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USA: 'The State would urge the Court to find that the defendant is competent'

Texas pursuing execution of inmate suffering from mental illness

13 July 2010

AI Index: AMR 51/061/2010

Mr Green does seem to have mental illness. That's not really in contention at this point. The question is whether that mental illness renders him competent to be executed under both [Texas law] and the Constitution... The State would urge the Court to find that the defendant is competent

Montgomery County Assistant District Attorney, 28 June 2010¹

Jonathan Marcus Green suffers from mental illness. He is also on death row in Texas. On 30 June 2010, he was less than four hours from execution when the Texas Court of Criminal Appeals issued a stay. It did so in order to consider legal questions relating to Jonathan Green's mental "competency to be executed".

In 1986, in *Ford v. Wainwright*, the US Supreme Court ruled that the execution of an insane prisoner violates the US Constitution. However, the *Ford* majority neither defined competence for execution (although Justice Lewis Powell's suggestion that the test should be whether the prisoner is aware of his or her impending execution and the reason for it were generally adopted), nor did a majority mandate specific procedures to be followed by the individual states to determine whether an inmate is legally insane. The result was different standards in different states, judicial uncertainty, and minimal protection for seriously mentally ill inmates.² Two decades later, in June 2007, in *Panetti v. Quarterman*, the Supreme Court offered the prospect of somewhat increased protection. "A prisoner's awareness of the State's rationale for an execution", wrote the Court, "is not the same as a rational understanding of it".³ The case of Jonathan Green, whose mental illness appears to distort rather than eradicate his awareness that he is facing execution, may be one that tests what has changed since the *Panetti* ruling.

Jonathan Green, now aged 42, was sentenced to death in 2002 for the murder of a 12-year-old girl, Christina Neal, in 2000. Her partially decomposed body was found by investigators searching Jonathan Green's home. The body was in a bag behind a sofa, after having apparently been removed from a shallow grave in Green's backyard earlier that day. The medical examiner determined that the victim had been strangled to death and had likely been sexually assaulted.⁴

In an appeal filed in federal District Court in 2007, Jonathan Green's lawyer argued that his client was suffering from a serious mental disorder and was "actively psychotic", experiencing a variety of hallucinations as well as paranoia. The petition stated that Jonathan Green was convinced that he would be set free if only his current lawyers would present a judge with certain papers in the possession of his former lawyers. The appeal continued that "Mr Green believes that he is the victim of, or pawn in, some sort of game" involving guards and other prisoners on death row. In her decision in February 2008 upholding the death sentence, the US District Court Judge ruled that there was no categorical prohibition on the execution of people with mental illness under US law, and that the claim that Green was incompetent for execution could not be ruled upon until his execution was imminent.

After federal appeals were exhausted and the execution date was set in 2010, the issue of Jonathan Green's mental health was again brought to the fore. On 1 June, his lawyer filed a motion in trial court for Green to be evaluated for competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure.⁵ The judge appointed a mental health expert for each side and on 23 June set a hearing for 28 June, two days before Jonathan Green's scheduled execution.

The defence lawyer presented Dr Diane Mosnik, a clinical neuro-psychologist specializing in schizophrenia. She testified that after reviewing the records in the case, and meeting with Jonathan Green for about eight hours, during which time she conducted a number of tests, she had diagnosed Jonathan Green as suffering from schizophrenia with symptoms including delusions, auditory and visual hallucinations, and thought disorder.⁶ Dr Mosnik testified that Jonathan Green has a "fixed delusional system" in which he believes that "spirits or personalities, both good and bad, reside within him...and are responsible for controlling his physical and mental functioning". In addition, she said that he suffers from auditory hallucinations "where he hears voices coming from the outside world. Some of them are male and some of them are female, described as talking directly to him and commanding – asking him to do various things, to inflict pain on himself, to bang his head..., and simply just talking to him to annoy him and disturb him".

Dr Mosnik noted that there was evidence from Jonathan Green's prison records dating back to 2003 that he had suffered such symptoms of mental illness for at least several years. More recently, a record from April 2010 shows that Jonathan Green was given a diagnosis of schizophrenia in the Jester IV Psychiatric Unit of the Texas Department of Criminal Justice, and that this diagnosis had been signed off on by five different individuals, including two doctors. This diagnosis included the sentence "It does not appear that he is exaggerating his symptoms for secondary gain". Dr Mosnik said that neither did she believe that Jonathan Green was malingering.

In *Panetti v. Quarterman*, the US Supreme Court said that even if a condemned prisoner has an awareness of the link between his crime and his punishment, "gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose". Dr Mosnik testified that, in her opinion, Jonathan Green's mental illness affected his understanding of his punishment: "While he is able to state that his execution date has been scheduled and the date of that execution, he believes that these spirits, these personalities within him that are warring inside of him and been planning his death since his birth are responsible for getting him in here and that's why he's going to be killed". She said that his understanding of his punishment is far removed from reality as a result of the delusions generated by his mental illness.

On cross-examination, the Assistant District Attorney sought to dismiss Dr Mosnik's conclusions as the product of Jonathan Green's self-interested reporting: "An important basis for your conclusion about those symptoms is Mr Green's own reporting to you about what he says he's experiencing, right?", he asked her, continuing "And that would be true of all mental health experts who have evaluated him, they have to rely on what he says is happening?" He also pressed Dr Mosnik on whether she thought it was possible Green was exaggerating "some of his symptoms because he knows his life is at stake with his execution being set". She replied that, in her opinion, the evidence did not support such a conclusion.

Jonathan Green himself was called to the stand and was questioned by his lawyer who, among other things, asked Green about the "personalities" that he said existed inside him:

Q: How long have they been bothering you?

A: From baby up, they never could tell me.

Q: Pardon me?

A: From a baby, since I was a baby.

Q: Okay. Now, are all these things that are bothering you, that are doing these terrible things to you, is that – are they – is that one side?

A: I don't understand what you're saying.

Q: Well, aren't there some good things that help you?

A: Yes, yes, I told you. If it wasn't for them, I would probably been dead a long time ago. If I didn't have them, when I was a baby, they probably would have killed me. If I didn't have some good – I call them personalities or things. I don't know what they are really.

Q: Do they talk to you?

A: Yes. They listening right now.

Q: They're listening to who?

A: Us. They – everybody else talk.

Q: They're listening to us right now?

A: Yes.

Q: Well, can you see them?

A: I see some vision of things, but I don't know if it's them or not.

Q: Are they saying anything back?

A: Yeah.

Q: What are they saying?

A: I can't tell you in the courtroom now.

Q: You can't tell me in the courtroom?

A: It's about you.

Q: Is it dirty?

A: No.

Q: It's about me?

A: Yeah. They said to tell you to shut up.

Q: Tell me what?

A: To shut up.

Q: Well, I can't do that. I have to interview you. I mean, I can't hear them.

A: They say they're just joking with you. They say they're just joking with you.

Q: So I can go on?

A: Yeah.

Q: So I can go on?

A: Yeah.

.....

Q: Okay. Now, while you've been in Polunsky [death row] you've done a lot – I have some records here and they say that you banged your head against the shower and the wall.

A: No, no, that wasn't me.

Q: That wasn't you?

A: But my body was made to do that.

Q: Your body was made to do that?

A: Yes.

Q: You couldn't stop it?

A: No, I've been in one place and they couldn't – you don't move and I try to move, I can't. And I've been gassed, accused of horrible things. My body want to do other things and keep from doing wrong and they control my body. They are trying to get my body to be in trouble some kind of way or another.

His lawyer then asked him about his knowledge of his legal predicament. During this part of the proceedings, Jonathan Green's concern was about what he perceived as the unfairness of his trial and the fact that he was innocent.

A: The judge Suzanne Stovall, she was – she was sitting in the deal – the chair there with her eyes closed during my trial for about 30 minutes to an hour, raising up to her shirt to let people look at her stomach or something. I don't know what she had it up for and she told me – telling the DAs [District Attorneys] to jump in and out of each other's lap.

.....

A: Yes, that was during a jury pick for a guy, she opened her legs so they could look through her legs. She walked past me and wink her eye, but I can't tell – I couldn't hear. My lawyers, they at the time, they didn't want to help me. Told me to my face. Who else going to help you? I didn't have no help, but I couldn't tell Judge Suzanne Stovall either because the fact if I hell – oh, excuse me – that something about this or that and doing things and opening her legs for the lead jurors, that got on my – that jury. She set him on as a juror.

Q: You think that's why you were convicted?

A: Nobody was paying attention to my trial. Half the jurors, they was over there with their eyes closed, asleep.

.....

Q: Now, you realize that you have an execution date for the 30th; is that right?

A: I understand that.

Q: And there's things that want you dead, right?

A: And people, if you consider them things, yeah, I guess you can and other things want me dead other than people.

Q: What other things?

A: I call it – I just say it's spiritual warfare, because I don't know what to call them.

Q: And they may win?

A: I'm hoping not. I got all the evidence and these other people that I'm needing to be come in and that were sworn in to testify for me. They have things to tell, also.

Q: That show you didn't do this?

A: Right. But I don't know why they're not here today to testify on my behalf. They were sworn in.

Q: That was a long time ago, wasn't it?

A: No. It doesn't matter, they're still sworn in. They should be here today to tell their side. Why they not here?

Q: Because this is about whether you – this is a different proceeding. Don't you understand?

A: Not a different proceeding if they could help me get a release from – because they should be here, because they could tell things that know what happen, but – to cause for the people that are in here listening to know that I'm innocent. They should be here.

....

Q: Is there anything that you've done – have you done anything that deserves the death penalty?

A: No, I'm innocent.

Q: Could it be, Mr Green, that you don't remember that you killed Christina Neal?

A: I'm innocent.

Q: And it's the letter that proves you're innocent.

A: Can't be in two places at once.

Q: And it's the letter that says you're in Conroe?

A: Can't be in two places at once.

Q: And you believe you were in Conroe?

A: The letter trail proves this. If you read it.

Asked whether she thought Jonathan Green was merely attempting to come up with a defence against his conviction, Dr Mosnik replied:

No. In fact, he doesn't even argue against the evidence. He simply says the same thing over and over, 'this letter shows'. Even though in the case, nobody did come forward, there was no alibi, there – you know, there is nothing that indicates that he has an alibi and was with this person, but he insists that despite evidence to the contrary, that this will exonerate him, that there is evidence in this letter and he is innocent.

She said, in her opinion, Jonathan Green's insistence on his innocence was a product of his mental illness.

The state presented its expert, Dr Mark Moeller, a psychiatrist. Dr Moeller, who had spent about two hours with the prisoner, testified that in his opinion Jonathan Green "understands the severity of the offence that he has been convicted of and he has a clear concept of this objective of community vindication, which is being put to death." In his opinion, although Jonathan Green suffers from mental illness and "has a number of psychotic symptoms", it was "unlikely" that he suffered from schizophrenia. He suggested that Jonathan Green could be exaggerating his symptoms and he said that, in his opinion, Jonathan Green's claim of innocence was not a product of his delusions, but "he knows what he did and he knows what is happening".

At the end of the hearing, the judge said she was finding that Jonathan Green was "not incompetent" for execution. The defence lawyer asked her to clarify what standard she was applying. She replied:

Let me state on the record that I talked about the three different types of subsequent writs just to show that I had read the statute, that I had an understanding of the statute, and that I knew that we were here on the incompetence claim. I did listen to both sides. I did follow the *Panetti* standard and I did also apply the *Ford* standard in this case. And after applying all of those standards, it's my ruling that I am not granting the stay in this case. Thank you very much.

The hearing demonstrated how, as has so often been the case in Texas, the aim of the state was to get the prisoner to the execution chamber as soon as possible rather than to countenance a pause for deeper consideration of troubling issues.

Urging the judge to credit Dr Moeller's opinion over that of Dr Mosnik, the Montgomery County Assistant District Attorney sought to paint Jonathan Green as a "typical" prisoner seeking to avoid execution on any number of "excuses":

"Dr Moeller testified that he does believe [Green] *can* understand that he committed the murder and that he *does* understand that he committed the murder. There are many typical albeit unbelievable excuses that Mr Green has latched onto that – the racial composition of the jury was not a fair trial, that there were people, both the judge and jurors who had their eyes closed, that his counsel didn't pursue issues he should have, that alibi witness wasn't presented. All of these things, yes, they're very difficult to believe in light of the strong evidence of his guilt; but lots of defendants latch on to claims of 'I got a bad trial' because of this and this and this..."

Jonathan Green: *They were a hung jury.*

Assistant District Attorney: *...Do you understand that hung jury mean they didn't reach a conclusion?*

Jonathan Green: *No. Hung jury means that they were all white.*

Assistant District Attorney: *Okay.*

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Jonathan Green is African American; Christina Neal was white. Montgomery County in eastern Texas, where Jonathan Green was convicted, is a jurisdiction where 85 per cent of the population is white. Twelve of those executed in Texas since 1977 were convicted in Montgomery County. All 12 were convicted of killing white victims. One was African American – Glen McGinnis, executed in violation of international law in 2000 for a crime committed when he was 17 years old. Four other men convicted in Montgomery County, including Jonathan Green, remain on death row in Texas. All four were convicted of killing white victims. One other African American has been sentenced to death in Montgomery County since 1977: Clarence Brandley, convicted of killing a 16-year-old white girl in 1980 was released in 1990 on grounds of innocence after a judge concluded that racial discrimination had riddled his prosecution. All three African Americans sentenced to death in Montgomery County – Glen McGinnis, Clarence Brandley and Jonathan Green – were convicted by all-white juries -- what Jonathan Green insisted at his competency hearing on 28 June 2010 is a "hung jury".

Of the 1,218 people executed in the USA since 1977, seventy-eight per percent (954) were convicted of crimes involving white victims. In 26 percent of these cases (249) the defendant was black. Of the 461 people executed in Texas since 1977, seventy-one percent (328) were convicted of crimes involving white victims, and in 29 percent (95) of these cases the defendant was black.

What this boils down to is just the two different experts' opinions and which one this court finds credible. The State would urge the court to find Mr Moeller's testimony credible."

At the beginning of the hearing, Jonathan Green's lawyer had pleaded with the judge to stay the execution and delay the hearing to allow more time for the defence to be able to bring in other expert witnesses, including mental health personnel in the prison system who had assessed Jonathan Green as suffering from serious mental illness, including schizophrenia. In the 2007 *Panetti v. Quarterman* ruling, the Supreme Court had said that "the conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent".

At Green's hearing, however, the state opposed any stay or subpoenaing of additional witnesses, with the Montgomery County Assistant District Attorney telling the judge "I don't see the point in bringing in a few more people from TDCJ [Texas Department of Criminal Justice]. It seems like that would just be an unnecessary delay at this point". The judge refused to grant a stay, and the hearing went ahead with each side presenting their single mental health expert. Given that the experts had formed opposing opinions – one concluding that Jonathan Green was incompetent for execution and the other concluding that he was not – they could be said to have essentially cancelled each other out.<sup>7</sup>

The record of the hearing and the judge's ruling was forwarded to the Texas Court of Criminal Appeals (TCCA) for review. Less than four hours before the execution was due to be carried out on the evening of 30 June 2010, the TCCA granted a stay. It stated that it needed further information, specifically clarification from the judge overseeing the competency hearing. It noted that some of the standards she had referred to in the hearing and her ruling "are not applicable in this instance". It ordered her, within 15 days, to clarify in writing "the standard she followed in making her determination" on Jonathan Green's competency for execution. In a separate order, the TCCA ordered the parties to submit briefs, also within 15 days, addressing the question of whether a *Ford* competence claim can be brought in a habeas corpus petition under Texas law given that Article 46.05 of the Texas Code of Criminal Procedure provides "a procedure by which a defendant can fully litigate such claims".

In the 2007 *Panetti* ruling, the US Supreme Court acknowledged that "a concept like rational understanding is difficult to define", adding that "the beginning of doubt about competence" lies in "a psychotic disorder". Two decades earlier, in its 1986 *Ford v. Wainwright* decision, four of the Justices noted that although "the stakes are high", the evidence of whether a prisoner is incompetent for execution "will always be imprecise". A fifth Justice added that "unlike issues of historical fact, the question of [a] petitioner's sanity calls for a basically subjective judgment." In other words, there will always be errors and inconsistencies on the margins.

In the end, there is only one solution – abolition of the death penalty. Pending that step – one already taken by a majority of countries – the State of Texas should drop its pursuit of Jonathan Green's execution and commute his death sentence.

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<sup>1</sup> *Texas v. Green*. Transcript of hearing on motion for issuance of subpoenas, continuance of the evidentiary hearing, and stay of execution. In the District Court of Montgomery County, Texas, 221<sup>st</sup> Judicial District, 28 June 2010.

<sup>2</sup> See USA: The execution of mentally ill offenders, January 2006, <http://www.amnesty.org/en/library/info/AMR51/003/2006/en>.

<sup>3</sup> See USA: Supreme Court tightens the standard on "competence" for execution, 29 June 2007, <http://www.amnesty.org/en/library/info/AMR51/114/2007/en>.

<sup>4</sup> See Condemned man's mental health in question, Amnesty International Urgent Action, 11 May 2010, <http://www.amnesty.org/en/library/info/AMR51/038/2010/en>

<sup>5</sup> Under Article 46.05, "a person who is incompetent to be executed may not be executed". Under this section, a defendant is incompetent to be executed if he or she does not understand "(1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed."

<sup>6</sup> She also assessed him as operating on the "borderline of intellectual functioning", with an IQ of 71.

<sup>7</sup> Under Article 46.05, the burden is on the defence to show by a "preponderance of the evidence" that the condemned prisoner is incompetent to be executed.