

MEDICATING TO EXECUTE: *SINGLETON V. NORRIS*

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INTRODUCTION

In *Ford v. Wainwright*, the Supreme Court held that the Constitution forbids executing mentally ill persons.¹ The *Ford* majority failed to articulate a standard by which competency may be measured, but Justice Powell wrote in his concurrence that, minimally, the inmate should know he is to be executed and should know why he is to be executed.² Since *Ford*, both lower courts and the Supreme Court have struggled with mental health-related questions, such as: Can a state medicate mentally ill inmates against their will?³ Can a state forcibly medicate mentally ill defendants for the sole purpose of rendering them competent to stand trial?⁴

The question presented in this Comment is whether a state may forcibly medicate prisoners in order to render them competent for execution⁵ without violating due process⁶ or the Eighth Amendment.⁷

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1. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). The Court did not choose a specific rationale for its rule, but said whatever the reason given, “the restriction finds enforcement in the Eighth Amendment.” *Id.* at 410.

2. *Id.* at 422 (Powell, J., concurring). Since *Ford*, state courts and commentators have developed a plethora of standards by which to adjudge an inmate’s competency. See Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 363–66 (1994), for a description of the various standards used in different states.

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

4. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003); *Riggins v. Nevada*, 504 U.S. 127 (1992); *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002), *vacated by* 539 U.S. 166, 123 S. Ct. 2174 (2003).

5. This Comment focuses on inmates that have already been tried and convicted for their crime. In order to have received the death penalty, the inmate must have been competent at the time of trial; otherwise, proceedings would have been suspended until competency was achieved. Byers, *supra* note 2, at 366–67 (citing *Medina v. California*, 505 U.S. 437 (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966)). The question arises: How should we treat those inmates who have degenerated into incompetency while on

The Eighth Circuit, in *Singleton v. Norris*, has held that due process is satisfied if the medication is in the prisoner's best medical interest, the state's interest in medicating the prisoner outweighs the prisoner's interest in not taking the unwanted medication, and there is no less intrusive method by which to accomplish the state's interest.⁸ The court further held that a state does not violate the Eighth Amendment when it executes a prisoner who became incompetent while on death row, but who later regained competency through forcibly-administered medication, if the state was otherwise under an obligation to administer the medication.⁹ The Supreme Court denied *certiorari* in the case,¹⁰ and Singleton was executed in Arkansas on January 6, 2004.¹¹

Part I of this Comment traces the development of the legal questions involving forcible medication. Part II of this Comment presents the facts of *Singleton*, and details the basis for the majority and dissenting opinions. Part III argues, first, that in examining Singleton's due process claim, the court incorrectly evaluated both the essentiality of the state's interest, as well as the medical appropriateness of the medication. Further, regarding the court's Eighth Amendment analysis, Part III argues first, that the court incorrectly equates artificial competency with true competency, and second, that because courts

death row? The development of mental illness while on death row is not an unusual phenomenon. For example, one commentator has written that as many as fifty percent of Florida's death row inmates become insane or incompetent while waiting for their sentences to be carried out. Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42 (1986). This statistic, however, must be read in perspective. Ernest van den Haag points out that of the 20,000 homicides committed on average each year (as of 1986, the year of Haag's piece), only 300 convicted murderers were sentenced to death. Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662 (1986). Commentators cite the uniquely stressful situation of an inmate on death row as the reason for his or her mental degeneration; one has written that "possibly the most stressful of all human experiences is the anticipation of death at a specific moment and time and in a known manner." Byers, *supra* note 2, at 367 (citing Ptolemy H. Taylor, Comment, *Execution of the "Artificially Competent;" Cruel and Unusual?*, 66 TUL. L. REV. 1045, 1049 (1992) (quoting Johnnie L. Gallemore & James H. Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM J. PSYCHIATRY 167, 167 (1972))).

6. The Fourteenth Amendment provides in part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

7. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

8. *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (en banc), *cert. denied*, 124 S. Ct. 74 (2003).

9. *Id.*

10. *Singleton v. Norris*, 124 S. Ct. 74 (2003).

11. See Steve Barnes, *National Briefing South: Arkansas: One Execution Held, One is Stayed*, N.Y. TIMES, Jan. 7, 2004, at A-17.

and medical professionals make mistakes in determining competency, the fact that the death penalty is involved cannot be irrelevant.

I. THE STATE OF THE LAW PRIOR TO *SINGLETON V. NORRIS*

Both English and American common law have long barred executing the insane.¹² In *Ford v. Wainwright*, the Supreme Court held that the Constitution also forbids the practice.¹³ Although the Court was presented with an opportunity in 1990,¹⁴ it has never specifically addressed whether a prisoner may be forcibly medicated for the purpose of rendering him competent to be executed.¹⁵

A. *Forced Medication and Due Process in the Incarceration Context*

In *Washington v. Harper*, the Supreme Court was asked whether the involuntary medication regimen imposed on Harper, a convicted inmate, violated his right to due process.¹⁶ At issue was Washington State's Policy 600.30, which established substantive and procedural standards for determining whether prison administrators could forcibly medicate an inmate.¹⁷ While in prison, psychiatrists had first diagnosed Harper as manic-depressive.¹⁸ They later found him to also be suffering from schizo-affective disorder.¹⁹ Although Harper initially gave voluntary consent to the administration of medication, he later refused to continue taking the Haldol, Prolixin, and Mellaril, among other antipsychotic drugs, which had been prescribed.²⁰ The treating physician then sought to forcibly medicate Harper pursuant to Policy 600.30.²¹

Declining to apply strict scrutiny to Harper's due process claim (or for any other claim challenging the constitutionality of a prison regulation),²² the Court nonetheless recognized that even a convicted

12. *Ford v. Wainwright*, 477 U.S. 399, 408–09 (1986).

13. *Id.* at 410.

14. Byers, *supra* note 2, at 386–87 (noting that the Supreme Court had granted *certiorari* in *Perry v. Louisiana*, 498 U.S. 38 (1990), but remanded the case to be considered in light of its recently issued opinion in *Washington v. Harper*).

15. *Id.* at 386.

16. *Washington v. Harper*, 494 U.S. 210, 213 (1990).

17. *Id.* at 215.

18. *Id.* at 214.

19. *Id.* at 214 n.2.

20. *Id.* at 214 n.1.

21. *Id.* at 214.

22. *Id.* at 223.

prisoner had a significant liberty interest in avoiding the forcible administration of antipsychotic drugs.²³ The Court held that, because under Policy 600.30 an inmate would only be treated with antipsychotic drugs against his will if he was “dangerous to himself or others and the treatment [was] in [his] medical interest,”²⁴ Harper’s due process rights were adequately protected.²⁵ The Court reasoned that the Policy balanced the inmate’s protected liberty interest in not taking the medication against the state’s interest in providing appropriate medical treatment in order to maintain a secure prison environment.²⁶

B. *Forced Medication, Due Process, and Trial Competency*

1. Maintaining Competence During Trial

Two years later, in *Riggins v. Nevada*, the Court had to decide whether a defendant who was forcibly medicated to maintain his competence for trial had, in fact, been denied a fair trial under the Sixth and Fourteenth Amendments.²⁷ In that case, the defendant, while awaiting trial for murder charges, complained of hearing voices in his head and having trouble sleeping.²⁸ The defendant was forcibly administered Mellaril, an antipsychotic drug, and was subsequently found legally sane and competent to stand trial.²⁹ Presumably once the trial was underway, Riggins moved for an order suspending the administration of the medication, on the theory that the medication would affect his demeanor and mental state during the trial, and would consequently deny him due process.³⁰ The court denied the motion with a one-page order that gave no indication of its rationale, and Riggins was later convicted and sentenced to death.³¹ On appeal, the Nevada Supreme Court affirmed Riggins’s conviction and sentence, reasoning that the expert testimony presented at trial was sufficient to inform the jury of the effect of the medication, and holding

23. *Id.* at 221–22.

24. *Id.* at 227.

25. *Id.* at 225.

26. *Id.* at 236.

27. *Riggins v. Nevada*, 504 U.S. 127, 132–33 (1992).

28. *Id.* at 129.

29. *Id.* at 130.

30. *Id.*

31. *Id.* at 131.

that the denial of the motion to suspend medication did not violate Riggins's trial rights.³²

The case was appealed to the Supreme Court, which noted that “[u]nder *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness.”³³ The Court reasoned that the Fourteenth Amendment affords a person detained for trial at least as much protection as a convict,³⁴ and that the risk of trial prejudice can sometimes be justified by an essential state interest.³⁵ The Court held, however, that on the particularly sparse facts of the record, there was no showing that the forced administration of antipsychotic medications was necessary to accomplish an essential state policy.³⁶ The Court noted that Nevada “certainly” would have satisfied due process if it had been found, per *Harper*, that the treatment was medically appropriate and essential for Riggins's own safety and the safety of others.³⁷ The Court also noted that Nevada could have satisfied due process if it had shown that there were no less intrusive means by which it could obtain an adjudication of Riggins's guilt or innocence.³⁸

Although Nevada failed to show an essential state interest, *Riggins* nonetheless expanded forcible medication doctrine. The “essential state policy” language adopted by the Court did two things: first, it suggested that the appropriate standard of review for the constitutional claims of inmates involving forced medication is more than the “reasonableness” standard called for by *Harper*³⁹; and second, it opened the door to other state interests, aside from a safe prison environment, that might justify forcible medication, such as the state's interest in adjudicating the guilt or innocence of a defendant. Indeed, the Court suggested that Nevada might have satisfied due process requirements if it had shown that forced medication was necessary either for ensuring the safety of Riggins or others, *or* for adjudicating Riggins's guilt or innocence.⁴⁰ In both cases, the State also had to

32. *Id.* at 132.

33. *Id.* at 135.

34. *Id.*

35. *Id.* at 138.

36. *Id.*

37. *Id.* at 135.

38. *Id.*

39. *Washington v. Harper*, 494 U.S. 210, 223 (1990); *United States v. Sell*, 282 F.3d 560, 567 n.7 (8th Cir. 2002), *vacated by* 539 U.S. 166, 123 S. Ct. 2174 (2003).

40. *Riggins*, 504 U.S. at 135.

show that it could not accomplish these objectives by less intrusive measures.⁴¹

2. Establishing Competence to Stand Trial

a. *The Eighth Circuit's Sell Opinion*

While *Riggins* focused on competence during trial, *United States v. Sell* addressed whether a state may forcibly medicate a defendant in order to render him competent to stand trial.⁴² In *Sell*, the Eighth Circuit held that the State could forcibly medicate a defendant for trial, subject to certain limitations.⁴³ The defendant, Sell, was a dentist who was indicted on several charges, the most serious being fraud and attempted murder.⁴⁴ Because of Sell's deteriorating mental capacity, the district court found him incompetent to stand trial and ordered that Sell be hospitalized to determine whether there was a substantial probability that he would regain the required competency.⁴⁵ Two doctors evaluated Sell and determined that he should receive antipsychotic medication because his condition would deteriorate without it and his behavior was dangerous, and further, that the medication was likely to restore his competency for trial; however, one doctor did not think Sell would respond well to the medication.⁴⁶ The magistrate judge authorized the medication, finding that Sell posed a danger to himself or others.⁴⁷ Although the district court reversed the magistrate on the ground that there was insufficient evidence in the record to support the forced medication, nonetheless the court held that the State's interest in trying Sell was sufficient to warrant the forced medication.⁴⁸ Sell then appealed to the Eighth Circuit.

In deciding the case, the Eighth Circuit followed *Riggins* and held that in order for the state to forcibly medicate a defendant for trial, the state must demonstrate: (1) that there is an essential state interest that outweighs the individual's interest in remaining free from medication, (2) that there is no less intrusive way to fulfill the

41. *Id.*

42. *Sell*, 282 F.3d at 562.

43. *Id.* at 567.

44. *Id.* at 563.

45. *Id.*

46. *Id.* at 564.

47. *Id.* at 565.

48. *Id.*

state interest, and (3) that, by clear and convincing evidence, the medication is medically appropriate.⁴⁹ The court further explained that medication is medically appropriate if: “(1) it is likely to render the patient competent; (2) the likelihood and gravity of side effects do not overwhelm its benefits; and (3) it is in the best medical interests of the patient.”⁵⁰

Affirming that the State had met its due process burden, the Eighth Circuit reasoned that the charges against Sell—sixty-two counts of fraud and one charge of money-laundering—were serious charges, which the State had an essential interest in adjudicating.⁵¹ Further, the court readily determined that there were no less intrusive measures by which to fulfill that interest.⁵² Finally, the Eighth Circuit agreed with the district court that the medication was medically appropriate because the State produced clear and convincing evidence that the medication could be expected to lessen Sell’s delusions and thereby render him competent to stand trial,⁵³ that the side effects could be minimized,⁵⁴ and that the medication was in Sell’s interest because reducing the delusions would improve his quality of life.⁵⁵

b. The Supreme Court’s Sell Opinion

The Supreme Court granted *certiorari* for Sell’s case.⁵⁶ Although it vacated the Eighth Circuit’s opinion, the Court largely agreed with the test employed in the case. The Court did break down the due process test differently (holding that in order to permit involuntary medication for trial competence purposes, a court must conclude (1) that important governmental interests are at stake, (2) that involuntary medication must significantly further the state interest, (3) that involuntary medication is necessary to further those interests, and (4) that administration of the drugs is medically appropriate),⁵⁷ but the Supreme Court’s analysis largely mirrors that of the Eighth Circuit’s.

49. *Id.* at 567 (citing *Riggins v. Nevada*, 504 U.S. 127, 135 (1992)).

50. *Id.* (citing *United States v. Weston*, 255 F.3d 873, 876 (D.C. Cir. 2001); *Washington v. Harper*, 494 U.S. 210, 227 (1990)).

51. *Id.* at 568.

52. *Id.*

53. *Id.* at 570.

54. *Id.*

55. *Id.* at 571.

56. It should be kept in mind that the Supreme Court’s *Sell* opinion was released after the Eighth Circuit’s opinion in *Singleton v. Norris*, and so the Eighth Circuit did not have the benefit of *Sell*.

57. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 2184–85 (2003).

The Court disagreed with the outcome of the case, however, holding that, as Sell had been found by the district court to not be a danger to himself or others, the Eighth Circuit was wrong to approve forced medication solely to render Sell competent to stand trial.⁵⁸ The Court reasoned that, though the State's interest in trying Sell was important, that interest had been lessened by Sell's already lengthy confinement in a mental hospital.⁵⁹ The Supreme Court explicitly criticized the lower courts for failing to consider this prior confinement.⁶⁰ The Court did, however, encourage the State to refile and pursue its request for medication based on *Harper*-type grounds, that is, that Sell was dangerous to himself or to others.⁶¹

C. *Forced Medication and Competency for Execution*

Although in *Singleton*, the Eighth Circuit was the first federal appeals court to squarely reach the medicating-to-execute issue, two state supreme courts had previously considered the question.⁶² Both of these courts held that the state could not medicate an inmate solely for the purposes of execution, but both based this on state constitutional right to privacy provisions.⁶³ In *State v. Perry*, however, the court did evaluate Perry's case in light of *Harper*, but found that *Harper* did not control, because the State failed to meet a *Harper* showing of dangerousness to self or others, and that the medication was in the interest of the inmate.⁶⁴ The court in this case reasoned that a state would never be able to meet the *Harper* requirements because "forcible administration of drugs to implement execution is not medically appropriate."⁶⁵

58. *Id.* at 123 S. Ct. 2187.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Singleton v. State*, 437 S.E.2d 53 (S.C. 1993); *State v. Perry*, 610 So. 2d 746 (La. 1992).

63. *Singleton*, 437 S.E.2d at 61; *Perry*, 610 So. 2d at 755.

64. *Perry*, 610 So. 2d at 751-55.

65. *Id.* at 754.

II. *SINGLETON V. NORRIS*A. *Facts*

Charles Laverne Singleton murdered Mary Lou York on June 1, 1979.⁶⁶ York died from the loss of blood from two stab wounds Singleton inflicted in her neck.⁶⁷ Singleton was convicted of capital felony murder,⁶⁸ and his execution was scheduled for June 4, 1982.⁶⁹ Years of petitions and appeals followed.⁷⁰ During his 1993 federal *Ford* habeas petition, Singleton conceded on appeal to the Eighth Circuit that he was competent for execution while he was on antipsychotic medication, which he was taking voluntarily at the time.⁷¹ Although the Eighth Circuit affirmed the dismissal of Singleton's 1993 federal habeas petition, it left the door open for a future *Ford* claim based on changed circumstances.⁷² In 1997, presumably after a period in which Singleton was not medicated, a review panel unanimously agreed that Singleton posed a danger to himself and others, and the State placed Singleton on an involuntarily medication regimen.⁷³

The medication took effect; Singleton regained legal competency, and the State scheduled Singleton's execution for March 1, 2000.⁷⁴ Singleton then filed another habeas corpus petition, arguing that the State could not forcibly medicate him solely for the purpose of rendering him competent to be executed without violating his due process and Eighth Amendment rights.⁷⁵ The district court dismissed the appeal, finding no evidence in the record that the State was in any degree motivated to administer the drugs solely to render Singleton competent to be executed.⁷⁶ On appeal, the Eighth Circuit initially reversed the district court,⁷⁷ but then reheard the case en banc, va-

66. *Singleton v. Norris*, 319 F.3d 1018, 1020 (8th Cir. 2003) (en banc) (quoting *Singleton v. State*, 623 S.W.2d 180, 181 (Ark. 1981)), *cert. denied*, 124 S. Ct. 74 (2003).

67. *Id.*

68. *Id.* at 1021.

69. *Id.*

70. *See id.* at 1021–22 for a detailed description of Singleton's many state and federal appeals.

71. *Id.* at 1021.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1021–22.

77. *Id.* at 1020 (citing *Singleton v. Norris*, 267 F.3d 859 (8th Cir. 2001)).

cated the panel decision, and affirmed the district court.⁷⁸ It is this final en banc opinion of the Eighth Circuit that is the focus of this Comment.

B. *The Eighth Circuit's Majority Opinion*

The appeal presented two issues: (1) whether, without violating due process, a state may forcibly administer antipsychotic medication to a prisoner whose date of execution has been set, and (2) whether, without violating the Eighth Amendment, a state may execute a prisoner who is artificially competent because of a forced medication regimen.⁷⁹

In affirming the district court on the due process issue, the Eighth Circuit held that “the mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set.”⁸⁰ The court adopted and employed the same rule that it had used in *United States v. Sell*: In order to justify the forcible medication of an inmate when that medication would render the prisoner competent for execution, the state must (1) present an essential state interest that outweighs the individual’s interest in remaining free from medication, (2) prove that there is no less intrusive way to fulfill the essential interest, and (3) prove by clear and convincing evidence that the medication is medically appropriate.⁸¹ Medication is medically appropriate where it is in the best medical interest of the inmate, where the medication is likely to render the inmate competent, and where the severity of the side effects of the medication does not overwhelm its benefits.⁸²

78. *Id.* The Eighth Circuit granted a stay of execution while it heard Singleton’s appeal. *Id.* at 1022. The court ordered a limited remand, asking the district court first, whether Singleton was competent prior to the involuntary medication regime started in 1997, and second, whether Singleton would regress into incompetency if the State stopped administering the medication. *Id.* The district court found that Singleton was not *Ford*-competent at the time the medication regime began in 1997. *Id.* The district court could not say with certainty whether Singleton would regress to the point of becoming *Ford*-incompetent if he were taken off the medication, but did find that Singleton’s psychosis would resurface without medication. *Id.* A divided panel reversed the district court, and the State petitioned for a rehearing en banc. *Id.* at 1020. On rehearing, the Eighth Circuit granted the petition, vacated the panel opinion, and affirmed the district court. *Id.*

79. *Id.* at 1023.

80. *Id.* at 1026.

81. *Id.* at 1024 (citing *United States v. Sell*, 282 F.3d 560, 567 (8th Cir. 2002), vacated by 539 U.S. 166, 123 S. Ct. 2174 (2003)).

82. *Id.* (citing *Sell*, 282 F.3d at 567).

As indicated in the discussion of *Harper* and *Riggins* above, the standard of review for the constitutional claims of inmates involving forcible medication regimes is somewhat unclear. The Eighth Circuit thought that *Harper* and *Riggins* called for “some sort of heightened standard of review.”⁸³ In *Harper*, the Court declined to adopt a standard of strict scrutiny for claims by inmates that prison regulations were unconstitutional, and instead established a standard of reasonableness.⁸⁴ The Court again declined to apply strict scrutiny in *Riggins*, but some Courts of Appeals have nonetheless interpreted *Riggins* as applying a standard more stringent than the reasonableness called for in *Harper*.⁸⁵ The Eighth Circuit is in this group, and applied a standard in *Singleton* that was more than reasonableness but less than strict scrutiny.⁸⁶

To reach its holding that the State had met the burden required to force medication on Singleton, the court treated each part of the due process analysis in turn. First, although the court had determined, and Singleton had agreed, that the medication regime would have been valid under *Harper* if no execution date had been set (because Singleton had been found to be a danger to himself or to others),⁸⁷ the court did not justify the medication on this ground. Instead, the court justified Singleton’s forcible medication on the State’s interest in carrying out Singleton’s lawfully imposed sentence. The court held that the interest in carrying out Singleton’s capital punishment sentence outweighed Singleton’s substantial liberty interest in remaining free of unwanted medication.⁸⁸ The court felt that the State’s interest in carrying out the lawfully imposed sentence “could not be doubted”⁸⁹ and was the greatest in capital murder cases where the death penalty had been imposed.⁹⁰

The court readily concluded that the second part of the test, requiring that there were no less intrusive measures by which the State could ensure Singleton’s competence, had been met.⁹¹ The crux of

83. *Sell*, 282 F.3d at 567 n.7.

84. *Washington v. Harper*, 494 U.S. 210, 223 (1990).

85. *Sell*, 282 F.3d at 567 n.7.

86. *Id.*

87. *Singleton*, 319 F.3d at 1026 (relying on the fact that the *Harper* procedure had been followed and met to find that the medication was in Singleton’s best interest).

88. *Id.* at 1025.

89. *Id.*

90. *Id.*

91. *Id.*

Singleton's argument, however, rested on the third part of the test—that medication could not be in his best medical interest when it would ultimately render him eligible for execution.⁹² The court rejected this argument, however, and held that, “[t]he due process interests in life and liberty that Singleton asserts have been foreclosed by the lawfully imposed sentence of execution and the *Harper* procedure.”⁹³ The court reasoned that to hold otherwise would lead to impracticable choices for the court: involuntary medication followed by execution on one hand or no medication followed by psychosis and imprisonment on the other.⁹⁴ Although Singleton offered a third option—a stay of execution until involuntary medication was no longer needed to maintain competence—the court rejected it out of hand. The court reasoned, “[i]n the circumstances presented in this case, the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution.”⁹⁵

In affirming on the Eighth Amendment issue, the court held that the state does not violate an inmate's Eighth Amendment rights when it executes a prisoner who lost competency while on death row but regained that competency due to appropriate medical care.⁹⁶ So long as the state is under an obligation to administer medication in the best medical interest of the prisoner, any additional motive to administer the medication is irrelevant.⁹⁷

C. Judge Heaney's Dissent

Dissenting Judge Heaney believed the crux of the case was the fact that Singleton, while lucid at times because of forcible medication, was nonetheless not cured. “Underneath this mask of stability,” he wrote, “[Singleton] remains insane.”⁹⁸ Judge Heaney thought that Singleton's execution would violate both his Eighth Amendment right to be free from cruel and unusual punishment and his right to due process. Regarding the Eighth Amendment, Judge Heaney decried “the barbarity of exacting mindless vengeance,” arguing that Singleton was “severely deranged without treatment” and that to execute

92. *Id.*

93. *Id.* at 1026.

94. *Id.*

95. *Id.*

96. *Id.* at 1027.

97. *Id.*

98. *Id.* at 1034 (Heaney, J., dissenting).

such a person was cruel and unusual punishment.⁹⁹ He also questioned whether Singleton was in fact competent even while on the forced medication.¹⁰⁰ If the medication failed to render Singleton competent, Singleton's execution would most certainly violate *Ford*.¹⁰¹

Regarding the due process issue, Judge Heaney criticized the majority for pinning the constitutional question on an inquiry into the state's motivation for forcibly medicating an inmate.¹⁰² He pointed out that courts would have a difficult time ascertaining the state's motivation, and expressed doubt that the courts could even find an exclusive motive.¹⁰³ Judge Heaney further argued that, "[a]t the very least, the setting of an execution date calls into question the State's true motivation for administering the medication in the first instance."¹⁰⁴ For Judge Heaney, the justification for forcibly medicating Singleton was pretextual and evaporated the moment the execution date was set.¹⁰⁵

Finally, Judge Heaney argued that the majority's holding created an insurmountable dilemma for the medical profession by requiring that the community practice in a manner contrary to its Hippocratic Oath to "do no harm."¹⁰⁶ He noted that courts have long taken the integrity of the medical profession into consideration in the decision making process, but he felt that the majority had eschewed it altogether in Singleton's case.¹⁰⁷

III. ANALYSIS

A. *The Court Misapplied the Due Process Test*

In *Singleton*, the Eighth Circuit held that in order to satisfy due process when a prisoner subject to the death penalty is forcibly medicated, the state must "(1) present an essential state interest that outweighs the individual's interest in remaining free from medication, (2) prove that there is no less intrusive way of fulfilling [the state's] essen-

99. *Id.* at 1030 (quoting *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)).

100. *Id.* at 1031–35.

101. *Id.* at 1032–34.

102. *Id.* at 1036.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1036–37.

107. *Id.* at 1037 (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (recognizing the significance of the medical profession's position against physician-assisted suicide)).

tial interest, and (3) prove by clear and convincing evidence that the medication is medically appropriate.”¹⁰⁸ Medication is medically appropriate where it is in the inmate’s best medical interest, where it is likely to render the inmate competent, and where the severity of its side effects does not overwhelm its benefits.¹⁰⁹

1. The State’s Interest in Capital Punishment

In order to satisfy the first element of the due process test, the state must show that it has an essential interest that outweighs the inmate’s interest in being free from unwanted medication. The Eighth Circuit thought that the state’s interest in carrying out a lawful sentence “could not be doubted,” and that this interest was greatest in a capital punishment case.¹¹⁰ Indeed, the *Singleton* majority states: “Society’s interest in punishing offenders is at its greatest in the narrow class of capital murder cases in which aggravating factors justify imposition of the death penalty.”¹¹¹

Harper and *Riggins* support the proposition that the state’s interest in carrying out lawfully imposed, severe punishments is an essential one. But because the court disregarded the possibility that Singleton could have served a life term in the event that he did not achieve unmedicated competency, the court improperly determined that the state’s interest in carrying out Singleton’s death penalty was an “essential state interest.”

a. Carrying Out Lawfully Imposed Punishments

The Supreme Court in *Harper* and *Riggins* did not catalogue which state interests were or were not essential. The *Harper* Court did not even speak in terms of an “essential state interest,” instead focusing narrowly on the dangerousness of an inmate. *Riggins* is similarly inconclusive on what exactly is an essential state interest because the facts in that case were not sufficient to warrant a finding of an essential state interest. These cases may be used, however, to glean the parameters of an essential state interest in order to evaluate the correctness of the Eighth Circuit’s finding in *Singleton*.

108. *Id.* at 1024 (quoting *United States v. Sell*, 282 F.3d 560, 567 (8th Cir. 2002), vacated by 539 U.S. 166, 123 S. Ct. 2174 (2003)).

109. *Id.* (citing *Sell*, 282 F.3d at 567).

110. *Id.* at 1025.

111. *Id.*

If *Harper* were decided today, there is little doubt that maintaining the safety of the prison environment would be found to be an essential state interest. Other inmates, workers in the prison, and the inmate himself may be endangered by an unmedicated mentally ill inmate's behavior.¹¹² The *Riggins* Court, which did employ the language of an essential state interest, indicated that the safety of the prison environment was an essential state interest when it said in dictum that Nevada could have satisfied due process if it had shown that Riggins was a danger to himself or others.

As mentioned above, *Riggins* is somewhat unhelpful in pinning down the definition of an essential state interest in a forced medication case. The facts did not support a finding of an essential State interest on Nevada's part, and the Court only indicated how due process *might* have been met, from which one must assume that the examples involved represented essential state interests. The Court noted that Nevada "certainly" would have satisfied due process if it had been found, per *Harper*, that the treatment was medically appropriate and essential for Riggins's own safety and the safety of others.¹¹³ The Court also noted that Nevada could have satisfied due process if it had shown that it could not obtain an adjudication of Riggins's guilt or innocence by using less intrusive means.¹¹⁴ After *Riggins*, it seems likely that both the safety of the prison environment and the ability to adjudicate guilt or innocence are essential state interests.

The court in *Singleton* correctly determined that carrying out a lawfully imposed, severe punishment is an essential state interest. Although the court offered little reasoning for its decision, saying only that the essentiality of the interest "cannot be doubted," *Riggins* supports the proposition that enforcing severe punishments is an essential state interest. The *Riggins* Court indicated that adjudicating guilt or innocence is an essential state interest; it follows that, so too must be punishing a guilty actor for his crime. It would make no sense to consider the assessment of blame essential, yet deem the atonement for the crime non-essential.

112. *Washington v. Harper*, 494 U.S. 210, 225 (1990).

113. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

114. *Id.*

b. *Weighing the State's Interest According to the Severity of the Sentence*

In addition to finding that the punishment of serious crimes is an essential state interest, the Eighth Circuit also indicated that the state's interest in carrying out a sentence for a serious crime, such as one where the death penalty is imposed, is greater than the state's interest in carrying out a sentence for a less serious crime.¹¹⁵ Indeed, the court noted that the state's interest in carrying out lawfully imposed sentences is the greatest in a capital punishment case.¹¹⁶ Certainly this is true; greater harms must be met by greater and more certain punishments. Whether the motivation is deterrence or retribution, the state's interest in accomplishing either goal is the greatest when capital punishment has been imposed..

c. *The State's Option of Life Imprisonment*

The *Singleton* court correctly found that punishing serious crimes is an essential state interest; it was also correct to weigh the state's interest according to the severity of the crime. Where the court reached the wrong result, however, was in its finding that exacting capital punishment, when there was the alternative of life without parole, was an essential state interest.

Although the state's interest in *exacting punishment* is essential, that interest may also be met by a term of life imprisonment; therefore, the state's interest in exacting a capital punishment sentence is not, in itself, essential. The state has an interest in punishing those convicted of crimes, especially those convicted of serious crimes, but does not have an essential interest in the particular means chosen to effect such punishment. As long as there is a viable alternative means by which the state may satisfy its interest in punishment, such as imposing a life sentence on an inmate who is mentally incompetent in the absence of forcibly-administered medication, the state does not have an essential interest in carrying out a death sentence. In fact, the alternative of a term of life imprisonment, in the event that the inmate does not achieve the competency required for execution, may actually *lessen* the state's interest in a capital punishment case.

Sell supports the position that alternative punishments lessen the state's interest carrying out a death penalty sentence. When evaluat-

115. *Singleton*, 319 F.3d at 1025.

116. *Id.*

ing the essentiality of the State's interest in *Sell*, the Supreme Court thought that the State's interest in trying Sell was lessened, although not eliminated, by the fact that Sell had already spent a significant amount of time confined in a mental health institution before trial.¹¹⁷ The *Sell* Court noted that the value of Sell's prior confinement, in essence, should have been subtracted from the essentiality of the State's interest. Similar reasoning should have applied in Singleton's case. The alternative punishment of life imprisonment should have been subtracted from the State's interest in executing Singleton. The State's interest in executing Singleton should have been lessened, although not eliminated, by the fact that Singleton could have served a life sentence in the event that he did not regain the unmedicated competency necessary to receive the death penalty.

2. Failure to Look Beyond Singleton's Narrow Medical Interests

Part three of the Eighth Circuit's due process test involves assessing whether the forced administration of medication is medically appropriate. According to the Eighth Circuit, medication is medically appropriate where it is in the best medical interest of the inmate, where the medication is likely to render the inmate competent, and where the severity of the side effects of the medication does not overwhelm its benefits.¹¹⁸ The problem with the court's application of this test to Singleton arises with the first element. The court held that the "the mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set."¹¹⁹ The court reached this conclusion by disregarding Singleton's central argument: that medication "obviously is not in the prisoner's ultimate best medical interest" where the consequence of the medication is that the patient is executed.¹²⁰ The court found the short-term, narrow effect of the medication to be the only effect of any relevance.¹²¹ This was because to hold otherwise would result in two impractical choices: either involuntary medication followed by execution, or no medication followed by life imprisonment.¹²² The court did not consider Singleton's suggestion, to grant a

117. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 2187 (2003).

118. *Singleton*, 319 F.3d at 1024.

119. *Id.* at 1026.

120. *Id.*

121. *Id.*

122. *Id.*

stay of execution until he regained unmedicated competency, a viable option.¹²³

The court should not have only looked to the narrow, short-term effects of the medication. Medication necessarily negatively affects an inmate's medical interests when the ultimate effect is death. When forced medication is not in the best medical interests of the inmate, it is a violation of due process. In *Harper*, *Riggins*, and *Sell*, the medication was in each inmate's short-term interest, and either was in—or did not negatively affect—the inmate's long-term interest. In the case of an already incarcerated inmate, as in *Harper*, any increase in sanity and mental health, so long as the side effects do not outweigh the benefits, is clearly in the inmate's short- and long-term medical interest.

Where the circumstances of the case involve adjudicating guilt or innocence, as in *Riggins* and *Sell*, medication is also in the defendant's long-term interest because the defendant has a long-term interest in obtaining a determination of guilt or innocence. If the defendant is found not guilty, the defendant has a long-term interest in not being stigmatized by the attachment of guilt. If the defendant is found guilty, the effect of the medication may lead to incarceration. While this is arguably not in the defendant's long-term health interest for many reasons, the medication does not determinatively *negatively affect* the defendant's long-term health interests because even though the defendant may be in jail, at least he or she will be receiving appropriate medical care. Appropriate medication improves the defendant's overall sanity and quality of life. In Singleton's case, the medication absolutely negatively affected his long-term health interests because it enabled the state to execute him.

The Eighth Circuit's assessment of the medical appropriateness of forced medication is not disturbed by, and may be in line with, the Supreme Court *Sell* opinion. Similar to the Eighth Circuit, the Supreme Court urges looking first for other *Harper*-type grounds to justify the forced medication, and in the event that the "medication [is authorized] on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear."¹²⁴ This language suggests that the Supreme Court might agree that if the state is obligated to medicate the inmate because other *Harper*-type

123. *Id.*

124. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 2185–86 (2003).

grounds are met, the broader consequences of the medication—in Singleton’s case, death—would be irrelevant. If so, this conclusion would be wrongheaded for the reasons argued above.

The Supreme Court further explained that if there are not alternative grounds for forcibly medicating a prisoner, then the *Harper* inquiry will inform its decision as to whether forced medication is justified by a state interest.¹²⁵ Although it is clear that the state has an essential interest in the competency of a criminal defendant at trial, the Court’s tone suggests that absent other *Harper*-type grounds, it might not be convinced of that alternative state interest. If this is so, in the capital punishment context, the result would be unacceptable. An insane inmate’s fate would depend on whether he or she happened to be dangerous or not. The mental health of a dangerous inmate and a non-dangerous inmate might be equivalent, yet one is eligible for execution (the dangerous person, because of the *Harper* grounds for forcibly medicating him into competency) and one may not be (the non-dangerous person, because *Harper* is unsatisfied and he cannot be forcibly medicated into competency).

The Eighth Circuit was wrong when it considered the fact of a scheduled execution irrelevant in evaluating the appropriateness of medication. Finding *Harper*-type grounds and ignoring other consequences may be defensible in other contexts, but in a capital punishment case, an obligation to medicate because of a *Harper* finding cannot be dispositive.

B. *The Eighth Amendment*

Singleton’s second argument on appeal involved the Eighth Amendment’s prohibition of cruel and unusual punishment. Singleton claimed that the Eighth Amendment forbids executing the artificially competent.¹²⁶ The court held that because the state was under an obligation to administer the medication, any other effect was irrelevant.¹²⁷ Once again the court wrongly ignored the essential elements of the case. At the end of the day, the state executed a person who was mentally ill.¹²⁸ Artificial sanity is not the same as true sanity.¹²⁹ As dissenting Judge Heaney argued, “treatment is not synonymous with being

125. *Id.* at 123 S. Ct. 2186.

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

127. *Id.* at 1027.

128. *Id.* at 1033–34 (Heaney, J., dissenting).

129. *Id.*

cured”; antipsychotic drugs merely mask mental illness.¹³⁰ Competency in Singleton’s case was a fiction maintained only by powerful antipsychotic medication. Judge Heaney considered Singleton’s competency fabricated and wrote: “I would hold that the State may continue to medicate [him], voluntarily or involuntarily, if it is necessary to protect him or others and is in his best medical interest, but it may not execute him.”¹³¹ When stripped to the bare bones, fulfilling Singleton’s death penalty sentence went against *Ford’s* prohibition on executing the insane.¹³²

The court’s holding is also problematic because, by disregarding that a now-competent inmate is eligible for execution when the state is otherwise obligated to medicate the inmate, the state will likely be executing those furthest from competency instead of those closest to it, if one must fashion such a continuum. This is because the test the Eighth Circuit has formulated to determine if medication is medically appropriate leads to the paradoxical result that the state’s most ill inmates will now be the most eligible for medication and then execution. According to the Eighth Circuit, medication is medically appropriate where it is in the inmate’s best medical interest, where the medication is likely to render the inmate competent, and where the severity of the side effects of the medication does not overwhelm its benefits.¹³³ The court’s test is fine until it is applied in the capital punishment context. Outside of that context, we want the most mentally ill persons to be the most eligible for treatment. But once the death penalty enters the picture, the result becomes that we are potentially medicating and executing insane inmates.

This paradoxical outcome is problematic under *Ford* because courts and medical professionals make mistakes. Who knows what sanity really is—indeed a plethora of legal standards exist in the several states.¹³⁴ Justice Powell’s standard that an inmate must know that he is to be executed and why¹³⁵ is arguably not hard to meet; our society executes inmates who many of us might consider insane despite the legal answer.¹³⁶ Given this, the result that the most ill inmates are

130. *Id.* (collecting cases and commentary).

131. *Id.* at 1037.

132. *Id.* at 1030.

133. *Id.* at 1024.

134. Byers, *supra* note 2, at 363–66 (listing standards).

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

136. Robert Sherrill, *Electrocution Binge: In Florida, Insanity Is No Defense*, 239 *NATION* 537, 552–55 (1984).

those most eligible for medication and execution is worrisome. The irreversible death penalty is involved; humans, courts, and medical professionals make mistakes. As such, the fact that the inmate is eligible for execution cannot be “irrelevant” in an Eighth Amendment analysis. Because artificial competency is not the same as true competency, and because *Singleton’s* medically appropriate test funnels the most ill inmates, and those most subject to the potential for institutional mistakes, toward the execution chamber, the only acceptable course under the Eighth Amendment is to stay an artificially competent inmate’s execution until the inmate achieves unmedicated competency.

CONCLUSION

Regarding due process, the Eighth Circuit was correct to say that carrying out the lawfully imposed sentences for severe crimes is essential; it was also correct to weigh the state’s interest according to the severity of the crime. Where the court first faltered was in its assessment of the capital punishment context. Here, the court found that the state’s interest is essential and the greatest in the capital punishment context. By dismissing the argument that *Singleton* could simply serve a life sentence until regaining unmedicated competency, the court asserted that the narrow difference between carrying out a death penalty sentence over a sentence of life imprisonment warranted a finding of essentiality. The state’s interest, however, is no greater and is actually less than a life imprisonment case. The court also faltered when it disregarded the broad implications of forced medication in a capital punishment case. Medication can never be in a person’s long-term medical interest when the ultimate result is death. The court also failed in its Eighth Amendment analysis. The court’s outcome independently violates the Eighth Amendment because the court incorrectly equated artificial competency with true competency. The result is that, in capital punishment cases involving forcible medication, due process and Eighth Amendment concerns are only protected by staying an inmate’s execution until the inmate regains the required unmedicated competency.