002).

[69] Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 409 (2000)) (internal quotation marks omitted).

[70] Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1257 (11th Cir. 2012) (quoting Harrington v. Richter, 131 S. Ct. 770, 786 (2011)).

[71] *Ferguson*, 716 F.3d at 1337.

[72] *Id.* (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam)) (internal quotation mark omitted).

[73] *Id.*

[74] *See id.* at 1336–38.

[75] *See id.* at 1337 ("That the Florida Supreme Court's opinion in this case used the terms 'awareness' and 'understanding' interchangeably, and often used both terms without the modifier

so reframed the trial court's conclusion that there was "*no evidence* that . . . Ferguson believe[d] himself unable to die or that he [was] being executed for any reason other than the murders he was convicted of in 1978,"[76] as actually meaning that there was evidence but it was not "*credible*."[77] Finally, the Eleventh Circuit interpreted the Florida Supreme Court's dismissal of the trial court's attribution of Ferguson's beliefs to "mainstream Christian principles"[78] as a refusal to adopt the trial court's characterization rather than as a refusal to "consider Ferguson's delusions or their source."[79]

Thus, the Eleventh Circuit affirmed the Florida Supreme Court's ruling notwithstanding a possible conflict with *Panetti*. This outcome is the foreseeable result of a troublesome dynamic central to federal habeas review of execution-incompetency claims: the interaction between Supreme Court competency law's ambiguity and AEDPA deference. Specifically, in *Ferguson*, the vague language employed by the Supreme Court in *Panetti* obscured the Eleventh Circuit's understanding of what, if anything, constitutes *clearly* established federal competency law. Without clearly established federal competency law, the Eleventh Circuit was bound by AEDPA to defer to the state supreme court's holding. Lacking more definitive guidance from the Supreme Court, federal habeas review of execution-incompetency claims is limited.[80] If the case at bar does not bear close factual resemblance to *Panetti*, lower courts can deny habeas relief on the ground that there is no clearly established federal law.[81] Without meaningful federal oversight of state standards, there may be "unfortunate consequences for both the development of constitutional law and the even-handed application of fundamental rights."[82]

'rational,' does not mean that it failed to heed the holding of *Panetti* or rendered a decision inconsistent with that precedent . . . .").

[76] State v. Ferguson, No. 04-2012-CA-507, slip op. at 18 (Fla. Cir. Ct. Oct. 12, 2007) (emphasis added).

[77] *Ferguson*, 716 F.3d at 1340.

[78] *Ferguson*, No. 04-2012-CA-507, slip op. at 18.

[79] *Ferguson*, 716 F.3d at 1336 n.4.

[80] *See* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 741 (2010); *The Supreme Court, 2006 Term — Leading Cases*, 121 HARV. L. REV. 185, 344 (2007) (noting that when inquiry ends with a finding that there is no clearly established federal law, "governing law in criminal cases will largely be made on direct review, with very little being explored — much less made — in habeas jurisprudence").

[81] *See* Bentele, *supra* note 80, at 741 ("Depending on how narrowly the 'holding' of a case is characterized, therefore, the federal habeas court can short-circuit its review of state court decisions by concluding that, because no clearly established Federal law governed the situation, no habeas relief is available."); *see also The Supreme Court, 2006 Term — Leading Cases*, *supra* note 80, at 345 ("A habeas regime in which primarily fact-bound holdings constitute 'clearly established law' will increasingly resemble a fact lottery . . . .").

[82] Bentele, *supra* note 80, at 741.