REPAIRING THE "SEA OF DISORGANIZED" PROCEDURES USED FOR DETERMINING COMPETENCY FOR EXECUTION

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When the government executes a person with severe mental illness, it is questionable whether the execution even serves any true retributive purpose due to the prisoner's inability to rationally understand the reasoning for the execution. Since the U.S. Supreme Court's landmark decision in Ford v. Wainwright, scholars and courts have debated the appropriate process for determining a prisoner's competency for execution—and what that even means.

Despite decades of discourse, recent cases—most significantly recent executions of persons who suffered from severe mental illness—illustrate that the processes used across the country for determining competency for execution are insufficient. This article presents a multifaceted solution to how states can improve their processes for reviewing whether prisoners are competent for execution in an effort to ensure each execution comports with the requirements of the Eighth Amendment, as established in Ford and its progeny. Practically, the article proposes recommendations for the process courts use to determine whether a prisoner is incompetent for execution—including imposing a mandatory stay to allow adequate time for the determination and updating the standard of incompetency. Also, for the first time, this article contemplates regulating certain aspects of experts' evaluations of prisoners who claim incompetency for execution—including requiring certain diagnostic imaging and standardizing the format of expert evaluations.

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I. INTRODUCTION

"Executing a prisoner who has lost his sanity has, for centuries, been branded inhuman."[1]

Justice Sotomayor wrote this chilling reminder in her August 2023 dissenting opinion just before Missouri executed Johnny Johnson, whom attorneys claimed to be insane for execution.[2] Johnson's case (and others like it) illustrates that states still fail to uphold the mandate announced by the U.S. Supreme Court over thirty-five years ago in *Ford v. Wainwright* that states must employ adequate safeguards against executing those who are incompetent for execution.[3]

Instead, states across the country continue to execute death-row prisoners whose mental health fundamentally undermines the penological purpose of their executions. While scholars have, throughout the years, offered various solutions to this quagmire, recent cases—including most significantly those that ended in execution—illustrate that the problem persists. Not only do such cases call into question the constitutionality of these executions, but they also present to the public real examples of a death penalty that "lack[s] objectivity and integrity."[4]

Adding to the literature on this critical issue, this article proposes a procedure for determining a prisoner's incompetency for execution that would address the constitutional deficiencies in the existing mechanisms used across the country. Part II sets the stage by reviewing foundational U.S. Supreme Court precedent establishing relevant standards under the Eighth Amendment to the U.S. Constitution, beginning with the Court's decision in *Ford v. Wainwright* in 1986. Part III reviews the current processes death penalty states around the country use to review claims of incompetency at the time of execution, as well as the standard used for determining the competency of people on federal death row for execution.

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1. Johnson v. Vandergriff, 143 S. Ct. 2551, 2551 (2023) (Sotomayor, J., dissenting).

2. *See id.* Case law on the subject uses both "insanity" for execution and "incompetence" for execution. *Compare* Ford v. Wainwright, 477 U.S. 399, 417 (1986), *with* Herrera v. Collins, 506 U.S. 390, 439 (1993). For scholars suggesting that the appropriate term is the latter, see for example John H. Blume et al., *Killing the Oblivious: An Empirical Study of Competency to Be Executed Litigation*, 82 U. KAN. L. REV. 335, 335 n.2 (2014); Peggy M. Tobolowsky, *To Panetti and Beyond—Defining and Identifying Capital Offenders Who are Too "Insane" to Be Executed*, 34 AM. J. CRIM. L. 369, 388-420 (2008). This article uses "incompetence." However, it is important to note that the concept of "incompetence" under the U.S. Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), where the court reviews whether the defendant is intellectually disabled, is a different test than the one discussed herein.

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

4. Linda Malone, *Too Ill to Be Killed: Mental and Physical Competency to Be Executed Pursuant to the Death Penalty*, 51 TEX. TECH L. REV. 147, 166 (2018).

Part IV canvasses recent cases from across the country that illustrate how states' methods for reviewing and determining a prisoner's incompetency at the time of execution fall far short of meeting the Court's mandate in *Ford v. Wainwright* and protecting incompetent prisoners' rights under the Eighth Amendment against execution.[5] As Part IV shows, the inadequacy of these processes causes confusion and chaos for those involved and a moral hazard for society in completing such executions.

Part V presents a multifaceted approach to changing how courts evaluate a prisoner's incompetency for execution. Specifically, this article recommends that states work to standardize expert evaluations of prisoners claiming incompetency for execution. Further, this article outlines an adversarial process for states to use that endeavors to balance the interests at stake in an effort to reach the correct conclusion each time. Part VI concludes.

II. EXECUTING THE INSANE IS CRUEL & UNUSUAL

It has long been true that executing an insane prisoner does not comport with the law.[6] The Supreme Court has explained that the reason for this is that the execution loses its retributive value when the condemned "has no comprehension of why he has been singled out and stripped of his fundamental right to life."[7] As Justice Powell wrote in his concurring opinion in *Ford v. Wainwright*, "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose."[8]

This Part briefly reviews the U.S. Supreme Court's precedent that helps define the boundaries for determining whether a prisoner is insane for execution. Section A discusses the Court's landmark decision in *Ford v. Wainwright*, in which the Court established the foundational premise that the Eighth Amendment precludes executing the insane and explained that states must employ adequate procedures for determining sanity for execution.[9] Section B reviews the Court's decisions in

5. *Ford*, 477 U.S. at 399.

6. *Id.* at 409-10 ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."); *see also* U.S. CONST. amend. VIII. For further discussion on this principle at common law, see for example Ford v. Wainwright, 752 F.2d 526, 530-31 (11th Cir. 1985) (Clark, J., dissenting), *rev'd*, 477 U.S. 399 (1986); Blume et al., *supra* note 2, at 336.

7. *Ford*, 477 U.S. at 409; *see* Paul J. Larkin, Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 777 & n.58 (1980).

8. *Ford*, 477 U.S. at 421 (Powell, J., concurring).

9. *See generally id.*

Panetti v. Quarterman[10] and *Madison v. Alabama*,[11] both of which further clarified the meaning of "insane" in this context.

A. States Must Employ Adequate Procedures

In *Ford v. Wainwright*, the Court held that it violates the Eighth Amendment to execute a person who is insane at the time of execution.[12] The Court also held that states must employ adequate procedures for determining sanity for execution.[13] This Section reviews *Ford*, starting with the background of Ford's case and mental illness, then reviewing the Court's decision and the separate opinions.

1. Background of Ford's Case

A Florida trial court convicted Alvin Bernard Ford of murder and sentenced him to death in Florida in 1974 in his early twenties.[14] There was no issue regarding his competence at the time of the crime or at trial.[15]

Almost a decade later,[16] while awaiting execution on Florida's death row, "Ford began to manifest gradual changes in behavior," which "became more serious over time."[17] Ultimately, Ford experienced an "increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the [Ku Klux] Klan and assorted others," including the prison guards, "designed to force him to commit suicide":

> He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family were being held hostage in the prison, and that only he could help them. By "day 287" of the "hostage crisis," the list of hostages had expanded to include "senators, Senator Kennedy, and many other leaders." In a letter to

10. Panetti v. Quarterman, 551 U.S. 930 (2007).
11. Madison v. Alabama, 586 U.S. 265 (2019).
12. *Ford*, 477 U.S. at 418.
13. *See generally id.*
14. *Id.* at 401.
15. *Id.*; *see* Blume et al., *supra* note 2, at 336.
16. *See* Blume et al., *supra* note 2, at 336-37 ("[A]lmost eight years after his conviction, [Ford] began to exhibit behavioral changes that became more serious over time.").
17. *Ford*, 477 U.S. at 402.

> the Attorney General of Florida, written in 1983, Ford appeared to assume authority for ending the "crisis," claiming to have fired a number of prison officials. He began to refer to himself as "Pope John Paul, III," and reported having appointed nine new justices to the Florida Supreme Court.[18]

Due to his deteriorating condition, Ford's attorney asked Dr. Jamal Amin, a psychiatrist who had previously examined Ford, "to continue seeing him and to recommend appropriate treatment."[19] After "roughly [fourteen] months of evaluation" and considering "taped conversations between Ford and his attorneys, letters written by Ford, interviews with Ford's acquaintances, and various medical records," Dr. Amin concluded that Ford suffered from "a severe, uncontrollable, mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential'—a 'major mental disorder . . . severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.'"[20]

Ford then refused to continue seeing Dr. Amin, "believing him to have joined the conspiracy against him."[21] Ford's counsel then sought the assistance of Dr. Harold Kaufman, who interviewed Ford in November 1983.[22] After interviewing Ford,

> Dr. Kaufman concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves.[23]

Dr. Kaufman further determined that there was "no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance . . . ."[24] In December 1983, "in an interview with his attorneys, Ford regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one.'"[25] He would make statements such as "Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one."[26]

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18. *Id.* (citation omitted).
19. *Id.*
20. *Id.*
21. *Id.* at 403.
22. *Id.*
23. *Id.*
24. *Id.* (citation omitted).
25. *Id.* (citation omitted).
26. *Id.* (citation omitted).

Due to his behavior, Ford's attorneys invoked Florida's statutory procedure for determining incompetency for execution.[27] Following the statute, then-Governor Bob Graham appointed a panel of three psychiatrists to examine Ford and determine whether he had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."[28] At that time, no death warrant had been signed for Ford's execution.[29] After Ford met with the three-doctor panel for approximately thirty minutes, each doctor on the panel "filed a separate two- or three-page report with the Governor."[30] All three doctors concluded that Ford had severe mental illness but, nevertheless, understood the nature and ramifications of his execution.[31] Following the panel's report, on April 30, 1984, Governor Graham determined Ford was sufficiently sane to be executed.[32] The Governor announced his determination "without explanation or statement by signing a death warrant for Ford's execution."[33]

Ford's attorneys then "unsuccessfully sought a hearing in state court to determine anew Ford's competency to suffer execution."[34] After that failed, Ford's attorneys sought relief in federal court.[35] The federal district court denied Ford's petition without an evidentiary hearing.[36]

Ford's attorneys appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit. A divided panel of the Eleventh Circuit "granted a certificate of probable cause and stayed Ford's execution."[37] The stay came just "[fourteen] hours before Ford was to die."[38] On the merits, the Eleventh Circuit affirmed the district court's holding based on the U.S. Supreme Court's decision in *Solesbee v. Balkcom*.[39] The

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27. *Id.*; *see* FLA. STAT. § 922.07 (1985).

28. *Ford*, 477 U.S. at 403-04 (quoting FLA. STAT. § 922.07 (1985)).

29. *See id.*

30. *Id.* at 404.

31. *Id.* ("Thus, the interview produced three different diagnoses, but accord on the question of sanity as defined by state law.").

32. *See id.* at 402.

33. *Id.*

34. *Id.*; *see* Ford v. Wainwright, 451 So. 2d 471, 475 (Fla. 1984).

35. *Ford*, 477 U.S. at 404.

36. *Id.*

37. *Id.*

38. *See Killer Dies During Death-Row Wait*, TAMPA BAY TIMES (Oct. 12, 2005), https://www.tampabay.com/archive/1991/03/09/killer-dies-during-death-row-wait/; *see also Ford*, 477 U.S. at 404 (citing Wainwright v. Ford, 467 U.S. 1220) (1984) ("[The U.S. Supreme Court] rejected the State's effort to vacate the stay of execution.")).

39. *Ford v. Wainwright*, 752 F.2d 526, 528 (11th Cir. 1985), *rev'd*, 477 U.S. 399 (1986). In *Solesbee v. Balkcom*, the Court held that it did not necessarily "offend[] due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." 339 U.S. 9,

U.S. Supreme Court "granted Ford's petition for certiorari . . . to resolve the important issue whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on [Ford's] claim."[40]

2. The U.S. Supreme Court's 1986 Decision in *Ford v. Wainwright*

On June 26, 1986, the U.S. Supreme Court decided *Ford v. Wainwright*.[41] The majority brought within the gambit of the Eighth Amendment what had long been true—that executing the insane is wrong.[42] The Court recognized that the "underlying social values encompassed by the Eighth Amendment" make "it . . . no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications."[43]

> Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.[44]

For Ford, the Court reversed the Eleventh Circuit and held that Florida's procedures for determining whether a prisoner is insane for execution were insufficient under the Eighth Amendment.[45] The Court determined that the process employed by Florida "provide[d] inadequate assurances of accuracy to satisfy the requirements"[46] of the Court's decision in *Townsend v. Sain*.[47] "In capital proceedings

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13 (1950). Rather, "upon a suggestion of insanity after sentence, the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard." *Id.* at 14. Dissenting in *Solesbee*, Justice Frankfurter noted that the Court neglected to address whether it violates the Due Process Clause of the Fourteenth Amendment to execute someone who allegedly "became insane while awaiting execution, if all opportunity to have his case put is denied and the claim of supervening insanity is rejected on the basis of an *ex parte* inquiry by the Governor of the State." *Id.* at 14-15 (Frankfurter, J., dissenting).

40. *Ford*, 477 U.S. at 405.

41. *Id.* at 399.

42. *See generally id.*

43. *Id.* at 417. For further discussion on this principle at common law, see *Ford*, 752 F.2d at 530-31 (Clark, J., dissenting); Blume et al., *supra* note 2, at 336.

44. *Ford*, 477 U.S. at 417.

45. *See id.* at 413 ("That this most cursory form of procedural review fails to achieve even the minimal degree of reliability required for the protection of any constitutional interest, and thus falls short of adequacy under *Townsend*, is self-evident.").

46. *Id.* at 418.

47. Townsend v. Sain, 372 U.S. 293, 312-13 (1963) (explaining that when facts are in dispute and the petitioner did not receive a full and fair evidentiary hearing in state court, a Federal court is required

generally," the Court explained, "factfinding procedures aspire to a heightened standard of reliability" due to the fact "that execution is the most irremediable and unfathomable of penalties; that death is different."[48]

The Court identified two deficiencies in Florida's procedure for determining incompetency for execution. First, Florida's procedure failed to "include the prisoner in the truth-seeking process,"[49] which contravenes the prisoner's right to due process, including "the opportunity to be heard."[50] The Court explained that there exists a "heightened concern for fairness and accuracy" in capital punishment cases before "the taking of a human life," and "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate."[51] An adversarial hearing is necessary partly because the psychiatric opinion offered by the defendant is a "much more extensive evaluation than that of the state-appointed commission" and because the result of excluding the "substantial benefit of potentially probative information" would result in "a much greater likelihood of an erroneous decision."[52]

Second, Florida's procedure denied "any opportunity to challenge or impeach the state-appointed psychiatrists' opinions."[53] The Court explained:

> Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report.[54]

While the Court made clear that Florida's procedures were insufficient, it declined to address "the meaning of insanity."[55] The Court also did not outline specific "procedures States must follow" to ensure the Eighth Amendment is upheld.[56] That

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to hold an evidentiary hearing to determine issues of fact in order to rule on the writ of habeas corpus).

48. *Ford*, 477 U.S. at 411.
49. *Id.* at 400, 413.
50. *Id.* at 413 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
51. *Id.* at 414.
52. *Id.*
53. *Id.* at 415.
54. *Id.*
55. *See id.* at 418 (Powell, J., concurring).
56. *Id.*

remained up to the states, which were left with "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[57]

3. Separate Opinions in *Ford*

Justice Powell, concurring in part and concurring in the judgment, addressed these two issues. As to the meaning of insanity, Justice Powell would have held "that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[58] He explained that "most [people] value the opportunity to prepare, mentally and spiritually, for their death," and only a defendant who "is aware that his death is approaching can . . . prepare himself for his passing."[59] Only when "the defendant perceives the connection between his crime and his punishment" is "the retributive goal of the criminal law . . . satisfied" because then "the defendant is aware that his death is approaching [and] can . . . prepare himself for his passing."[60] Without this understanding, the execution violates the Eighth Amendment because it "impose[s] a uniquely cruel penalty and [is] inconsistent with one of the chief purposes of executions generally."[61] Justice Powell explained that Ford did not meet this definition because, according to the experts, he was unaware he was to be executed and, instead, believed that "the death penalty ha[d] been invalidated."[62]

As to the proper procedures states should employ, Justice Powell argued that the standard was no different from the protections afforded by procedural due process, meaning inmates claiming incompetency for execution are entitled to a "fair hearing."[63] He relied upon our common-law heritage and the modern practices of the States, which he argued are indicative of the "evolving standards of decency that mark the progress of a maturing society."[64] While Justice Powell observed that the procedure used in Ford's case—which looked solely to the governor-appointed psychiatrist's examination and report was inadequate and, therefore, "invite[d]

57. *Id.* at 416-17.

58. *Id.* at 422 (Powell, J., concurring).

59. *Id.* at 421-22.

60. *Id.*

61. *Id.* at 421.

62. *Id.* at 422.

63. *Id.* at 424 ("It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a 'fair hearing.'").

64. *Id.* at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *accord id.* at 419 (Powell, J., concurring).

arbitrariness and error"[65]—he suggested that a "constitutionally acceptable procedure" in this context "may be far less formal than a trial."[66]

Justices O'Connor and White concurred in result and dissented in part, echoing Justice Powell's contention that defendants are entitled to due process in the insanity inquiry, writing: "If there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'"[67] Justice Rehnquist dissented (joined by Chief Justice Burger), writing that the majority's creation of "a constitutional right to a judicial determination of sanity" before execution "needlessly complicate[d] and postpone[d] . . . any finality in this area of the law."[68]

The Court's decision in *Ford* forced several states to address their existing procedures for determining insanity at the time of execution, including redefining "insanity" in this context and adding or modifying procedures for determining insanity.[69] Ford died in 1991 after being found unconscious in his cell on death row while litigation regarding his sentence remained pending.[70]

B. Sanity Requires a "Rational Understanding"

While *Ford* made clear that the Eighth Amendment bars executing the insane, the *Ford* Court did not set forth a precise standard for competency; instead, it provided a "substantive standard at a high level of generality."[71] Over time, this lack of guidance proved problematic for the states. Decades later, the Court clarified the meaning of "insanity" in *Panetti v. Quarterman*.[72] This Section reviews *Panetti*, starting with the background of Panetti's case and mental illness, then reviewing the Court's decision and the dissenting opinion.

1. Background of Panetti's Case

When Scott Louis Panetti "sought to represent himself" at trial on charges of first-degree murder, "[t]he court ordered a psychiatric evaluation, which indicated

65. *Id.* at 424 (Powell, J., concurring).

66. *Id.* at 427.

67. *Id.* at 430 (O'Connor, J., concurring) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)); *see id.* at 427 (concluding that "Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area," Ford's judgment should have been vacated and his case remanded to the Court of Appeal for a hearing to be held "in a manner consistent with the requirements of the Due Process Clause").

68. *Id.* at 435 (Rehnquist, J., dissenting).

69. Tobolowsky, *supra* note 2, at 371.

70. TAMPA BAY TIMES, *supra* note 38.

71. Panetti v. Quarterman, 551 U.S. 930, 957 (2007).

72. *Id.*

that petitioner suffered from a fragmented personality, delusions, and hallucinations."[73] Despite the experts' findings, the trial court found Panetti to be competent to stand trial and to waive counsel.[74] Panetti proceeded pro se.[75] His appointed standby counsel described Panetti's behavior at trial "as 'bizarre,' 'scary,' and 'trance-like.'"[76] "[H]e wore a Tom Mix cowboy suit to court each day and attempted to subpoena Jesus Christ, John F. Kennedy, and a number of celebrities, some dead and some alive to testify."[77] Panetti unsuccessfully raised an insanity defense at trial, and a trial court convicted him and sentenced him to death in Texas in 1997.[78]

In October 2003, the state trial court scheduled Panetti's execution for February 5, 2004.[79] Panetti unsuccessfully sought relief for incompetency for execution in state court.[80] After experts evaluated Panetti, who submitted their evaluations to the court, the trial court issued "a short order" finding,"[b]ased on the . . . doctors' reports," Panetti "has failed to show, by a preponderance of the evidence, that he is incompetent to be executed."[81]

Panetti then sought relief in federal court.[82] The federal court stayed Panetti's execution and "set the case for an evidentiary hearing, which included testimony by a psychiatrist, a professor, and two psychologists, all called by [Panetti], as well as two psychologists and three correctional officers, called by [the State]."[83] In the federal court hearing, Panetti stated that "he believed that the devil was conspiring with the State of Texas to thwart his divine mission of saving souls on death row."[84]

Under *Ford*, the federal district court concluded that the state court competency proceedings "failed to comply with Texas law" and were "constitutionally

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73. *Id.* at 936. Panetti "had been hospitalized numerous times for these disorders," and "doctors had prescribed medication for petitioner's mental disorders that, in the opinion of one expert, would be difficult for a person not suffering from extreme psychosis even to tolerate." *Id.*

74. *Id.* at 937.

75. *Id.* at 937-38.

76. *Id.* at 936.

77. Blume et al., *supra* note 2, at 339.

78. *Panetti*, 551 U.S. at 935.

79. *Id.* at 937.

80. *Id.* at 930.

81. *Id.* at 941.

82. *Id.*

83. *Id.* One expert opined that Panetti's mental issues were indicative of "schizo-affective disorder," resulting in a "genuine delusion" affecting his ability to understand the reason for his execution. *Id.* at 954. This delusion was described as "part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light." *Id.*

84. *Federal District Court Finds Scott Panetti Not Competent for Execution*, DEATH PENALTY INFO. CTR. (Sept. 29, 2023), https://deathpenaltyinfo.org/news/federal-district-court-finds-scott-panetti-not-competent-for-execution [hereinafter *Panetti Not Competent*].

inadequate."[85] Therefore, the court reviewed Panetti's claim without deferring to the state court.[86]

Ultimately, however, the court determined that Panetti "had not demonstrated that he met the standard for incompetency," as defined by precedent from the U.S. Court of Appeals for the Fifth Circuit—which required that a prisoner "know no more than the fact of his impending execution and the factual predicate for the execution."[87] On appeal, the Fifth Circuit affirmed the district court's decision, emphasizing certain findings made by the district court, including that Panetti was "aware that he committed the murders," "aware that he will be executed," and "aware that the reason the State has given for the execution is his commission of the crimes in question."[88]

The U.S. Supreme Court granted certiorari to resolve "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of 'the mental capacity to understand that [he] is being executed as a punishment for a crime.'"[89]

2. U.S. Supreme Court's Decision in *Panetti v. Quarterman*

On June 28, 2007, the Supreme Court held in *Panetti v. Quarterman* that the Fifth Circuit's interpretation of *Ford* in Panetti's case was flawed.[90] Specifically, the Fifth Circuit's standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."[91] In practice, the Fifth Circuit's standard treated a defendant's "delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution."[92] The Court explained that refusing to consider "evidence of psychological dysfunction" that may result in a prisoner's ability to "appreciate the connection between [his] crime and his execution" violates *Ford* "and its logic":[93]

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85. *Panetti*, 551 U.S. at 930.

86. *Id.*

87. *Id.* at 942 (quoting Panetti v. Dretke, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004), *rev'd*, 435 U.S. 930 (2007)).

88. *Id.* at 956 (citation omitted).

89. *Id.* at 954.

90. *Id.* at 959 ("Whether *Ford's* inquiry into competency is formulated as a question of the prisoner's ability to 'comprehen[d] the reasons' for his punishment or as a determination into whether he is 'unaware of . . . why [he is] to suffer it,' then, the approach taken by the Court of Appeals [in Panetti's case] is inconsistent with *Ford*.") (quoting Panetti v. Dretke, 448 F.3d 815, 919-21 (5th Cir. 2006)).

91. *Id.* at 956-57.

92. *Id.* at 958.

93. *Id.* at 960 (citation omitted).

> Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford,* and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.[94]

Accordingly, the Supreme Court reversed the Fifth Circuit's decision and remanded Panetti's case for further evaluation.[95]

In *Panetti*, the Court made the critical distinction between "a prisoner's awareness of the State's rationale for an execution" and the prisoner's "rational understanding of [the rationale for an execution]."[96] After *Panetti*, the critical question for determining a prisoner's competency for execution "is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's rationale for [his] execution.'"[97]

The defendant's "rational understanding" is also part of the test used for determining competency to stand trial.[98] In *Dusky v. United States* in 1960, the Court established that "[a] defendant may not be put to trial unless he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.'"[99]

Even though the "rational understanding" standard had existed for a while, the *Panetti* Court acknowledged that the concept is difficult to define, and that some prisoners will fail to understand why they are being executed for reasons other than

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94. *Id.*

95. *Id.* at 962. "The conclusions of physicians, psychiatrists, and other experts in the field," as well as evidence that would "clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent," should be addressed by the lower court. *Id.* For further discussion and analysis of the Court's decision in *Panetti*, see Gary R. Studen, Panetti v. Quarterman*: Solving the Competency Dilemma by Broadening the Concept of Rational Understanding in Competency-to-be-Executed Determinations*, Comment, 39 SETON HALL L. REV. 163, 174-181 (2009).

96. *Panetti*, 551 U.S. at 959.

97. Madison v. Alabama, 586 U.S. 265, 269 (2019) (quoting *Panetti*, 551 U.S. at 958).

98. Competency to stand trial is the first of four instances in which "mental competency is evaluated in criminal proceedings." Malone, *supra* note 4, at 150. The standard at each stage is different. *Id.* For further discussion of this, see *id.* at 150-58.

99. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (internal quotation marks omitted)).

those stemming from "severe mental illness."[100] Nevertheless, the Court stated the concern in a case like Panetti's "is not a misanthropic personality or an amoral character. It is a psychotic disorder."[101]

Justice Thomas dissented, joined by Chief Justice Roberts and Justices Scalia and Alito, opining that Panetti showed "no evidence that his condition has worsened—or even changed—since 1995."[102] The dissent emphasized procedural and time bars related to Panetti's successive filings rather than emphasizing the applicable facts and evidence of Panetti's incompetency.[103]

As to the merits of Panetti's claim, the dissent argued that the Court's conclusion that Panetti made a "satisfactory threshold showing" of incompetency was "absurd" and "insupportable" because Panetti presented "only the preliminary observations of a psychologist and a lawyer."[104] The dissent argued that the majority improperly imposed "a new standard for determining incompetency" without an Eighth Amendment analysis,[105] writing, "[T]oday's opinion can be understood only as holding for the first time that the Eighth Amendment requires 'rational understanding.'"[106]

Litigation related to Panetti's competence for execution continued for over a decade following the Court's decision.[107] The resolution of Panetti's case is discussed below in Part IV.D.

C. Insufficient Memory is Insufficient

Even after *Panetti*, confusion remained as to what constituted incompetency for execution.[108] Several years after *Panetti*, in *Madison v. Alabama*, the Court further expanded on the "rational understanding" standard.[109]

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100. *Panetti*, 551 U.S. at 959.
101. *Id.* at 960.
102. *Id.* at 963 (Thomas, J., dissenting).
103. *Id.* at 963-68.
104. *Id.* at 969-70.
105. *Id.* at 963.
106. *Id.* at 980.
107. *See* discussion *infra* Part IV.D.
108. *See* Blume et al., *supra* note 2, at 341.
109. *See* Madison v. Alabama, 586 U.S. 265, 274-78 (2019).

1. Background of Madison's Case

An Alabama trial court sentenced Vernon Madison to death for killing a police officer in 1985.[110] While awaiting execution, "Madison's mental condition . . . sharply deteriorated."[111] He experienced "a series of strokes" and was diagnosed with "vascular dementia with attendant disorientation and confusion, cognitive impairment, and memory loss."[112] Madison petitioned the Alabama state trial court for a stay of execution on the ground that he was mentally incompetent because he could "no longer recollect committing the crime for which he ha[d] been sentenced to die."[113] He "emphasized [in court filings] that he could not 'independently recall the facts of the offense he is convicted of.'"[114]

Alabama contended that even if Madison had no recollection of committing the crime for which he was sentenced to death, he still had a "rational understanding of the reasons for his . . . execution[]" to satisfy the standard set forth in *Panetti*.[115]

At a competency hearing, the state sought to distinguish *Ford* and *Panetti* by emphasizing Madison's lack of psychotic episodes or delusions.[116] Dr. John Goff, Madison's expert psychologist, reported that Madison understood "in the abstract" that Alabama would execute him, but did not understand why.[117] The trial court found Madison competent to be executed based on the testimony of two expert witnesses.[118] "In a single, final paragraph, the court provided both its ruling and its reasoning. Madison had failed to show, the court wrote, that he did not 'rationally understand the punishment he is about to suffer and why he is about to suffer it.'"[119]

Madison sought relief in federal court.[120] After the federal district rejected his petition, the Eleventh Circuit reversed the district court's decision, determining that Madison had met the burden of showing that the lower court's ruling "'involved an

110. *Id.* at 269.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 270 (quoting Brief Pursuant to Order at 8, *Madison*, 586 U.S. 265 (No. 17-7505)).
115. *Id.* at 267.
116. *Id.* at 270.
117. *Id.*
118. *See id.* at 270-71.
119. *Id.* at 271-72 (quoting Brief Pursuant to Order at 10, *Madison*, 586 U.S. 265 (No. 17-7505)).
120. *Id.* at 272.

unreasonable application of[] clearly established federal law' or rested on an 'unreasonable determination of the facts.'"[121]

The U.S. Supreme Court then summarily reversed the Eleventh Circuit's decision, holding that "'neither *Panetti* nor *Ford* "clearly established" that a prisoner is incompetent to be executed' because of a simple failure to remember his crime."[122]

Later, in 2018, Alabama again set Madison's execution date.[123] At that time, he returned to state court to argue that his execution violated the Eighth Amendment due to his incompetence.[124] A week before the scheduled execution, the state court again found Madison competent for execution, concluding that he "did not provide a substantial threshold showing of insanity" and suggesting that a *Ford* claim could only be substantiated by delusions, not dementia.[125]

The U.S. Supreme Court granted Madison's request to stay his execution.[126] A few weeks later, the Court granted certiorari to determine whether the Eighth Amendment "forbid[s] execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime" and whether it "appl[ies] similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions."[127]

2. U.S. Supreme Court's Decision in *Madison v. Alabama*

In *Madison*, the Court held that under *Panetti*, "the failure to remember committing a crime alone" is not enough to prevent a State from executing someone under the Eighth Amendment: "[L]oss of memory of a crime does not prevent rational understanding of the State's reasons for resorting to punishment. And that kind of comprehension is the *Panetti* standard's singular focus."[128] The Court reasoned that "a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence" and, therefore, the Eighth Amendment does not necessarily forbid the execution of one who does not have

121. *Id.* (alteration in original) (citation omitted).
122. *Id.* (citation omitted).
123. *Id.* at 273.
124. *Id.*
125. *Id.* at 273-74 (citation omitted).
126. *Id.* at 274 (citation omitted).
127. *Id.* at 267.
128. *Id.* at 276.

any memory of committing the crime.[129] The critical question is whether the prisoner understands the reasoning for the execution.[130]

However, the Court clarified that incompetency for execution is not limited to psychotic delusions—as the lower court had suggested.[131] While the Court recognized that "not all [delusions] will interfere with the understanding that the Eighth Amendment requires,"[132] dementia "can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him,"[133] which is the focus of the test under the Eighth Amendment.[134] Accordingly, the Court remanded the case back to the state court to reevaluate Madison's competency, directing that "[i]t must do so as the first step in assessing Madison's competency—and ensuring that if he is to be executed, he understands why."[135]

Justice Alito, joined by Justices Thomas and Gorsuch, dissented, stating that the Court "[mad]e a mockery of [its] Rules."[136]

Madison died in 2020 on Alabama's death row.[137] He "never received a state court determination of his competency" after the Supreme Court's decision.[138]

III. HOW STATES CURRENTLY ADDRESS THIS ISSUE

Every jurisdiction has adopted the rule that "a sentence of execution cannot be carried out if the prisoner is insane at the time set for execution."[139] In the past few years, only a few states have completed executions;[140] most death penalty states

129. *Id.* at 267.

130. *See id.* at 269.

131. *Id.* at 279.

132. *Id.*

133. *Id.*; *see id.* at 267-68 (The Eighth Amendment "appl[ies] similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions . . . because "either condition may . . . impede the requisite comprehension of his punishment.").

134. *Id.* at 269.

135. *Id.* at 283.

136. *Id.* (Alito, J., dissenting).

137. Vernon Madison, *Whose Case Challenged Execution of Prisoners with Dementia, Dies on Alabama's Death Row*, DEATH PENALTY INFO. CTR. (Feb. 25, 2020), https://deathpenaltyinfo.org/news/vernon-madison-whose-case-challenged-execution-of-prisoners-with-dementia-dies-on-alabamas-death-row.

138. *Id.*

139. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 8.1(c) (3d ed. 2022).

140. Ronald J. Tabak, *Capital Punishment*, in THE STATE OF CRIM. JUST. 2022 131, 131-33 (Mark E. Wojcik & Kyo Suh eds., 2022).

have not completed an execution in several years.[141] This Part (A) explores how states that continue to conduct executions address competency for execution and (B) explains the federal standard for determining competency for execution.

A. Examples from Executing States

While capital punishment remains viable in more than half of the country, only a handful of states still conduct executions and lead the efforts on pro-death penalty policymaking.[142] Focusing on these "ringleader" States, this Section shows a few examples of how death penalty states that continue to contemplate or conduct executions review prisoners' competency for execution.

1. Florida

In Florida, a claim of incompetency for execution, like other execution-related claims, cannot be raised until a prisoner is under an active death warrant.[143] Section 922.07, Florida Statutes, and Florida Rule of Criminal Procedure 3.811 set forth the process by which death-row prisoners in Florida may raise a claim of incompetency for execution once a warrant has been issued.[144] Rule 3.811(b) defines "insanity" as

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141. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Aug. 12, 2023). Even within the states that conduct executions, these policies are often localized to certain regions. *See, e.g.*, Tabak, *supra* note 140, at 132-33 ("Merely 30 counties in the United States . . . and one federal district accounted for all death sentences imposed in the United States in 2019. In only two counties . . . were more than one death sentence imposed.").

142. *See, e.g.*, Tabak, *supra* note 140, at 133 (explaining that five states conducted the seven executions completed in 2020 and only seven states conducted executions in 2019); *see also Executions Overview*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview (last visited Aug. 12, 2023). *See generally* Melanie Kalmanson, *Death After* Dobbs*: Addressing the Viability of Capital Punishment for Abortion*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 545 (2023) (discussing and identifying these "ringleader" states).

143. *E.g.*, Barnes v. State, 124 So. 3d 904, 918 (Fla.), *as revised on denial of reh'g* (Oct. 17, 2013) (citing Johnson v. State, 104 So. 3d 1010, 1029 (Fla. 2012)) ("We have repeatedly held that this claim may not be asserted until a death warrant has been issued."); Butler v. State, 100 So. 3d 638, 672 (Fla. 2012); Phillips v. State, 894 So. 2d 28, 36 (Fla. 2004); Jones v. State, 845 So. 2d 55, 74 (Fla. 2003)). Despite this rule, Florida death-row prisoners sometimes raise an insanity for execution claim before a warrant is issued—for preservation purposes. *See, e.g.*, *Barnes*, 124 So. 3d at 918 (conceding that the party's insanity claim was not ripe for review but nevertheless raising it for preservation purposes only). For further discussion on the procedural trap issues like this present to prisoners facing execution, see generally Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, 5 U. PA. J.L. & PUB. AFFAIRS 1 (2020).

144. The Florida Supreme Court adopted Rule 3.811 on an emergency basis shortly after the U.S. Supreme Court decided *Ford* when Nollie Martin, who was under an active death warrant, filed a petition for writ of habeas corpus claiming he was incompetent to be executed. Martin v. Dugger, 515 So. 2d 185, 186 (Fla. 1987). A panel of State-appointed psychiatrists determining Martin met the constitutional threshold for execution—*i.e.*, that he "understood the nature of the death penalty and

"lack[ing] the mental capacity to understand the fact of the impending execution and the reason for it."[145] Florida's process for determining incompetency for execution proceeds as follows:

1. After the Governor signs a warrant scheduling the prisoner's execution, counsel for the condemned must submit a letter to the governor indicating the basis for a claim of insanity and, thereby, invoking the process;[146]
2. Upon receipt of such letter, the Governor must stay the execution and appoint three experts to examine the prisoner;[147]
3. The three-expert panel evaluates the prisoner and submits their evaluation to the Governor;[148]
4. After receiving the panel's evaluation, the Governor makes a determination regarding the prisoner's competency. If the Governor determines the inmate is competent for execution, the Governor lifts the stay. If the Governor determines the inmate is incompetent, "the Governor shall have the convicted person committed to a Department of Corrections mental health treatment facility";[149]
5. Upon receiving the Governor's determination, counsel for the prisoner can file a motion in the trial court seeking review *de novo* of the Governor's determination;[150]
6. If the circuit judge "has reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant a stay of execution and may order further proceedings which may include a hearing";[151]
7. The circuit judge may hold an evidentiary hearing, at which both parties are allowed to present evidence.[152]

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why it is to be imposed on him." *Id.* at 187. Martin sought review in the trial court pursuant to Rule 3.811. *Id.* The trial court ultimately found Martin competent to be executed. *Id.* Martin was executed May 12, 1992. *Execution List: 1976-Present*, FLA. DEP'T CORRS., https://fdc.myflorida.com/ci/execlist.html (last visited Nov. 12, 2023) [hereinafter *Florida Execution List*].

For further discussion on Martin's case, see Melanie Kalmanson, *The History of Rule 3.811*, TRACKING FLA.'S DEATH PENALTY (June 5, 2023), https://fladeathpenalty.substack.com/p/a-look-at-the-history-of-rule-3811 [hereinafter *History of 3.811*].

145. FLA. R. CRIM. P. 3.811(b).

146. FLA. STAT. § 922.07(1) (2023).

147. *Id.*

148. *Id.*

149. *Id.* § 922.07(2)-(4) (2023) "When a person under sentence of death has been committed to a Department of Corrections mental health treatment facility, he or she shall be kept there until the facility administrator determines that he or she has been restored to sanity." *Id.*

150. *See* FLA. R. CRIM. P. 3.811(d); *accord id.* 3.812(a) .

151. *See* FLA. R. CRIM. P. 3.811(e).

152. The hearing is governed by Florida Rule of Criminal Procedure 3.812.

The threshold for justifying an evidentiary hearing (sixth step above) is much lower than the standard for establishing relief.[153] In *Provenzano v. State*, the Florida Supreme Court determined that "the evidence presented by Provenzano, which consisted of an expert report and other corroborating evidence of Provenzano's bizarre behavior, when taken alone, establishe[d] reasonable grounds to believe that Provenzano is incompetent to be executed."[154] Further, the Court determined that the evidence presented by both Provenzano and the State "created questions of fact on" Provenzano's sanity, which "should be examined and resolved in the crucible of an adversarial proceeding."[155] Therefore, the Court reversed the trial court's order, summarily denying Provenzano's claim, and remanded for an evidentiary hearing.[156]

At the evidentiary hearing, though, the applicable standard is clear and convincing evidence.[157] If, after the hearing, the court determines that the prisoner showed "by clear and convincing evidence that the prisoner is insane to be executed, the court shall enter its order continuing the stay of the death warrant; otherwise, the court shall deny the motion and enter its order dissolving the stay of execution."[158] The prisoner or the State can then appeal the trial court's determination to the Florida Supreme Court.[159]

Between the Florida Supreme Court adopting Rule 3.811 in 1986 and 2013, four people raised and litigated claims of incompetency for execution in the State of Florida: Pedro Medina (1997),[160] Thomas Provenzano (1999),[161] John Ferguson

153. *Compare* FLA. R. CRIM. P. 3.811(e), *with* FLA. R. CRIM. P. 3.812(e) (stating that a Florida court only needs "reasonable grounds" to believe the prisoner is insane to grant a hearing but must find clear and convincing evidence that the prisoner is insane before it can permanently stay the prisoner's execution).

154. Provenzano v. State, 751 So. 2d 37, 40 (Fla. 1999).

155. *Id.*

156. *Id.* Justice Harding concurred, noting that, as the Supreme Court noted in *Ford*, the goal of proceedings under Rule 3.811 "is to seek the truth. The mere potential for delay should not divert us from this goal, especially in light of the severity of the punishment in this case." *Id.* at 41 (Harding, J., concurring). He considered "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions" to be a "flaw" in Florida's procedure. *Id.*

157. *See* FLA. R. CRIM. P. 3.812(e).

158. *Id.*

159. *See* Owen v. State, 363 So. 3d 1035, 1038 (Fla. 2023).

160. For discussion of Pedro Medina's case, see *History of 3.811*, *supra* note 144.

161. *Id.*

(2012),[162] and Marshall Gore (2013).[163] All four were executed despite their claims of incompetency.[164]

The litigation surrounding these prisoners' claims of incompetency for execution provides insight into how Florida courts interpret these standards. Medina argued that Florida's use of the "clear and convincing" standard in this context is unconstitutional under the U.S. Supreme Court's decision in *Cooper v. Oklahoma*.[165] The Florida Supreme Court rejected this argument, holding that *Cooper* did not apply in this context because the issue of a defendant's competency to stand trial is "clearly different from a determination of sanity to be executed."[166]

Provenzano argued that Rule 3.811 is unconstitutional because "the test for competency . . . within the rule does not allow for the rational appreciation of the connection between the crime and the punishment."[167] The Court said that it "implicitly rejected this claim" in Martin's case.[168] The Court agreed with the circuit court that rule 3.811 is not unconstitutional and explained that "the test for competency under rule 3.811 contains a rationality element, albeit a limited one."[169] That being said, the Court recognized that the rationality element entitled Provenzano to cross-examine the State's expert "concerning Provenzano's rational appreciation of the connection between his crime and the punishment he is to receive."[170] Later, in

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162. Melanie Kalmanson, *Warrant Litigation: The Primary Issue is Owen's Competence for Execution*, TRACKING FLA'S DEATH PENALTY (May 21, 2023), https://fladeathpenalty.substack.com/p/warrant-litigation-the-primary-issue?r=248zyf&utm_campaign=post&utm_medium=web [hereinafter *Warrant Litigation*]. For a discussion of John Ferguson's case, see Lacey Stutz, *The Troubling Case of John E. Ferguson: Procedural Failure, Mental Illness, and the Death Penalty In Florida*, U. MIA. L. REV. (Jan. 22, 2013), https://lawreview.law.miami.edu/troubling-case-john-e-ferguson-procedural-failure-mental-illness-death-penalty-florida./.

163. For discussion of Marshall Gore's case, see *Warrant Litigation*, *supra* note 162.

164. *Florida Execution List*, *supra* note 144.

165. Medina v. State, 690 So. 2d 1241, 1247 (Fla. 1997). *See generally* Cooper v. Oklahoma, 517 U.S. 348, 350 (1996) (holding that an Oklahoma law that presumed a defendant competent to stand trial "unless he proves his incompetence by clear and convincing evidence" violated the defendant's due process rights).

166. *Medina*, 690 So. 2d at 1247. Justice Anstead, concurring in part and dissenting in part, found the plurality majority opinion "inadequate in many respects." *Id.* at 1250, 1253-54 (Anstead, J., concurring in part and dissenting in part). In pertinent part, Justice Anstead believed that Medina had presented "extensive evidence" of his mental illness and that with "any objective evaluation of the evidence, there [were] reasonable grounds . . . to believe that Medina was incompetent to be executed. *Id.* at 254.

167. Provenzano v. State, 750 So. 2d 597, 602 (Fla. 1999).

168. *Id.*

169. *Id.*

170. *Id.* at 602-03. Provenzano also argued that Rule 3.812 is unconstitutional because it requires a prisoner to prove incompetency by "clear and convincing" evidence rather than by the "preponderance of the evidence." *Id.* at 603. The Florida Supreme Court rejected this argument, citing *Medina*. *Id.*

another opinion in Provenzano's case, the Court stated that, through its rules, Florida had "adopted the Eighth Amendment standard announced by Justice Powell in *Ford*"—that "the Eighth Amendment only requires that defendants be aware of the punishment they are about to suffer and why they are to suffer it."[171]

Ferguson litigated his competency for the 30 years following his sentence.[172] After Florida's then-governor Rick Scott signed a death warrant scheduling his execution,[173] Ferguson's counsel instituted the Rule 3.811 procedure.[174] Per the procedure, Governor Scott issued an Executive Order appointing a panel to review Ferguson's competency and temporarily staying Ferguson's execution.[175] Six days later, after the panel interviewed Ferguson, Governor Scott issued another Executive Order determining Ferguson was competent for execution and lifting the stay.[176] Ferguson sought review of the Governor's determination in the trial court.[177]

At a two-day evidentiary hearing, the trial court heard testimony from multiple defense and state witnesses, including the governor's three appointed psychiatrists.[178] Dr. George Woods, a psychiatrist, testified that Ferguson exhibited delusional thinking and olfactory, visual, and auditory hallucinations.[179] Dr. Wade Myers, one of the Governor's appointed psychiatrists, testified that "the combination of visual, auditory, olfactory, and tactile hallucinations reported by Ferguson [was] fairly unusual, even for a schizophrenic," and that he "found no credible evidence of major mental illness in Ferguson."[180]

A few days after the hearing, the trial court entered an Order finding Ferguson sane to be executed.[181] Although the court agreed "Ferguson does have a diagnosed mental illness, paranoid schizophrenia," it did not find any "evidence that his mental illness interferes, in any way, with his 'rational understanding' of the fact of his pending execution and the reason for it."[182]

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171. *Id.* at 140 (Fla. 2000) (Powell, J., concurring) (citing *Ford*, 477 U.S. at 422).

172. *See* Ferguson v. Fla. Dep't of Corr., 716 F.3d 1315, 1317-19 (11th Cir. 2013).

173. Stutz, *supra* note 162.

174. *See Ferguson*, 716 F.3d at 1323.

175. Fla. Exec. Order 12-220 (Sept. 26, 2012).

176. *See generally* Order Finding John Errol Ferguson Sane To Be Executed, No. 04–2012–CA–000507 (Fla. Cir. Ct. Oct. 12, 2012).

177. *See generally id.*

178. *Id.*

179. *Id.* at 5.

180. *Id.* at 11-12.

181. *Id.* at 18.

182. *Id.*

Ferguson appealed to the Florida Supreme Court, arguing that *Panetti* constituted a change in the applicable standard.[183] The Court ultimately rejected the idea that *Panetti* required a stricter standard than the Court adopted in *Provenzano.*[184]

As to Ferguson's case, the Court explained that its inquiry was limited to whether the trial court's ruling was supported by competent, substantial evidence.[185] While the Court recognized there was "evidence that Ferguson suffer[ed] from some mental illness"—including "a documented history of paranoid schizophrenia," the trial court's finding that "Ferguson's 'Prince of God' delusion is . . . [a] genuine belief," and a "lack of sufficient evidence of malingering"—the Court held that Ferguson's delusional thoughts neither interfered with his "rational understanding . . . of his execution [nor] the reason for" which he had been sentenced to death.[186] Noting the trial court's finding that "Ferguson [was] aware that the State [was] executing him for the murders he committed and that he will physically die as a result of the execution."[187] The Court determined that the *Provenzano* standard was satisfied.[188]

Litigation continued in federal courts, with the U.S. Court of Appeals for the Eleventh Circuit staying Ferguson's execution just moments before the execution was to proceed, after "Mr. Ferguson had already finished his last meal."[189] Ultimately, Ferguson was executed on August 5, 2013.[190]

2. Missouri

In Missouri, a person is considered incompetent for execution if, due to "mental disease or defect," he or she "lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency[,] or reasons why the sentence should not be carried

183. Ferguson v. State, 112 So. 3d 1154, 1157 (Fla. 2012).

184. *Id.*

185. *Id.*

186. *Id.* at 1156-57 (quoting Order Finding John Errol Ferguson Sane To Be Executed, *supra* note 176, at 17-18).

187. *Id.* at 1157 (quoting Order Finding John Errol Ferguson Sane To Be Executed, *supra* note 176, at 18).

188. *Id.*

189. Stutz, *supra* note 162. For further discussion of the Eleventh Circuit's decision in Ferguson's case, see generally *Federal Habeas Corpus – Death Penalty – Eleventh Circuit Affirms Lower Court Finding that Mentally Ill Prisoner Is Competent to Be Executed* – Ferguson v. Secretary, Florida Department of Corrections, *716 F.3d 1315 (11th Cir.), cert. denied 186 L. Ed. 2d 946 (2013)*, 127 HARV. L. REV. 1065, 1276 (2014).

190. *Florida Execution List*, *supra* note 144.

out."[191] It is the responsibility of the director of the department of corrections to "immediately notify the governor" if the director has "reasonable cause to believe that any inmate . . . sentenced to death has a mental disease or defect excluding fitness for execution."[192] After receiving such notice, "if there is not sufficient time between such notification and time of execution for a determination of the [prisoner's] mental condition . . . be made" pursuant to the statute, then the governor shall stay the execution.[193]

Upon notification by the director, the trial court "shall conduct an inquiry into the mental condition of the offender after first granting any of the parties entitled to notification an examination by a physician of their own choosing on proper application made within five days of such notification."[194]

If the court determines that "the prisoner does not have a mental disease or defect," and a stay has been granted, the governor shall set a new execution date and issue a warrant.[195] If the court determines that the prisoner is incompetent for execution, the prisoner is not executed and is transferred "to a mental hospital."[196]

3. Texas

Texas did not have a statute governing the procedure to determine competency to be executed until 1999—thirteen years after *Ford*.[197] Today, Texas's statute for determining competency to be executed is codified in Article 46.05.[198] As in Florida, a motion claiming incompetency for execution cannot be filed until an execution date is set.[199] The standard for determining incompetency is that a defendant is incompetent to be executed if he "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."[200]

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191. MO. REV. STAT. § 552.060 (2022).

192. *Id.* The director shall also "notify the director of the department of mental health and the prosecuting or circuit attorney of the county where the defendant was tried, the attorney general and the circuit court of the county where the correctional facility is located." *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Brian D. Shannon & Victor R. Scarano, *Incompetency to be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 TEX. TECH L. REV. 419, 428 (2013).

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

199. *Id.* art. 46.05(c).

200. *Id.* art. 46.05(h).

In Texas, motions claiming incompetency for execution are filed with the trial court, which "retains jurisdiction over motions filed by or for a defendant" regarding competency for execution.[201] As to the requirements for a motion filed under the statute, the motion must, in pertinent part, "clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent to be executed. The defendant shall attach affidavits, records, or other evidence supporting the defendant's allegations or shall state why those items are not attached."[202]

Upon receiving the motion, the trial court "shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed."[203] If the trial court "does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion and may set an execution date as otherwise provided by law."[204]

If the court determines that "the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant . . . to determine whether the defendant is incompetent to be executed."[205] At that point, the case proceeds to a final competency hearing, where the trial court determines whether "the defendant has established by a preponderance of the evidence" that he or she is incompetent for execution.[206] Following the trial court's determination, the statute provides for an automatic appeal.[207]

4. Oklahoma

In Oklahoma, "mentally incompetent to be executed" means that, due to a mental condition, the prisoner is unable to have a rational understanding "[o]f the reason he or she is being executed," "[t]hat he or she is to be executed," and that the "execution is imminent."[208]

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201. *Id.* art. 46.05(b).

202. *Id.* art. 46.05(c). In addition, the motion "shall identify any previous proceedings [challenging] the defendant's competency in relation to the conviction and sentence in question, including any challenge to the defendant's competency to be executed, competency to stand trial, or sanity at the time of the offense. The motion must be verified by the oath of some person on the defendant's behalf." *Id.*

203. *Id.* art. 46.05(d).

204. *Id.* art. 46.05(g).

205. *Id.* art. 46.05(f).

206. *Id.* art. 46.05(k).

207. *Id.* art. 46.05(*l*) ("[T]he clerk shall send immediately to the court of criminal appeals . . . the appropriate documents . . . and entry of a judgment of whether to adopt the trial court's order, findings, or recommendations . . . [and] determine whether the existing execution date should be withdrawn.").

208. OKLA. STAT. ANN. tit. 22, § 1005.1 (West, Westlaw through legislation of the Second Regular Session of the 59th Legislature).

If, when the Attorney General files a motion to set an execution date, the prisoner's attorney "has good reason to believe" the prisoner is "mentally incompetent to be executed," the attorney may file a motion on the prisoner's behalf "setting forth the facts giving rise to the belief that the person may be mentally incompetent to be executed and requesting the court to order that the person be examined for mental competency to be executed."[209] The motion must be filed with the written response to and within seven days of the Attorney General's motion to set an execution.[210]

Upon the defense's motion, the issue of competency of the defendant to be executed is remanded to the trial court where the person was originally sentenced.[211] The trial court then "shall hold an evidentiary hearing to determine whether the person has raised a substantial doubt as to the person's competency to be executed."[212] If the court determines that the prisoner has failed to make such a "substantial showing," the court "shall deny the motion and the execution shall proceed."[213]

If the court determines the prisoner *has* made a "substantial showing that he or she is mentally incompetent to be executed, the trial court shall order an examination of the [prisoner]."[214] By filing the original motion, the prisoner is "deemed to consent to submit to an examination . . . for the purpose of assessment of mental competency to be executed."[215] The prisoner is also deemed to "waive[] any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant" to the defendant's competency.[216] If the prisoner "refuses

209. *Id.* The motion must also "identify the proceeding in which the person was convicted." *Id.* Support includes "affidavits, records, or other evidence." *Id.* A party must also include "[a]ny previous proceeding in which the person challenged his or her competency in relation to the conviction and judgment of death including any challenge to the person's competency to be executed, competency to stand trial, or sanity at the time of the offense." *Id.*

210. *Id.* If an "intervening change in the mental competency of the person to be executed occurs after the seven (7) day deadline" for responding to the Attorney General's motion, counsel "may file a motion alleging [the prisoner] is mentally incompetent to be executed with the Court of Criminal Appeals. An intervening change shall be a condition that has not and could not have been presented in a timely motion because the factual basis for the claim was not ascertainable through the exercise of reasonable diligence." *Id.* § 1005.1 (Westlaw).

211. *Id.* § 1005.1(F) (Westlaw).

212. *Id.* § 1005.1(H) (Westlaw).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

to be examined by the state's expert, the trial court shall not consider any expert evidence offered by the person concerning his or her competency."[217]

The qualified examiner(s) will receive instruction to examine the prisoner and determine whether he or she has a rational understanding of "the reason he or she is being executed" and "[t]hat he or she is to be executed and that execution is imminent."[218] At the completion of all psychiatric evaluations, "the trial court shall conduct a hearing to determine whether the [prisoner] is mentally competent to be executed."[219] It is the prisoner's burden to rebut a presumption of competence by "a preponderance of the evidence."[220]

B. Federal Standard

Under the Federal Death Penalty Act (FDPA), a death sentence "shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person."[221] The FDPA requires federal executions to be implemented "in the manner prescribed by the law of the State in which the sentence is imposed."[222]

At the end of his Presidency, President Donald Trump directed the completion of thirteen federal executions in six months.[223] The prisoner's competency for execution was an issue in the pre-execution litigation for several cases.[224]

Wesley Purkey was "68 years old, frail, and suffering from Alzheimer's disease and other psychiatric conditions," and had undergone many years of "the 'immense mental anxiety' of confinement on death row."[225] When his execution was scheduled for July 2020, his attorneys argued, based on expert opinions, that he was incompetent for execution.[226] They argued that, "in the years since his sentencing, his mental condition ha[d] deteriorated to the point where he no longer understands why he is being executed."[227] The U.S. District Court for the District of Columbia

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217. *Id.*

218. *Id.* § 1005.1(I) (Westlaw).

219. *Id.*

220. *Id.*

221. 18 U.S.C. § 3596(c).

222. 18 U.S.C. § 3596(a).

223. Michael Tarm, *Fuller Picture Emerges of the 13 Federal Executions at the End of Trump's Presidency*, AP NEWS (Oct. 3, 2023, 10:52 AM), https://apnews.com/article/trump-executions-biden-death-penalty-brandon-bernard-c1b26807c5c40b337d14485c3d6df2de.

224. *Id.*

225. Barr v. Purkey, 140 S. Ct. 2594, 2595 (2020) (Breyer, J., dissenting).

226. *Id.* at 2597 (Sotomayor, J., dissenting).

227. *Id.* at 2595-96 (Breyer, J., dissenting) (citation omitted).

enjoined the government from completing Purkey's execution, "finding that the evidence Purkey . . . put forth . . . established a likelihood of success on the merits of his claims."[228]

On appeal by the government, in a 5-4 decision issued just before 3:00 a.m. (hours after his execution was scheduled to begin),[229] the Supreme Court vacated the District Court's injunction, clearing the way for the federal government to proceed.[230] In her dissenting opinion, Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan) explained the significance of determining a prisoner's competence for execution and the irreversible result of the Court's decision:

> Although the Government and the family members of the victim have a legitimate interest in punishing the guilty, that interest must be measured against Purkey's and the public's interest in ensuring that such punishment comports with the Constitution. At the same time, proceeding with Purkey's execution now, despite the grave questions and factual findings regarding his mental competency, casts a shroud of constitutional doubt over the most irrevocable of injuries.[231]

Purkey was executed shortly after the Court's decision and was pronounced dead at 8:19 a.m.[232]

Lisa Montgomery was executed months after Purkey, just days before the end of President Trump's term.[233] Questions about Montgomery's mental competence began before her original trial when Montgomery filed a "notice of intent to assert the defense of insanity and to present . . . evidence relating to mental disease or defect."[234] Defense experts evaluated Montgomery and diagnosed her with "depression, borderline personality disorder, post-traumatic stress disorder, and

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228. *Id.* at 2597 (Sotomayor, J., dissenting).

229. *U.S. Government Hurriedly Executes Wesley Purkey After Overnight Rulings by U.S. Supreme Court Vacate Two Injunctions and a Stay of Execution*, DEATH PENALTY INFO. CTR. (July 16, 2020) [hereinafter *Purkey Execution*], https://deathpenaltyinfo.org/news/u-s-government-hurriedly-executes-wesley-purkey-after-overnight-rulings-by-u-s-supreme-court-vacate-two-injunctions-and-a-stay-of-execution.

230. *Purkey*, 140 S. Ct. at 2595 (Breyer, J., dissenting).

231. *Id.* at 2599 (Sotomayor, J., dissenting).

232. *Purkey Execution*, *supra* note 229. At the time of his execution, Purkey had several claims pending in federal court at the time of his execution. *Id.*

233. *See generally* Cheryl Corley, *U.S. Executes Lisa Montgomery, The Only Woman on Federal Death Row*, NPR (Jan. 12, 2021, 11:02 AM), https://www.npr.org/2021/01/12/955984890/u-s-executes-lisa-montgomery-the-only-female-on-federal-death-row.

234. United States v. Montgomery, 635 F.3d 1074, 1082 (8th Cir. 2011).

pseudocyesis."[235] The government's expert agreed with all diagnoses except for pseudocyesis.[236]

Litigation leading up to Montgomery's execution over a decade later also related to her mental health.[237] Her attorneys argued that, based on expert opinions and under *Ford*, "she lack[ed] a rational understanding of the government's reason for executing her."[238] Like in Purkey's case, the federal district court stayed the execution.[239] On appeal by the government, the U.S. Court of Appeals for the Seventh Circuit vacated the stay, determining that the timing of Montgomery's petition suggested strategic delay and that nothing in the petition overcame the strong presumption against a stay.[240] The U.S. Supreme Court denied Montgomery's request for relief from the decision, with Justices Breyer, Sotomayor, and Kagan dissenting.[241]

Ahead of the final execution of President Trump's unprecedented spree, Justice Sotomayor discussed her lasting concerns with the Court allowing the government to execute Purkey and Montgomery, recalling that both presented significant evidence of their incompetence that the Court essentially ignored in allowing their executions to proceed: "These findings with respect to Purkey and Montgomery raised significant questions as to whether their executions comported with the Constitution. We will never have definitive answers to those questions because this Court sanctioned their executions anyway."[242]

IV. RECENT CASES ILLUSTRATE THE INADEQUACY OF STATES' CURRENT PROCESSES

For decades, scholars have expressed concerns regarding the sufficiency of procedures for reviewing and determining incompetency claims for execution.[243]

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235. *Id.*

236. *Id.* Pseudocyesis is "a false belief of being pregnant that is associated with objective signs of pregnancy, which may include abdominal enlargement[,] . . . reduced menstrual flow, amenorrhea, subjective sensation of fetal movement, nausea, breast engorgement and secretions, and labor pains at the expected date of delivery." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 468-69 (4th ed. 2000).

237. Montgomery v. Watson, 833 F. App'x 438, 439 (7th Cir. 2021); *see also* Montgomery v. Barr, No. 20-3261, 2020 WL 6799140, at *2 (D.D.C. Nov. 19, 2020).

238. *Watson*, 833 F. App'x at 439.

239. *Id.*

240. *Id.*

241. Montgomery v. Watson, 141 S. Ct. 1232 (2021) (mem.).

242. United States v. Higgs, 141 S. Ct. 645, 651-52 (2021) (mem.) (Sotomayor, J., dissenting).

243. *E.g.*, Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F.L. REV. 823, 843 (2002) (arguing that death sentences of prisoners who are insane should be commuted to life); Tobolowsky, *supra* note 2.

Recent executions across the country illustrate the ongoing need for change in this area and the reality that the processes used today suffer from inadequacies that have existed for years. This Part canvasses recent cases from across the country in which competency for execution was at issue, most of which ended in execution.

A. The Case of Duane Owen (Florida)

In 2023, Florida executed Duane Owen after his attorneys raised and litigated claims that he was insane for execution.[244] Owen's counsel initiated this process based on claims that Owen suffered from delusions in which he believed that "he didn't kill the victim but, in fact, had taken them into his body through his penis, which acted as a hose to take their estrogen in, and that—the idea that he was seeking to transition himself through that from a man into a woman."[245]

After receiving counsel's request, Governor Ron DeSantis issued a temporary stay, as required by Rule 3.811, and appointed a panel of three psychiatrists to evaluate Owen.[246] After interviewing Owen for 100 minutes the day after the stay was issued,[247] the panel issued a report to Governor DeSantis concluding that Owen was sane for execution.[248] After receiving the Commission's report, on May 25, 2023, Governor DeSantis issued an Executive Order determining Owen was sane for execution and lifting the stay.[249]

Owen, through his attorneys, sought review in the trial court per Rule 3.811.[250] The trial court held a two-day evidentiary hearing, in which multiple experts confirmed that Owen had gender dysphoria and schizophrenia.[251] Owen had a fixed delusion of intending and desiring to be female, and "that to physically become a female [Owen] needed to absorb the fluids of his female victims . . . ."[252] As part of

244. Mallika Kallingal & Jamiel Lynch, *Florida Man Executed for 1984 Murders of Babysitter, Single Mother*, CNN (June 16, 2023, 1:58 PM), https://www.cnn.com/2023/06/16/us/florida-executes-inmate/index.html.

245. Initial Brief of the Appellant at 24, Owen v. State, No. SC2023-0819, 2023 WL 4027225 (Fla. 2023) [hereinafter Owen Initial Brief].

246. Fla. Exec. Order No. 23-106 (May 22, 2023).

247. Transcript on Appeal at 273, Owen v. State, No. 04-2023-CA-000264-CAAM, 2023 WL 6544889 (Fla. Cir. Ct. June 4, 2023) [hereinafter Owen Transcript].

248. *See* Petition for a Writ of Certiorari at 4, Owen v. State, 363 So. 3d 1035 (Fla. 2023) (No. 22-7764) [hereinafter Owen Petition for a Writ of Certiorari].

249. Fla. Exec. Order No. 23-116 (May 25, 2023).

250. Owen Petition for a Writ of Certiorari, *supra* note 248, at 4-5.

251. *See generally* Owen Initial Brief, *supra* note 245, at 11-12.

252. Owen Petition for a Writ of Certiorari, *supra* note 248, at 7.

the delusion, Owen believed that the souls of his victims (two young women) lived inside of him.[253]

Owen's counsel testified during an evidentiary hearing that when visiting Owen the day after Governor DeSantis issued his death warrant, "Owen was not the same Owen he had known in terms of Owen's cognitive abilities."[254] Owen would not discuss legal claims with counsel and instead "only wanted to discuss how the pending execution would prevent him from completing his transition from a man to a woman."[255]

After a two-day evidentiary hearing, the trial court concluded that Owen "failed to establish by clear and convincing evidence that he is insane to be executed."[256] The trial court found "it 'inconceivable and completely unbelievable' that Owen ha[d] 'any current mental illness' and determined that 'Owen's purported delusion [was] demonstrably false.'"[257] Owen then appealed to the Florida Supreme Court, which affirmed the trial court's ruling on June 9, 2023, finding the trial court's ruling was supported by competent, substantial evidence.[258] The Court also affirmed that the trial court applied the appropriate standard: that Owen had a "rational understanding of the fact of his pending execution and the reason for it and [was] aware that the State is executing him for the murders he committed and that he will physically die as a result of the execution."[259]

Owen was the first person to raise and litigate an incompetency for execution claim in Florida in ten years.[260] Before Owen, five people had raised and litigated claims under Florida's statute (as discussed above) all the way through the Rule 3.811 and 3.812 processes.[261] Owen's case proceeded through the Florida courts the fastest of the six and was the only instance where a stay of execution was not granted during the competency-related litigation.[262] In other words, Owen's case was resolved the fastest of all prisoners who have raised and litigated incompetency

253. *Id.* at 19.

254. *Id.* at 10.

255. *Id.*

256. Owen v. State, 363 So. 3d 1035, 1037 (Fla. 2023).

257. *Id.* at 1038 (quoting trial court).

258. *Id.*

259. *Id.* (internal quotation marks omitted).

260. *See Warrant Litigation, supra* note 162.

261. *Id.*; *The History of Rule 3.811*, *supra* note 144. The five people before Owen to litigate their claims of insanity for execution are Nollie Martin, Pedro Medina, Thomas Provenzano, John Ferguson, and Marshall Gore. Others have raised claims of insanity for execution but not fully litigated the claims through the litigation process for one reason or another. Those are not included here. *See Florida Execution List*, *supra* note 144.

262. *Warrant Litigation*, *supra* note 162.

for execution claims when facing execution in Florida. From start to finish, the litigation lasted twenty-four days, ending in Owen's execution on June 15, 2023.[263]

B. The Case of Johnny Johnson (Missouri)

In August 2023, Missouri executed Johnny Johnson after his attorneys unsuccessfully claimed he was insane for execution.[264] Johnson had a documented history of decades-long serious mental illness, including schizophrenia.[265] While evidence of Johnson's mental illness was presented at trial, he had not been determined incompetent.[266]

After the Supreme Court of Missouri set Johnson's execution, his attorneys sought relief based on a theory of incompetency for execution.[267] Johnson believed that "Satan [was] 'using' the State of Missouri to execute him in order to bring about the end of the world."[268] He believed "the spirits of the underworld [could] influence the State not to execute him for Satan's purposes."[269]

In support of his claim, Johnson presented evidence from Dr. Bhushan Agharkar, a psychiatrist who interviewed Johnson in February 2023 (approximately four months before his execution was set).[270] Dr. Agharkar concluded that Johnson did "not have a rational understanding of the link between his crime and his punishment."[271]

> Mr. Johnson is aware he is on death row and that he was convicted of murder. However, he does not have a rational understanding of the link between his crime and his punishment. His understanding of the reason for his execution is irrational and delusional, because he believes it is Satan "using"

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263. *Id.*; *Florida Execution List*, *supra* note 144.

264. Dakin Andone, *Missouri Executes Johnny Johnson, Convicted of Murdering a 6-Year-Old Girl, Despite his Claim he was Mentally Ill*, CNN (Aug. 2, 2023, 1:53 PM), https://www.cnn.com/2023/08/02/us/johnny-johnson-execution-casey-williamson/index.html. *See generally* Johnson v. Vandergriff, 143 S. Ct. 2551, 2551 (2023).

265. In a 2001 presentence evaluation, a psychiatrist determined that Johnson suffered from "schizophrenia, undifferentiated type." Appellant Statement, Brief and Argument at 8, Johnson v. Missouri, 550 U.S. 971 (2007) (No. SC91787).

266. *See generally id.*

267. Johnson v. Vandergriff, No. 23-2664, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551 (2023).

268. *Johnson*, 143 S. Ct. at 2552 ((Sotomayor, J., dissenting); *accord* State *ex rel.* Johnson v. Vandergriff, 668 S.W.3d 574, 577 (Mo. 2023), *cert. denied sub nom.* Johnson v. Vandergriff, No. 23-5243, 2023 WL 4881405 (U.S. Aug. 1, 2023).

269. *Johnson*, 668 S.W.3d at 577.

270. *Id.*

271. *Id.*

> the State of Missouri to execute him in order to bring about the end of the world and that the voice of Satan confirmed this plan to him. He believes he has been marked with the "Seventh Sign" and the world will be destroyed were he to die. His belief that he can change this plan by going into the judge and lawyers' heads to influence them to not execute him is likewise irrational and delusional, as is his belief that the spirits of the underworld can influence the State to not execute him for Satan's purposes. He endorsed delusional beliefs about his mortality, and while he conceded he "thinks" he would die by lethal injection, his statements that he is a vampire and able to "reanimate" his organs, and his belief he can enter an animal's mind if he can learn the right "code" in order to go on living after his execution show that he does not have a rational understanding of the finality of his punishment.[272]

The State argued that Johnson's "awareness" alone made him competent to be executed.[273] While the Court agreed that Johnson "lack[ed] a rational understanding of his punishment and genuinely believe[d] the true purpose of his execution is to do Satan's bidding and bring about the end of the world," the Court explained that, based on *Panetti*, "Johnson's awareness of the State's rationale for his execution should not end the inquiry as to whether he has a rational understanding of the reason for his penalty."[274] Ultimately, the Court determined that Dr. Agharkar's report was "contrary to the other evidence" and "Johnson's evidence lack[ed] credibility, particularly when viewed in light of the State's evidence, to demonstrate a substantial threshold showing of insanity."[275] Accordingly, the Supreme Court of Missouri denied Johnson's claim without a hearing.[276]

Johnson then sought relief in federal court, and the federal district court denied Johnson's petition, determining that the trial court did not err in denying a hearing.[277] The court reasoned that *Panetti* was "materially distinguishable" because, there, it was undisputed that "petitioner made a substantial threshold showing of insanity."[278] The court referred to the Supreme Court of Missouri's decision in *State ex rel. Cole v. Griffith*, holding Andre Cole was "not entitled to any further process under *Ford* and *Panetti* because he ha[d] been afforded the opportunity to submit

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272. *Id.*

273. *Id.* at 578.

274. *Id.*

275. *Id.* at 579.

276. *Id.*

277. Johnson v. Vandergriff, No. 4:23-CV-00845-MTS, 2023 WL 4560814, at *2 (E.D. Mo. July 17, 2023), *appeal dismissed*, No. 23-2664, 2023 WL 4851623 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551 (2023).

278. *Id.* at *3.

argument and evidence, including expert psychiatrist evidence, and to reply to the evidence submitted by the state."[279]

On application, a panel of the U.S. Court of Appeals for the Eighth Circuit originally granted a COA and a stay.[280] However, on review *en banc*, the Eighth Circuit denied the COA and lifted the stay.[281]

C. Benjamin Cole (Oklahoma)

Benjamin Cole was sentenced to death in Oklahoma for crimes that occurred in 2002.[282] Cole's competence was consistently a central issue in his case.[283] During pre-trial proceedings, Cole's attorneys raised concerns about his competence, but both the State's and defense's psychologists concluded he was competent to stand trial.[284] As early as 2004, Cole had been diagnosed with schizophrenia and "a significant brain lesion that worsen[ed] his symptoms making him paranoid and delusional."[285]

Beginning in January 2014, prison psychologists observed that Cole showed "minor symptoms of mental illness when they spoke with him."[286] Cole "exhibited looseness of association, poor eye contact, poor hygiene, decompensation, and exhibited signs of possible schizophrenia."[287]

On October 10, 2014, Oklahoma filed an application with the Court of Criminal Appeals of Oklahoma seeking an order scheduling a date for Cole's execution.[288] The Court set the execution for March 5, 2015.[289] Cole's execution was temporarily stayed on other grounds.[290] After the State again sought to set a date for Cole's execution, he filed a request for an evidentiary hearing on his competency to be

279. *Id.* at *4 (quoting State *ex rel.* Cole v. Griffith, 460 S.W.3d 349, 362 (Mo. 2015) (en banc)).

280. Johnson v. Vandergriff, No. 23-2664, 2023 WL 4861623, at *3 (8th Cir. July 29, 2023) (Kelly, J., dissenting).

281. *Id.* at *1.

282. Cole v. Trammell, 358 P.3d 932, 934 (Okla. Crim. App. 2015).

283. *Id.* at 936.

284. *Id.*

285. Petition for Original Writ of Habeas Corpus and Request for Stay of Execution by a Person in State Custody Under Title 28 United States Code Section 2241 at 2, *In Re* Benjamin Cole (2022) (stating that Defendant's execution was stayed from 2015 until early 2022).

286. *Trammell*, 358 P.3d at 937.

287. *Id.*

288. *Id.* at 935.

289. *Id.*

290. *Id.*

executed.[291] The trial court granted Cole an evidentiary hearing to make "a substantial threshold showing" of incompetency for execution.[292]

At the hearing in August 2015, Cole's attorneys introduced his personal writings, records from the Department of Corrections "concerning [Cole's] medical and mental health status," and four witnesses, including a psychiatrist.[293] After the hearing, the court determined Cole "had not met [his] burden of proof and had not shown" the Warden "refused to carry out a clear legal duty."[294]

On September 16, 2015, Cole sought "extraordinary relief" in the Oklahoma Court of Criminal Appeals of Oklahoma, requesting the Court issue a writ requiring the Warden of the Oklahoma State Penitentiary "to notify the District Attorney of Pittsburg County that there [was] good reason to believe that [Cole] . . . ha[d] become insane as provided in 22 O.S.2011, § 1005."[295] Cole raised several claims, including a challenge to "the adequacy of the procedure for determining whether he is competent to be executed,"[296] that he presently is incompetent, and that the trial court's "determination that he failed to establish that he was entitled to relief was erroneous."[297] Cole also requested a stay of execution, which was scheduled for October 7, 2015.[298]

The appellate court denied each of Cole's claims, concluding that Oklahoma's statute "afford[ed] more than the constitutionally mandated due process,"[299] and that the trial court did not abuse its discretion in determining Cole "had not met the burden of proof and had not shown [the State] had refused to carry out a clear legal duty."[300]

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291. *Id.*

292. *Id.* (quoting Allen v. State, 265 P.3d 754, 756-57 (Okla. Crim. App. 2011)) (holding that the process necessary to prevent an incompetent person from being executed requires a substantial threshold showing of insanity). On January 28, 2015, the U.S. Supreme Court temporarily stayed Cole's execution pending final disposition of a separate case for which the Court granted *certiorari*. *Id.* After finding Oklahoma's method of execution constitutional, on June 29, 2015, the U.S. Supreme Court dissolved the stay of Cole's execution. *Id.* at 935.

293. *Id.* at 935-36.

294. *Id.* at 936.

295. *Id.* at 934.

296. *Id.* at 938. Cole argued that the State's procedures for determining competency for execution violated the Constitution because it left the decision to a member of the executive branch—the Warden. *Id.*

297. *Id.*

298. *Id.* at 934.

299. *Id.* at 938.

300. *Id.* at 936.

After exhausting state procedures for determining competency to be executed, Cole filed a federal habeas petition in the U.S. District Court for the Northern District of Oklahoma.[301] His counsel argued that the physical effects of Cole's "brain lesion" and "wheelchair bound body" presented an "added dimension to the competency equation and overall constitutionality of his proposed execution."[302]

"In June 2022, the district court approved . . . a mental health evaluation [for Cole]."[303] The evaluation was conducted in July 2022 by Dr. Scott Orth, who found Cole competent to be executed.[304] Cole's execution was rescheduled for October 20, 2022, and he invoked the state's procedure for determining competency for execution, asking the Warden to refer him for competency proceedings.[305] (Note that Oklahoma's statute at the time was different than its current statute described above.)[306] The Warden refused to make the referral, determining that, upon "carefully consider[ing] all information and material" provided, Cole "ha[d] not become insane" since his delivery to the Warden for execution.[307]

The court denied his petition, and Cole sought a certificate of appealability (COA) from the U.S. Court of Appeals for the Tenth Circuit, asserting a due process challenge because he did not receive a new competency hearing after being delivered "to the warden for execution."[308] Cole sought a COA on two relevant issues:

I. Whether Mr. Cole made a substantial threshold showing of insanity sufficient to entitle him to a competency hearing that satisfied the *Ford* and *Panetti* due-process standard.
II. Whether the statutory procedure prescribed by Okla. Stat., tit. 22, § 1005 violates the Constitution by placing the warden—who is an

301. Cole v. Farris, 54 F.4th 1174, 1179 (10th Cir. 2022).

302. Petition for Original Writ of Habeas Corpus and Request for Stay of Execution by a Person in State Custody Under Title 28 United States Code Section 2241, *supra* note 285, at 9. Cole's execution was stayed from 2015 until early 2022, when the district court entered a judgment against Cole and other Oklahoma death-row inmates in a case challenging the state's execution method. *Id.*

303. *Cole*, 54 F.4th at 1179.

304. Petition for Original Writ of Habeas Corpus and Request for Stay of Execution by a Person in State Custody Under Title 28 United States Code Section 2241, *supra* note 285, at 4.

305. *Id.*

306. *See* OKLA. STAT. ANN. tit. 22, § 1005.1 (West, Westlaw through legislation of the Second Regular Session of the 59th Legislature).

307. Petition for Original Writ of Habeas Corpus and Request for Stay of Execution by a Person in State Custody Under Title 28 United States Code Section 2241, *supra* note 285, at 4-5.

308. *Cole*, 54 F.4th at 1179.

> executive officer and executioner—in the position of a gatekeeper who decides whether to seek a competency trial.[309]

The Tenth Circuit denied the COA, concluding that Cole "fail[ed] to show the district court's decision upholding the OCCA's determination was debatable among reasonable jurists."[310] The Tenth Circuit based its analysis on *Madison* and "whether a mental disorder has had a particular *effect*: an inability to rationally understand why a State is seeking execution."[311] The Tenth Circuit noted that Dr. Orth reported that Cole "not only accurately described his own execution date but provided fairly accurate estimated dates for the two inmates whose executions preceded his" and that Cole "acknowledged his understanding about execution proceedings, including the fact that the State of Oklahoma will execute him by lethal injection."[312] This "rational awareness," the Tenth Circuit explained, is not a "general 'competency' or freedom from mental illness,[but] is the standard the Supreme Court requires for a prisoner to be competent to be executed."[313]

Shortly after Cole was executed, the State of Oklahoma changed its procedure for determining incompetency for execution to the current process explained above.[314]

D. Scott Panetti Determined Incompetent for Execution

After the U.S. Supreme Court's landmark decision in his case in 2007, Panetti's execution date was reset for December 2014.[315] Panetti sought a stay of his execution for an opportunity to litigate his competency once again, ultimately receiving a stay in federal court.[316]

After various proceedings and a remand by the U.S. Court of Appeals for the Fifth Circuit, Panetti's third competency hearing was held in October 2022.[317] The

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309. *Id.* at 1178; *see also* OKLA. STAT. ANN. tit. 22, § 1005 (West, Westlaw repealed effective Nov. 1, 2022).

310. *Cole*, 54 F.4th at 1181.

311. *Id.* at 1178 (quoting Madison v. Alabama, 586 U.S. 265, 277 (2019)). In addition, Cole sought a COA on one other issue related to the state's execution protocol. *Id.*

312. *Id.* at 1181.

313. *Id.*

314. Cole's attorneys, in their Petition for Writ of Certiorari to the U.S. Supreme Court, mentioned that the new statute was set to go into effect eleven days after Cole's execution. Petition for Writ of Certiorari at 12, Cole v. Farris, 54 F.4th 1174 (10th Cir. 2022) (No. 22-5093) [hereinafter Cole Petition for Writ of Certiorari].

315. Panetti v. Lumpkin, No. A-04-CA-042-RP, 2023 WL 6348877, at *3 (W.D. Tex. Sept. 27, 2023).

316. *See id.*

317. *See id.* at *4.

evidence showed that Panetti's mental illness started when he was eighteen years old and involved numerous hospitalizations.[318] Both Panetti and the state presented testimony from various experts, all of whom "agree[d] that Panetti is a severely mentally ill person suffering from chronic schizophrenia, with symptoms at the very severe end of the schizophrenia spectrum. The experts also agree[d] that these symptoms—delusions, hallucinations, and disorganized thought processes—are genuine, and have consistently presented themselves throughout forty-plus years of Panetti's mental health history."[319] Further, "none of the experts believe[d] that Panetti is malingering."[320] Thus, the Court's inquiry turned on whether Panetti's mental illness interfered with his rational understanding of the execution.[321]

The Court explained that, although it could consider Panetti's prior history, the relevant inquiry was Panetti's current mental state—the "prisoner's mental state at the time an execution is imminent."[322] Therefore, prior determinations of competency were not determinative.[323]

Upon review of the evidence and the parties' post-hearing briefing, the U.S. District Court for the Western District of Texas ruled in September 2023—after Panetti's competency for execution had been "prolifically litigated" for twenty years[324]—that Scott Panetti is incompetent for execution.[325] After reviewing the evidence, the Court concluded:

> In short, the Eighth Amendment demands more than a single thread of arguably rational thought in a sea of otherwise disorganized thoughts and delusions to establish that a person rationally understands the reasons for his execution. And given the severity of Panetti's psychosis, the Court lack[s] confidence in Panetti's ability to rationally understand much of anything, let alone the "causal retributive connection" between his crime and

318. *Id.* at *1 ("In all, between 1981 and 1992, Panetti was hospitalized fourteen times in six different facilities for various mental health reasons, including symptoms of schizophrenia, manic depression, and paranoid delusions. Among other things, he has been diagnosed with sociopathic personality disorder, severe schizophrenia, and schizoaffective disorder. He was also repeatedly hospitalized for alcohol and drug abuse, which aggravated his underlying mental illness.").

319. *Id.* at *9.

320. *Id.*

321. *See id.* at *10 (citing Madison v. Alabama, 586 U.S. 265, 260 (2019)) ("[W]hile psychiatrists, psychologists, and other experts can contribute to this Court's understanding of these mental health issues, the sole inquiry for the Court remains a legal one—whether Panetti is 'so distorted by a mental illness' that he lacks a rational understanding of his conviction, his impending execution, and the relationship between the two.").

322. *Id.* at *4.

323. *See id.*

324. *Id.* at *2.

325. *Id.* at *12.

> impending death in this case. *Panetti*, 727 F.3d at 410. Panetti is a deeply-disturbed, severely mentally-ill individual whose mental condition precludes him from accurately or rationally perceiving and interpreting the world around him. He has no capacity to understand or comprehend the State's rationale for his execution. Therefore, the Court finds that Panetti is not competent to be executed for his crimes.[326]

V. FIXING A BROKEN SYSTEM

These recent cases from across the country indicate that, even after several decisions from the U.S. Supreme Court and robust discussion by scholars, the way states approach determining competency for execution remains deficient. Rather than providing safeguards against executing the insane, the procedures prove to be nothing more than procedural hurdles for the State in completing executions. This has been true for over a decade; as one scholar found in 2013, 86% of *Ford* claims filed between 1986 and 2013 were unsuccessful.[327]

This Part proposes a system for determining a prisoner's incompetency for execution that aims to minimize these deficiencies to ensure these claims are properly reviewed and determined to avoid further unconstitutional executions.[328] Section A reviews how experts evaluate prisoners who have raised claims of insanity for execution. Section B addresses the format and timing of proceedings for determining a prisoner's competency for execution.

A. Expert Evaluations

Oftentimes, a prisoner claiming incompetency for execution unsuccessfully seeks further diagnostic testing or evaluation before a final determination. This Section addresses how to standardize expert evaluations in this context to ensure

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326. *Id.*

327. Blume et al., *supra* note 2, at 10. For more statistics on these claims, see generally Blume et al., *supra* note 2.

328. While it is an important aspect of this discussion, this article (and specifically this Part) does not address what happens after a prisoner is determined insane for execution—including whether the government can constitutionally medicate the prisoner and/or reevaluate the prisoner at a later date after medication. For discussion on this topic, see generally, for example, Leah Eisenberg, *Medicating Death Row Inmates so They Qualify for Execution*, 6 HEALTH L. 377, 405 (2004); Kristen Wenstrup Crosby, *State v. Perry: Louisiana's Cure to Kill Scheme Forces Death Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 MINN. L.R. 1193, 1193 (1993); John E. Theuman, Annotation, *Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals*, 111 A.L.R. 5th 491, 491 (2003).

adequate information is obtained regarding the prisoner's mental condition—first, the expert's evaluation of the prisoner and then diagnostic testing.[329]

1. Parameters for Expert Evaluations

Across-the-board, experts' evaluations of prisoners seeking a determination of incompetency for execution vary greatly. Some experts spend several hours with the prisoner over several days. Others spend minutes with the prisoner in just one session before making a determination. For instance, in Duane Owen's case, the three-expert panel spent approximately 100 minutes with him before making their recommendation to the governor that he was sane for execution.[330] Defense experts, on the other hand, spent several hours over more than one day with Owen and testified that it took him a while to feel comfortable opening up.[331]

Because the accuracy of the experts' evaluation is critical to the veracity of these proceedings, we recommend that states consider standardizing certain aspects of the evaluations—including without limitation the format of evaluations, the length of time the expert must spend with the prisoner, the type of notes and/or records the expert must retain regarding the evaluation, etc.

As to the format of evaluations, all interviews conducted in this context should be done in-person. If requested, defense counsel should be allowed to attend each evaluation. Further, it is important that each evaluation be done individually, even if states employ a panel to evaluate the prisoner—as Florida does currently.[332] As Dr. Joseph E. Thornton, Clinical Associate Professor of Psychiatry at the University of Florida College of Medicine, explains, there is no clinical setting outside of this legal context where three psychiatrists would evaluate one patient at the same time.[333] Instead, each expert should spend equal time individually with the prisoner and provide his or her individualized findings.[334] If allowed by the prisoner and defense counsel, the evaluation may be videotaped.

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329. *Cf.* Tobolowsky, *supra* note 2, at 425 ("To ensure consistent application of the execution competency standard, examination protocols should be established and employed in all execution competency examinations."). While not addressed here, we agree with Professor Tobolowsky that experts used in this instance should be properly qualified. *Id.*

330. State v. Owen, No. 04-2023-CA-000264, 2023 WL 6544889, at *2 (Fla. Cir. Ct. June 4, 2023).

331. *Id.* ("According to Dr. Eisenstein, one interview is not sufficient, and 100 minutes of interview time is not sufficient, in part because Mr. Owen is reticent in talking about his specific delusion.").

332. *See* discussion *supra* Part III.A.1.

333. Zoom Interview with Joseph E. Thornton, M.D. (Jan. 5, 2024) [hereinafter Thornton Interview].

334. *Id.* In one case, doctors in Florida were found to have used the same "template" for a majority of incompetency for execution evaluations, even forgetting to remove John Ferguson's name from

Further, at minimum, states should require that each expert individually spend two hours with the prisoner to complete a formal initial evaluation of a client showing symptoms of incompetency.[335] This time should be outside of any time spent reviewing the prisoner's records.[336] Following the initial evaluation and record review, we recommend that states allow experts to conduct a follow-up evaluation if requested. According to Dr. Thornton, a total of six hours is likely required to provide a diagnosis or recommendation.[337]

2. Neuroimaging

Another common shortfall of proceedings related to prisoners' claims of incompetency for execution is the lack of diagnostic imaging.

When a person is suspected of having brain damage, neuro-diagnostic imaging (including MRI scans and PET scans) can show what the brain actually looks like, as opposed to an observation from a cognitive behavioral perspective.[338] The categorical exemption from execution for those who are incompetent depends upon whether the defendant has an altered perception of reality and abnormal brain functioning.[339] As established in *Ford* and its progeny, determining whether a prisoner is incompetent for execution requires a comprehensive and complex evidentiary hearing.[340] Yet, neuro-diagnostic imaging has rarely been used to evaluate competency in this context.[341]

In the years since *Ford*, scientific advancements—particularly, here, the advancement of brain imaging—have allowed doctors to better understand physical abnormalities in the brain, as well as improved the ability to confirm, document, and analyze these abnormalities and the conditions that impact cognitive functioning.[342] The DSM-5 reflects these scientific advancements with expanded criteria for

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their report submitted for Marshall Gore. Initial Brief for Appellant at 39, Gore v. State, 120 So. 3d 554 (Fla. 2013) (No. SC13-1281).

335. Thornton Interview, *supra* note 333.

336. *Id.*

337. *Id.*

338. Owen Transcript, *supra* note 247, at 53.

339. Alexa Johnson-Gomez, *The Brain on Death Row: Reconciling Neuroscience & Categorical Exemptions from Execution*, 24 MINN. J.L. SCI. & TECH. 447, 452-53 (2023).

340. Michael L. Perlin, *"Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow": Neuroimaging and Competency to be Executed after Panetti*, 28 BEHAV. SCIS. & L. 671, 688 (2010).

341. Michael L. Perlin & Alison J. Lynch, *"My Brain is so Wired"; Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities*, 27 B.U. PUB. INT. L. J. 73, 75 (2018).

342. *See, e.g.*, Reply to the Respondent's Brief in Opposition to Petition for Writ of Certiorari at 16-17, 29-30 & 32-35, Madison v. Alabama, 583 U.S. 1108 (2018) (No. 17-7505).

neurocognitive disorders.[343] For example, in Madison's case, brain imaging and testing confirmed Madison's cognitive decline.[344]

CT, MRI, and PET scans are three types of brain imaging tests that are available and widely used in modern medicine.[345] For purposes of evaluating competency for execution, a standard CT scan is not sensitive enough to provide the information necessary to form a diagnostic conclusion.[346] The scan may show holes in the brain structure, but it does not allow the doctor to evaluate fine structures.[347] CT scans also cannot measure structures in the area of the brain that covers memory, the hippocampus.[348]

Functional MRIs and PET scans are the gold standard for neuroimaging.[349] While they are used primarily for research, these scans can help diagnose conditions that are frequently discussed in competency determinations, including schizophrenia.[350] They are also useful for indicating depression, associations with negative thought processes, assisting in OCD diagnosis, and, among other things, indicating how a person is likely to react to certain trauma or neurological infirmity.[351]

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343. *See id.* at 30; *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Susan K. Schultz, & Emily A. Kuhl, eds., 5th ed. 2013) [hereinafter DSM-5].

344. Reply to the Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 342, at 32.

345. *See generally* Chiahui Yen et al., *Exploring the Frontiers of Neuroimaging: A Review of Recent Advances in Understanding Brain Functioning and Disorders*, 13 LIFE 1472 (2023); Tomoyo Morita et al., *Contribution of Neuroimaging Studies to Understanding Development of Human Cognitive Brain Functions*, 10 FRONTIERS IN HUM. NEUROSCIENCE 464 (2016).

346. Thornton Interview, *supra* note 333; *see* Kimberley Molina et al., *The Sensitivity of Computed Tomography (CT) Scans in Detecting Trauma: Are CT Scans Reliable Enough for Courtroom Testimony?*, 63 J. TRAUMA INJ., INFECTION, & CRITICAL CARE 625, 625 (2007) ("CT scans are an inadequate detection tool for forensic pathologists, where a definitive diagnosis is required, because they have a low level of accuracy in detecting traumatic injuries. CT scans may be adequate for clinicians in the emergency room setting, but are inadequate for courtroom testimony. If the evidence of trauma is based solely on CT scan reports, there is a high possibility of erroneous accusations, indictments, and convictions.").

347. Paula Patel & Orlando De Jesus, *CT Scan*, NAT'L CTR. FOR BIOTECH. INFO., https://www.ncbi.nlm.nih.gov/books/NBK567796/ (last updated Jan. 2, 2023).

348. S. Heckers & C. Konradi, *Hippocampal Neurons in Schizophrenia,* 109 J. NEURAL TRANSMISSION 891, 891 (2002) ("Neuropsychiatric disorders including temporal lobe epilepsy, amnesia, [dementia, and schizophrenia] are associated with structural and functional abnormalities of specific hippocampal neurons.").

349. *See* Freimut D. Juengling et al., *Simultaneous PET/MRI: The Future Gold Standard for Characterizing Motor Neuron Disease—A Clinico-Radiological and Neuroscientific Perspective*, 13 FRONTIERS IN NEUROLOGY (Aug. 16, 2022), https://www.frontiersin.org/journals/neurology/articles/10.3389/fneur.2022.890425/full.

350. *Id.*

351. Thornton Interview, *supra* note 333.

Advanced technology in neuroimaging has affected competency determinations in several cases.[352] For example, the technology provided undisputed evidence that Madison suffered from vascular dementia and brain injury.[353] Madison's defense attorneys argued that "the evolving landscape of evidence allowing courts to adequately review maladies that could give rise to incompetence . . . [is] relevant to the evolving standards of decency that define the Eighth Amendment's core values . . . ."[354]

In Benjamin Cole's case, Dr. Linda Haymen identified a lesion in Cole's basal ganglia region of his brain in 2004 based on an MRI.[355] Lesions in that specific area are indicative of schizophrenia, which is a neuro-chemical disease.[356] Dr. Travis Snyder reviewed an MRI performed on Cole on March 30, 2022, and found the results to be "markedly abnormal, demonstrating multiple pathological findings, including the previously-mentioned lesion."[357]

Lisa Montgomery's 2021 petition for writ of habeas corpus and application for a stay referred to neuroimaging that showed Montgomery's brain was "damaged structurally and functionally."[358]

Based on the utility and unique perspective neuroimaging provides, we recommend that it be considered routine in this context. A brain MRI should be ordered for any person claiming incompetency for execution. While not as specific as a functional test like a PET scan, MRIs are widespread, accurate, and available at a lower cost than other types of imaging.[359] They are also easily understood by most neurologists or psychiatrists working with radiologists.[360]

Even if an MRI is not specifically indicative of a particular malady, the scan can certainly show damage, wear and tear in the brain blood vessels, and abnormalities that can assist in confirming a doctor's interpretation of a patient's behavior.[361]

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352. *See id.*

353. *See* Reply to the Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 342, at 9.

354. *See id.* at 35.

355. Cole Petition for Writ of Certiorari, *supra* note 314, at 12.

356. *Id.*

357. *Id.* at 13.

358. Alison Lynch et al., *'My Bewildering Brain Toils in Vain': Traumatic Brain Injury, the Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS U.L. REV. 215, 247 (2021).

359. Thornton Interview, *supra* note 333.

360. *Id.*

361. *Id.*; Evelyne Baroud et al., *Brain Imaging in New Onset Psychiatric Presentations,* 16 INNOVATIONS IN CLINICAL NEUROSCIENCE 21, 21 (2019); *see also* Jeffrey A. Lieberman et al., *Practice*

Experts may have slightly different interpretations of the results, but having a material diagnostic imaging done of the brain, particularly of this type, would provide a concrete baseline for evaluating incompetency for execution.[362]

Once an MRI scan is completed, states should allow defense attorneys to request, by court order for good cause, a PET scan. Good cause would include situations where the prisoner's abnormalities require further imaging, or if an evaluating psychiatrist suggests one be ordered.

Having this type of evidence available can also aid the factfinder in their determination. For example, a defense expert may argue a defendant is suffering from a particular abnormality, and the state's expert might refute that opinion—creating a "battle of the experts."[363] A brain scan showing a lesion or lesions on the brain, even though not indicative of the causation or manifestations, would provide irrefutable, concrete evidence of a brain abnormality to assist the court with assessing the contradicting experts' opinions. With that, a reasonable person would be able to infer the current level of functioning in the frontal lobe and the condition of the deeper basal ganglia (which impacts one's ability to read and plan), suggesting that good imaging improves the inferences.

While we believe that standardizing neuroimaging will aid in this process, it is important to make clear that diagnostic imaging is a tool that assists doctors in providing the most comprehensive and non-biased evaluation of the defendant—in addition to other tools including medical records, empirical evaluations, etc. It is not conclusive evidence of the prisoner's competency. In other words, a normal brain scan does not necessarily indicate that the person is competent to be executed.

3. Other Diagnostics

Standardized tests should be used during the evaluation process to obtain objective measures to present to the factfinder. For instance, the Montreal Cognitive Assessment (MoCA) is a widespread and robust screening tool commonly used to evaluate executive functioning, attention, language, memory, orientation, and visuo-spatial abilities.[364] This test is an example of one that could provide the factfinder with objective data to consider.

Guideline for the Treatment of Patients with Schizophrenia, Second Edition, 161 AM. J. PSYCHIATRY 1, 23 (2004).

362. Thornton Interview, *supra* note 333.

363. Cole Petition for Writ of Certiorari, *supra* note 314, at 17.

364. Edoardo Nicolò Aiello et al., *The Montreal Cognitive Assessment (MoCA): Updated Norms and Psychometric Insights into Adaptive Testing from Healthy Individuals in Northern Italy*, 34 AGING CLINICAL & EXPERIMENTAL RSCH. 375, 375-76 (2021).

Further, if a doctor suspects that the defendant is malingering, the doctor must perform a standardized test aimed to determine the presence of malingering,[365] such as the Structured Interview of Reported Symptoms (SIRS) malingering test.[366] An expert should not be permitted to make a malingering determination without performing such a test.

4. Prisoner's Refusal of Evaluation

If a defendant is unable to respond or unwilling to participate in evaluations and testing, a doctor is obligated to report that to the relevant legal parties.[367] No doctor should evaluate a client for competency for execution without making perfectly clear his role in the evaluation, which is not to support or care for the defendant, but to instead follow legal procedures and safeguards and then offer an expert opinion for the judge to consider in addition to other evidence.[368] If the defendant refuses to cooperate, there can be no diagnosis or conclusion offered.[369] For instance, a doctor should avoid making a conclusion that the prisoner must be malingering because he avoided the evaluation.[370]

B. Redefining Competency Proceedings

As this article has shown, the processes that states use across the country for determining a prisoner's competency for execution fall short in various respects of upholding prisoners' rights under the U.S. Constitution—including the right to due process under the Fifth and Fourteenth Amendments and the rights under the Eighth Amendment the Court discussed in *Ford* and its progeny.[371] This Section attempts to redefine various aspects of the process for determining a prisoner's competency for execution in an effort to uphold those rights.

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365. The National Library of Medicine defines "malingering" as "falsification or profound exaggeration of illness (physical or mental) to gain external benefits such as avoiding work or responsibility, seeking drugs, avoiding trial (law), seeking attention, avoiding military services, leave from school, paid leave from a job, among others." Ubaid ullah Alozai & Pamela K. McPherson, *Malingering*, NAT'L INST. OF HEALTH (June 12, 2023), https://www.ncbi.nlm.nih.gov/books/NBK507837/.

366. Thornton Interview, *supra* note 333. "The SIRS is the most commonly used and best-validated assessment in the forensic detection of malingering . . . ." Jeffrey Walczyk et al., *A Review of Approaches to Detecting Malingering in Forensic Contexts Promising Cognitive Load-Inducing Detection Techniques,* 9 FRONTIERS IN PSYCHIATRY, (Dec. 21, 2018), https://www.frontiersin.org/journals/psychiatry/articles/10.3389/fpsyt.2018.00700/full.

367. Thornton Interview, *supra* note 333.

368. *Id.*

369. *Id.*

370. *Id.*

371. *See* Ford v. Wainwright, 477 U.S. 399, 416 (1986).

1. An Adversarial Process

In some states, like Alabama, the process for determining competency for execution begins in the trial courts.[372] In other states, such as Florida, the process begins with the Executive—the Governor makes a determination of the prisoner's competency,[373] which can then be challenged in the trial court.[374] We propose that Alabama's approach—*i.e.*, facilitating the determination of a prisoner's competency for execution in an adversarial proceeding in the trial court—should be the standard. As one scholar explained in 2007, utilizing the adversarial process in this context is "necessary to fully examine the competency issue and prevent an unconstitutional execution of an incompetent offender."[375]

The process should begin and proceed in an adversarial process in the trial court with a motion being filed by the prisoner's counsel or prison staff who believe there is good cause for determining the prisoner is insane for execution.[376] As one scholar previously explained, allowing "multiple . . . parties to initiate proceedings," such as correctional personnel, defense counsel, and even the prisoner's family and friends, "the risk of unresolved execution competency issues can be reduced."[377]

Upon the filing of a motion, the adversarial process should proceed with the judge making an initial determination under the controlling standard whether the prisoner has made the threshold showing of insanity to proceed to an evidentiary hearing.[378] Utilizing the adversary process minimizes the possibility of bias and sway in this constitutional determination—which is prevalent in the procedures used by states like Florida.

Letting the Executive control the process from the outset, as Florida does, taints the process from the beginning. The Governor, "[t]he commander of the State's corps of prosecutors,"[379] has a political interest in the execution proceeding.[380]

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372. *See* Madison v. Alabama, 586 U.S. 265, 281 (2019).

373. FLA. STAT. ANN. § 922.05 (West 2013).

374. FLA. R. CRIM. P. 3.203(c)(3).

375. Tobolowsky, *supra* note 2, at 424.

376. *See id.* at 421.

377. *See id.* at 422.

378. *See id.* ("A judge should be the decision maker regarding whether the initial threshold showing of incompetency has been made to warrant further inquiry, and if so, that judge should be the ultimate decision maker regarding execution competency . . . ." (footnotes omitted)). For jurisdictional and venue considerations, see *id.* at 422-23.

379. *See* Ford v. Wainwright, 477 U.S. 399, 416 (1986).

380. *Cf.* Maurice Chammah, *How the Death Penalty Is Returning to Presidential Politics*, THE MARSHALL PROJECT (April 22, 2023, 12:00 PM), https://www.themarshallproject.org/2023/04/22/florida-trump-desantis-death-penalty-politics.

Therefore, allowing the Governor to control the appointment of the experts in the initial phase and to render the initial determination of competency based on those experts' recommendations skews the proceedings from the beginning.[381] As the majority said in *Ford*, the Governor "cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding."[382] Justice Powell further addressed this concern in his concurring in part decision in *Ford*, where he explained that he did not see any reason "for affording any deference to the Governor's determination" of sanity in Ford's case, in part because "the Governor is [t]he commander of the State's corps of prosecutors."[383]

Even though Florida's statute directs that review of the Governor's determination is *de novo*, the same Governor-appointed experts serve as the State's testifying experts when the case goes to litigation. Duane Owen's case from 2023 illustrates this problem. In Owen's case, two of the three governor-appointed experts, Dr. Wade Myers, M.D. and Dr. Tonia Werner, M.D., had been appointed by the governor of Florida in several prior cases to determine the prisoner's competency for execution, including the other Florida cases discussed in this article.[384] Not one time did either of them recommend determining the prisoner was incompetent.[385] The third doctor, Dr. Emily Lazarou, M.D., had not previously been appointed to determine a prisoner's competency for execution but was a mentee of Dr. Myers, who worked at a Florida prison and often testified for the State in other contexts.[386]

While experts are supposed to be objective, their ability to be truly objective in this circumstance must be questioned considering they are appointed by the Governor. Of course, in the general adversarial proceeding, experts generally are hired by a specific party, and their opinion generally aligns with the hiring party's interests.

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381. *See Ford*, 477 U.S. at 416.

382. *Id.*

383. *Id.* at 423 (Powell, J., concurring in part).

384. Owen Transcript, *supra* note 247, at 139 (Dr. Werner testifying she had been appointed approximately five prior times to determine a prisoner's competency for execution); *id.* at 257 (Dr. Myers testifying he had been appointed "approximately ten times" before to determine a prisoner's competency for execution); *see Owen Warrant Update: After Two Days of Testimony, Bradford County Ruling Expected Tuesday*, TRACKING FLA.'S DEATH PENALTY (June 2, 2023) https://fladeathpenalty.substack.com/p/owen-warrant-update-after-two-days [hereinafter *Owen Warrant Update*] (summarizing the doctors' testimony).

385. Owen Transcript, *supra* note 247, at 139, 147, 279-80 (explaining that they did not find death row defendants incompetent while a warrant is signed); *Owen Warrant Update*, *supra* note 384 (summarizing the doctors' testimony).

386. Owen Transcript, *supra* note 247, at 325, 357, 363; *Owen Warrant Update*, *supra* note 384 (summarizing the doctors' testimony); *see* Romy Ellenbogen & Dan Sullivan, *Florida Doctor Involved in Death Row Case Criticized Execution Vigil*, TAMPA BAY TIMES (June 14, 2023), https://www.tampabay.com/news/crime/2023/06/14/florida-doctor-involved-death-row-case-criticized-execution-vigil/.

However, there is more of an inherent bias in this situation where the experts are appointed by the Governor and comprise the entire panel assigned to make a recommendation to the Governor in the first stage of Florida's process for determining competency for execution. The State's institutional experts greenlight the execution to proceed, putting the defense at a large disadvantage in attempting to overcome the State's experts' opinions with independent expert testimony in later proceedings.

2. Mandatory Stay to Ensure Due Process

In most state and federal cases, the issue of insanity for execution is not ripe for review until the prisoner is under an active death warrant.[387] Therefore, the need to raise and litigate the issue is sprung on the prisoner and his or her attorneys with a moment's notice when the death warrant is issued.[388] With short warrant periods, the defense is left scrambling in a "fire drill" attempt to stop the execution as a result of the prisoner's mental incapacity.[389] Even as time progresses—with society's support for capital punishment declining and the imposition of death sentences declining—claims of insanity are being resolved even more summarily than they have been in the past, as shown by Duane Owen's case in Florida.[390]

To ensure prisoners claiming incompetency for execution are afforded appropriate due process, it should be required that, upon a claim of incompetency for execution, any scheduled execution be stayed for at least 100 days to allow for (a) diagnostic testing as needed, which is discussed further below, (b) the parties to properly litigate the claim, and (c) for a determination on the evidence.

States like Missouri and Florida already direct that any scheduled execution be stayed upon a claim of incompetency.[391] However, the length of the stay is not standardized.[392] As Duane Owen's recent Florida case showed, the stay was only a

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387. *Id.* at 421. For further discussion on how execution-related claims are litigated and the procedural difficulties prisoners face in litigating these claims, see generally Kalmanson, *supra* note 143, at 1, 15-16, 19 & 21.

388. *See, e.g.*, United States v. Higgs, 141 S. Ct. 645, 647 (2021) (Sotomayor, J., dissenting) ("This rapid pace required those facing execution to fast-track challenges to their sentences. . . . The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours.").

389. Jimenez v. State, 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., concurring in part and dissenting in part) ("This extremely short warrant period created a fire drill approach to the review of Jimenez's claims.").

390. *See supra* Part IV.A.

391. S*ee* MO. REV. STAT. § 552.060 (2022); FLA. STAT. ANN. § 922.07 (West, through 2024 regular session).

392. *See* MO. REV. STAT. § 552.060 (2022).

matter of days and was more perfunctory than substantive.[393] This proposed 100-day time-period aims to provide both sides with adequate time to properly litigate the claim without unduly delaying the execution. The 100-day timeframe is consistent with the stay imposed by the Oklahoma Court of Criminal Appeals in James Ryder's case in December 2023 to allow for a hearing on Ryder's competency for execution.[394]

Providing for a mandatory stay would allow the parties to focus on the constitutional threshold claim of insanity without the pressure of a looming execution. The prejudice to the State and victim as a result of the stay is minimal, as the execution can be swiftly reset once litigation regarding the prisoner's claim of insanity is concluded, if it is determined that the execution can proceed.[395] As Judge Millett of the U.S. Court of Appeals for the District of Columbia explained in *Montgomery v. Rosen*, ahead of Lisa Montgomery's 2021 execution: "[T]he movant's injury is quintessentially irreparable, with no corresponding harm to the government entailed in simply postponing for a short time the date of execution."[396]

3. Jury Determination

Upon a determination that the prisoner has made a threshold showing under the applicable standard, the proceeding should proceed toward a determination by the factfinder of the prisoner's competency for execution by a preponderance of the evidence.[397] While most states provide for a determination by a trial judge, we recommend that states allow the defense to request a jury determination and, upon such request, require the trial court to empanel a jury to make the competency determination.

This proposal is consistent with Alabama's current statute, which provides that the competency statute "shall not prevent the judge or court from impaneling a jury

393. *See generally* State v. Owen, No. 04-2023-CA-000264, 2023 WL 6544889, at *1 (Fla. Cir. Ct. June 4, 2023).

394. Sean Murphy, *Oklahoma's Next Lethal Injection Delayed for 100 Days for Competency Hearing*, ASSOCIATED PRESS (Jan. 3, 2024), https://apnews.com/article/oklahoma-execution-james-ryder-death-penalty-1595e2b05a52358bcc506c9dd11b275e.

395. Application for Stay of Execution at 4, Owen v. State, No. 22-7764 (2023) ("Florida has a minimal interest in finality and efficient enforcement of judgments, but Owen, whose delusions and dementia prevent him from rationally understanding the consequences of his execution, has a right in ensuring that his execution comports with the Constitution."); Barr v. Purkey, 140 S. Ct. 2594, 2599 (2020) (Sotomayor, J., dissenting) ("[D]espite the grave questions and factual findings regarding his mental competency, casts a shroud of constitutional doubt over the most irrevocable of injuries.").

396. Montgomery v. Rosen, No. 21-5001, 2021 WL 116391, at *4 (D.C. Cir. Jan. 11, 2021) (Millett, J., dissenting).

397. *See infra* Part V.B.5.

to try the question of insanity or from examining such witnesses as he may deem proper for guidance."[398]

Further, this proposal honors the prisoner's rights under the U.S. Constitution. Consistent with the right to a jury trial under the Sixth Amendment,[399] this proposal provides the defense with the option of a jury determination of competency. A jury is involved at the most critical stages of a capital punishment proceeding—determining guilt and determining the appropriate penalty. When a defendant raises an insanity defense at trial, that determination is left to the jury.[400] It follows that a jury, in an adversarial proceeding, would make the determination whether the defendant is competent for execution.

Indeed, this proposal is likewise consistent with the Eighth Amendment's goal of ensuring capital punishment comports with the "evolving standards of decency"[401] by allowing a "cross section"[402] of society to confirm that the execution should proceed. The execution is the pinnacle of a capital punishment case, and it should likewise be up to a jury, comprised of members of the community, whether the execution can withstand scrutiny. As with other jury determinations in the capital punishment process,[403] the outcome would be subject to appeal to ensure the jury's determination is supported by the record.

4. Standard for Competency

Setting the standard for competency for execution is a complex balancing test. On one hand is the possibility of malingering and the State's (and victim's) interest in finality. On the other is the possibility of getting it wrong and conducting an execution that violates the Eighth Amendment. Setting the standard too low begs the question of whether executions even serve their retributive purpose.[404] Since *Panetti*, scholars have debated whether the standard set forth in the Court's decision is sufficient and how to properly articulate the competency standard for execution.[405]

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398. ALA. CODE § 15-16-23 (1975).

399. U.S. CONST. amend. VI.

400. *See* Richard Arens et al., *Jurors, Jury Charges, and Insanity*, 14 CATH. UNIV. L. REV. 1, 4 (1965).

401. Baze v. Rees, 553 U.S. 35, 115 (2008) (Ginsburg, J., dissenting).

402. *Id.* at 84.

403. *See generally id.*

404. *See, e.g.*, Malone, *supra* note 4, at 149; *see also supra* notes 9-10 and accompanying text.

405. *See, e.g.*, Horstman, *supra* note 243, at 836-40; Studen, *supra* note 95, at 165 (discussing how courts should use other areas of the law "to craft a proper test" for competency in this context);

In 2007, following *Panetti*, one scholar argued that the standard for competency should include consideration of the prisoner's ability to assist counsel in legal proceedings.[406] She explained that a "double-pronged execution competency definition, with both cognitive and assistance of counsel prongs, is more consistent with the common law origins of the execution prohibition and more likely to ensure against the unconstitutional execution of incompetent offenders."[407] This is consistent with the U.S. Supreme Court's sentiment related to the standard for competency to stand trial in *Dusky*: "[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[408]

Considering the import of pre-execution litigation, we agree that the prisoner's ability to assist counsel should be considered in determining a prisoner's competency for execution. Accordingly, we would propose the following standard for competency:

> A prisoner is incompetent for execution if, at the time a death warrant is signed scheduling the prisoner's execution, the prisoner, due to a mental condition, disease, or defect, is (a) unable to rationally understand the reason for the execution, (b) unable to rationally understand the consequence of the execution, or (c) unable to competently assist counsel in pre-execution litigation.

5. Burden of Proof: Preponderance of the Evidence

While standards of proof may seem amorphous at times, "adopting a 'standard of proof is more than an empty semantic exercise.'"[409] The U.S. Supreme Court has explained that, at the least, the standard of proof gives some indication of societal values related to the issue at hand.[410] For instance, criminal convictions must be

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Tobolowsky, *supra* note 2, at 372 (proposing a model definition for incompetency to be used in this context).

406. *See* Tobolowsky, *supra* note 2, at 418-19.

407. *Id.* at 419.

408. Dusky v. United States, 362 U.S. 402, 402 (1960).

409. Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

410. Cooper v. Oklahoma, 517 U.S. 348, 362 (1996) (The purpose of a standard of proof, "as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"); *Addington*, 441 U.S. at 425 ("In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'") (quoting *Tippett*, 436 F.2d at 1156).

borne by proof beyond a reasonable doubt—the highest standard—because of the value society places on personal freedom.[411]

In this context, though, there is an inverse relationship with the societal value and the burden because, rather than the State, the burden falls on the condemned to rebut the presumption of competence.[412] In other words, a higher burden indicates lower societal value placed on the veracity of the outcome and ensuring incompetent individuals are immune from execution.[413]

Currently, states are not uniform as to the appropriate burden of proof to impose on prisoners seeking to establish incompetency for execution.[414] Some states use a "preponderance of the evidence" standard, while others use the higher "clear, unequivocal and convincing" standard.[415]

When a criminal defendant seeks to establish he is incompetent to stand trial, the applicable burden is a preponderance of the evidence; the defendant must overcome the presumption of competency by a preponderance of the evidence.[416] In 1996, in *Cooper v. Oklahoma*, the U.S. Supreme Court held that states cannot impose a higher burden on this inquiry because it violates due process to require a criminal defendant to prove incompetence to stand trial by clear and convincing evidence.[417] The Court explained that "[t]he *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent."[418]

Consistent with the Court's reasoning in *Cooper*, states should uniformly employ the preponderance of the evidence standard for determining competency for execution. Employing the heightened clear and convincing standard places a significant burden on the condemned that does not comport with the Constitution.

Imposing this heightened burden increases the risk of error, and the consequences of an error are wholly one-sided. As the Court explained in *Cooper*, "[t]he 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'"[419] As in the instance of determining competence for

411. *Addington*, 441 U.S. at 424.

412. *See Cooper*, 517 U.S. at 359.

413. *See id.*

414. *See Addington*, 441 U.S. at 430-31.

415. *Id.* at 424 (explaining that the "clear and convincing" standard is an "intermediate standard" somewhere between "preponderance of the evidence" and "beyond a reasonable doubt").

416. *See Cooper*, 517 U.S. at 362.

417. *See generally id.*

418. *Id.* at 369.

419. *Id.* at 362 (quoting Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 283 (1990)).

trial, "[f]or the defendant, the consequences of an erroneous determination of competence are dire."[420] In this context, that is arguably even more true—as the consequence of an errant determination, the condemned's execution, is irreversible.

To the contrary, despite arguments made by prosecutors in recent cases, the harm to the State if an errant determination of incompetence is made "is modest," as the Court explained in *Cooper* in the context of a determination of incompetency for trial.[421] Similar to the impact the Court analyzed in *Cooper*, the State may suffer "an expense on the state treasury" and frustration of the State's interest in completing the execution.[422] However, it is arguable whether the State would actually even experience an increase in costs. Any increase would likely be minimal considering that the State would avoid the costs associated with the remainder of the execution process (which would otherwise be incurred if the condemned is determined competent for execution).[423] And, regardless, the State would not forego the ability to continue incarcerating the prisoner under sentence of death.

VI. CONCLUSION

The U.S. Supreme Court's decision in *Ford* and its progeny established that executing people who are incompetent does not serve the penological justifications for the death penalty.[424] The execution loses its retributive value when the condemned "has no comprehension of why he has been singled out and stripped of his fundamental right to life."[425] Still, various states have not implemented or maintained sufficient procedural safeguards to appropriately determine whether a person has the rational understanding that the Eighth Amendment of the U.S. Constitution requires prior to execution.[426] As this article explained, procedures across the country fail to meet the constitutional threshold established in *Ford*—allowing bias and political clout to affect the conclusory proceedings.[427]

Addressing these longstanding constitutional deficiencies, this article proposes several recommendations states should consider in assessing whether their

420. *Id.* at 364.

421. *Id.* at 365.

422. *Id.*

423. These costs would include further litigation related to the execution, including likely an appeal of the competence determination, as well as the costs associated with the execution itself. *See, e.g.*, *State Studies on Monetary Costs*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty (last visited Nov. 12, 2023) (summarizing studies from around the country on the increased costs associated with the death penalty, including executions).

424. *See* Ford v. Wainwright, 477 U.S. 399, 417 (1986).

425. *Id.* at 409; *see* Larkin, *supra* note 7, at 777 & n.58.

426. *See* Larkin, *supra* note 7, at 794-96.

427. *Id.* at 772. *See generally Ford*, 477 U.S. 399.

procedures for determining competency for execution comport with the requirements of the Eighth Amendment, as explained by the U.S. Supreme Court's precedent. For example, this article proposes that states automatically stay any scheduled execution for 100 days when a prisoner raises a claim of incompetence for execution to allow attorneys and the courts adequate time to litigate and review the claim, including the necessary expert evaluation.[428]

Further, this article is one of the first to contribute recommendations for improving and standardizing the expert evaluation process involved in determining a prisoner's incompetency for execution. These recommendations relate to the format, length, documentation, and records kept during the evaluation.

As Justice Sotomayor recently wrote in her dissenting opinion just before the state of Alabama executed Kenny Smith using its novel nitrogen hypoxia execution method, "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."[429] So long as this country maintains the death penalty and states continue to conduct executions, we must endeavor to ensure the Eighth Amendment's protection against executing the incompetent is upheld.

428. *See* Larkin, *supra* note 7, at 794.

429. Smith v. Hamm, 144 S. Ct. 414, 416 (2024) (Sotomayor, J., dissenting) (quoting Hall v. Florida, 572 U.S. 701, 708 (2014)).