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## Situating Staley: Investigating the Constitutionality of Forcibly Medicating a Texas Death Row Inmate to Render Him Competent for Execution

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# SITUATING *STALEY*: INVESTIGATING THE CONSTITUTIONALITY OF FORCIBLY MEDICATING A TEXAS DEATH ROW INMATE TO RENDER HIM COMPETENT FOR EXECUTION

MEGAN A. RUSCIANO\*

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\* Senior Staff, Vol. 22, *American University Journal of Gender, Social Policy & the Law*; J.D. Candidate, May 2015, Dual Degree Program: American University Washington College of Law and University of Ottawa Law School; B.A. 2010, McGill University. I would like to thank my parents and family—who inspire me to be more cognizant and continue to provide unwavering encouragement despite my incessant questions. Many thanks to Professor Robert Dinerstein for his tireless editing and guidance, without which this paper likely would not have appeared in publication. I am grateful for the help and input of the entire JGSPL staff throughout this process. Casey and D—thank you for the discursive support, safe harbor, and respite—you’ll always have my gratitude—all the hours.

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## I. INTRODUCTION

Philosopher Michel Foucault stated that the State’s power to punish involves a power to discipline, which “regards individuals both as objects and as instruments of its exercise . . . . It is not a triumphant power . . . it is

a modest, suspicious power.”<sup>1</sup> Foucault’s words about the State’s power reveal the tension within the question facing the Texas Criminal Court of Appeals: does the State have the power to force a death row inmate with mental illness<sup>2</sup> to take medication which may render him competent for his own execution?<sup>3</sup> The issue raises the question of who possesses the power over the treatment of an individual with mental illness and brings to the surface an underlying dilemma between mental illness and the legal system’s competency to address it.<sup>4</sup>

Courts have struggled to define the scope of the constitutional protections that safeguard an inmate with mental illness.<sup>5</sup> The Eighth Amendment prohibits the execution of an inmate who is unable to comprehend the reasoning for his or her execution in light of his or her mental illness.<sup>6</sup> Still, this allows for an inmate who is diagnosed with a mental illness to face execution. Moreover, while an inmate who has a mental illness has a right under the Fourteenth Amendment to refuse medication, courts have had difficulty defining the scope of this right.<sup>7</sup> A State’s interest in enforcing an inmate’s sentence must be weighed against the means of enforcing its interest since anti-psychotic medication provides no panacea for mental illness and may cause irreversible effects.<sup>8</sup> This

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1. See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 170 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing the evolution of punishment from physical torture to discipline and control of a prisoner’s body).

2. Though the term psychosocial disability is preferable, this paper will use the older terminology of “mental illness” as both the medical community and the relevant case law use this terminology.

3. See *Ex parte Staley*, No. WR-37034-05, 2012 WL 1882267 at \*1 (Tex. Crim. App. May 14, 2012) (staying Staley’s execution pending consideration of the constitutionality of his forced medication for execution).

4. See, e.g., MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 5-7 (Richard Howard trans., Vintage Books 1st ed. 1988) (1965) (studying the treatment of patients with mental illness’s in institutions within a power analysis).

5. See generally Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 282 (2007) (noting that the criminal justice system fails to account for culpability during the crime, adequate defenses during trial, and the efficacy of post-conviction processes for individuals with mental illness).

6. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

7. See, e.g., *Washington v. Harper*, 494 U.S. 210, 225-27 (1990) (favoring a state’s interest in safety over a dangerous inmate’s interest in its decisions to forcibly medicate the inmate); *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (recognizing a committed patient’s Fourteenth Amendment right to refuse medication).

8. See generally THE CITIZENS COMMISSION ON HUMAN RIGHTS INTERNATIONAL, *THE SIDE EFFECTS OF COMMON PSYCHIATRIC DRUGS* 20 (2012) [hereinafter *CITIZENS COMMISSION ON HUMAN RIGHTS*], available at

balancing test is further complicated when the State aims to enforce the death penalty.<sup>9</sup> Courts struggle to establish an adequate balance in such circumstances and adopt conflicting notions of what constitutes an inmate's best medical interest in regards to his or her treatment.<sup>10</sup>

It is within this unsettled jurisprudence that the *Staley* case is situated.<sup>11</sup> Staley was convicted of capital murder, sentenced to death, and later diagnosed with schizophrenia.<sup>12</sup> When medicated, Staley is considered by courts to be competent for execution, yet when unmedicated he is commonly considered to be incompetent for execution. Absent medication, he at times believed that the judge convicted him and sentenced him to death as part of a plot to steal his one-of-a-kind red pickup truck.<sup>13</sup> Staley also has a history of being treated with older medication, experiences undesirable effects from his medication, and often refuses to take this medication because of these effects.<sup>14</sup> The issue is whether the State can force Staley to take this medication, which may render him competent for execution.

This Comment argues Staley's forcible medication violates the Eighth and Fourteenth Amendments because it unjustifiably interferes with his right to bodily integrity and deprives him of his dignity.<sup>15</sup> Part II of this

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[http://www.cchrint.org/pdfs/The\\_Side\\_Effects\\_of\\_Common\\_Psychiatric\\_Drugs.pdf](http://www.cchrint.org/pdfs/The_Side_Effects_of_Common_Psychiatric_Drugs.pdf) (mentioning tardive dyskinesia, a potentially irreversible disorder that impairs basic motor functions and can cause involuntary movement of the lips, tongue, jaw, and fingers).

9. See Daniel N. Lerman, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 GEO. L.J. 1941, 1944, 1970 (2007) (addressing the ethical dilemma physicians face in these situations when they must consider the consequences of the clinical and legal realities of treatment).

10. Compare *Singleton v. Norris*, 319 F.3d 1018, 1026-27 (8th Cir. 2003) (holding that an inmate has an interest in receiving medication that alleviates his delusions), with *State v. Perry*, 610 So. 2d 746, 747-48 (La. 1992) (holding that an inmate never has an interest in receiving medication that removes the barrier to his execution).

11. *Ex parte Staley*, No. WR-37034-05, 2012 WL 1882267 at \*1 (Tex. Crim. App. May 14, 2012).

12. See Brief for Appellant at app. A, at 31, *Staley v. Texas*, 233 S.W.3d 337 (Tex. Crim. App. Sept. 12, 2007) (No. AD-75-462) (noting in a physician's testimony that Staley's diagnosis did not occur until 1993, which was after his trial).

13. See *id.* at 25 (noting also the instance when Staley believed that Oprah Winfrey paid off the jury and that his victim was alive).

14. See Brief for Appellee at 13-14, *Staley v. Texas*, 233 S.W.3d 337 (Tex. Crim. App. Sept. 12, 2007) (No. AD-75-462) (detailing that, after receiving medication, Staley suffered paralysis, delusions, and extreme sedation, which led him to lie on the floor so long he wore a bald spot onto the back of his head).

15. See *infra* Part II (arguing that administering medication to Staley violates his recognized right to make decisions about his medical treatment).

Comment outlines the Eighth Amendment prohibition against executing an inmate who, due to mental illness, cannot understand the connection between his or her crime and punishment and the progression of the right to refuse medication.<sup>16</sup> This Comment also describes the growing controversy around the issue of forcibly medicating an inmate just prior to his execution.<sup>17</sup> Part III applies this constitutional analysis to Staley's case and argues that his sentence should be commuted.<sup>18</sup> Part IV finds that society has an interest in preserving the integrity of the medical community and in avoiding placing inmates in a situation wherein their medication's effectiveness makes them eligible for forcible medication and execution.<sup>19</sup> Part V concludes that the Texas Criminal Court of Appeals should rule that Staley's forcible medication is unconstitutional because it violates his dignity and bodily integrity.<sup>20</sup>

## II. BACKGROUND

### *A. The Constitutional Foundation for the Forcible Medication of Death Row Inmates*

#### *1. The Eighth Amendment Protects an Inmate From Experiencing Cruel, Unusual, and Disproportionate Punishment.*

The Eighth Amendment prohibits punishments that are cruel and unusual because such punishments are either disproportionate to the crime committed or barbaric in nature.<sup>21</sup> The Supreme Court held that executing an inmate who lacks a rational understanding of the imminence of his execution and the reasoning behind it constitutes cruel and unusual

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16. *See id.* (discussing the protections within the Eighth and Fourteenth Amendments and relevant case law defining when an inmate is competent for execution and can refuse medication).

17. *See infra* Part III (introducing the differing analyses the *Singleton* and *Perry* courts employed to determine whether forced medication for execution was in an inmate's interest).

18. *See id.* (determining that, given the underlying rationales provided by the Supreme Court in forcible medication and competency for execution cases, Staley's forcible medication violates constitutional protections).

19. *See infra* Part IV (arguing that rationales embedded in preserving medicine as a "healing art" and in protecting inmates' dignity support Staley's right to refuse medication).

20. *See infra* Part V (concluding that Staley's forcible medication is unconstitutional and that commuting his sentence represents a viable alternative).

21. U.S. CONST. amend. VIII; *see also* *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (articulating the view that the Eighth Amendment, grounded in the dignity of man, tempers the power of the court to punish "within the limits of civilized standards").

punishment, and, thus, runs afoul of the Eighth Amendment's protections.<sup>22</sup>

Finding support in common law, the Court in *Ford v. Wainwright* held that executing an inmate who was unable to understand the reason for his execution due to his mental illness was cruel and unusual in part because no retributive purpose was served by his execution.<sup>23</sup> The Court, in a plurality opinion, stated that it would offend societal decency to exact this "mindless vengeance" on an inmate as a punishment.<sup>24</sup>

Because the majority opinion failed to define when an inmate could not be executed in this context, Justice Powell, in his concurrence, provided a standard to determine when an inmate was incompetent to be executed.<sup>25</sup> Here, an inmate is incompetent to be executed if the inmate is unable to understand: (1) the imminence of his or her execution and (2) the reason why he or she is being executed.<sup>26</sup> Justice Powell also noted that an inmate could be executed only if the inmate was cured of his or her illness.<sup>27</sup> Although treatment and medication can control the symptoms of mental illness, mental illnesses are understood to have no cure.<sup>28</sup>

Justice Powell's standard for competency was widely accepted by state legislatures and used in *Panetti v. Quarterman* to determine whether Panetti, the inmate, was competent for execution.<sup>29</sup> In *Panetti*, the Court

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22. See *Ford v. Wainwright*, 477 U.S. 399, 403, 409-10 (1986) (plurality opinion) (holding that executing Ford was unconstitutional because his punishment inflicted suffering without understanding since he believed he owned the prisons, could control the Governor through mind waves, and would not be executed); see also *Panetti v. Quarterman*, 551 U.S. 930, 957-60 (2007) (clarifying that an inmate's understanding of execution must be rational and not rooted in the manifestations of his illness).

23. See *Ford*, 477 U.S. at 403-04 (holding that Ford's execution served no retributive purpose since Ford did not connect his execution to his crime and believed he was free to leave the prison whenever he wanted).

24. See *id.* at 409-10 (noting that executing an individual who was unable to understand his impending execution offended humanity); see also *Trop*, 356 U.S. at 101 (finding that the Eighth Amendment's protections evolve with "standards of decency").

25. *Ford*, 477 U.S. at 420 (Powell, J., concurring).

26. See *id.* at 419-22 (using principles of dignity embedded in the Eighth Amendment to compose this definition of competency).

27. See *id.* at 425 n.5 (mentioning that certain inmates may permanently lose their mental faculties and thus may avoid execution altogether). But see MD. CODE ANN., CORR. SERVS. § 3-904(b) (2004) (stating that an inmate is not incompetent if his competence is sustained by treatment).

28. See generally *What Does Recovery Look Like*, NAT'L ALLIANCE ON MENTAL ILLNESS, [http://www.nami.org/Template.cfm?Section=By\\_Illness](http://www.nami.org/Template.cfm?Section=By_Illness) (last visited January 29, 2013) (noting that effective treatments, but not cures, exist for mental illnesses).

29. See *Panetti v. Quarterman*, 551 U.S. 930, 954-55, 957-60 (2007) (clarifying that *Ford's* safeguards also protected Panetti, who was convicted of murder, believed his victim was alive, and thought he was being executed to stop preaching); see also

held that Panetti's mere awareness of the link between a crime and punishment was insufficient because it allowed the symptoms of Panetti's illness, namely his delusions, to provide the basis for his competency.<sup>30</sup> Panetti's punishment was stripped of its retributive purpose when he believed his execution was due to spiritual warfare and not due to his crime.<sup>31</sup> As a result, the Court promulgated its test requiring that an inmate have a rational understanding of the imminence of his execution and the reasoning behind it.<sup>32</sup>

*2. The Fourteenth Amendment Protects an Inmate's Right to Bodily Integrity, Which Includes the Inmate's Right to Make Decisions About His or Her Medical Treatment.*

The Fourteenth Amendment safeguards an individual's bodily integrity when the state attempts to violate the individual's dignity and due process rights by unjustifiably infringing on his or her life or liberty.<sup>33</sup> This protection extends to the right of an individual with mental illness to refuse treatment with anti-psychotic medication.<sup>34</sup> Where inmates are concerned, the Supreme Court permits forcible medication only when: (1) an inmate is a danger to himself or others, (2) medication is medically appropriate, and (3) no less intrusive alternative is viable to serve an important state interest.<sup>35</sup>

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Lyn Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 646 (2009) (noting that many state competency statutes correspond to *Ford's* standard).

30. See *Panetti*, 551 U.S. at 960 (noting that Panetti's belief that his execution was a sham was a belief caused by his illness, not by a denial of his crime).

31. *Id.* at 959-61.

32. *But see* Debra Cassens Weiss, *New Stay Granted for Inmate Claiming 'Grandiose Delusion' Bars His Execution*, ABA JOURNAL NEWS (Oct 24, 2012) [http://www.abajournal.com/news/article/new\\_stay\\_of\\_execution\\_granted\\_for\\_inmate\\_seeking\\_hearing\\_on\\_mental\\_health\\_i/](http://www.abajournal.com/news/article/new_stay_of_execution_granted_for_inmate_seeking_hearing_on_mental_health_i/) (discussing whether *Panetti* and *Ford* have been correctly applied in the ongoing case of John Ferguson, a Florida death row inmate who suffers from paranoid schizophrenia, believes he is the Prince of God, and yet is poised to be executed).

33. U.S. CONST. amend. XIV; *see also* *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (finding that anti-psychotic medication is dangerous and forcible medication violates bodily integrity); Michael Ashley Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1217 n.78 (2007) (citing Martha Nussbaum's capability approach that finds that a state must ensure that an individual can "live a 'truly human' existence" by ensuring that he or she can exercise ten central capabilities including bodily integrity).

34. *See, e.g.,* *Rogers v. Okin*, 738 F.2d 1, 7 (1st Cir. 1984) (holding that a patient can appreciate the risks and benefits of treatment, can refuse treatment, and is entitled to safeguards before being forcibly medicated).

35. *See* *Sell v. United States*, 539 U.S. 166, 181 (2003) (requiring that the forced



This protection developed from the right of a patient with a mental illness in a hospital to be involved in his or her treatment decisions and refuse medication even when found incompetent.<sup>36</sup> This safeguard was applied to prisoners in *Washington v. Harper*, when the Supreme Court held that Harper, an inmate with mental illness, could be forcibly medicated only when: (1) he was a danger to himself and others and (2) his treatment was medically appropriate.<sup>37</sup> The Court emphasized that the State had a legitimate interest in forcibly medicating Harper since he was found to be dangerous absent medication. Moreover, it also found that Harper's forced medication was medically appropriate since a doctor ethically prescribed the medication solely for his treatment.<sup>38</sup>

In *Riggins v. Nevada*, the Court applied the *Harper* standard to a trial competency context and emphasized evaluating a medication's side effects within the medically appropriate prong of this standard.<sup>39</sup> Riggins was forcibly medicated to stand trial and was later convicted of robbery and murder.<sup>40</sup> The Court remanded the case, noting that medication could make a defendant appear overtly sedated and calm during the proceedings, which could influence a determination of guilt.<sup>41</sup> Justice Kennedy, in his

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medication analysis consider less intrusive alternatives that are likely to achieve a similar result); *Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (finding medically appropriate treatment considers a medication's side effects); *Washington v. Harper*, 494 U.S. 210, 225-27 (1990) (asserting that an inmate may be forcibly medicated when he is a danger to himself or others and it is medically appropriate).

36. See, e.g., *Mills v. Rogers*, 457 U.S. 291, 301 (1982) (recognizing that when found incompetent, a patient with a mental illness has the right to be involved in his treatment decisions through the substituted judgment standard). The substituted judgment standard relies on the patient's past preferences regarding medication to inform his treatment when found to be incompetent. *Rennie*, 720 F.2d at 269 (holding that medication may only be forcibly administered to a committed patient when, in a physician's professional judgment, the patient is dangerous).

37. See *Harper*, 494 U.S. at 227 (finding the State's interest was paramount because of Harper's assault of a nurse).

38. See *id.* at 226-27 (noting that physicians can only prescribe medication for a patient's treatment and that the American Psychological Association found that medication was effective in treating symptoms). But see *id.* at 239 (Brennan, J., dissenting) (mentioning Harper's statement that he would have rather died than taken his medication since it resulted in paralysis).

39. See *Riggins*, 504 U.S. at 137-38 (finding that a medication's effects may influence a defendant's ability to assist counsel and receive a fair trial).

40. See *id.* at 142-43 (Kennedy, J., concurring) (noting that Riggins was strongly medicated with Mellaril, a drug that can severely depress basic motor and cognitive functions).

41. See *id.* at 134, 137-38 (majority opinion) (stating that Riggins's medication could make him drowsy and confused, which could have an impact on his outward appearance, testimony, and examination).

concurrency, found that until effective drugs have minimal side effects, a defendant should only be forcibly medicated when it does not render his trial unfair.<sup>42</sup> This concern, coupled with the potential of a medication's serious effects, emphasizes the importance of requiring the state to demonstrate an important government interest before it can forcibly medicate an inmate.<sup>43</sup>

Finally, in *Sell v. United States*, the Supreme Court reaffirmed that only on rare occasions could an inmate with mental illness be forcibly medicated to stand trial.<sup>44</sup> The Court remanded the case, noting that Sell's forcible medication was not medically appropriate since it failed to consider the potential side effects of his medication and his alternative treatment options.<sup>45</sup> The Court noted that the possibility of receiving alternative treatment in a mental health institution weighed against the state's interest in prosecution.<sup>46</sup> In return, the dissent argued that this possibility would cause defendants to engage in opportunistic behavior to manipulate their trials and avoid prosecution.<sup>47</sup> Nonetheless, the test that was solidified in *Sell* found that Sell could be forcibly medicated only if he was dangerous, his medication was medically appropriate, and no less intrusive options were plausible to actually further the State's important interest.<sup>48</sup>

### B. *The Controversy*

Because the Supreme Court has yet to rule on the constitutionality of forcibly medicating inmates to render them competent for execution, lower

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42. *Id.* at 142-43 (Kennedy, J., concurring).

43. *See id.* at 135-36, 138 (majority opinion) (finding that although adjudication of a murder charge was an important interest, forced medication still needed to be the least intrusive means for this end); *see also id.* at 156 (Thomas, J., dissenting) (finding that this approach applied a strict scrutiny analysis).

44. *Sell v. United States*, 539 U.S. 166, 180-81 (2003).

45. *See id.* at 179 (citing Justice Kennedy's concurrence in *Riggins* acknowledging medication's dangerous side effects but also noting that if Sell's medication was authorized due to his dangerousness, the need to justify authorization on other grounds would be less important); *see also* *United States v. Loughner*, 672 F.3d 731, 748 (9th Cir. 2012) (relying on this justification in *Sell* for forcibly medicating a prisoner because he is dangerous to justify forcibly medicating Jared Loughner).

46. *See Sell*, 539 U.S. at 180-81 (finding that the State's interest in bringing the accused to trial is essential for justice, but a consideration of an inmate's interest given his medical interest is necessary).

47. *See id.* at 191 (Scalia, J., dissenting) (contending that criminals could disrupt proceedings by conveniently not taking medication for their benefit).

48. *See generally* Jeremy P. Burnette, *The Supreme Court "Sells" Charles Singleton Short: Why the Court Should Have Granted Certiorari to Singleton v. Norris After Reversing United States v. Sell*, 21 GA. ST. U. L. REV. 541, 551 (2004) (defining the standard for forcible medication after *Sell*).

courts have reached divergent conclusions on this constitutional issue.<sup>49</sup> One interpretation emerged from *State v. Perry*, where the Louisiana Supreme Court held that it was unconstitutional to forcibly medicate Perry, a death row inmate, solely for the purpose of executing him.<sup>50</sup> The court found that forcibly medicating Perry violated Louisiana's constitution since it rendered treatment a punishment with added indignity.<sup>51</sup> The court noted that Perry's physician had conflicting responsibilities to the state and to Perry, which left room for the physician to make arbitrary decisions about Perry's treatment options.<sup>52</sup> The physician had to determine whether the treatment provided to Perry for his illness could be separated from the reality that this treatment would hasten his execution. If the physician decided this was possible, he or she may violate the Hippocratic Oath when treatment meant to alleviate suffering contributes to a punishment that results in death.<sup>53</sup> The court also reasoned that indignity was added to punishment since Perry would be cognizant of the violation of his bodily integrity for his execution.<sup>54</sup> The court determined that when achieved through his forced medication, Perry's competency addressed the symptoms of his illness rather than curing his illness and thus did not pass *Ford's* constitutional threshold for competency.<sup>55</sup>

Furthermore, the court held that Perry's forced medication was not medically appropriate since it did not allow him to discuss his treatment

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49. Compare *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (holding that an inmate's forcible medication is not unconstitutional when his execution date is pending), with *State v. Perry*, 610 So. 2d 746, 747-48 (La. 1992) (holding that forcibly medicating an inmate and carrying out his execution thereafter was unconstitutional), and *Singleton v. State*, 437 S.E.2d 53, 56, 61 (S.C. 1993) (applying the American Bar Association's standard for competency to find forcible medication unconstitutional).

50. *Perry*, 610 So. 2d at 771.

51. *Id.* at 750.

52. See *id.* at 752-53 (finding that, in this situation, a physician cannot use "informed and dispassionate professional judgment").

53. See *id.* at 752-55 (adding that this scheme also undermined the basic trust of the physician-patient relationship); see also *Furman v. Georgia*, 408 U.S. 238, 242, 274 (1972) (holding that one of the markers of cruel and unusual punishment is the arbitrary infliction of punishment); AM. MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS, E-2.06 Capital Punishment (2000) [hereinafter AM. MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS], available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> (finding that the Hippocratic Oath prevents doctors from rendering an inmate competent for execution who was found incompetent).

54. See *Perry*, 610 at 763 (stating this scheme turned Perry's life into a means for the state's ends).

55. *Perry*, 610 So. 2d at 759.

with a physician acting in his best medical interest.<sup>56</sup> The court found that the state could not separate its interest in medicating and treating Perry from its underlying goal of executing him.<sup>57</sup> Perry's own death could never be in his best medical interest and therefore, Perry's forced medication was unconstitutional.<sup>58</sup>

Yet, in *Singleton v. Norris*, the Eighth Circuit held that Singleton, an inmate convicted of murder, could be forcibly medicated when his execution date was pending.<sup>59</sup> The court reasoned that medicating Singleton was constitutional since the medication alleviated his delusions, caused no serious effects, and allowed Singleton to understand the connection between his crime and punishment.<sup>60</sup>

The court distinguished its holding from *Perry* on two grounds: (1) *Perry* applied Louisiana law and (2) *Perry* found, within the medically appropriate analysis, that the defendant's treatment could not be separated from his punishment.<sup>61</sup> The *Singleton* court maintained that Singleton's own interest in taking medication to abate his symptoms, coupled with the state's significant interest in enforcing his sentence, rendered his forced medication constitutional.<sup>62</sup>

### C. *State v. Staley*

In 1991, Steven Staley was convicted of robbery and murder, sentenced to death, and later diagnosed with paranoid schizophrenia. Since then, Staley has been partially compliant with taking his medication.<sup>63</sup> Staley experiences adverse effects from his medication and the medication alone has proven ineffective in treating his illness.<sup>64</sup> In 2006, he was forcibly

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56. *Id.* at 768.

57. *See id.* at 761 (emphasizing that discussions of Perry's treatment were only centered on his competency and thus on removing the barrier preventing his execution).

58. *But see id.* at 780 (Cole, J., dissenting) (finding that a state's interest in protecting society from murderers seeking to avoid punishment by feigning illness could render forced medication in this instance constitutional).

59. *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003).

60. *But see id.* at 1031 (Heaney, J., dissenting) (mentioning that, while medicated, Singleton believed he was under a voodoo curse that turned his food into worms).

61. *Id.* at 1026 (majority opinion).

62. *See id.* at 1024-25 (relying on the Eighth Circuit's emphasis in *Sell* that *Sell*'s forced medication was justified to bring him to trial). *But see* Burnette, *supra* note 48, at 541-43 (arguing that because at the time *Singleton* was decided the Supreme Court had granted certiorari to and later reversed *Sell*, *Singleton* was wrongly decided).

63. *See* Brief for Appellant, *supra* note 12, at 15 (noting Staley's protests about taking his medication due to its effects).

64. *See id.* at 14 (noting that after being medicated with Haldol, Staley has experienced paralysis and continued delusions).

medicated for his execution.<sup>65</sup> Yet, his execution was repeatedly stayed and continues to be appealed due to the debate over the constitutionality of his forced medication.<sup>66</sup>

Under the Texas Code of Criminal Procedure, Staley cannot be executed if he does not understand (1) the imminence of his execution and (2) the reasoning for his execution.<sup>67</sup> Yet, the *Staley* case emerges from a jurisdiction where courts have been slow to enforce *Panetti*'s safeguards and where several inmates with mental disabilities have recently been executed.<sup>68</sup> From this context, it is uncertain whether a Texas court will find that forcibly medicating Staley on the eve of his execution is constitutional.<sup>69</sup>

### III. ANALYSIS

#### *A. Forcibly Medicating Staley Constitutes Cruel and Unusual Punishment Under the Eighth Amendment Because It Does Not Pass The Ford/Panetti Test.*

Forcibly medicating Staley violates the Eighth Amendment because his forcible medication: (1) would result in a medication-induced competency that does not conform with the Supreme Court's competency requirement, (2) would not further a retributive purpose, and (3) would conflict with evolving standards of decency by turning his treatment into additional and

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65. *Staley v. State*, 233 S.W.3d 337, 337 (Tex. Crim. App. 2007).

66. *Ex parte Staley*, 2012 WL 1882267, at \*1 (Tex. Crim. App. May 14, 2012).

67. TEX. CODE CRIM. PROC. ANN. art. 46.05 (West 2007).

68. See Vidisha Barua, *Synthetic Sanity: A Way Around the Eighth Amendment?*, 44 CRIM. L. BULL. 4, 8 (2008) (noting that from 2003 to 2005, Texas executed three inmates with mental illness); see also Martiya Karimjee, *Marvin Wilson Execution Goes Ahead in Texas Despite Claims of Low IQ*, GLOBAL POST (August 8, 2012) <http://www.globalpost.com/dispatch/news/regions/americas/united-states/120808/marvin-wilson-execution-goes-ahead-texas-despite> (last visited February 1, 2013) (addressing Texas's recent execution of an individual with an intellectual disability).

69. See *Green v. State*, 374 S.W.3d 434, 444 (Tex. Crim. App. 2012) (holding that the fact that a defendant claimed that he was innocent of his crime indicated that he understood the reasoning for his execution and even though the record presented evidence of his incompetency, this understanding was sufficient to find him competent under the Texas Code of Criminal Procedure). In light of this case the parties to the *Staley* case were required to submit briefs partially on the question of whether the forcible medication issue was under review under the Texas Code of Criminal Procedure. *Staley*'s brief asserts what his claims are and also presents an argument that *Staley*'s forcible medication renders him in state wherein he is incompetent to be executed under the *Atkins v. Virginia* standard. Brief for Appellant, at 15, *Ex parte Staley*, 2012 WL 6729419 (Tex. Crim. App. Dec. 10, 2012) (No. AP-76798).

arbitrary punishment.<sup>70</sup> Reaching this conclusion requires the application of Eighth Amendment jurisprudence to the *Staley* case to determine whether Staley's understanding passes the Supreme Court's threshold for competency. The controversy in this case revolves around whether Staley merely must achieve a rational understanding of his execution, or whether the means of achieving this understanding must pass the Supreme Court's standard for competency.<sup>71</sup>

*1. Justice Powell's Standard is the Appropriate Test to Use Under the Eighth Amendment Because the Supreme Court in Panetti Used This Standard for Its Competency Determination and State Legislatures Have Used the Standard to Formulate Their Competency Statutes.*

Though *Ford's* competency standard is found in Justice Powell's concurrence, it is the appropriate standard for the Eighth Amendment analysis of this forcible medication issue. Justice Powell's standard not only corresponds to the majority's holding that executing an inmate who does not understand why he is to die is unconstitutional, but was also incorporated into numerous state competency statutes.<sup>72</sup> Additionally, in 2007, the Supreme Court in *Panetti* clarified Justice Powell's definition of competency, which underscores that Justice Powell's test remains the relevant standard for this Eighth Amendment analysis.<sup>73</sup>

*2. Staley's Competency Achieved by His Forced Medication Does Not Pass the Ford/Panetti Competency Test Because It Does Not Ensure That He Will Have a Rational Understanding of the Nature and Purpose of His Execution Nor Does It Comport with the Underlying Rationales Provided for This Test.*

Forcing Staley to take medication that may render him competent for execution violates the Eighth Amendment. The treatment of Staley's illness reveals his history of adverse effects from medication and has not

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70. Brief for Appellant, *supra* note 12, at 15.

71. Compare *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (focusing on whether Singleton would achieve *Ford* competency under the Eighth Amendment as it was decided before *Panetti*), with *State v. Perry*, 610 So. 2d 746, 747-48 (La. 1992) (focusing on whether the means by which Perry achieved competency violated the Eighth Amendment).

72. See generally Entzeroth, *supra* note 29, at 646 (mentioning among others Oregon's competency statute, which states that a death warrant may not be issued until a defendant understands the reason for his execution).

73. See *Panetti v. Quarterman*, 551 U.S. 930, 932 (2007) (using Justice Powell's concurrence in *Ford* to find that a rational understanding was part of the definition of awareness).

ensured his competency.<sup>74</sup> Furthermore, the effects of medication, which were acknowledged in *Riggins* to influence Riggins's ability to assist his counsel and participate in his trial, can also influence Staley's understanding of and participation in his execution.<sup>75</sup> Staley's experience of extreme lethargy, apathy, and catatonia after being forcibly medicated make it unlikely that the competency he receives thereafter satisfies the safeguards established by *Ford* and *Panetti*.<sup>76</sup>

Indeed, the *Singleton* court's reliance on medication as the ultimate remedy for incompetency for execution is contrasted by the *Perry* court's determination that medication-induced competency is artificial and does not pass the *Ford* competency test.<sup>77</sup> The flaw in the *Singleton* reasoning is in its failure to consider the underpinnings of *Ford*'s competency test, namely an execution's retributive value and the opportunity for an inmate to prepare for his death.<sup>78</sup> That Ford believed he could not be executed because he could control the Governor through mind waves reinforced the view that he did not connect his execution to his crime and would not be able to meaningfully prepare for his death.<sup>79</sup> Similarly, evidence shows that Staley when unmedicated believed he was convicted because the judge wanted to steal his pickup truck and, when medicated, experienced adverse effects and may require different doses of medication so he can achieve competency.<sup>80</sup> These facts reinforce the view that even if Staley can

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74. See Brief for Appellant, *supra* note 12, at 12-13 (noting that Staley experienced hallucinations while medicated).

75. See *Riggins v. Nevada*, 504 U.S. 127, 134-38 (1992) (noting that Riggins's medication could have made him suffer from confusion and affected his testimony); Brief for Appellant, *supra* note 12, at 14 (mentioning the powerful nature of Staley's medication, which left him in a catatonic stupor). See generally Mahendra T. Bhati et al., *Clinical Manifestations, Diagnosis, and Empirical Treatments for Catatonia*, 4 PSYCHIATRY 46 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2922358> (noting that catatonic stupors depress an individual's motor functions leaving him motionless and commonly mute, and that catatonia is a symptom of certain types of schizophrenia, which can also be exacerbated by certain medications, including Haldol).

76. Brief for Appellant, *supra* note 12, at 21-22.

77. See *State v. Perry*, 610 So. 2d 746, 759 (La. 1992) (finding that antipsychotic medications induce artificial competency because they do not cure but rather calm and mask the symptoms of mental illness).

78. See *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring) (stating that no retributive purpose is served if an inmate is aware of his execution's imminence but not why it is to occur).

79. See *id.* at 410 (majority opinion).

80. See Brief for Appellee, *supra* note 14, at app. A, at 18 (mentioning, in physician's testimony, concern that Staley's condition was deteriorating and that walking into his execution he may no longer be aware of the connection between his crime and punishment).

connect his crime and punishment he will be denied the opportunity to meaningfully prepare for his execution.

Hence, *Singleton's* finding that competency achieved by forced medication is constitutional does not comport with *Panetti's* interpretation of *Ford*. In *Panetti*, decided after *Perry* and *Singleton*, the Court recognized that a test for competency that ignored *Panetti's* ability to rationally appreciate and understand the connection between his crime and punishment before he confronts his execution was unconstitutional.<sup>81</sup> Likewise, a test for competency that ignores that to rationally appreciate and understand the connection between his crime and punishment, *Staley* must be forced to take medication that can affect the clarity of his cognitive ability prior to his execution is similarly unconstitutional. While the *Panetti* Court's failure to delineate what constitutes a rational understanding reveals a key flaw in its mental health capital punishment law, its clarification of *Ford* should be interpreted to also protect an inmate who cannot be assured to achieve a rational understanding absent medication and who is forced to take medication that could impact how he confronts his execution.<sup>82</sup> In light of these safeguards, *Staley's* competency achieved after he is forcibly medicated does not comport with the underlying rationales of *Ford* and *Panetti*.

*3. Forcibly Medicating Staley to Render Him Competent For His Execution Does Not Serve a Retributive Purpose Because His Competency is Not Guaranteed and May Only Be Artificial.*

Forcibly medicating *Staley* to establish his competency for execution is unconstitutional because it would not fulfill a basic purpose of enforcing the death penalty: retribution. The *Singleton* and *Perry* courts present two divergent rationales on this issue. Whereas the *Singleton* court found that the retributive goals of the death penalty are served when an inmate understands the link between his crime and punishment, the *Perry* court found that competency achieved by forced medication did not fulfill this goal.<sup>83</sup>

Yet, consider the Supreme Court's rationale in *Panetti*. The Court found

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81. *Panetti v. Quarterman*, 551 U.S. 930, 957-60 (2007).

82. See *Bonnie*, *supra* note 5, at 283 (suggesting that *Panetti's* inability to fully define rational understanding exposes the Court's failure to clarify its mental health capital sentencing jurisprudence).

83. Compare *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (holding that the state's interest in enforcing *Singleton's* sentence was served when he was aware of the nature and purpose of his punishment), with *State v. Perry*, 610 So. 2d 746, 747-48 (La. 1992) (holding that the state's enforcement of *Perry's* sentence was unconstitutional when *Perry's* awareness of the nature and purpose of his punishment was the effect of his forced medication).



that Panetti's illness caused him to believe that his victim was still alive and that his execution was part of spiritual warfare, which differed greatly from the rationale of the state's punishment for his crime.<sup>84</sup> Similarly, executing Staley, who, because of his illness, believes his execution is due to the judge's desire for his pickup truck, and will likely be medicated to understand the rationale for his punishment, is unconstitutional.<sup>85</sup> This is because given Staley's history of experiencing adverse effects after being medicated, it is uncertain whether Staley's understanding of his execution when he is medicated meaningfully corresponds to the rationale of those seeking his punishment.<sup>86</sup> Executing Panetti, who lacked a rational understanding of his execution due to his illness was unconstitutional and lacked a retributive effect. Similarly, Staley likely has to be medicated to attain such a rational understanding, may experience catatonia after receiving medication, and could be subject to changes in medication to maintain this understanding. This reality does not comport with *Ford's* rationale that an inmate have an opportunity to appreciate the imminence and purpose of his punishment prior to execution for his execution to serve a retributive purpose.<sup>87</sup> Thus, forcibly medicating Staley on the eve of his execution does not advance the state's retributive goal.

*4. Forcibly Medicating Staley Violates the Prohibition Against Cruel and Unusual Punishment as Recognized in Ford Since It Deprives Him of His Dignity by Turning His Treatment into Additional and Arbitrary Punishment.*

Forcibly medicating Staley to render him competent for execution inflicts an additional and arbitrary punishment. The Eighth Amendment's protection of human dignity safeguards an inmate's ability to prepare for his or her death and protects the inmate from society's attempts to exact additional punishment from him or her.<sup>88</sup> The *Singleton* and *Perry* courts again approached this issue by employing two different rationales. Whereas the *Singleton* court found that Singleton did not experience additional punishment since being medicated was in his medical interest, the *Perry* court found that such a scheme stripped Perry of his dignity and

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84. *Panetti*, 551 U.S. at 959-60.

85. Brief for Appellee, *supra* note 14, at app. A, at 8-9.

86. See Brief for Appellant, *supra* note 12, at 14-15 (arguing that leading a heavily-medicated and stoned Staley to death serves no retributive purpose).

87. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring).

88. See *id.* at 421 (Powell, J., concurring) (noting that it is unconstitutional to execute an individual who does not have an opportunity to prepare "mentally and spiritually" for his death); see also *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (finding that the state's power to punish an inmate is limited by the Eighth Amendment's protection of civilized standards of decency).

inflicted arbitrary punishment.<sup>89</sup> The difference between these two views centers upon whether the court finds that treatment can be separated from punishment or whether both of these state motives are entwined.

Indeed, in *Perry*, the court found that instead of suffering the mere extinguishment of his life, Perry's forcible medication turned his life into a means for the state's ends by forcing treatment upon him that would become the means to, and the mere preparation for, his death.<sup>90</sup> The court noted that seeking to disguise as medical treatment what was solely an attempt to render Perry competent for execution was an additional and arbitrary punishment.<sup>91</sup> Nonetheless, the *Singleton* court found that a treatment, which abates delusion, was in Singleton's interest and, thus, was not a punishment.<sup>92</sup> Thus, unlike the *Perry* court, the *Singleton* court approached this issue by recognizing Singleton's short-term medical interest in treatment as separate from his punishment.

While Staley's execution is a lawfully imposed punishment and Staley has an interest in any respite medication may provide, the Eighth Amendment protects Staley's dignity. Staley's medication is, at times, effective in treating the symptoms of his illness, and yet his treatment has centered on medicating him with older anti-psychotic drugs to render him competent for execution.<sup>93</sup> Thus, framing Staley's treatment with medication as beneficial, when it involves older medication, is addressed primarily in terms of whether it will render him competent and not on its potential effects, and ultimately is administered against his will, exacts the additional and arbitrary punishment *Ford* warned is prohibited by the Eighth Amendment.<sup>94</sup> Here, a treatment framed and discussed in terms of competency is a treatment for Staley that is not separated from his punishment.

Moreover, the *Perry* court held that turning treatment into punishment

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89. Compare *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (noting that that if an inmate concedes that medication is effective in abating the symptoms of his illness then its forcible administration prior to his execution is not unconstitutional), with *State v. Perry*, 610 So. 2d 746, 766 (La. 1992) (reinforcing the view that forcibly medicating Perry stripped him of control over his mind prior to his execution).

90. *Perry*, 610 So. 2d at 768.

91. *Id.* at 766.

92. *Singleton*, 319 F.3d at 1026.

93. See Brief for Appellee, *supra* note 14, at 3 (noting Staley's medication with the anti-psychotic drug Haldol, which is an older anti-psychotic drug); see also, CITIZENS COMMISSION ON HUMAN RIGHTS, *supra* note 8, at 23 (mentioning the FDA alert that patients treated intravenously or in high doses with Haldol experienced heart abnormalities and death).

94. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (finding that the Eighth Amendment protects against society exacting vengeance on an inmate).

violated the integrity of the medical community, which led to arbitrary punishment, an issue not considered in *Singleton*.<sup>95</sup> The forcible medication of an inmate for execution requires a physician's conflicting loyalty to his or her patients when the physician must choose between assuaging a patient's symptoms through medication that could result in the patient's execution or allowing the patient to suffer from the symptoms of the patient's illness.<sup>96</sup> The *Perry* court warned that punishments could be arbitrarily enforced when physicians weigh these interests.<sup>97</sup> Indeed, this punishment was arbitrary in *Singleton* because it rested in part upon a determination that Singleton's good fortune of not experiencing many effects to his medication implied that medication was in his best medical interest.<sup>98</sup> Nonetheless, while Staley has benefited from medication, he also has experienced its side effects, which allows his physicians to make arbitrary decisions about his treatment. Such "treatment" results in arbitrary punishment and reveals the flaw in the *Singleton* court's rationale.

Furthermore, under *Harper*, medication cannot be prescribed for any reason other than medical treatment.<sup>99</sup> Yet, in Staley's case, the state has largely focused on addressing Staley's treatment in terms of medicating him for competency proceedings, revealing that it has not separated treatment from punishment.<sup>100</sup> Moreover, the medical community has indicated that it finds forcibly medicating an inmate when it will render him competent for execution to constitute a punishment.<sup>101</sup> The American Medical Association (AMA) and the American Psychiatric Association (APA) both condemned a physician's involvement in this practice.<sup>102</sup> Thus, if one defers to the standards of the medical community, forcibly medicating prisoners constitutes a punishment, which violates the Eighth

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95. See *Perry*, 610 So. 2d at 752 (stating that while the Hippocratic Oath requires that a physician alleviate suffering and do no harm, the State's forcible medication order involves an active participation in execution).

96. Lerman, *supra* note 9, at 1944.

97. *Perry*, 610 So. 2d at 752-53.

98. *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003). *But see id.* at 1031 (Heaney, J., dissenting) (mentioning that even when medicated Singleton experienced delusions).

99. See *Washington v. Harper*, 494 U.S. 210, 222 n.8 (1990) (noting that Harper's medication was in his interest because it was ethically prescribed by a doctor).

100. Brief for Appellant, *supra* note 12, at 21-22.

101. See Lerman, *supra* note 9, at 1969, 1973 (discussing the state's interest in the integrity of the medical profession, which needs to allow physicians to balance the consequences of all treatment options, including non-treatment).

102. See *id.* at 1945, 1950, 1974 (noting that although membership to the APA or AMA is not required to practice medicine, both organizations modified their policies to find forcibly medicating death row inmates unethical).

Amendment.

Indeed, if such a scheme can be found constitutional and the state has the power to deny Staley the ability to control his bodily integrity and treatment by forcibly medicating him, one is left to wonder where the line protecting individuals under the Eighth Amendment remains.<sup>103</sup> A death row inmate has acquired the opportunity to choose his last meal, his method of execution in some states, and ultimately his final words, yet the forcible medication scheme deprives Staley of this conception of choice about how he confronts his treatment and own death by forcing him to take medication against his will.<sup>104</sup> Such a punishment is categorically different from and disproportionate to another's punishment and resembles the kind of "mindless vengeance" Justice Marshall warned violates the Eighth Amendment.<sup>105</sup> Framing Staley's treatment in terms of competency, allowing for arbitrary decisions to be made about this treatment, and denying Staley a choice about whether he receives the treatment turns his treatment into an unconstitutional punishment.<sup>106</sup>

*B. Forcibly Medicating Staley to Render Him Competent for His Own Execution Violates His Fundamental Due Process Rights Ensured under the Fourteenth Amendment Because It Is Not in His Best Medical Interest and Unjustifiably Violates His Bodily Integrity.*

The Supreme Court held that an inmate may be forcibly medicated only when (1) he is a danger to himself or others, (2) medication is medically appropriate, meaning it is medically ethical and in the inmate's best interest, and (3) no viable less intrusive alternatives exist that will actually further an important state interest.<sup>107</sup> The difference between the *Perry* and *Singleton* decisions focused upon the courts' interpretations of the second prong of this test, namely whether it could be seen as medically appropriate

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103. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (emphasizing the Eighth Amendment's protection of human dignity).

104. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 378 (1997) (stating that some states allow a prisoner to choose between lethal injections and other methods of execution); see also *Bonnie*, *supra* note 5, at 277 (arguing that the ability to prepare and choose how one confronts death is inherent in the Eighth Amendment protections and delineated in *Ford* and *Trop*).

105. *Ford*, 477 U.S. at 409-10.

106. See *id.* (holding that executing an inmate whose illness prevented him from understanding why he was to die was unconstitutional because it offered no capacity for the inmate to come to terms with his conscience, and offended human decency and dignity).

107. See *Sell v. United States*, 539 U.S. 166, 178-79 (2003) (applying this constitutional standard in an analysis of whether to forcibly medicate a defendant for trial).

and in an inmate's best interest to be forcibly medicated in light of his approaching execution date.<sup>108</sup> This discussion invokes questions regarding whether treatment can be separated from punishment and whether it can ever be in an inmate's interest to receive medication that may lead to his or her death. The third prong of the test, which weighs the State's interest against less intrusive alternatives, was also a point of controversy between the *Perry* and *Singleton* courts.<sup>109</sup> In light of the Supreme Court's analysis, Staley's forcible medication prior to his execution is unconstitutional because: (1) it is not in his best medical interest to be forced to receive treatment that may result in his death and (2) it deprives him of bodily integrity absent a legitimate state interest.<sup>110</sup>

*1. Forcibly Medicating Staley Is Unconstitutional Because It Is Not in His Best Medical Interest to Be Forced to Receive Medication That May Result in His Death.*

The Court in *Harper* held that the state had an interest in preserving safety in the prison environment; however, the Court also found that forced medication is only constitutional when it is ethically prescribed by a doctor for treatment.<sup>111</sup> Since that ruling, when confronted with the medically appropriate analysis, the *Riggins* and *Sell* Courts emphasized the dangers associated with anti-psychotic medication and an individual's liberty interest in refusing medication.<sup>112</sup> The Court sees both of these concerns as important in evaluating whether forced medication is in an individual's best medical interest.

Thus, when analyzing whether forcible medication was in a death row inmate's best medical interest, the *Perry* court viewed treatment as medically appropriate if it comported with medical ethics and sustained

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108. Compare *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (finding that forcible medication is in the inmate's best medical interest if it alleviates his delusions), with *State v. Perry*, 610 So. 2d 746, 761 (La. 1992) (noting that forcibly medicating Perry prior to his execution could never be in his best medical interest).

109. Compare *Singleton*, 319 F.3d at 1026 (highlighting the state's important interest in administering Singleton's sentence and that Singleton likely could not be rendered competent through other means), with *Perry*, 610 So. 2d at 761 (noting the second prong of the analysis could never be fulfilled because of the state's ultimate interest in executing Perry).

110. See *Washington v. Harper*, 494 U.S. 210, 225-26, 250 (1990) (finding that forced medication still must be in the inmate's best medical interest despite a state's interest in preserving prison safety); see also *Mills v. Rogers*, 457 U.S. 291, 300-01 (1982), remanded 738 F.2d 1 (1st Cir. 1984) (acknowledging that a patient with mental illness has a constitutional right to be involved in his or her treatment decisions).

111. *Harper*, 494 U.S. at 226.

112. *Sell*, 539 U.S. at 179; *Riggins v. Nevada*, 504 U.S. 127, 134 (1992).

Perry's life.<sup>113</sup> However, there are situations when taking medication that may hasten death may be in an individual's best medical interest, including receiving chemotherapy as a terminally ill cancer patient.<sup>114</sup> While it is difficult to surmise that it is in Staley's best medical interest to receive treatment prescribed by a physician who is acting arbitrarily when he or she administers medication, it is in Staley's interest to experience the relief medication may provide him. Here, if Staley's treatment is separated from his punishment, it could be argued that it is in Staley's best medical interest to receive medication even though it may hasten his death. Indeed, the *Singleton* court argued that it was in Singleton's interest to take medication that would alleviate his delusions and, which he agreed absent his impending execution date, was in his interest to take.<sup>115</sup> Additionally, because the *Perry* court did not establish how much weight should be given to a state's interest if an inmate is found to be dangerous, it is uncertain whether Staley's medication could be justified on other grounds.<sup>116</sup> Thus, the *Perry* and *Singleton* courts again took divergent approaches towards this issue.

Nevertheless, though medication is certainly an integral part of Staley's treatment, it is difficult to argue that his treatment is medically appropriate if the physicians prescribing the treatment are prohibited by both the APA and the AMA from administering it.<sup>117</sup> Indeed, even if Staley is found to be dangerous or if it is in his interest to receive medication, which could hasten his death, under the *Harper* standard it is not medically appropriate to receive unethical medical treatment.<sup>118</sup>

However, ultimately this issue comes down to the question of choice, which was recognized as the right of an individual with a mental illness to refuse dangerous and invasive medication and to be involved in his or her treatment decisions.<sup>119</sup> While there are situations in which an individual may choose to receive medication that might hasten his or her death, the

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113. *Perry*, 610 So. 2d at 752, 761.

114. Lerman, *supra* note 9, at 1944, 1947.

115. *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (majority opinion).

116. *See id.* at 1036 (Heaney, J., dissenting) (noting that by tying Perry's medication to the State's goal of retribution, the court presumed the state only had one motive).

117. *See generally* Lerman, *supra* note 9, at 1945, 1969 (noting that both the AMA and APA disallow physicians to administer medication to inmates whose execution rests on his or her forcible medication).

118. *Washington v. Harper*, 494 U.S. 210, 214 (1990).

119. *See Rogers v. Okin*, 738 F.2d 1, 6, 9 (1st Cir. 1984) (holding that a patient with mental illness can appreciate the benefits and risks of medication and should be involved in his or her treatment plan); *Rennie v. Klein*, 720 F.2d 266, 268 (3d Cir. 1983) (recognizing a committed patient's right to refuse medication).

crucial element here is that of choice.<sup>120</sup>

Staley cannot choose to avoid his punishment; however, depriving him of his right to make decisions about his medical treatment after his conviction subjects him to an imposition of the state's power absent the Fourteenth Amendment's protections.<sup>121</sup> Here, given that the importance of considering the actual impact of medication on the individual and the individual's own medical interest were affirmed in *Riggins* and *Sell*, the fact that an inmate, as in *Singleton*, consents or does not strongly protest medication at one time should not mean that he does not have a right to refuse it at another.<sup>122</sup> The conception of treatment, not punishment, involves the ability to make decisions that at times medication is appropriate and at others it is not. This recognition ultimately protects Staley's bodily integrity. Indeed, given Staley's medical history of experiencing side effects to medication, the potential ineffectiveness of his medication in treating his illness, and his treatment with older medication, his choice regarding his treatment seems to be of greater importance.<sup>123</sup> Recognizing the importance of subjectivity in the treatment process, it is Staley's choice about whether he wants to receive medication prior to his execution that prevents his treatment from becoming punishment and in this context ensures that medication is in his interest.<sup>124</sup> Depriving Staley of this choice about his bodily integrity just prior to his execution reinforces the view that his treatment has become a punishment that appears to be an even more cruel and unusual violation of the Eighth Amendment.

## *2. Forcibly Medicating Staley Violates the Fourteenth Amendment Because It Greatly Infringes on Staley's Bodily Integrity and Does Not Advance a*

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120. See Bonnie, *supra* note 5, at 277 (arguing that choice prior to execution is pivotal to the inmate not becoming a means to the State's retributive ends); see also Associated Press, *Oregon Judge Allows Condemned Man to Reject Reprieve from Governor*, N.Y. TIMES, (Aug. 3, 2012) <http://www.nytimes.com/2012/08/04/us/oregon-judge-allows-condemned-man-to-reject-reprieve-from-governor.html?src=recg> (noting a judge's ruling that an Oregon inmate even has the right to reject the Governor's clemency).

121. See *Harper*, 494 U.S. at 221-22 (emphasizing that imprisonment does not authorize the state to subject an inmate to involuntary treatment without affording him additional due process rights).

122. See generally *Sell v. United States*, 539 U.S. 166, 179 (2003) (stating that determining what is medically appropriate should consider the impact of the medication on the individual in light of its effects and the individual's medical interest).

123. Brief for Appellant, *supra* note 12, at 14.

124. See generally *Rogers*, 738 F.2d at 6, 9 (recognizing the right of an individual with mental illness to be involved in his or her treatment analysis, even when he or she is found to be incompetent).

*Legitimate State Interest Because Life Without Parole Is an Alternative Punishment.*

Forcibly medicating Staley to render him competent for execution violates his bodily integrity absent actually furthering a legitimate state interest. Neither the *Singleton* nor the *Perry* court denied the invasive and potentially dangerous nature of anti-psychotic medication.<sup>125</sup> In fact, the *Perry* court underscored the invasive nature of medication and its forcible administration prior to execution.<sup>126</sup> Yet, the *Perry* and *Singleton* courts again placed different weight on the inmate's interest in avoiding forced medication and on the state's interest in using medication to further its goal of implementing a lawfully imposed sentence.<sup>127</sup>

Staley, however, has been asymptomatic and has experienced manifestations of his illness when medicated.<sup>128</sup> Similar to the situation in the *Singleton* case, forcible medication appears to be the only likely way to render Staley competent for his execution.<sup>129</sup> Nevertheless, akin to the *Perry* case, commuting Staley's sentence can be seen to offer an alternative to fulfilling the state's goals without inciting this controversy and has been done in recent cases.<sup>130</sup>

However, both *Singleton* and *Perry* were decided before the final ruling

125. See *Singleton v. Norris*, 319 F.3d 1018, 1024 (8th Cir. 2003) (citing *Harper's* recognition of the dangers of medication's side effects, which *Singleton* did not experience); *State v. Perry*, 610 So. 2d 746, 760 (La. 1992) (finding that the medication's effects caused greater infringement on bodily integrity than other intrusions).

126. *Perry*, 610 So. 2d at 760. *But see* Douglas Mossoman, *Unbuckling the "Chemical Straightjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1068-70 (2002) (arguing that newer anti-psychotic medication offers fewer side effects and a lowered chance of neurological damage than older drugs).

127. Compare *Singleton*, 319 F.3d at 1025 (finding punishing offenders whose crimes justified the death penalty to be paramount and that forcible medication provided the only viable means to further this interest), with *Perry*, 610 So. 2d at 761 (finding that forcibly medicating *Perry* did not further the state's interest when his sentence could be commuted).

128. Brief for Appellee, *supra* note 14, at 3, at app. A, at 18.

129. See *id.* at app. A, at 9 (finding that without medication Staley believed he was being executed due to a conspiracy involving the judge).

130. See Reginald Fields, *Ohio Gov. John Kasich Commutes Inmate's Death Sentence to Life in Prison*, CLEVELAND.COM, July 10, 2012, [http://www.cleveland.com/open/index.ssf/2012/07/ohio\\_governor\\_commutes\\_inmates.html](http://www.cleveland.com/open/index.ssf/2012/07/ohio_governor_commutes_inmates.html) (noting that the Governor of Ohio commuted an inmate's sentence to life imprisonment after the inmate was found to be incompetent); see also Brief for Appellant, *supra* note 12, at 11 (mentioning that many states provide for civil commitment after incompetency and others follow an informal practice of dropping attempts to execute an inmate).



in *Sell*, where the Court determined that forcible medication must significantly further the State's interest, be unlikely to result in side effects that influence a defendant's ability to assist in his defense, and only be administered where no less intrusive alternative exists to further the state's interest.<sup>131</sup> Here, forcibly medicating Staley could result in effects that may influence his understanding of his punishment and its imminence, and therefore it may not further the state's interest in retribution.<sup>132</sup> Staley may instead attain competency through a natural remission of his illness or through non-drug therapies.<sup>133</sup> Yet, commuting his sentence fulfills the state's interest in retribution without requiring this issue to remain in the balance.<sup>134</sup>

Nevertheless, an argument can be made, as the dissent in *Perry* noted, that the state also has an interest in ensuring that convicted murderers do not feign mental illness.<sup>135</sup> Indeed, an inmate has an interest in alleging mental illness to avoid the death penalty.<sup>136</sup> While advancements have been made in diagnosing mental illness, absolute faith in a physician's capacity to determine when an inmate is malingering remains misplaced.<sup>137</sup>

Nonetheless, malingering mental illness requires high intelligence and

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131. See *Sell v. United States*, 539 U.S. 166, 181 (2003) (finding that weighing potential side effects with the possibility of alternative treatment including non-drug therapies is required). But see Christopher Slobogin, *Sell's Conundrums: The Right of Incompetent Defendants to Refuse Anti-Psychotic Medication*, 89 WASH. L. REV. 1523, 1532 (noting an exception may exist in *Sell* when an inmate's guardian can make decisions about his medication when the inmate is found to be incompetent).

132. Brief for Appellant, *supra* note 12, at 14-15.

133. See generally *Sell*, 539 U.S. at 181 (noting that alternatives to medication including non-drug therapies may establish competency).

134. But cf. *Ryan v. Gonzales*, Nos. 10-930, 11-218, 2013 WL 68690 (January 8, 2013) (finding that a death row inmate suffering from mental illness may not indefinitely stay his habeas proceedings until he is found competent).

135. See *State v. Perry*, 610 So. 2d 746, 780 (La. 1992) (Cole, J., dissenting) (finding that the majority ignored the state's interest in protecting society from capital offenders seeking to avoid punishment by feigning mental illness); see also *Sell*, 539 U.S. at 191 (Scalia, J., dissenting) (noting that weighing alternative treatment options could lead defendants to opportunistically refuse medication).

136. See generally *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (holding that since Singleton stated that taking medication could be in his interest, his allegation that having to take medication after his execution date was set was not in his interest reduced to a claim that his punishment is not in his interest).

137. See Joseph A. Toomey, *The Utility of the MMPI-2 Malingering Discriminant Function Index in the Detection of Malingering: A Study of Criminal Defendants*, 16 ASSESSMENT 115, 119 (2009), available at <http://asm.sagepub.com/content/16/1/115> (noting that a predominant test used to determine when a criminal defendant is feigning mental illness failed to adequately differentiate those malingering from those who were not).

knowledge of its diagnostic tests.<sup>138</sup> New technology, including brain imaging, provides an opportunity to actually see the effects of schizophrenia on the brain and thus offers grounds for more effective diagnosis.<sup>139</sup> That the Court has, at times, given deference to the medical community regarding treatment determinations, coupled with the difficulty of feigning mental illness, potentially over decades as the appeal process endures, supports the notion that the State's interest in this context is not overwhelming.<sup>140</sup> Additionally, the physicians in the *Staley* case all agreed that Staley was not malingering.<sup>141</sup> It is unlikely that Staley could feign his illness for over twenty-one years while he was on death row and thus, it is unlikely that the state has an interest in protecting society from his avoidance of retribution for his crimes.

Ultimately, regarding the State's interest, *Sell* found that within the balancing test between the interest of an individual with mental illness and the State, forcible medication must be necessary to further the State's goal.<sup>142</sup> That the State, in Staley's case, stressed its interest in enforcing his punishment, which cannot be tied to Staley's treatment, reinforces the view that this scheme is unconstitutional.<sup>143</sup> Finally, Staley's case requires one additional safeguard not present in either *Sell* or *Riggins*: that the State's interest must be tempered by the safeguards of the Eighth Amendment, which is violated when Staley's treatment, absent his choice, delivers him to his punishment. Given the reality of Staley's illness and his treatment, his forcible medication is unconstitutional because it violates his bodily

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138. See William V. Pelfrey Jr, *The Relationship Between Malingering's Intelligence and MMPI-2 Knowledge and Their Ability to Avoid Detection*, 48 INT'L. J. OFFENDER THER. COMP. CRIMINOLOGY 649, 655 (2004) (showing that factors including a higher IQ and prior MMPI-2 knowledge contribute to the likelihood of an individual successfully avoiding detection).

139. See *Neuroimaging and Mental Illness: A Window Into the Brain*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/neuroimaging-and-mental-illness-a-window-into-the-brain/neuroimaging-and-mental-illness-a-window-into-the-brain.shtml> (last visited January 29, 2013) (finding that while brain scans are helpful in aiding in diagnosis, they alone cannot diagnose an illness).

140. See generally *Washington v. Harper*, 494 U.S. 210, 222-23, 231-33 (1990) (noting that Harper's forced medication was medically appropriate because it was prescribed by a physician who determined it was appropriate treatment); see also Brief for Appellee, *supra* note 14, at app. A, at 5 (noting that Staley was diagnosed with schizophrenia in 1993 and thus would have had to have feigned illness for decades throughout the appeal process, which was unlikely).

141. See Brief for Appellee, *supra* note 14, at app. A, at 10-11 (describing in physicians' testimonies that they did not believe Staley was malingering because of their past experience with Staley).

142. *Sell v. United States*, 539 U.S. 166, 180-183 (2003).

143. Brief for Appellant, *supra* note 12, at 21-22.

integrity without significantly furthering a legitimate state interest when life in prison without parole remains an alternative.<sup>144</sup>

#### IV. POLICY IMPLICATIONS

There are two additional factors that support the argument that Staley's forcible medication is unconstitutional: (1) the forcible medication scheme places physicians in too precarious of an ethical situation, and (2) it violates conceptions of human dignity and decency to make decisions about an inmate's ability to refuse medication where the inmate can either refuse medication and live a life plagued by delusion or accept medication and likely be put to death.<sup>145</sup>

First, the court in *Perry* recognized that there is a societal interest in preserving the image of medicine as a healing profession that would be eroded if physicians consistently faced the dilemma of whether they could separate an inmate's treatment from the reality of his or her punishment.<sup>146</sup> Creating this conflict potentially erodes public trust of physicians who, instead of being seen as healers, become too entwined with an inmate's execution.<sup>147</sup> Placing physicians in this kind of ethical dilemma raises the question of what would occur if physicians refused to prescribe medication to these inmates.<sup>148</sup> Ultimately, physicians may withdraw their support.<sup>149</sup> Such a situation leaves society wondering when modern standards of

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144. See generally Sell, 539 U.S. at 181 (noting the importance of weighing alternative and less intrusive treatments capable of achieving substantially the same results); see also *State v. Perry*, 610 So. 2d 746, 770 (La. 1992) (quoting a Maryland statute that allows trial courts, on remand, to convert death sentences to life imprisonment without the possibility of parole).

145. See generally Rhonda K. Jenkins, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 170-73 (1995) (finding that the medical ethical dilemma and the precarious message that forcible medication jurisprudence sends inmates are underlying issues in this analysis).

146. See generally *Perry*, 610 So. 2d at 761-62 (finding that the state itself also had an interest in preserving the integrity of the medical community, which would be damaged if physicians were associated with rendering inmates competent for their deaths).

147. See Lerman, *supra* note 9, at 1945-46 (noting that society trusts that physicians heal, not harm, and thus when physicians "enter the death chamber" and become entwined with an inmate's execution, they damage the general relationship between doctors and their patients).

148. See *id.* at 1946-47 (arguing that if physicians ceased to be involved in the process of lethal injection, it is foreseeable that the grounds for administering this form of the death penalty in the United States would crumble).

149. See *id.* at 1945 (addressing the argument that involvement in the forcible medication issue is held to be unethical by the AMA and APA, and conflicts with the Hippocratic Oath).

decency evolved to allow a punishment that, because it places physicians in this dilemma and requires them to act unethically, appears increasingly more cruel and unusual.<sup>150</sup>

Additionally, the tension created by the controversy between *Perry* and *Singleton* is that *Singleton* ties any admission on the inmate's part that medication is ever in his interest to a justification for his forcible medication.<sup>151</sup> This dilemma denies an individual with mental illness the opportunity to weigh his or her treatment options and determine that at times, medication is the best option to alleviate the symptoms of his or her illness, while at others medication is not in his or her best interest.<sup>152</sup> Furthermore, it appears to distinctly punish individuals who have the "good luck" of not experiencing some of the debilitating effects of medication.<sup>153</sup> Though *Perry* found that forcible medication prior to execution was unconstitutional, by framing the issue solely in terms of the state's interest in *Perry*'s execution, the *Perry* court did not address the issue of what would occur if medication were justified on other grounds, such as dangerousness.<sup>154</sup> *Perry* also roots this opinion in Louisiana law.<sup>155</sup> Nevertheless, the tension between these two cases raises the question of whether a punishment reliant on so many varying factors and results could ever be anything except arbitrarily enforced.<sup>156</sup>

#### V. CONCLUSION

If the Texas Criminal Court of Appeals addresses the issue of whether Staley's forcible medication is constitutional, it should rule that such a scheme violates both the Eighth and Fourteenth Amendments. To execute an inmate who likely can only comprehend the imminence and purpose of his punishment prior to his execution due to the forced manipulation of his

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150. See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (holding that standards of decency and human dignity are embedded within the Eighth Amendment).

151. *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003).

152. See generally *Rogers v. Okin*, 738 F.2d 1, 6 (1st Cir. 1984) (recognizing the right of an individual with mental illness who is committed to be involved in the course of their treatment).

153. See *Singleton*, 319 F.3d at 1027 (noting that because *Singleton* did not experience adverse side effects to his medication, his forcible medication could be in his best medical interest).

154. See *id.* at 1035-36 (Heaney, J., dissenting) (noting that *Perry* tied the constitutionality of *Perry*'s execution to the state's goal in enforcing his sentence and thus presumed that the state did not have an interest in medicating on other grounds).

155. See *id.* at 1026-7 (dismissing the *Perry* analysis in part because it relied on Louisiana's Constitution).

156. See generally *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (noting that arbitrary punishment is unconstitutional under the Eighth Amendment).

mind and body by intrusive medication violates the protections of the Eighth Amendment.<sup>157</sup> Moreover, on the eve of his execution, to forcibly inject Staley with dangerous medication that has caused him adverse effects, that has been ineffective in treating his illness, and most importantly, that he does not want to take, violates Staley's due process rights.<sup>158</sup> Ultimately, this issue rests upon a need to respect Staley's fundamental control over his mind and body in an effort not to see him merely as a means for the implementation of the state's ends.

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157. *Id.* at 421-22 (Powell, J., concurring).

158. *See generally* *Washington v. Harper*, 494 U.S. 210, 222-23 (1990) (holding that for an inmate's forcible medication to be constitutional it must be medically appropriate and thus in the inmate's best interest).