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MEDICATE TO EXECUTE: CONSTITUTIONAL AND ETHICAL
CONSIDERATIONS

by

ADAM G. SCHULTZ

A Thesis submitted in partial fulfillment of the requirements
For the Honors in the Major Program in Legal Studies
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Thesis Chair: Dr. C. Chad Cronon

ABSTRACT

The United States Supreme Court has not yet examined several aspects of the death penalty. One aspect is the ability for the state to forcefully medicate an incompetent inmate, which may result in the inmate appearing competent for execution. While the Supreme Court' ruled that it is unconstitutional to execute an inmate who is incompetent, inmates who would have had their executions vacated due to mental illness are executed because the state can put them on an involuntary medication regimen. According to many experts, involuntary medication regimens mask the affects of their illness instead of providing a cure. Experts often refer to this practice as the "chemical straitjacket." Because the effects of antipsychotic medication, inmates may be sedated to a point where they appear competent, but in reality, they are sedated to a point where their mental illness is still present yet undetectable. As a result, placing condemned inmates on involuntary medication regimens has the possibility to violate the inmate's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The intent of this thesis is to examine whether the Supreme Court has successfully upheld its duty to promote a fair judicial system by allowing the medicate to execute scheme to continue. Through the analysis of case law, law review articles, and the American Constitution, this thesis will evaluate the treatment of condemned inmates who show signs of incompetence. Through analysis, this thesis aims to raise awareness to an issue that, in the opinion of this writer, deserves the attention of American courts and other governing bodies.

DEDICATION

For my loving mother and father.

For my sister Alex.

For my brother Evan.

And in memory of Max Bagan

ACKNOWLEDGEMENTS

I express sincere gratitude to my committee members, who have dedicated their time, knowledge, and experience. Special thanks to my thesis chair, Dr. C. Chad Cronon, and in-department chair, Dr. David Slaughter, who have taught me so much, both inside and outside the classroom. Thanks also to my out-of-department member, Mr. Jason Chesnut, who helped me resolve a crisis.

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OVERVIEW OF THE AMERICAN DEATH PENALTY

Despite the overall trend of almost all Western industrialized countries to eliminate the death penalty and the strong resentment against it of many criminologists and legal experts, the death penalty has shown no evidence of ending in the foreseeable future. While there is no indication that capital punishment will end in the near future, the United States Supreme Court has made significant strides in moving towards making the death penalty less capricious in the way it is administered. These strides can be seen in such cases as *Atkins v. Virginia*, in which the Supreme Court ruled that it is unconstitutional to execute anyone who is mentally retarded,¹ and *Roper v. Simmons* in which the Supreme Court ruled that it is unconstitutional to execute anyone who is under eighteen years old at the time of the offense.² Another significant change to death penalty policy was the case *Kennedy v. Louisiana*, in which the Supreme Court prohibited the use of capital punishment in a rape case of a child when the child is not killed. *Kennedy* also ruled that only crimes that result in the death of a victim can result in capital punishment, with the exception of crimes against the state such as espionage or treason.³ However, the United States government has not utilized the right to execute a person for an espionage related crime since the mid 1950's in the execution of Julius and Ethel Rosenberg.⁴

¹ *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)

² *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)

³ *Kennedy v. Louisiana*, 554 U.S. 407 (2008)

⁴ Death Penalty Information Center, Federal Executions 1927-2003 (2012)
<http://www.deathpenaltyinfo.org/federal-executions-1927-2003>

Capital punishment is a facet of the American penal system that is established by the language of the United States Constitution. According to Black's Law Dictionary, the death penalty is defined as a "[s]tate-imposed death as a punishment for a serious crime."⁵ As stated in the Fifth Amendment of the United States Constitution, a person cannot be "deprived of life, liberty or property, without due process of the law."⁶ To be "deprived of life" is presumably a reference to the government's ability to take an individual's life through capital punishment. The phrase "deprived of life" is one of the constitutional foundations of capital punishment. The phrase supposedly gives the government the ability to take a person's life, as long as there is due process of the law.⁷ Due process is the right established by the Fifth and Fourteenth Amendments of the Constitution that provides for procedural and substantive fairness in the application of the law.

Another portion of the Fifth Amendment seems more explicit: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."⁸ According to Black's Law Dictionary, a grand jury is defined as, "[a] body of (often 23) people who are chosen to sit permanently for at least a month—and sometimes a year—and who, in ex parte proceedings, decide whether to issue indictments."⁹ Ex parte, in the preceding definition, refers to "of or from one side or party"

⁵ Black's Law Dictionary 407 (7th ed. 1999)

⁶ U.S. Const. amend. V § 1

⁷ Adam S. Goldstone, *The Death Penalty: How Americas Highest Court is Narrowing its Application*, 4 Crim. L. Brief 23, (2009)

⁸ U.S. Const. amend. V § 1

⁹ Black's Law Dictionary 706 (7th ed. 1999)

usually made without notifying the “adverse party”¹⁰. An indictment is “an accusation or charge of the commission of an indictable offense, made by writing by a grand jury against one or more persons upon evidence heard by the grand jury and presented under oath by them at the instance, and by the authority, of the state or the government.”¹¹ The use the term “capital” is arguably the Framers’ consideration of the application of a death penalty. As a result, it allows for the opportunity for certain acts to “fall into the category of *capital crimes*.”¹² Such capital crimes require indictment by a grand jury to be constitutionally prosecuted.

The United States government functions under the political concept of federalism. Federalism is the division of authority between the federal and state governments. The Fourteenth Amendment is a central amendment in understanding how federalism works. Like the Fifth Amendment, the Fourteenth Amendment also serves as an important foundation for capital punishment. While the Fifth Amendment gives the federal government the ability to ‘deprive’ a person of his or her life¹³, the Fourteenth Amendment makes such a practice applicable to state governments. The language of the Fourteenth Amendment makes a specific reference to capital punishment at the state level. As written, “[no] State shall make or enforce any law which shall abridge the privileges or

¹⁰ Ballentines Law Dictionary (Matthew Bender & Company, Inc. 3rd ed. 2010)

¹¹ Ballentines Law Dictionary (Matthew Bender & Company, Inc. 3rd ed. 2010)

¹² Adam S. Goldstone, *The Death Penalty: How Americas Highest Court is Narrowing its Application*, 4 Crim. L. Brief 23, (2009)

¹³ U.S. Const. amend. V § 1

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”¹⁴

In clear language, the Fourteenth Amendment refers to the state government’s ability to deprive one of life. What distinguishes the Fourteenth Amendment from the Fifth Amendment is the consideration of the methods to be used at the state level. As long as due process is provided and the Eighth Amendment is not violated, a state government may execute an individual according to the United States Constitution. Due process at the state level is the same as at the federal level. Due process is used to provide procedural fairness in the application of the law. Requiring due process in executions at the state level is important because an overwhelming majority of all executions take place at the state level.

In addition to the Fifth and Fourteenth Amendments, other portions of the United States Constitution significantly affect capital punishment. One portion of great importance is the cruel and unusual clause of the Eighth Amendment. The Eighth Amendment states that, “...excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.[Emphasis mine]”¹⁵ Because death is arguably the harshest punishment allowed, capital punishment and many of its facets have often been challenged as a violation of the Eighth Amendment. The definition of cruel and unusual punishment and what constitutes “excessive punishment” is not fixed in time, but changes with evolving social conditions.”¹⁶ This means that as American society matures, views on what constitutes cruel and unusual punishments may change to include punishments that were

¹⁴ U.S. Const. amend. XIV § 1

¹⁵ U.S. Const. amend. VIII § 1

¹⁶ *Weems v. United States*, 217 U.S. 349 (1910)

once considered permissible. An example of American views on cruel and usual punishments can be seen in the case *Roper v. Simmons*. In *Roper*, the Supreme Court ruled that executing individuals under the age of eighteen is cruel and unusual despite the view in previous years that executing minors was not excessive nor cruel and unusual. Many significant cases that affect death penalty jurisprudence have been decided on Eighth Amendment grounds. An example is *Ford v. Wainwright*,¹⁷ in which the Supreme Court held that executing the incompetent is cruel and unusual punishment.

In addition to the Constitution, case law also plays a large role in the administration of capital punishment. One of the most important cases in death penalty jurisprudence is *Furman v. Georgia*.¹⁸ *Furman*, decided in 1972, is significant because it is the only case in American history that found the practice of capital punishment unconstitutional, resulting in a de jure moratorium on capital punishment until it was reinstated in 1976. De jure, in the above instance, means “by lawful right,”¹⁹ meaning that American law would not permit the continuation of the death penalty in the way it was previously administered. Because *Furman* abolished the way the death penalty was administered in previous years, *Furman* was responsible for ushering in what some death penalty experts would refer to as the modern period of the death penalty.²⁰

In *Furman*, William Henry Furman was sentenced to death for murder during the commission of a felony. On a writ of certiorari to the United States Supreme Court,

¹⁷ *Ford v Wainwright*, 477 U.S. 399 (1986)

¹⁸ *Furman v. Georgia*, 408 U.S. 238 (1972)

¹⁹ Ballentines Law Dictionary (Matthew Bender & Company, Inc. 3rd ed. 2010)

²⁰ Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 1-323 (Anderson ed., 4th ed. 2012)

Furman's counsel argued that the death penalty was arbitrary and capricious in the way it was administered. A writ of certiorari is a request from a higher court to a lower court asking to send the record of the case for review. Furman's counsel made a direct challenge to the unfettered jury discretion used in capital cases. According to Furman's counsel, such unconstrained discretion constituted a violation of Furman's rights guaranteed under the Eighth and Fourteenth Amendments. In a five to four decision, the Supreme Court ruled in Furman's favor, subsequently making the death penalty, as administered, unconstitutional. As stated in Justice Brennan's concurring opinion, "[Death] today is an unusually severe punishment, unusual in its pain, its finality, and enormity."²¹ The reaction to the *Furman* decision was immediate and widespread, as many states began revising their death penalty statutes in light of the decision.

The moratorium on imposing the death penalty did not last long. Executions were found to be permissible in the Supreme Court's 1976 decision of *Gregg v. Georgia* and *Proffitt v. Florida*.²² Condemned inmate, Troy Leon Gregg, petitioned for a writ of certiorari to the Supreme Court claiming that Georgia's death penalty violated the cruel and unusual clause of the Eighth Amendment. The question the court considered was whether Georgia's post-Furman death penalty statutes violated the cruel and unusual punishment clause of the Eighth Amendment. Georgia had made several amendments to its death penalty statutes in response to the Court's earlier *Furman* decision, including bifurcated trials and expedited direct review to determine if arbitrariness played a factor in sentencing. The

²¹ *Furman v. Georgia*, 408 U.S. 238, (1972)

²² *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)

addition of a bifurcated trial is presumably one of the most notable requirements for a constitutional death penalty trial. A bifurcated trial in death penalty cases refers to having death penalty cases separated into two separate and independent phases. The first phase is a guilt or innocence phase, in which the jury decides if the respondent is guilty or innocent. The second phase is a sentencing phase in which the decision of the punishment is made by the judge with recommendation from the jury or in some circumstances by the jury. In the second phase, aggravating and mitigating circumstances are weighed to decide if the guilty person should receive death or a lighter sentence, such as life without opportunity of parole. Furthermore, *Gregg* provided for new safeguards to ensure that arbitrariness did not play a factor in sentencing. In determining if arbitrariness was a factor in sentencing, the court must determine

“1. Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor and 2. Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance, and 3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.”²³

The questions of arbitrariness are questions that the Georgia Supreme Court had to answer on direct review. With these reforms, the Supreme Court found Georgia’s new death penalty statute did not violate the Eighth or Fourteenth Amendments. Gregg became one of

²³ *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)

the first persons to be sentenced to death after the Supreme Court's decision in *Furman*. The decision in *Gregg* had a tremendous influence on death penalty jurisprudence by requiring death penalty statutes to provide guided discretion, bifurcated trials, expedited direct appellate review, and proportionality review. Proportionality review is a process by which states compare the circumstances of a case with other cases in which death was sought. A lack of proportionality review can result in a reversal of a judgment, which has happened in past instances.²⁴ According to Dr. Bohm, "Its [proportionality review] purpose is to reduce arbitrariness and discrimination in death sentencing."²⁵

The death penalty is also a unique aspect of the American penal system because of its appellate process. One distinctive nature of the death penalty, as noted above, is automatic appellate review. Almost all death penalty jurisdictions have granted automatic appellate review of convictions and sentences in their post-*Gregg* death penalty statutes.²⁶ In addition to automatic appellate review, inmates can try to have their convictions overturned through filing discretionary appeals. This may be done in one of two ways. The first way is to file a petition for writ of certiorari. The higher court has discretion whether or not to hear the case and to grant the writ. A writ is a court order. In addition, an inmate can have his convictions or sentences overturned by filing a petition for a writ of habeas corpus. A writ of habeas corpus is a legal action that requests that a prisoner be released from custody because he or she is held unlawfully. Habeas corpus appeals are usually

²⁴ *Walker v. Georgia*, 381 U.S. 355 (1965)

²⁵ Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 79 (Anderson, 4th ed. 2012).

²⁶ Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 62 (Anderson, 4th ed. 2012).

reserved as a last resort appellate method. Also, the death sentence can be commuted through clemency. Clemency, according to Ballentine's Law Dictionary, is "a disposition to forgive or be lenient in a punishment."²⁷ Clemency has been described as a "'fail safe' in our criminal justice system."²⁸ Executive commutation, a form of clemency, is a right held by the President of the United States to reduce or vacate a punishment. In addition to presidential commutation, a governor, in many states, reserves the right to commute a sentence of a charge at the state level in his or her respective state.

While the death penalty has changed much since its temporary moratorium created by *Furman*, it is essential to note that the United States is one of the few countries that still practices capital punishment. Today, the United States is the only Western democratic state to employ the death penalty. At the end of the Nineteenth Century, executions in Europe became increasingly "rare."²⁹ Now almost all Western countries have abolished the death penalty and many other countries have become abolitionists in practice. The United States remains one of the only democratic countries with a practicing death penalty. Among the other countries that still maintain a death penalty are Iran, North Korea, Japan, China, Saudi Arabia and many more countries.³⁰

²⁷ Ballentines Law Dictionary (Matthew Bender & Company, Inc. 3rd ed. 2010)

²⁸ *Herrera v. Collins*, 506, U.S. 390 (1993)

²⁹ Elizabeth Burlison, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 69 Alb. L. Rev. 909 (2005)

³⁰ Death Penalty Information Center, *Abolitionist and Retentionist Countries* (2012)
<http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>

THE DEATH PENLTY AND MENTAL ILLNESS

While the Supreme Court did not address the issue of protecting the mentally insane from execution until the 1980s, such bans have been an aspect of law brought from English Common Law tradition.³¹ Despite the fact that such bans were present, many condemned inmates were executed because of a lack of a uniform definition of insanity.³² While the courts had tests such as the M’Naghten rule to find insanity, such tests were not as straightforward as were those proving other mental illnesses such as mental retardation. The Supreme Court did not generate such a definition for when someone was too mentally ill to be executed until the 1986 case, *Ford v. Wainwright*.³³

Ford is a landmark case because it was the first United States Supreme Court case in the modern period of the death penalty that questioned whether the United States Constitution permits the execution of an inmate who became insane while awaiting execution. In *Ford*, the petitioner began to show evidence of delusions and paranoia while on death row. Alvin Bernard Ford believed that he was the pope and that there was a conspiracy by prison guards to bury dead prisoners within prison walls. Due to his symptoms of mental illness, his counsel filed a petition for a writ of certiorari to the Supreme Court to determine if the Eighth Amendment allows for the execution of a

³¹ Rhonda K. Jenkins, *Fit To Die: Drug-Induced Competency For The Purpose Of Execution*, 20 S. Ill. U. L.J. 149 (1995)

³² Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 88 (Anderson, 4th ed. 2012).

³³ *Ford v Wainwright*, 477 U.S. 399 (1986)

mentally ill inmate. At the time, Florida statutes did not provide adequate protection for those inmates who began to show signs of mental illness on death row. Ford argued that the execution of a mentally insane inmate is a violation of the cruel and unusual punishment clause of the Eighth Amendment. *Ford* was the first case in which the Supreme Court addressed the issue of executing the incompetent under the Eighth Amendment in the modern period of the death penalty.

In a landmark decision, the Supreme Court ruled that executing the incompetent was a violation of the cruel and unusual punishment clause of the Eighth Amendment. In the majority opinion, Justice Thurgood Marshall wrote that it is cruel and unusual to send a person “into another world, when he is not of a capacity to fit himself for it.”³⁴ In addition, Marshall writes, “Execution serves no purpose in these cases because madness is its own punishment.”³⁵ As a result, executing the insane was found to be cruel and unusual by the Supreme Court, binding all lower courts in the United States.

While the Supreme Court in *Ford* did not create a definition for insanity, they created a standard for competency to be executed. Thus, The Supreme Court shifted the focus in such cases from proving insanity to proving competency. The Court created a two-pronged test for determining competency for execution. As defined by Justice Powell in his concurring opinion, a person is incompetent if “they are unaware of the punishment they are about to suffer” and “why they are to suffer it.”³⁶ A failure to satisfy either parts of the two-pronged test would result in a stay of the execution. As a result, *Ford* established a

³⁴ *Ford v Wainwright*, 477 U.S. 399 (1986)

³⁵ *Ford v Wainwright*, 477 U.S. 399 (1986)

³⁶ *Ford v Wainwright*, 477 U.S. 399 (1986)

legal definition for competency as well as strengthened the procedural rights for inmates on death row who suffered from mental illness. Any prisoner who makes a “substantial threshold showing of insanity” is guaranteed a fair hearing to resolve the question of his competency.³⁷

Ford is not the only instance in which the Supreme Court addressed the issue of executing mentally ill inmates; the issue would again be addressed in the case *Panetti v. Quartermaster*.³⁸ In *Panetti*, the petitioner, who suffered from a long history of mental illness, was on trial for a double homicide. Scott Louis Panetti, who showed symptoms of schizophrenia, including extreme delusions, chose to defend himself at trial. Panetti’s defense was “disastrous” and at trial, Panetti, taking on the persona of a cowboy, subpoenaed John F. Kennedy and the pope to testify. During the trial, his wife testified that he had in the past gone into psychotic episodes during which Panetti had buried valuables outside to cleanse his home from possession from the devil. Despite his signs of incompetence, a jury found him guilty and sentenced him to death.

While awaiting his execution, Panetti was given a competency hearing. Despite his symptoms of mental illness, an evaluation of Panetti by three psychiatrists appointed by the governor found that Panetti was in fact competent to be executed. After exhausting all other appellate methods, Panetti’s counsel filed a petition of habeas corpus to the United States Supreme Court. The Supreme Court, after finding jurisdiction, agreed to hear the case.

³⁷ *Ford v. Wainwright*, 477 U.S. 339 (1986)

³⁸ *Panetti v. Quartermaster*, 551 U.S. 930, 127 (2007)

In a five to four decision, the Supreme Court ruled in Panetti's favor. They concluded that executing Panetti in his mental condition was a violation of the cruel and unusual punishment clause of the Eighth Amendment. The court ruled that the determination of competency cannot be left to the sole discretion of a judge with the help of mental health experts and that a condemned inmate has the right to cross-examine such claims. The decision of *Panetti* also had a more far-reaching effect on the execution procedures of the mentally ill: *Panetti* also expanded the definition of incompetency. As stated by Dr. Bohm, "The court held that it is not enough to consider only whether the death row inmate is aware that he is going to be executed and why, without considering delusions that may prevent him from comprehending the meaning of the punishment."³⁹

Panetti, who believed his execution was a conspiracy, would be found incompetent under this new expanded definition because his delusions prevented him from having a rational understanding of his punishment. Today *Panetti* remains one of the strongest challenges to the execution of legally incompetent inmates. *Pannetti* reaffirmed the provisions in *Ford* establishing the definition of incompetency to "an ultimately legal and not solely medical determination."⁴⁰

Both *Ford* and *Panetti* have established the legal foundation for barring the execution of legally incompetent inmates. As a result of these two cases, an inmate cannot be executed if he or she cannot understand that his or her execution is imminent and it will

³⁹ Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 89 (Anderson, 4th ed. 2012).

⁴⁰ Peggy M. Tobolowsky, *To Panetti and Beyond - Defining and Identifying Capital Offenders Who Are Too "Insane" to be Executed*, 34 *American Journal of Criminal Law* 369, (2007)

be carried out as a result of the nature of his or her act. The state or federal government has responsibility under these two cases to provide a fair hearing during which an inmate's competency and sanity can be determined. Competency has become an essential question for judges in death penalty cases. Competency, unlike the jury question of being found not guilty by reason of insanity, is determined as a matter of law by a judge. However, by making the determination of competency a legal and not medical concern, other issues have arisen. A notable issue involves whether inmates placed under involuntary medication regimens fit under the Supreme Court definition of competency.

FORCED MEDICATION REGIMENS

The ability of a government to place an inmate on a forced medication regimen is a security matter, but one of great controversy. A government has a responsibility to protect an inmate or others from harm while also protecting the inmate's right to due process. Under due process, an inmate has a right for procedural fairness when placed on an involuntary medication regimen. Whether an inmate has a constitutional right to refuse an involuntary medication regimen is an issue American courts have addressed in several cases. More specifically, the courts have gone into great detail to describe what procedural safeguards are required by due process.

The foundation of this legal argument is found in the case *Washington v. Harper*.⁴¹ In *Harper*, the respondent was serving a sentence for robbery. Walter Harper had a long-standing history of violence when he was not on antipsychotic medications. While incarcerated, Harper was transferred to the Special Offender Center (SOC), an institution for mentally ill inmates. While in treatment there, Harper refused to take his prescribed medications. As a result, his physician medicated Harper over his objection in accordance to SOC Policy 600.30. The SOC policy states that an inmate may be placed on an involuntary medication treatment if the inmate suffers from a mental disorder and poses a likelihood of injuring himself or others.

⁴¹ *Washington v. Harper*, 494 U.S. 210 (1990)

Harper sued the State of Washington, claiming that placing him on a regimen without a judicial hearing is a violation of due process. According to Harper, his rights were violated because he did not receive a judicial hearing before he was placed on an involuntary medication regimen. At the level of the State Supreme Court, the case was transferred into criminal Court because the Court believed the issue was criminal instead of civil. The Washington State Supreme Court ruled against Harper. Harper then filed for a petition for a writ of certiorari to the United States Supreme Court claiming that he did not receive a fair judicial hearing before the treatment was administered.

In a six to three decision, the Supreme Court held that the SOC policy was, in fact, constitutional. The Supreme Court developed a two-pronged test to determine if an involuntary medication regimen is permissible. First the inmate must be “a danger to himself or others” and second, the treatment must be in the inmate’s “best medical interest.”⁴² If both of these aspects are satisfied, then the inmate can be medicated against his will without violating due process because the decision was decided fairly and in accordance with the law. However, *Harper* would not be the last case the Supreme Court would hear on the matter. Two years later, in *Riggins v. Nevada*, the Court addressed some of the implications of *Harper*.⁴³

While *Harper* made it constitutional for the government to place an inmate on a forced medication regimen, *Riggins* questioned the implications that such regimens would have on the medicated inmate’s future judicial hearings. David Riggins, the petitioner, was

⁴² *Washington v. Harper*, 494 U.S. 210 (1990)

⁴³ *Riggins v Nevada*, 504 U.S. 127 (1992)

charged with capital murder. During his trial, he began showing signs of psychotic and delusional behavior. As a result, he requested to be placed on the drug Mellaril, which he was prescribed in the past. Mellaril is a brand name for the medication thioridazine, a “conventional antipsychotic” that works “by decreasing abnormal excitement in the brain.”⁴⁴ Riggins’ counsel filed for a hearing to determine if he had competency to stand trial. In an initial hearing, the judge determined that Riggins was in fact competent to stand trial. Riggins’ counsel then moved to an insanity defense and requested that he be taken off of his medication to show the jury his “true mental state.”⁴⁵ The judge denied this motion because a psychiatrist felt that he might regress into an unpredictable state and be “difficult to manage.”⁴⁶ The judge did not allow his insanity defense and he was convicted of capital murder.

Riggins filed a petition for a writ of certiorari to the Supreme Court to determine if an involuntary medication regimen violated his due process rights at trial; i.e., if the medication he was placed on violated his Fifth and Fourteenth Amendment rights to a fair trial because he was prevented from showing his “true mental state.” The Supreme Court ruled in Riggins’ favor reversing and remanding the case for a new trial. The Court found that the lower court did not properly demonstrate that the medicine was in the petitioner’s best medical interest and that he was a danger to himself or others. Further, the Court expanded the requirements of involuntary medication regimens. In order to be considered

⁴⁴ National Center for Biotechnology Information, (May 16, 2011), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000584/>

⁴⁵ *Riggins v. Nevada*, 504 U.S. 127 (1992)

⁴⁶ *Riggins v. Nevada*, 504 U.S. 127 (1992)

fair, a treatment must be the “least intrusive method” and be “medically appropriate to reduce the danger he poses.”⁴⁷ *Harper* did not distinguish whether the medication was the least intrusive method. The Court found that because forcibly injecting antipsychotic medications into inmates “invades a person’s body” and because “the medication alters the chemical balance of their brain” the treatment was “highly intrusive.”⁴⁸ Less intrusive methods may include lowering the dosage of the medication prescribed.⁴⁹ As a result, *Riggins* made the requirements stricter for placing inmates on an involuntary medication regimen, thus giving mentally ill inmates stronger rights under due process. Such rights include the right against a highly intrusive procedure when less intrusive methods exist and the right against being placed on a medication that is not medically appropriate.

Riggins would not be the last time the United States Supreme Court addressed giving an inmate antipsychotic medications against his or her will. In *Sell v. United States*,⁵⁰ the Court examined the question of whether or not the Federal government could place an inmate on an involuntary medication regimen for the sole purpose of rendering him competent to stand trial. Charles Thomas Sell, a dentist with a history of delusional disorders, was charged with several counts of mail fraud, Medicaid fraud, and money laundering. Sell was initially placed on bail, but his bail was revoked when his delusions worsened. While awaiting trial, Sell was videotaped trying to hire a contract killer to

⁴⁷ *Riggins v. Nevada*, 504 U.S. 127 (1992)

⁴⁸ Vickie L. Feeman, *Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada*, 35 B.C.L. Rev 681 (1994)

⁴⁹ Vickie L. Feeman, *Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada*, 35 B.C.L. Rev 681 (1994)

⁵⁰ *Sell v. United States*, 539 U.S. 166 (2003)

murder an FBI officer and was charged with one count of attempted murder. Sell then requested a competency hearing and was found incompetent to stand trial. The United States Center for Federal Prisoners placed Sell in a hospital where it could be determined if Sell's competency could be restored through the prescription of medication. While in the hospital, Sell refused to take his prescribed medication and, during an administrative hearing, was put on a forced medication treatment. At the hearing, the hearing officer found that Sell's delusions "could make him dangerous."⁵¹ Sell appealed his regimen to the United States Court of Appeals for the Eighth Circuit; the Court ruled that the medication was the only way to treat Sell so a judge could find him competent to stand trial. On a petition for a writ of certiorari to the Supreme Court, Sell appealed the lower court's decision claiming his regimen was unconstitutional. The Supreme Court granted certiorari.

In a six to three decision, the Supreme Court found that the constitution does permit the involuntary medication of an inmate. In the majority opinion, the Supreme Court established in what limited circumstances such a treatment is permissible. The Court established three conditions. First, the "court must find that important government interests are at stake." Second, it must be concluded that the regimen would "significantly further that interest." Third, the court must find that the medication is "necessary to further those interests." Finally, the court must find that the drugs are "medically appropriate."⁵²

⁵¹ *Sell v. United States*, 539 U.S. 166 (2003)

⁵² *Sell v. United States*, 539 U.S. 166 (2003)

The Court was careful to include a description of what constitutes an important government interest. A court will “most likely” turn down a petition for a forced medication regimen because of the government interest condition.⁵³ Such a government interest is created by the need to prosecute someone for a “serious” crime, but the Court did not define what a serious crime constitutes.⁵⁴ To satisfy the second condition, a government entity petitioning for an involuntary regimen must prove that the interests to prosecute guilty offenders are significantly furthered. As a result, the court must show that the medication “is substantially likely to render the defendant competent for trial.”⁵⁵ With this said, a court must also find that the defendant’s right to a fair trial is not impaired due to the defendant’s inability to assist his own counsel, as guaranteed by the Sixth Amendment. The Sixth Amendment rights include the “likelihood that medications will render the defendant competent to stand trial, balanced against the likelihood that the medication will cause side effects that will compromise the fairness of the defendant’s trial.”⁵⁶ The third condition specifies that the medication must be the “least intrusive”⁵⁷ option to obtain the desired result. The last condition is present to ensure that the medication is in the patient’s best medical interest. The question of whether the medication is in the patient’s best medical interest is decided by the judge who authorizes the involuntary medication

⁵³ Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After Sell V. United States*, 13 Wm. & Mary Bill of Rts. J. 897, (2005)

⁵⁴ *Sell v. United States*, 539 U.S. 166 (2003)

⁵⁵ *Sell v. United States*, 539 U.S. 166 (2003)

⁵⁶ Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After Sell V. United States*, 13 Wm. & Mary Bill of Rts. J. 897, (2005)

⁵⁷ *Sell v. United States*, 539 U.S. 166 (2003)

treatment. With all of these conditions, the Supreme Court developed a test of higher scrutiny to determine when a forced medication regimen is permissible.

As a result of the above cases, the government has a constitutional right to place an inmate on an involuntary medication regimen. As decided in *Sell*, such a regimen is permissible even if the medication results in the inmate's restored competency.

NEXUS OF FORCED MEDICATION AND EXECUTIONS

As stated in the Supreme Court case *Furman*, the death penalty is “unique.”⁵⁸ It is unlike any other punishment in the law with respect to its “finality and enormity.”⁵⁹ As a result, the death penalty must be afforded specific considerations when functioning with other aspects of the law. With this taken into consideration, a practice of the law that is constitutional in normal circumstances might be interpreted as unconstitutional in death penalty cases.

Forced medication regimens are an example of a constitutional government practice that might have different implications when applied to inmates facing capital punishment. As stated in *Ford*, inmates may be found competent to be executed if the inmates are aware of the “punishment they are about to suffer” and “why.”⁶⁰ In addition, inmates can have their competency restored by an involuntary medication regimen. However, the implications of these two issues can become clouded when they are used in the same case. The instance where involuntary medication regimens are used on a condemned inmate has been referred to as the “medicate to execute scheme.”⁶¹

At the heart of the “medicate to execute scheme” are two fundamental questions:

⁵⁸ *Furman v. Georgia*, 408 U.S. 238 (1972)

⁵⁹ *Furman v. Georgia*, 408 U.S. 238 (1972)

⁶⁰ *Ford v Wainwright*, 477 U.S. 399 (1986)

⁶¹ *Singleton v. Norris*, 319 F.3d (8th District 2003) (review of whether forced medications restores competency in accordance to *Ford*), cert denied, 540 U.S. 832 (2003).

The first question asks, “Does the medication actually cure the inmate of his or her illness instead of just masking the symptoms?”

The second question asks “Is the medication in the inmate’s best medical interest if it allows him or her to be executed?”

Neither of these questions have been addressed by the Supreme Court, thus allowing the “medicate to execute scheme” to be an aspect of the American penal system.

There is much disagreement among experts about whether antipsychotic medication does indeed achieve its intended purpose. Many experts claim that there have been significant strides on the area of antipsychotic medications, resulting in the curing of mental illness. Other experts feel that such medications sedate instead of cure the inmate. Since the Eighth Amendment bars the execution of the mentally incompetent, the constitutionality of forced medication regimens depends on whether the medication does, in fact, cure the mentally ill inmate of his or her symptoms. If the medications are not found to cure patients, then the Eighth Amendment is clearly being violated by the “medicate to execute scheme.”

Proponents of the use of medication attest to its ability to cure patients of their symptoms. Many believe that better medications allow for better care. As stated by Douglas Mossman, M.D., an expert on forced medication regimens, “[m]ost patients who take antipsychotic drugs need no longer endure chemical straitjacketing to get relief from their

delusions, hallucinations and disordered thinking”⁶² The “chemical straightjacket” refers to the effect some medications have of sedating patients to mask the severity of their symptoms of mental illness. Yet Mossman, a strong advocate of the utilities of antipsychotic medications, attests to antipsychotic medication’s ability to grant patients relief from their delusions.⁶³

On the other hand, opponents of medication’s reliability and effectiveness strongly believe that medications do not grant relief from the symptoms of mental illness. Many believe that antipsychotic medications “merely mask symptoms and do not provide a cure.”⁶⁴ As a result, an inmate on these medications cannot achieve *Ford* competency. The use of these medications creates a risk that the resulting return to competency is only “artificial” and that that an inmate “is no more competent than before the administration of the treatment.”⁶⁵

It is argued that antipsychotic drugs have a sedation effect that frequently interferes with “the ability to think” and can result in a “clouding of consciousness, and impairment of judgment.”⁶⁶ Such side effects could result in the inmate’s appearance of competence when, in reality, the inmate is just sedated to the point where his or her

⁶² Douglas Mossman, *Unbuckling the Chemical Straitjacket: The Legal Significance of Recent Advances in the Pharmaceutical Treatment of Psychosis*, 39 San Diego L. Rev. 1033, (2002)

⁶³ Douglas Mossman, *Unbuckling the Chemical Straitjacket: The Legal Significance of Recent Advances in the Pharmaceutical Treatment of Psychosis*, 39 San Diego L. Rev. 1033, (2002)

⁶⁴ Sarah F. DePanfilis, *Singleton v. Norris: Exploring the Insanity of Forcibly Medicating, then Eliminating the Insane*, 4 Conn. Pub. Int. L.J. 68 (2004)

⁶⁵ Lisa N. Jones, *Singleton v. Norris: The Eighth Circuit Maneuvered Around the Constitution By Forcibly Medicating Insane Prisoners to Create an Artificial Competence for Purposes of Execution*, 37 Creighton L. Rev. 431 (2004)

⁶⁶ Bruce J. Winick, *The Right to Refuse Mental Heath Treatment: A First Amendment Perspective*, 44 U. Miami L. Rev. 1 (1989).

insanity cannot be detected. If so, forced medication regimens are a violation of the Eighth Amendment because they allow for the execution of an incompetent inmate. This Eighth Amendment argument was paramount in the case *Perry v. Louisiana*, in which medicate to execute schemes were ruled unconstitutional in the state of Louisiana.⁶⁷ In addition, an inmate's Fourteenth Amendment rights would be violated because the inmate lacks the ability to help in his or her defense because of the medication he or she is placed on. Several of the drugs administered to patients on involuntary medication treatments have many potential side affects. One that may go undetected is memory dysfunction. Memory dysfunction can be "devastating to the defendant's fair trial rights" and as a result a violation of the defendant's Fifth, Fourteenth and Sixth Amendment rights.⁶⁸

Furthermore, many experts question whether a forced medication regimen is, in fact, in the patient's best medical interest. As stated earlier, the government has the right to forcibly medicate inmates if it is "medically appropriate."⁶⁹ Yet some believe a contradiction arises when an execution date is set prior to a medication regimen being applied. Once an execution date is set, a forcible medication regimen "ceases to meet the constitutional requirement," outlined in *Harper* thus turning the treatment into "a degrading punishment unique to incompetent death row inmates."⁷⁰

⁶⁷ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Crt. 1992) forcefully medicating condemned inmates) rev'd 584 So.2d 1145 (1991)

⁶⁸ Joseph R. Dunn, *Prescription for Death?: Psychotic Capital Defendants and the Need for Medication*, 17 Cap. Def. J. 1 (2004)

⁶⁹ *Riggins v. Nevada*, 504 U.S. 127 (1992)

⁷⁰ Michaela P. Sewall, *Pushing Execution Over the Constitutional Line: Forcible Medication of Condemned Inmates and the Eighth and Fourteenth Amendments*, 51 B.C. L. Rev 1279 (2010)

The above question was addressed by the United States Court of Appeals for the Eighth Circuit in *Singleton v. Norris*.⁷¹ In *Singleton*, the appellant, Charles Singleton, was convicted of capital felony murder and aggravated robbery. The State of Arkansas placed him on a forced medication regimen after a medical review panel found him to be a danger to himself and others. Singleton appealed the regimen to the Eighth Circuit Court of Appeals arguing, “The State could not constitutionally restore his *Ford* competency through the use of forced medication and then execute him.”⁷² The state recognized that the medication regimen did restore his *Ford* competency. The question the court did look at in *Singleton* was whether such a medication regimen went against the inmate’s best medical interest. The court ruled against Singleton, finding the application for such regimens permissible after an execution date is set. In the majority opinion, Chief Judge Wollman stated, “eligibility for execution is the only unwanted consequence of the medication” and because the medication relieves his symptoms of psychosis, it is in the patient’s best medical interest.

Singleton filed a petition for a writ of certiorari to the United States Supreme Court, but the petition was denied. As a result, the Supreme Court allowed the lower court’s ruling to control. By not addressing the issue of medicate to execute schemes, the Supreme Court of the United States allowed lower courts to decide if medicate to execute schemes would be permissible in the lower court’s respective jurisdictions. The bottom line is that an

⁷¹ *Singleton v. Norris*, 319 F.3d (8th District 2003) (review of whether forced medications restores competency in accordance to Ford), cert denied, 540 U.S. 832 (2003).

⁷² *Singleton v. Norris*, 319 F.3d (8th District 2003) (review of whether forced medications restores competency in accordance to Ford), cert denied, 540 U.S. 832 (2003).

inmate may be involuntarily medicated once an execution date is set if permitted by the jurisdiction of the deciding court. Several courts, such as the Eighth Circuit Court of Appeals in *Singleton*, have allowed the practice of medicating inmates to restore their competency to be executed. Many courts have taken an active role in abolishing the practice.

Louisiana v. Perry is a strong example of a court using its judicial authority to abolish the practice of medicate to execute schemes.⁷³ In *Perry*, the petitioner Michael Owen Perry, who suffered from a long history of schizophrenia, was on trial for murdering five of his family members in a criminal episode. Schizophrenia is “ a mental disorder, not necessarily an impairment of intelligence, characterized by hallucinations, indifference, and delusions of omnipotence and persecution.”⁷⁴ While on trial, Perry was placed on a forced medication regimen and found competent to stand trial. He, against the advice of his counsel, withdrew his plea of insanity and instead pleaded not guilty. In 1985, Perry was convicted of five counts of first-degree murder and sentenced to death. In response, Perry appealed his death sentence to the Louisiana Supreme Court. The Louisiana Supreme Court affirmed the lower court’s decision, but ordered that his competency be evaluated. Perry was transferred to a state facility where it was determined that he suffered from incurable schizophrenia that “causes his days to be a series of hallucinations, delusional and disordered thinking, incoherent speech, and manic behavior.”⁷⁵ The mental health

⁷³ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Crt. 1992) forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

⁷⁴ Ballentines Law Dictionary (Matthew Bender & Company, Inc. 3rd ed. 2010)

⁷⁵ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Crt. 1992) forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

professionals also determined that Perry was only competent for execution while on medication. As a result, the state placed Perry on a forced medication treatment of doses of the drug Haldol. Haldol, the brand name for the medication haloperidol, is a “conventional antipsychotic” that is used to treat “severe behavioral problems” including “explosive, aggressive behavior.”⁷⁶ At this time in Perry’s case, the United States Supreme Court had not yet decided *Washington v. Harper*, which outlined the procedures for placing inmates on involuntary medication regimens. During Perry’s appellate process, the Supreme Court of the United States made a decision on *Harper*, establishing a procedure for determining when involuntary medication treatments are permissible. Perry filed a petition writ of certiorari to the United States Supreme Court, who after just deciding *Harper*, vacated and remanded the case to the trial court. The trial court reinstated the forced medication regimen, finding that *Harper* did not apply to this situation. Perry then filed a petition for a writ of certiorari to the Louisiana State Supreme Court.

In light of the new provisions established in *Harper*, the Louisiana Supreme Court ruled in favor of Perry, finding that medicate to execute schemes are unconstitutional in the state of Louisiana according to the Louisiana Constitution. The court provided many reasons why such a practice is unconstitutional. First, the Louisiana Supreme Court considered the nature of medicate to execute schemes. The court ruled that that “forcing a prisoner to take antipsychotic drugs to facilitate his execution does not constitute medical

⁷⁶ U.S; National Library of Medicine, Medline Plus, (May 16, 2011), <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682180.html>

treatment.”⁷⁷ Thus, placing an inmate on a forced medication regimen cannot be in the patient’s best medical interest.

Furthermore, the Louisiana Supreme Court looked at the Hippocratic Oath to determine if doctors are permitted to place a condemned inmate on a forced medication regimen. The Louisiana Supreme Court concluded that, “because the physician is required by his oath to alleviate suffering and do no harm, the state’s order forces him to act unethically.”⁷⁸ Also, the court found that such a regimen, because of its degrading nature, can be “analogous to torture.”⁷⁹ To that end, the court ruled that “[w]hen antipsychotic drugs are forcibly administered to further the state’s interest in carrying out capital punishment, and therefore not done in the prisoner’s best medical interest, the intrusion represents an extremely severe interference with that person’s liberty.”⁸⁰ The Louisiana Supreme Court, in addition, found that the state lacked a compelling state interest to medicate Perry against his will. Medicating a person to meet competency for execution is not a compelling interest for the state and therefore does not allow the state to strip someone of his or her rights for such a cause. The Louisiana Supreme Court also ruled that medicate to execute schemes violate the right to privacy as established in the Louisiana State Constitution. The Louisiana State Constitution reads, “*Every person shall be secure in*

⁷⁷ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

⁷⁸ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

⁷⁹ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

⁸⁰ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy.”[Emphasis Mine]⁸¹ While the right to privacy is not specifically mentioned in the United States Constitution and is only established by case law,⁸² the Louisiana State Constitution defines such a right for those in Louisiana. Medicate to execute schemes violate the “right to control one’s own mind and thoughts.” The court found that the intrusive measures employed by medicate to execute schemes violate the right to privacy the Louisiana State Constitution was written to protect.

Lastly, the court ruled that such a punishment violates the Eighth Amendment. In the opinion, the court stated,

“The punishment is cruel because it imposes significantly more indignity, pain and suffering than ordinarily is necessary for the mere extinguishment of life, excessive because it imposes a severe penalty without furthering any of the valid social goals of punishment, and unusual because it subjects to the death penalty a class of offenders that has been exempt therefrom for centuries and adds novel burdens to the punishment of the insane which will not be suffered by sane capital offenders.”

⁸¹ Louisiana Constitution Art I, § 5 (2012)

⁸² *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev’d 584 So.2d 1145 (1991)

In the *Perry* decision, the Supreme Court of Louisiana abolished the administration of medicate to execute schemes for all courts within its jurisdiction. While *Perry* is not legally binding on courts outside Louisiana, it provided a strong model for many other courts to follow. Such was the circumstance in *Singleton v. State*⁸³

In *Singleton v. State*, the appellant, Fred Singleton (of no relation to Charles Singleton from the case *Singleton v. Norris*) was sentenced to death for first-degree criminal sexual conduct, murder and other serious offenses. After exhausting several appeal attempts, Singleton finally was granted appeal by the Supreme Court of South Carolina. One issue the court considered was whether the state of South Carolina maintained the right to medicate an inmate solely to restore his or her competency for execution. In order to answer the above question, the Supreme Court of South Carolina used *Louisiana v. Perry* as persuasive authority. The Supreme Court of South Carolina found many similarities in the privacy clause of the South Carolina and Louisiana state constitutions. The South Carolina Constitution had a privacy clause that reads, “*the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated.*” [Emphasis Mine]⁸⁴ Drawing from the decision in *Perry*, the Supreme Court of South Carolina found that “the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution.”⁸⁵ Moreover, like the decision of *Louisiana v. Perry*,

⁸³ Daniel N. Lerman, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 Geo. L.J. 1941 (2007)

⁸⁴ S.C. Constitution. Art. I, §10

⁸⁵ *Singleton v. State*, 437 SE 2d 53 (SC Supreme Court 1993)

the South Carolina Supreme Court also included the roles of physicians in their analysis. The South Carolina Supreme Court found that the prescription of an antipsychotic medication against the will of the inmate constitutes physician participation in executions. The South Carolina Supreme Court reasoned “the medical ethical position reinforces the mandates of our constitutional law, which dictate that we prohibit” medicate to execute schemes.⁸⁶ Having medicate to execute schemes forces physicians to violate their ethical responsibilities. In a unanimous decision, the South Carolina Supreme Court banned the use of forced medication regimens to facilitate an execution in the state of South Carolina.

Since the Supreme Court denied the petition for a writ of certiorari in *Singleton v. Norris*, the future of the abolitionist movement for medicate to execute schemes may rest in the lower courts such as the Louisiana State Supreme Court. Yet as seen in the case *Singleton v. State*, the decision of the Louisiana Supreme Court can be further reaching than its jurisdiction. The arguments proposed in *Louisiana v. Perry* provide sound persuasive arguments for other jurisdictions to support banning the practice of executing an inmate who is placed on antipsychotic medication treatments against his or her will.

⁸⁶ *Singleton v. State*, 437 SE 2d 53 (SC Supreme Court 1993)

CONSTITUTIONAL CONSIDERATIONS

Due to the unique nature of the death penalty, involuntary medication regimens bring up constitutional considerations when applied to condemned inmates. Establishing competency is an ongoing judicial function that, like all other judicial functions, must be conducted in accordance to the United States Constitution and respective state constitutions. When medication to execute schemes are put into practice, many rights guaranteed to inmates become compromised. Some of the rights that may be violated are those guaranteed from the Fifth, Sixth, Eighth and Fourteenth Amendments.

The Fifth and Fourteenth Amendments guarantee that individuals be given “due process of law” at both the federal⁸⁷ and state⁸⁸ levels. The Sixth Amendment provides for the right to an “impartial” trial.⁸⁹ Medication to execute schemes may have the potential to violate these rights. Many inmates wish to show their true mental state during competency hearings. Being on antipsychotic medications may make it difficult for a judge to see an inmate’s symptoms of mental illnesses thus making an inmate appear competent to stand trial. As was the case in *Riggins v. Nevada*, a forced medication regimen may prevent an inmate from showing his or her true mental state, thus violating his or her Fifth Amendment’s due process rights.

⁸⁷ U.S. Const. amend. V § 1

⁸⁸ U.S. Const. amend. XIV § 1

⁸⁹ U.S. Const. amend. VI § 1

Medicate to execute schemes also have the possibility of violating one's Sixth Amendment rights. According to Elizabeth G. Schultz, this can happen in a variety of ways.⁹⁰ One way is that forced medication regimens may interfere with a defendant's right to present a defense. Many of the medications used in involuntary medication regimens have a sedation effect.⁹¹ Such a sedation effect may affect the defendant's ability to help his counsel present an accurate defense. In addition, Schultz argues that these medication regimens can cause prejudice against a defendant. The effects of some antipsychotic medications can make the patient unable to communicate and act naturally. These unnatural actions may prejudice juries and violate the Sixth Amendment. These forced medication regimens also interfere with the defendant's right to testify in his or her own words. Side effects of antipsychotic medications may also impair an inmate's memory, making it difficult for him or her to assist in his or her defense. Such a side effect has a strong potential to violate an inmate's rights under the Fifth, Fourteenth, and Sixth Amendments.

In addition to the Fifth, Fourteenth and Sixth Amendments, medicate to execute schemes have the potential to violate the Eighth Amendment as well. As stated in Justice Marshall's opinion in *Ford*, the Eighth Amendment "prohibits the State from inflicting the penalty of death upon a prisoner who is insane."⁹² The Supreme Court addressed this issue with the need to establish competency, but the test for competency is "ambiguous" in

⁹⁰ Elizabeth G. Schultz. *Sell-ing Your Soul to the Courts: Forced Medication to Achieve Trial Competency in the Wake of Sell v. United States*, 38 Akron L. Rev. 503, (2005)

⁹¹ Bruce J. Witnick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. Miami L. Rev. 1 (1989).

⁹² *Ford v Wainwright*, 477 U.S. 399 (1986)

practice and “fails to recognize the unpredictable nature of mental illness and antipsychotic medications.”⁹³ In essence, not much is known about the role that antipsychotic medications play in evaluating one’s competency.

One concern is that these medications do not cure symptoms, but only mask symptoms. Many opponents of the policy of forcefully medicating inmates claim that the medicated still maintain symptoms of mental illness, and that medications may only mask these.⁹⁴ Ronda K. Jenkins effectively makes this argument in her law review article, *Fit to Die: Drug-Induced Competency For the Purpose of Execution*.⁹⁵ In this article, she describes medicating an individual once an execution date is set as a “macabre, brutish ritual.” She is not alone in her beliefs; Judge Gerald Heaney of the United States Court of Appeals for the Eighth Circuit used Jenkins’s article in his dissenting opinion in *Singleton v. Norris*.⁹⁶ Heaney writes, “One of the pitfalls of equating true sanity with its medically-coerced cousin is that the drug-induced sanity is temporary and unpredictable: ‘the effect of psychoactive drugs on a particular recipient is uncertain; the drugs may affect the same individual differently each time they are administered.’ Jenkins, *supra* at 170.”⁹⁷ Both Jenkins and Heaney strongly believe that antipsychotic medications have a tendency to mask symptoms

⁹³ Kelley A. Gabos, Note and Comment: The Perils of *Singleton v. Norris*: Ethics and Beyond, 32 Am. J.L. and Med. 117 (2006)

⁹⁴ Rhonda Jenkins, Comment: *Fit To Die: Drug-Induced Competency For the Purpose of Execution*, 20 S. Ill. U. L. J. 149 (1995)

⁹⁵ Rhonda Jenkins, Comment: *Fit To Die: Drug-Induced Competency For the Purpose of Execution*, 20 S. Ill. U. L. J. 149 (1995)

⁹⁶ *Singleton v. Norris*, 319 F.3d (8th District 2003) (review of whether forced medications restores competency in accordance to Ford), cert denied, 540 U.S. 832 (2003).

⁹⁷ *Singleton v. Norris*, 319 F.3d (8th District 2003) (review of whether forced medications restores competency in accordance to Ford), cert denied, 540 U.S. 832 (2003).

instead of curing them, and that the underlying illness becomes almost impossible to detect although the illness is ever-present. There exists recorded evidence of inmates on involuntary medication treatments who still experience the debilitating effects of their mental illnesses.

One notable example of medications failing to cure the underlying symptoms of mental illness can be seen in the executed inmate, Charles Singleton, from the case *Singleton v. Norris*. Singleton was executed in 2004 despite his symptoms of schizophrenia. In an interview with CNN, Singleton asserted that he heard voices. He claimed, "They talk about, for example, 'Let's hold him and see when his father come. We'll have him and his father.' They talk about ruling the world and finding a way to kill me."⁹⁸ Even with evidence of mental illness, Singleton was found competent to be executed.

The Eighth Amendment protects citizens from cruel and unusual punishments and, according to case law, the execution of incompetent inmates has been determined to be cruel and unusual punishment.⁹⁹ Even though medication may revive the patient's competency, symptoms of insanity may still be present, as were the circumstances of Charles Singleton. Because symptoms of illness can still be present despite the prescription of antipsychotic medications, medicating to execute schemes may be seen as cruel and unusual punishment and also arguably a violation of the right to due process under the Fifth Amendment.

⁹⁸Brian Cabell, *Arkansas Executes Mentally Ill Inmate*, CNN (Jan. 7, (2004), <http://www.cnn.com/2004/LAW/01/07/arkansas.executions/index.html?iref=allsearch>

⁹⁹ *Ford v Wainwright*, 477 U.S. 399 (1986)

While it has been established that an inmate who is on medication may be executed, there has been a lack of understanding of the mechanics by which these medications work in treating illnesses. Because of the lack of understanding, questions arise as to whether inmates on antipsychotic medications are relieved from illness to the point that they are no longer incompetent. More specifically, inmates who are on such medications may experience fluctuations in the medications' ability to alleviate their symptoms based on duration of the treatment and the normal mechanics of the body. Because of the fluctuations of the human body, it may be uncertain that an inmate on an involuntary medication treatment will be competent throughout the duration of his or her treatment. As stated by opponents to the practice, "[t]he effect of psychoactive drugs on an individual is uncertain; the drugs may affect the same individual differently each time they are administered."¹⁰⁰ The uncertainty of the medication makes knowing whether an inmate is competent at the time of their execution difficult and uncertain. Since knowledge about the effects of these medications is lacking, it is cruel and unusual to execute inmates on forced medication regimens until more information is available. Only after more evidence on the effects of antipsychotic medications is collected can a government be certain that an inmate is competent at the time of his or her execution.

¹⁰⁰ Rhonda Jenkins, *Coment: Fit To Die: Drug-Induced Competency For the Purpose of Execution*, 20 S. Ill. U. L. J. 149 (1995)

ETHICAL CONSIDERATIONS

The nexus of forced medication regimens and capital punishment can also create ethical violations, in addition to the constitutional considerations that arise. One profound ethical consideration is the responsibilities of physicians who participate in such regimens. Doctors, like many other professionals, are regulated by guidelines and oaths that affirm that physicians will practice in accordance with an “appropriate standard of professional ethics.”¹⁰¹ These standards are set forth in provisions from the American Medical Association (AMA) and the Hippocratic Oath, an oath doctors take that “embodies concepts of religions, integrity, ethics, and collegiality in the pursuit of medicine as a profession.”¹⁰² Both of these place strict restrictions on a doctor’s ability to participate in executions, involuntary medication regimens, and the nexus of the two.

The Hippocratic Oath lies at the heart of the regulation of physicians’ participation in executions. Upon becoming a physician, medical students swear, “I will prescribe regimens for the good of my patients according to my ability and judgment and never do harm to anyone.”¹⁰³ The oath, and most specifically the section in which physicians swear to do no harm “consistently and universally has been interpreted by medical societies to

¹⁰¹ Jennifer E. Lloyd, *Primum Non Nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark L. Rev. 225, (2005)

¹⁰² Richard A. Spector, *Article: Managed Health Care Liability Issues*, 32 Cumb. L. Rev. 311 (2002)

¹⁰³ Peter Tyson, *The Hippocratic Oath Today*, PBS (March 27, 2001) <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>

prohibit the participation of physicians in the infliction of capital punishment.”¹⁰⁴ By swearing to “never harm anyone” physicians are arguably barred from directly participating in executions. As a result, physicians have an ethical responsibility to refrain from any participation in an execution.

As a supplement to the Hippocratic oath, the AMA provides more specific guidelines for a physician’s participation in an execution. The AMA is an organization of doctors and medical students whose purpose is to further the interests of physicians and their patients, as well as to lobby for legislation helpful to the practice of medicine. While doctors rely on the state for licensure to practice medicine, the AMA has tremendous effects on the way physicians practice medicine because of the active role the AMA takes in promoting physicians’ interests. Doctors must comply with the rules of their state departments of health because these state departments have the ultimate authority to revoke or suspend a physician’s license. Despite this, many physicians abide by the recommendations of the AMA because it creates a standard that many doctors follow.

The AMA openly opposes doctors participating in executions. The AMA code of ethics specifically discusses executions and has dedicated a section to the issue. The code states “[a]ny physician participation in execution is banned.”¹⁰⁵ Unlike the Hippocratic oath, which has been interpreted to ban physician participation in executions, the AMA, in clear language, bans physician participation in executions. Armed with this, the AMA goes into great detail to define an execution. According to the AMA an execution is defined as,

¹⁰⁴ Markus Dirk Dubber, *Article: The Pain of Punishment*, 44 Buffalo L. Rev. 545 (1996)

¹⁰⁵ American Medical Association Code of Ethics, Capital Punishment Opinion 2.06 (June 1994)

“[1.] An action that would directly result in the death of the condemned, [2.] An action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned, [3.] An action that would automatically cause an execution to be carried out on a condemned prisoner”¹⁰⁶

This definition is strict, preventing physicians from helping conduct an execution in almost all possible ways. Most notable is the section that bans physicians from participating in “an action which would assist, supervise, or contribute to the ability of another individual to directly cause death.”¹⁰⁷ As a result, physicians are ethically excluded from even helping select veins to insert needles for lethal injection.

The AMA goes further to describe what constitutes physician participation. According to the AMA, physician participation,

“includes, but is not limited to, the following actions:
prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or

¹⁰⁶ American Medical Association Code of Ethics, Capital Punishment Opinion 2.06 (June 1994)

¹⁰⁷ American Medical Association Code of Ethics, Capital Punishment Opinion 2.06 (June 1994)

observing an execution as a physician; and rendering of technical advice regarding execution.”¹⁰⁸

In opinion 2.06, the AMA outlines practices that would be considered participation and also provides for other actions to be included. Thus, the AMA establishes an ethical consideration that prohibits physicians from participating in an execution. However, this section of the AMA does not define whether placing a patient on a forced medication regimen constitutes physician participation in an execution.

Like executions, the AMA details the provisions for physicians participating in forced medication regimens in its code of ethics. AMA opinion 2.065: Court-initiated Medical Treatments in Criminal Cases describes provisions for when it is ethical for a physician to prescribe a forced medication regimen. According to the AMA, “[p]hysicians can ethically participate in court-initiated medical treatments only if the procedure being mandated is therapeutically efficacious and is therefore undoubtedly not a form of punishment or solely a mechanism of social control.”¹⁰⁹ Opinion 2.065 requires that the treatment be used to better the patient’s medical condition and not be used as method to restore the patient’s competency for execution. The AMA forbids the use of a medication regimen as a “mechanism of social control.” A physician thus violates his or her ethical duty to participate in an involuntary medication regimen when the patient’s medical condition is not the sole purpose of the treatment.

¹⁰⁸ American Medical Association Code of Ethics, Capital Punishment Opinion 2.06 (June 1994)

¹⁰⁹ American Medical Association Code of Ethics, Court-initiated Medical Treatments in Criminal Cases Opinion 2.065 (June 1998)

The AMA, in addition, addresses the ethical responsibilities of physicians during the connection of involuntary medication regimens and capital punishment. In Opinion 2.06 of the AMA code of ethics, the ethical responsibilities of physicians participating in medicate to execute schemes are addressed: “When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins.”¹¹⁰ If such a guideline is followed, then the execution of an inmate who is artificially competent should never occur because physicians have an ethical responsibility to refrain from doing so. Yet, this is not always the case, as can be seen with the execution of Charles Singleton.

Additionally, there is a question of whether a forced medication regimen can be seen as a direct participation in an execution. If so, then a physician involved in such an act violates opinion 2.06 of the AMA code of ethics that prohibits physicians from participating in executions. According to Douglass Mossman, M.D. , “Some commentators suggest that the physician can be directly responsible for an inmate’s death” when the physician places the patient on an involuntary medication regimen that ultimately restores the inmate’s competency for execution.¹¹¹ Unfortunately, as seen in many scenarios, “[p]rotocol assigns physician or nurse an essential role in the actual execution.”¹¹² With this said, can a state permit a practice that causes a physician to violate his or her ethical obligation?

¹¹⁰ American Medical Association Code of Ethics, Capital Punishment Opinion 2.06 (June 1994)

¹¹¹ Douglass Mossman, *The Psychiatrist and Execution Competency: Forging Murky Ethical Waters*, 43 Case W. Res. 1 (1992)

¹¹² Markus Dirk Dubber, *Article: The Pain of Punishment*, 44 Buffalo L. Rev. 545 (1996)

The above question was essential to the argument established in the case *State of Louisiana v. Perry*. In *Perry*, the Louisiana Supreme Court abolished the medicate to execute scheme for the state of Louisiana. Central to the court's argument to justify the abolishment of involuntarily medicating condemned inmates was the fact that medicate to execute schemes are "contrary to the code of the American Medical Association."¹¹³ Moreover, in the case *Singleton v. State*, the Supreme Court of South Carolina outlawed medicate to execute schemes in part because such schemes violate the ethical responsibilities physicians owe to their professions.¹¹⁴ Because the Eighth Circuit did not consider the ethical obligations of physicians, an "inherent" societal problem was created.¹¹⁵ Such a practice is detrimental to the inmate-patient relationship because it violates the inmate's trust that his or her physician is performing to the ethical standards of the medical profession. According to Jennifer E. Lloyd, an expert on medicate to execute schemes, a physician violating his or her ethical obligations by participating in executions can harm society outside the prison walls. She states, "[T]he credibility of physicians is inextricably linked to the medical profession's ability to keep itself separate from activities that violate the AMA." In addition, the "cloud that physician participation casts over the medical community as a whole unravels the fabric of the elite moral position with which society

¹¹³ *State of Louisiana v. Perry*, 610 So. 2d 746 (La Supreme Ct. 1992) (forcefully medicating condemned inmates) rev'd 584 So.2d 1145 (1991)

¹¹⁴ Rebecca A. Miller-Rice, *The "Insane" Contradiction of Singleton v. Norris: Forced Medication in a Death Row Inmate's Medical Interest Which Happens to Facilitate His Execution*, 22 U. Ark. Little Rock L. Rev. 659 (2000)

¹¹⁵ Jennifer E. Lloyd, *Primum Non Nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark L. Rev. 225, (2005)

views its medical professionals.”¹¹⁶ The fact that forced medication regimens violate the ethical responsibilities of physicians may create doubt that the physicians are performing other medical practices in accordance with their ethical responsibilities. As a result, it can be seen as a great error by the courts to allow forced medication regimens. Had the Eighth Circuit Court of Appeals addressed the issue of physicians’ ethics, it is likely that the court would have reached a decision “more consistent with those reached by other courts.”¹¹⁷

¹¹⁶ Jennifer E. Lloyd, *Primum Non Nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark L. Rev. 225, (2005) (how ethics affect medicating condemned inmates)

¹¹⁷ Jennifer E. Lloyd, *Primum Non Nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark L. Rev. 225, (2005)

OPINION

In order to evaluate the worth of a practice, it is essential to weigh the benefits of the practice against the detrimental effects. Allowing medicate to execute schemes to persist does produce benefits to society. First of all, it allows those who have committed capital crimes to be brought to justice. Execution is seen as a means of retribution to some proponents of the death penalty. As noted in national opinion surveys, retribution is the main basis for support of capital punishment.¹¹⁸ Retribution is defined as “the formal act of a community against one of its members, and is carried out in the manner and for the reasons that are justified under the political constitution of the community.”¹¹⁹ Thus, there is justification for executing an incompetent inmate, regardless of the inmate’s mental illness, because he or she committed a crime and should be punished.

In addition, medicate to execute schemes prevent the inmate from reoffending. By executing an inmate, they are removed entirely from society, preventing them from committing future crimes. Those placed on involuntary medication regimens are inherently dangerous. To be placed on such a medication, one must pose a danger to himself or others.¹²⁰ Once these individuals are executed, they no longer pose any risk of harm. If these inmates were to be kept incarcerated instead of being executed, there is an ever-present possibility that they will act out in violence towards themselves or those around

¹¹⁸ Bohm, Clark, and Aveni (1991)

¹¹⁹ Radin (1980, p. 1169)

¹²⁰ *Washington v. Harper*, 494 U.S. 210 (1990)

them. Executing these inmates may be the only way to be sure that such harm will never result.

On the other hand, medicate to execute schemes lead to many detrimental effects on society. First of all, the constitutional violations created by medicate to execute schemes are great. It can be argued that medicate to execute schemes can violate inmates' rights under the Fifth, Fourteenth, and Sixth Amendments. They do so by preventing an inmate from aiding in his or her defense.¹²¹ In addition, involuntary medication regimens may create a sedation effect that can cause prejudice during competency hearing.¹²²

Along with the possible violations of the Fifth, Fourteenth, and Sixth amendments, medicate to execute schemes have a potential to violate the Eighth Amendment. As noted earlier, the Eighth Amendment serves to protect citizens from "cruel and unusual punishments."¹²³ English common law and United States case law establish that executing the incompetent constitutes cruel and unusual punishment.¹²⁴ There still exists the possibility that antipsychotic medications do not cure a patient's symptoms but instead mask them.¹²⁵ Also, there is doubt on whether the medications consistently alleviate a

¹²¹ Elizabeth G. Schultz. *Sell-ing Your Soul to the Courts: Forced Medication to Achieve Trial Competency in the Wake of Sell v. United States*, 38 Akron L. Rev. 503, (2005)

¹²² Elizabeth G. Schultz. *Sell-ing Your Soul to the Courts: Forced Medication to Achieve Trial Competency in the Wake of Sell v. United States*, 38 Akron L. Rev. 503, (2005)

¹²³ U.S. Const. amend. VIII § 1

¹²⁴ *Ford v Wainwright*, 477 U.S. 399 (1986)

¹²⁵ Sarah F. DePanfilis, *Singleton v. Norris: Exploring the Insanity of Forcibly Medicating, then Eliminating the Insane*, 4 Conn. Pub. Int. L.J. 68 (2004)

patient's symptoms.¹²⁶ In the case of either of these two scenarios, an incompetent inmate may be executed, resulting in a violation of the Eighth Amendment.

Finally, medicate to execute schemes place physicians in a position where they must violate their ethical obligations. As stated in the AMA, doctors are discouraged from participating in executions. Yet medicate to execute schemes require doctors to participate in executions violating their ethical considerations established by the AMA and the Hippocratic Oath.

When weighing the positive and negative effects of medicate to execute schemes, it becomes obvious, in my opinion, that the negative effects outweigh the positive effects. As stated by Justice Marshall, retribution "is not served by the execution of an insane person."¹²⁷ Furthermore, the fact that medicate to execute schemes may compromise an inmate's constitutional rights and may cause doctors to violate their ethical obligations outweighs the risk of the inmate endangering himself or others. Thus, reviving an inmate's competency for execution through an involuntary medication regimen goes against the best interest of society.

In the opinion of this writer, more judicial action from the courts is needed. The Supreme Court of Louisiana in *Louisiana v. Perry* provides a persuasive argument for other jurisdictions to consider. If courts are to address the ethical obligations of physicians, then

¹²⁶ Rhonda Jenkins, *Comment: Fit To Die: Drug-Induced Competency For the Purpose of Execution*, 20 S. Ill. U. L. J. 149 (1995)

¹²⁷ *Ford v Wainwright*, 477 U.S. 399 (1986)

it is likely that they will move toward abolishing medicate to execute schemes.¹²⁸ Hopefully, a case that addresses medicate to execute schemes will reach the Supreme Court of the United States. Even more strongly, this writer is convinced that the medical community and its licensing agencies should penalize any doctor that participates in medicate to execute schemes. Participating in medicate to execute schemes violates the very ethics physicians promise to uphold. To this end, if a doctor participates in an execution in a prison, the doctor should be stripped of his or her medical license and barred forever from practicing medicine in any state. Yet until action is taken by American courts and state medical licensing agencies, medicate to execute schemes will remain an unfortunate blemish on the American penal system.

¹²⁸ Jennifer E. Lloyd, *Primum Non Nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 Ark L. Rev. 225, (2005)

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