COMPETENCY FOR EXECUTION IN THE WAKE OF *PANETTI*: SHIFTING THE BURDEN TO THE GOVERNMENT

I. INTRODUCTION

Approximately two hundred prisoners sitting on death row are mentally ill.[1] Distinguishing mental illness from legal insanity can be a difficult exercise in line drawing, and additional complications arise when determining what procedure is required to protect the constitutional rights of the insane. These matters can be so difficult, in fact, that when handling these issues the Supreme Court tends to leave many of the details up in the air for the states to determine as they see fit.[2]

In *Ford v. Wainwright*,[3] the Supreme Court unequivocally determined that the Eighth Amendment prohibits executing the insane, but it chose not to define insanity, instead leaving it for the states to determine.[4] This issue returned to the Supreme Court in 2007 when Scott Panetti, a capital defendant alleging he was incompetent for execution, challenged the insanity standard set by the Texas courts, which required only awareness on the part of the defendant of his crime and his punishment.[5] While the Supreme Court held that in order to be competent for execution a prisoner must have more than mere awareness—he must have a rational understanding of the State's rationale for his execution[6]—it chose not to set out the procedures that must be afforded to the prisoner alleging incompetence for execution.[7] On remand, the district court decided to place a double presumption against the allegedly incompetent defendant—first the defendant must make a substantial showing of insanity to trigger a hearing, and ultimately the defendant must prove by a preponderance of the evidence that he is incompetent to be executed.[8]

The case has been appealed and will likely find its way back up the court system for a more intricate description of the rights that should be afforded to defendants alleging incompetence for execution. It is also just one illustration of the issues faced by defendants attempting to navigate the requirements for incompetency that the Supreme Court has never really finished articulating.

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1. Abid Aslam, *Hundreds of Mentally Ill to Be Executed in America: Amnesty*, COMMON DREAMS, Feb. 2, 2006, http://www.commondreams.org/headlines06/0202-02.htm.

2. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2383–87 (2008) (holding mentally ill defendant may be competent to stand trial while being incompetent to conduct his own defense, but declining to set standard for self-representation); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (determining Eighth Amendment prohibits executing insane convicts but avoiding setting definition for insanity).

3. 477 U.S. 399 (1986).

4. *Ford*, 477 U.S. at 410, 416–17.

5. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 956 (2007).

6. *Id.* at 959–61.

7. *Id.* at 960–61.

8. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *33 (W.D. Tex. Mar. 26, 2008).

This Comment explores the law leading up to this point in competency for execution, and argues against placing a double burden on the defendant claiming incompetence for execution. Placing the initial burden of triggering the hearing process on the defendant is necessary in order to avoid constant litigation, and is in line with the precedent that a defendant is presumed sane.[9] This Comment argues that once the defendant has triggered that hearing process, the presumption of sanity vanishes and the burden should then shift to the government to prove the defendant's competence.

Part II of this Comment presents an overview of the relevant law. Part II.A discusses the relationship between mental illness and capital punishment, as well as Supreme Court precedent in other relevant areas such as competency for trial[10] and competence for self-representation.[11] Part II.B discusses competency for execution prior to the *Panetti* case including the landmark case of *Ford v. Wainwright*.[12] Part II.C discusses the *Panetti* opinion in both the lower courts[13] and the Supreme Court.[14]

Part III makes several distinct arguments as to why the burden of proof should fall on the government to prove a defendant's competency for execution. Part III.A argues that it is inappropriate to place the burden of proof on the defendant because a claim of incompetence for execution is based on contemporary information that was not available at a prior time for litigation. Generally, a defendant attempting to litigate new information is not required to shoulder the burden of proof.

Part III.B describes the clear precedent that has been set throughout death penalty jurisprudence that greater precautions must be taken when a defendant's life is at stake. This Comment argues that placing a double burden of proof on an allegedly incompetent defendant sentenced to death flies in the face of capital jurisprudence. Part III.C discusses a line of cases culminating in *Ring v. Arizona*[15] which held that aggravating factors must be treated as akin to essential elements of a crime because absent aggravating factors the defendant cannot be sentenced to death.[16] This Comment argues that following the *Ring* reasoning, sanity should be considered an essential element of an offense, and accordingly, the prosecution should be required to prove sanity beyond a reasonable doubt in a competence-for-execution proceeding. Finally, Part III.D argues that while the Supreme Court

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9. *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 766 (2006) (stating that presumption of sanity is universal).

10. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) ("[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." (internal quotation omitted)).

11. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2385–88 (2008) (establishing test for determining competence for self-representation).

12. *See* Ford v. Wainwright, 477 U.S. 399, 410–12 (1986) (discussing standard for competence for execution).

13. *Panetti II*, 2008 WL 2338498.

14. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930 (2007).

15. 536 U.S. 584 (2002).

16. *Ring*, 536 U.S. at 601, 609.

set an appropriate standard for insanity in *Panetti*, the district court erred in its application of that standard, an error which never would have occurred but for the district court's double presumption against Panetti.

Overall this Comment argues that not only did the *Panetti* district court incorrectly assess whether the defendant was insane, but that going forward the double burden should be rejected and the government should shoulder the ultimate burden of proving the defendant competent for execution. Placing the ultimate burden on the government will alleviate the constitutional violations that are sure to follow a procedure that makes death the default position for a defendant of questionable competency.[17]

II. OVERVIEW

A. Mental Illness and Capital Punishment

Approximately one percent of the U.S. population suffers from schizophrenia.[18] Though it is difficult to compute exact figures, one study found that fifty-six percent of state prison inmates suffer from mental illness[19] and the American Civil Liberties Union estimates that up to ten percent of inmates on death row suffer from a serious mental illness.[20] Many cases involving a criminal defendant with questionable competency center around a defendant suffering from a psychotic illness.[21]

Defendants who suffer from psychotic illnesses that impact their ability to appropriately understand reality cause great confusion in criminal law. Schizophrenia, a common mental illness involving psychotic symptoms, is typically defined to encompass two or more of the following five symptoms: (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly disorganized or catatonic behavior; and (5) negative symptoms, i.e., affective flattening (diminished emotional expressiveness), alogia (poverty of speech), or avolition (inability to initiate and persist in goal-oriented activities).[22] The condition is also characterized by functional impairment in a major area including interpersonal relationships, communication, or self-care.[23]

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17. *See* Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (stating in capital cases Eighth Amendment requires increased degree of accuracy and fact-finding); *Ford*, 477 U.S. at 411–12 (stating where execution is contingent on particular fact, Constitution requires that fact to be determined with "high regard for truth that befits a decision affecting the life or death of a human being").

18. Schizophrenia.com, Schizophrenia Facts and Statistics, http://www.schizophrenia.com/szfacts.htm (last visited Jan. 19, 2011).

19. Erik Eckholm, *Inmates Report Mental Illness at High Levels*, N.Y. TIMES, Sept. 7, 2006, at A22.

20. *See* Dan Malone, *Cruel and Inhumane: Executing the Mentally Ill*, AMNESTY INT'L MAG., Winter 2008, http://www.amnestyusa.org/amnesty-magazine/fall-2005/cruel-and-inhumane-executing-the-mentally-ill /page.do?id=1105184&n1=2&n2=19&n3=354 (citing American Civil Liberties Union data).

21. *See, e.g.*, Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 935–42 (2007) (focusing on sanity of psychotic defendant); *Ford*, 477 U.S. at 402–05 (same).

22. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299–301, 312, 463–64 (4th ed. text rev. 2000).

23. U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL, 271 (1999), *available at* http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c4.pdf.

Delusions, a common symptom of schizophrenia, greatly affect the person's ability to rationally understand reality. A delusion is defined as "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary."[24]

Schizophrenia can also impair cognitive functioning. Cognitive dysfunction in the areas of information processing, abstract categorization, regulating goal-directed behavior, cognitive flexibility, and memory are often found in persons suffering from schizophrenia.[25] Current research on schizophrenia suggests that problems with cognitive functioning may actually be at the center of the illness rather than just a side effect of the illness.[26] Studies generally agree that the level of cognitive dysfunction in a schizophrenic patient varies from person to person over time.[27] Though it is debatable whether schizophrenia or the cognitive dysfunction associated with schizophrenia is the cause, studies show that those with schizophrenia often experience impaired decision-making ability.[28] The MacArthur studies examined the decision-making abilities of persons recently hospitalized for mental illness as compared to both those recently hospitalized for a physical illness and a control group.[29] The study found that those with mental illnesses more frequently showed deficits in their decision-making abilities than those in the other groups.[30] This was especially true for patients diagnosed with schizophrenia.[31] The study found that some schizophrenics performed adequately in the study but that those with more severe symptoms, such as disorganized thinking and delusions, tended to fare worse.[32]

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24. AM. PSYCHIATRIC ASS'N, *supra* note 22, at 821.

25. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 23, at 272.

26. *Id.*

27. *Id.*

28. *See* Scott Stroup et al., *Decision-Making Capacity for Research Participation Among Individuals in the CATIE Schizophrenia Trial*, 80 SCHIZOPHRENIA RES. 1, 1–2 (2005) (finding decision-making capacity of schizophrenic patients was affected only by working memory); Joan Arehart-Treichel, *Schizophrenia May Not Impair Decision-Making Ability*, PSYCHIATRIC NEWS, Apr. 2, 2004, at 56, *available at* http://pn.psychiatryonline.org/cgi/content/full/39/7/56?maxtoshow=&HITS=40&hits=40&RESULTFORMAT=&fulltext=jeste&searchid=1&FIRSTINDEX=0&sortspec=date&resourcetype=HWCIT (finding "considerable heterogeneity in decisional capacity" amongst schizophrenic patients).

29. Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 LAW & HUM. BEHAV. 149, 150 (1995). For research related to the frequency of hospital admissions for schizophrenic patients, see Neven Henigsberg & Vera Folnegović-Šmalc, *Frequency and Length of Schizophrenia Admissions: Analysis by ICD-10 Defined Subtypes*, 11 J. FOR GEN. SOC. ISSUES 113, 114–16 (2002) (Croat.), *available at* http://hrcak.srce.hr/file/30931 (finding frequently schizophrenic patients discharged from hospital must be readmitted due to decrease in functioning).

30. Grisso & Appelbaum, *supra* note 29, at 159–62.

31. *Id.*

32. *Id.*

B. Confusion in Competency Standards: Competence to Stand Trial, Competence to Proceed Pro Se, and Allocating the Burden of Proof

Assessing competency can be problematic when dealing with a defendant suffering from a psychotic mental illness because such illnesses may leave certain areas of functioning intact while distorting other brain functions.[33] For example, the process of a schizophrenic person's thinking may appear normal while the content of the thinking seems bizarre.[34] Additional problems occur because symptoms of a person with schizophrenia do not necessarily progress or remain static; rather, the condition of a person with schizophrenia is likely to vary over time.[35] Such inconsistencies have caused the Supreme Court difficulty in addressing competency standards and procedure for mentally ill defendants, stating "[t]he beginning of doubt about competence in a case . . . is not a misanthropic personality or an amoral character. It is a psychotic disorder."[36]

The courts have struggled to set clear competency standards for the mentally ill in various stages of trial proceedings.[37] In *Dusky v. United States*,[38] the Supreme Court proclaimed a definitive standard which has survived many years.[39] According to the *Dusky* standard, to be competent, a defendant must have the ability to consult with his or her lawyer with a reasonable degree of understanding, and must have a factual as well as rational understanding of trial proceedings.[40]

Despite the clarity of the *Dusky* standard, the courts have struggled with determining which party should shoulder the burden of proof in competence-for-

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33. Brief for Amici Curiae American Psychological Ass'n et al. in Support of Petitioner at 10, Panetti v. Quarterman, 127 S. Ct. 2842 (2007) (No. 06-6407), 2007 WL 579235. For information regarding the standard for competency for execution proposed by psychologists, see 11 HANDBOOK OF PSYCHOLOGY 432 (Irving B. Weiner et al. eds., 2003); Kimberley S. Ackerson et al., *Judges' and Psychologists' Assessments of Legal and Clinical Factors in Competence for Execution*, 11 PSYCHOL. PUB. POL'Y & L. 164, 169 (2005). *See also* Brown v. Dodd, 484 U.S. 874, 876–77 (1987) (Marshall, J., dissenting) (discussing role of experts in competency determinations); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 59–61, (2000) (discussing problems inherent in relying on experts).

34. *See* Brief for Amici Curiae American Psychological Ass'n et al., *supra* note 33, at 10 (explaining landmark study showing rationalizations of bizarre beliefs).

35. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 23, at 273–74.

36. *Panetti I*, 551 U.S. at 960.

37. *Compare* James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992) (placing burden of proving substantive claim of incompetency on defendant), *with* United States v. Makris, 535 F.2d 899, 906 (5th Cir. 1976) (stating government must prove defendant competent to stand trial).

38. 362 U.S. 402 (1960).

39. Additionally, the Court has unequivocally determined that if a defendant's competency to stand trial is in question, a court must hold an evidentiary hearing. *See, e.g.*, Porter v. McKaskle, 466 U.S. 984, 985 (1984) (Marshall, J., dissenting) (emphasizing obligation of trial judge to order competency examination); Pate v. Robinson, 383 U.S. 375, 378–86 (1966) (stating that denial of sanity hearing can result in deprivation of right to fair trial). The Supreme Court has made clear that the courts must carefully guard the rights of the incompetent defendant. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 363–67 (1996) (emphasizing fundamental right of criminal defendant to be tried only when competent); Wolfe v. Weisner, 488 F.3d 234, 238 (4th Cir. 2007) (recognizing that state court defendant has right against being tried while incompetent).

40. *Dusky*, 362 U.S. at 402.

trial proceedings.[41] While several circuits place the burden of proof on the government,[42] others place the burden of proving incompetence for trial on the defendant.[43] The Supreme Court has provided, however, that regardless of whom the courts choose to shoulder the burden of proof in competency for trial proceedings, if the facts are sufficient to raise a doubt as to the defendant's competency for trial, the court must hold an evidentiary hearing even if it does so on its own motion.[44]

In another line of cases in which the Supreme Court struggled with burden of proof issues, the Court held that aggravating factors in a death penalty case must be proved beyond a reasonable doubt by the prosecution.[45] Though the Court had originally held that aggravating factors are not an essential element of a crime,[46] it later determined that because absent aggravating factors a defendant could not be sentenced to death, aggravating factors are functionally equivalent to essential elements of a crime.[47] Accordingly, the burden of proof for proving aggravating factors is the same as proving an essential element of the crime, and the burden falls on the prosecution to prove those factors beyond a reasonable doubt.[48]

The competency standard for a mentally ill defendant to represent himself at trial is less sturdy than the *Dusky* standard and still evolving. In *Faretta v. California*,[49] the Supreme Court established that a defendant has a constitutional right to represent himself at trial when he voluntarily and intelligently elects to do so, subject to certain qualifications.[50] There remains considerable debate over whether the *Dusky* standard for a mentally ill defendant to be competent to stand trial is coterminous with the pro se competency standard.[51] Some courts have chosen to put in place a standard higher than the *Dusky* requirements for a

41. *Compare James*, 957 F.2d at 1571 (establishing that defendant bears burden of proving substantive claim of incompetency), *with Makris*, 535 F.2d at 906 (establishing that government must prove competency to stand trial).

42. *See, e.g.*, *Makris*, 535 F.2d at 906 (finding "no question" that government has burden to prove defendant competent to stand trial in Fifth Circuit federal criminal cases).

43. *See, e.g.*, *James*, 957 F.2d at 1571 (finding defendant bears burden to produce clear and convincing evidence indicating substantial doubt that would entitle defendant to incompetency hearing).

44. *Porter*, 466 U.S. at 985 (Marshall, J., dissenting).

45. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding Sixth Amendment requires that aggravating circumstances necessary for imposition of death penalty be determined by jury).

46. *See* Walton v. Arizona, 497 U.S. 639, 649 (1990) (rejecting defendant's argument that aggravating factors are "'elements' of the offense"), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

47. *Ring*, 536 U.S. at 609.

48. *Id.* at 612 (Scalia, J., concurring).

49. 422 U.S. 806 (1975).

50. *See Faretta*, 422 U.S. at 834 n.46 (stating Sixth Amendment provides constitutional right to self-representation but right can be terminated where defendant deliberately and seriously obstructs his own trial).

51. *See, e.g.*, Sara G. West & Sherif Soliman, *Competence to Stand Trial and Competence to Proceed* Pro Se*: A Unitary Standard?*, 36 J. AM. ACAD. PSYCHIATRY & L. 577, 578–79 (2008) (discussing effect of recent federal and state law on deciding whether competency for trial and pro se competency are defined by unitary standard).

defendant to proceed pro se.[52] In deciding whether a mentally ill defendant may choose to waive counsel and enter a guilty plea, the Ninth Circuit, in *Sieling v. Eyman*,[53] adopted a standard different from that of the *Dusky* standard. The court examined whether a defendant's mental condition "'ha[d] substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.'"[54]

The Supreme Court addressed the issue of pro se competency in *Godinez v. Moran*.[55] In *Godinez*, a mentally ill defendant was charged with three counts of first-degree murder and the prosecution sought the death penalty.[56] Godinez, the defendant, waived his right to counsel, entered a guilty plea, and was sentenced to death.[57] Godinez appealed, arguing that although he was found competent to stand trial, he was not competent to represent himself.[58] The Supreme Court determined that once a defendant is found competent to stand trial, he is also competent to enter a guilty plea and waive his right to counsel.[59] Thus, according to the Supreme Court in *Godinez*, although courts are free to raise the standard required for competency to waive the right to counsel, the Due Process Clause requires only that the defendant meet the *Dusky* standard for competency to stand trial to be considered competent for various stages and decisions of the criminal proceedings.[60]

In June of 2008, the Supreme Court again addressed the issue of pro se competency in *Indiana v. Edwards*.[61] In *Edwards*, Ahmad Edwards tried to steal a pair of shoes from a department store and when chased, he fired a gun at a store security officer and wounded a bystander.[62] Over the course of three years, Edwards was found incompetent to stand trial twice due to schizophrenic illness.[63] However, in June of 2004 Edwards was found competent to stand trial,

52. *See, e.g.*, Sieling v. Eyman, 478 F.2d 211, 214–15 (9th Cir. 1973) (concluding that degree of competency required by defendant to waive constitutional right is "that degree which enables him to make decisions of very serious import"); State v. Briggs, 787 A.2d 479, 486 (R.I. 2001) (citing State v. Chabot, 682 A.2d 1377, 1380 (R.I. 1996)) (listing factors courts should consider when determining if defendant may proceed pro se, including defendant's age, education, experience, background, behavior at hearing, mental and physical health, contact with lawyers before hearing, knowledge of proceedings and knowledge of possible sentence).

53. 478 F.2d 211 (9th Cir. 1973).

54. *Sieling*, 478 F.2d at 215 (quoting Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970) (Hufstedler, J., dissenting)). The federal courts are split on the appropriate standard for withdrawing a guilty plea. *Compare* United States v. Izquierdo, 448 F.3d 1269, 1276–77 (11th Cir. 2006) (placing heavy burden on defendant in withdrawing guilty plea), *with* United States v. Thomas, 519 F. Supp. 2d 135, 139 (D. Me. 2007) (placing burden on government to prove defendant is competent).

55. 509 U.S. 389 (1993).

56. *Godinez*, 509 U.S. at 391–92.

57. *Id.* at 392–93.

58. *Id.* at 393.

59. *See id.* at 398–400 (stating that competency to stand trial and knowing and voluntary waiver of constitutional rights are all that is necessary before defendant may be "permitted to plead guilty or waive his right to counsel").

60. *Id.* at 402.

61. 128 S. Ct. 2379 (2008).

62. *Edwards*, 128 S. Ct. at 2382.

63. *Id.*

and a year later, his trial began.[64] Just prior to trial, Edwards requested to represent himself, but the trial court determined based on his psychiatric history and continuing affliction of schizophrenia that, despite being competent to stand trial, he was incompetent to represent himself.[65] Edwards argued for a constitutional right to proceed pro se.[66]

The Supreme Court determined that *Edwards* presented an issue of first impression: whether a court may constitutionally insist on counsel for a mentally ill defendant who wishes to proceed pro se.[67] The Court distinguished *Godinez* because *Godinez* involved only the right to waive counsel to enter a guilty plea, not the right to proceed pro se in the entire trial as Edwards wished to do.[68] In holding that the State may constitutionally insist that a mentally ill defendant be represented by counsel, the Court examined prior law and determined that precedent "points slightly in [that] direction."[69] The *Edwards* Court also discussed the potential for a mentally incompetent defendant to be humiliated in his self-representation effort as well as the threat of failing to achieve a proper result.[70]

Finally, the *Edwards* Court discussed the problems inherent in using a single mental competency standard to determine whether a defendant is competent to stand trial as well as whether a defendant is competent to represent himself.[71] Because mental illnesses vary over time and affect functioning at different times in different ways,[72] it is possible that a mentally ill defendant may be competent to stand trial while being incompetent to conduct his own defense.[73]

The *Edwards* Court affirmed that the standard for competency to stand trial is the *Dusky* standard;[74] however, the *Edwards* Court expressly declined to define

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64. *Id.*

65. *Id.* at 2382–83.

66. *See id.* at 2383 (arguing Sixth Amendment provides constitutional right for defendant to choose self-representation).

67. *Id.* at 2383–86.

68. *Id.* at 2385.

69. *Id.* at 2386–88. The *Edwards* Court examined two prior cases. Referring to the language in *Dusky* stating that the competency standard is focused on the defendant's "present ability to consult with his lawyer," the *Edwards* Court held that competency "standards assume representation by counsel and [thus] emphasize the importance of counsel." *Id*. at 2386 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). Additionally, the *Edwards* Court discussed the "foundational self-representation case," *Faretta,* which concluded that the right to self-representation contemplates a competency limitation. *Id*. (citing Faretta v. California, 422 U.S. 806, 813 (1975)).

70. *Id.* at 2387. In contrast, it is presumed the performance of counsel is effective. In order to prove counsel was ineffective, the defendant bears the burden of showing that his or her attorney was deficient and that such deficiency affected the outcome of the case. Strickland v. Washington, 466 U.S. 668, 687 (1984).

71. *Edwards*, 128 S. Ct. at 2386–87.

72. See *supra* Part II.A for a discussion regarding the nature of mental illness.

73. *Edwards*, 128 S. Ct. at 2387 (citing Brief for the American Psychiatric Ass'n & American Academy of Psychiatry & the Law as Amici Curiae in Support of Neither Party at 26, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-028), 2008 WL 405546; NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 103 (2002) (suggesting competency varies for different tasks among schizophrenic criminal defendants)).

74. *Edwards*, 128 S. Ct. at 2388. *See Dusky*, 362 U.S. at 402 (requiring defendant to have rational and factual understanding of proceedings against him as well as sufficient present ability to consult with

the standard for self-representation.[75] Instead, the Court simply rejected Indiana's proposed standard, which would "'deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury.'"[76] According to the *Edwards* Court, such a standard might be confusing in practice.[77]

C. Competence for Execution: Setting the Standard in Ford v. Wainwright

The courts have also faced great difficulty in determining the competency standard for a mentally ill defendant to be executed as well as the procedural requirements in determining competence for execution.[78] The first comprehensive analysis covering the competency to be executed issue was in the 1986 case of *Ford v. Wainwright*.[79] "Ford was convicted of murder in 1974 and sentenced to death."[80] Ford never argued "that he was incompetent at the time of his offense, at trial, or at sentencing."[81] However, in 1982 Ford began to manifest behavioral changes including delusions that he was the target of a conspiracy involving the Ku Klux Klan.[82] His behavior continued to deteriorate: he believed there was a hostage situation inside the prison involving his relatives and celebrities, and he referred to himself as "Pope John Paul, III."[83] Ford continued to regress further into nearly complete incomprehensibility as he spoke only in code.[84] Ford was examined by multiple psychiatrists, each of whom reported that Ford suffered from schizophrenia or some form of psychosis that interfered with his ability to assist in his defense and to understand the reasons for his impending execution.[85] Yet, Ford was subsequently examined by three state-appointed psychiatrists, each of whom found that Ford *was* able to understand the nature of the death penalty and why it would be imposed on him.[86]

Based on these diagnoses, the Florida governor signed a death warrant for Ford's execution.[87] The district court denied Ford's request for a hearing on his

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his lawyer with reasonable degree of rational understanding). See *supra* notes 38–40 and accompanying text for a complete discussion of the *Dusky* standard.

75. *Edwards*, 128 S. Ct. at 2388.

76. *Id.* at 2388 (quoting Brief for Petitioner at 20, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 336303).

77. *Id.*

78. *See* Walton v. Arizona, 497 U.S. 639, 653–54 (1990) (holding it is sufficient for judge to determine whether aggravating or mitigating factors call for leniency from execution), *overruled by* Ring v. Arizona, 536 U.S. 584, 609 (2002) (stating aggravating factors are "functional equivalent" of essential elements and must be proved beyond reasonable doubt by prosecution).

79. 477 U.S. 399 (1986).

80. *Ford*, 477 U.S. at 401.

81. *Id.*

82. *Id.* at 402.

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

84. *Id.* at 402–03.

85. *Id.* See also *supra* Part II.A for a discussion of how schizophrenia can interfere with a defendant's ability to participate in his criminal proceedings.

86. *Ford*, 477 U.S. at 403–04.

87. *Id.* at 404.

competency as well as his habeas corpus petition, but the Supreme Court granted Ford's petition for habeas corpus to determine whether the Eighth Amendment prohibits execution of the insane.[88]

The Eighth Amendment prohibits the imposition of cruel and unusual punishment.[89] Noting that there was consensus among all fifty states that the insane should not be executed, the Supreme Court concluded that the Eighth Amendment prohibits a state from executing a prisoner who is insane.[90] The Court cited several rationales, including the idea that such executions deviate from standards of human decency as well as the argument that executions of the insane serve no retributive purpose.[91] While holding that procedures to ascertain a prisoner's sanity prior to execution must be at least as stringent as the standards for other parts of the capital proceeding, the plurality opinion did not address the appropriate definition of insanity.[92]

In his concurrence, Justice Powell defined the meaning of insanity in the context of competency to be executed.[93] Stating that society continues to be concerned that executions of the insane are cruel and serve no retributive purpose, Justice Powell argued that the Florida statute requiring a stay of executions for those who "'d[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed' on them" meets constitutional minimums.[94] Justice Powell "would hold 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."[95]

Justice Powell also addressed the procedures that should be followed by state courts in determining defendant prisoner's sanity. Under the relevant Florida statute the Governor made the ultimate finding regarding the sanity of a prisoner sentenced to execution.[96] Justice Powell agreed with the plurality that the

88. *Id.* at 404–05.

89. U.S. CONST. amend. VIII.

90. *Ford*, 477 U.S. at 408–10.

91. *Id.* at 407–08.

92. *Id.* at 411–12, 416–17. Subsequent cases have noted that execution cases require additional precautions. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 362 (2004) (Breyer, J., dissenting) (stating risk of error which is legally tolerable diminishes in capital proceeding); Apprendi v. New Jersey, 530 U.S. 466, 522–23 (2000) (Thomas, J., concurring) (stating only in area of capital punishment is legislature limited in determining what facts will lead to particular punishments); McFarland v. Scott, 512 U.S. 849, 854 n.2 (1994) (stating counsel representing capital defendants must meet more stringent experience requirements than counsel representing noncapital defendants); Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (stating Eighth Amendment case must be more accurate than other cases); Sawyer v. Whitley, 505 U.S. 333, 366 (1992) (Stevens, J., concurring) (stating it is "heartlessly perverse" to place "more stringent standard of proof" on capital defendant than noncapital defendant); *see also* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 22–23 (1991) (discussing government interest in maintaining integrity of capital punishment system and ensuring that capital punishment is not applied arbitrarily).

93. *See Ford*, 477 U.S. at 418–23 (Powell, J., concurring) (discussing history of execution of mentally deficient criminals and what standard should govern who is "insane").

94. *Id.* at 421 (quoting FLA. STAT. § 922.07 (1985 and Supp. 1986)).

95. *Id.* at 422.

96. *Id.* at 423.

Governor's finding regarding a prisoner's sanity is not entitled to a presumption of correctness on review under 28 U.S.C. § 2254(d) because the statute requires deference to state court findings and not to those of the executive branch.[97] Additionally, Justice Powell opined that the State did not give Ford a full and fair hearing, and the decision to execute must not lie entirely within the executive branch.[98] Rather, he argued that the defendant is entitled to a proper judicial hearing with full procedural rights.[99] Justice Powell also stated that when, prior to being convicted and sentenced, a prisoner has already been found competent, the State may presume that the petitioner remains sane for execution unless the prisoner can make "a substantial threshold showing of insanity . . . to trigger the hearing process."[100]

D. A Chance to Clear the Confusion: Competency for Execution in Panetti

The Supreme Court again examined the procedure and standard of competency for execution of a mentally ill defendant in 2007 in *Panetti v. Quarterman* (*Panetti I*).[101] The Supreme Court held in *Panetti* that to be executed a prisoner must not only be aware of the reason for his execution, the prisoner must have a rational understanding of the State's rationale for his execution.[102] It was from this holding that on remand the district court held that a prisoner challenging his incompetence for execution must meet a double burden—first he must show that his competency has deteriorated since the time of trial to trigger the hearing process, then the prisoner must establish his incompetence by a preponderance of the evidence.[103]

Scott Louis Panetti was convicted in a Texas state court of murdering his estranged wife's parents in front of his wife and daughter.[104] The record showed a long history of mental illness for Panetti including extreme psychosis characterized by delusions, hallucinations, and a dose of medication so high as to be intolerable for most people.[105] Panetti was found competent to stand trial and later competent to represent himself at trial.[106] In finding Panetti competent to represent himself, the trial court applied the same standard as that used in finding Panetti competent to stand trial.[107]

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97. *Id.*; *see also* 28 U.S.C. § 2254(d) (2000) (governing standards for habeas corpus petitions).

98. *See Ford*, 477 U.S. at 423 (Powell, J., concurring) (questioning governor's impartiality given his position as "'commander of the State's corps of prosecutors'" (quoting *Ford*, 477 U.S. at 416 (plurality opinion))).

99. *Id.* at 424.

100. *Id.* at 425–26; *see also* Clark v. Arizona, 548 U.S. 735, 766–67 (2006) (stating criminal defendant is presumed sane).

101. 551 U.S. 930 (2007).

102. *Panetti I*, 551 U.S. at 959–60.

103. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *34 (W.D. Tex. Mar. 26, 2008).

104. *Panetti I*, 551 U.S. at 935–36.

105. *Id.* at 936.

106. *Id.*

107. *Panetti II*, 2008 WL 2338498, at *12.

At trial, Panetti engaged in behavior so bizarre that his standby counsel stated it was obvious he suffered from "mental incompetence" and the trial was thus rendered "a judicial farce, and a mockery of self-representation."[108] Panetti dressed up in a cowboy costume, summoned witnesses including J.F.K. and Jesus Christ, continually ignored the orders of the trial judge, frightened the jurors by staring at them, and harassed his ex-wife on the witness stand.[109] Panetti's statements would often become rambling and incomprehensible.[110] Panetti was sentenced to death and two months later was found incompetent to waive the appointment of state habeas counsel.[111]

After the trial court set an execution date, Panetti filed a motion claiming for the first time that he was incompetent to be executed due to mental illness and accordingly that his execution would constitute cruel and unusual punishment under the Eighth Amendment.[112] The Texas trial court denied the motion without a hearing and the Texas Court of Criminal Appeals dismissed for lack of jurisdiction.[113] Panetti then filed a federal habeas petition raising his *Ford* claim.[114] The district court stayed Panetti's execution to allow the state court to consider the evidence of Panetti's then-current state.[115] Panetti filed motions in the state court requesting funds for a mental health expert and a competency hearing but instead the state sent two court-appointed mental health experts.[116] The experts concluded that Panetti knew of his execution and was capable of understanding the reasons for his execution.[117] Panetti filed a motion criticizing the court-appointed experts' methodology and renewed his motion for a mental health expert and a competency hearing.[118] Without responding to Panetti's motions, the state court closed the case stating Panetti failed to show by a preponderance of the evidence that he was incompetent to be executed.[119]

Panetti returned to the district court seeking a resolution on his § 2254[120] habeas petition.[121] The district court held that Panetti's state court proceedings had failed to comply with both state law and the *Ford* requirements.[122] Ultimately, however, the district court granted no relief, finding that Panetti had not demonstrated that he met the burden for incompetency as he knew of his

108. *Panetti I*, 551 U.S. at 936 (internal quotation marks omitted).
109. *Panetti II*, 2008 WL 2338498, at *35.
110. *Id.* at *12.
111. *Panetti I*, 551 U.S. at 937.
112. *Id.* at 938.
113. *Id.*
114. *Id.* The motion was filed under 28 U.S.C. § 2254 (2000). *Id.*
115. *Id.*
116. *Id.* at 939–40.
117. *Id.* at 940.
118. *Id.* at 940–41.
119. *Id.* at 941.
120. 28 U.S.C. § 2254 (2006).
121. *Panetti I*, 551 U.S. at 941.
122. *Id.* at 941–42.

impending execution and the factual predicate for it.[123] The Fifth Circuit affirmed, and the Supreme Court granted certiorari.[124]

The government claimed that the Supreme Court lacked jurisdiction under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[125] because Panetti's first federal habeas petition had not included a *Ford* claim and that under AEDPA, deference was due to the state court competency findings.[126] The Supreme Court rejected both claims finding that the *Ford* competency claims were not ripe at the time of Panetti's state proceedings and because Panetti was not afforded the minimum procedures required by *Ford*, the Supreme Court held it could review the case *de novo*.[127]

In addressing the procedural requirements for a prisoner alleging incompetence for execution, the *Panetti* Court stated that though there was no majority opinion in *Ford*, Justice Powell's concurrence regarding the process required for competency hearings "constitutes 'clearly established' law" because it comprises the narrower holding.[128] Accordingly, as it was uncontested that Panetti made a "substantial threshold showing of insanity," he was entitled to a fair hearing including an opportunity to be heard regarding his competency to be executed.[129] Therefore, as a threshold matter, the Supreme Court held that the district court failed to meet the constitutional minimums set forth in *Ford* as it did not allow Panetti the opportunity to respond to the evidence against him.[130]

The Supreme Court then set out to determine whether the Eighth Amendment permits execution of a prisoner who is unable to "understand that he is being executed as a punishment for a crime."[131] Panetti had stated that he

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123. *Id.* at 942.

124. *Id.*

125. 28 U.S.C. § 2264 states,

> (a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
>
> (b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

28 U.S.C. § 2264 (2006).

126. *Panetti I*, 551 U.S. at 942.

127. *Id.* at 948.

128. *Id.* at 949 (quoting 28 U.S.C. § 2254(d)(1) (2006)).

129. *Id.* at 950 (citing Ford v. Wainwright, 477 U.S. 399, 426 (1986) (Powell, J., concurring)).

130. *Id.* at 951. In addition to the *Ford* holding that execution of the insane violates the Eighth Amendment, subsequent Supreme Court cases stated that under the Eighth Amendment, more stringent precautions are required in a capital case in order to reduce the risk of erroneously sentencing the defendant to death. *See, e.g.*, Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (noting that greater degree of accuracy and fact finding is needed in capital cases than in noncapital cases).

131. *Panetti I*, 551 U.S. at 954 (internal quotations omitted).

understood that the State sought to execute him for murder, but he believed the reason was a "sham" and the State actually wanted to execute him to "stop him from preaching."[132] The record supported the notion that Panetti actually experienced these delusions and that Panetti spent a great deal of time "preaching" the Bible in prison.[133]

The Supreme Court in *Panetti* went on to find that the Fifth Circuit had interpreted *Ford* too restrictively.[134] In Justice Marshall's plurality opinion in *Ford*, he indicated "that the Eighth Amendment prohibits execution of 'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.'"[135] In his separate opinion, Justice Powell stated "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.'"[136] The Supreme Court in *Panetti* stated that nothing in either Justice Powell's or the plurality's opinion in *Ford* should be interpreted to mean that an assessment of the prisoner's delusions and their effect on his understanding is irrelevant.[137] According to the Court, though a prisoner may be able to state his reason for execution, mere awareness is not enough.[138] Thus, in *Panetti*, the Supreme Court held that a prisoner may not be executed unless he has a rational understanding of the State's rationale for his execution.[139] The Court declined to set a more definitive standard for competency determinations and remanded the case to the district court.[140]

The district court decided the case on remand in March of 2008.[141] The district court conducted a thorough hearing involving testimony from experts, review of records, and recorded tapes of Panetti's conversations in an attempt to determine whether Panetti had a "rational understanding" of the State's rationale for his execution.[142]

Panetti argued that the facts determined in his 2004 hearing[143] were entitled to a "presumption of correctness."[144] Partially on the basis of the 2004 hearing, the district court determined that Panetti was aware of his execution, was aware he committed the murders that served as the basis for his execution, and

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132. *Id.* at 954–55 (internal quotations omitted).

133. *See* Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *18 (W.D. Tex. Mar. 26, 2008) (acknowledging testimony by correctional officers that Panetti preached the Bible while in prison).

134. *Panetti I*, 551 U.S. at 956–57.

135. *Id.* at 957 (quoting Ford v. Wainwright, 477 U.S. 399, 417 (1986)).

136. *Id.* (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

137. *Id.* at 958.

138. *See id.* at 959 (distinguishing between prisoner's ability to name reason for execution and rational understanding of that reason).

139. *Id.*

140. *Id.* at 960–62.

141. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *1 (W.D. Tex. Mar. 26, 2008).

142. *Id.* at *14–29.

143. *See id.* at *14–18 (setting out facts determined in 2004 hearing).

144. *Id.* at *33.

understood the State's stated reason for executing him notwithstanding his delusions that the underlying reason for execution was his preaching of the Gospel.[145] On remand, the district court acknowledged that under the Supreme Court's formulation in *Panetti*, the prisoner "must have a present, actual, rational understanding of the connection between his crime and his punishment."[146] The district court stated, however, that the "presumption of correctness" for facts found in 2004 were of little consequence to the case as the question at issue is related to "his *current* mental state."[147]

Panetti argued that in determining the standard for competence to be executed, a court can look to the standard required for a defendant to stand trial and to defend himself pro se, because both require a "rational understanding" of the charges and potential sentence the defendant faces.[148] Though not binding on the Fifth Circuit, the district court cited a Tenth Circuit holding that "'sufficient contact with reality [is] the touchstone for ascertaining the existence of a rational understanding'" and that a "'defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him.'"[149] Because Panetti was found competent to stand trial and represent himself in 1994, the district court articulated the question presented as: (1) whether the necessary "rational understanding" for execution and the "rational understanding" required for self-representation and standing trial are different, or (2) whether Panetti must instead "show that his rational understanding of the charges and the penalty has deteriorated since he was found competent to stand trial."[150]

The district court noted that while amici for Panetti argued that the standard for incompetence to be executed was historically different than that required to stand trial, Justice Powell's concurrence in *Ford* suggested the opposite.[151] The district court interpreted Justice Powell as saying that prior to determining competency for execution, the defendant must have been judged competent for trial. Accordingly, "'[t]he State . . . may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.'"[152] Thus, the district court noted that the "rational understanding" and "contact with reality" required at execution is "substantially similar to that required at the trial stage"

145. *Id.* at *36.

146. *Id.* at *31, 36–37.

147. *Id.* at *33.

148. *Id.* at *31.

149. *Id.* at *32 (quoting Lafferty v. Cook, 949 F.2d 1546, 1551 (10th Cir. 1991)).

150. *Id.* Various authorities agree that there is a long time lapse between sentencing and execution of a prisoner. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring) (stating that between 1977 and 1987, average time lapse between sentencing and execution was 111 months); Kevin Johnson, *Prisoners' Time Spent on Death Row Doubles*, USA TODAY, July 23, 2008, at A1 (stating that average time spent on death row increased from seven years in 1986 to twelve years in 2006).

151. *Panetti II*, 2008 WL 2338498, at *32.

152. *Id.* (quoting Ford v. Wainwright, 477 U.S. 399, 425–26 (1986) (Powell, J., concurring)).

and so petitioner must show that his rational understanding has deteriorated in order to be judged incompetent for execution.[153]

The district court cited *Ford* in determining that "the petitioner may be made to bear the burden of rebutting . . . a 'presumption of sanity' established by his prior competence to stand trial" in order to trigger the hearing process.[154] The district court then went a step further, holding that the State may place the burden of proof on the defendant not only in triggering the hearing process, "but also in ultimately establishing incompetence to be executed."[155] To support this proposition, the district court cited Powell's concurrence in *Ford*, which stated that "'the States should have substantial leeway to determine what process best balances the various interests at stake.'"[156] The district court held that Panetti must establish his incompetence to be executed by a preponderance of the evidence.[157]

In applying this standard to Panetti, the district court found that Panetti failed to show his condition "deteriorated to a point that would undermine or negate the 'presumption of sanity'" established by the finding that he was competent to stand trial and proceed pro se.[158] Despite stating that Panetti was clearly mentally ill, the district court held that the evidence showed Panetti had an understanding of the causal connection between his crime and his punishment and was thus competent to be executed.[159] Although Panetti overcame the first presumption, he could not overcome the second.[160]

III. DISCUSSION

Placing the first burden of proof on the defendant to raise a substantial doubt as to his competence to be executed sufficient to trigger a factual inquiry into his mental state[161] is both rational[162] and supported by case law.[163] Conversely,

153. *Id.* at *32, *34.

154. *Id.* at *33.

155. *Id.*

156. *Id.* (quoting *Ford*, 477 U.S. at 427 (Powell, J., concurring)).

157. *Id.* at *34.

158. *Id.* at *35.

159. *Id.* at *36–37.

160. *See id.* at *35 (stating that although Panetti could reopen issue of incompetence and trigger hearing process, he was unable to meet ultimate burden of showing material deterioration that would challenge presumption of sanity already established in previous trials).

161. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 46.05(d) (Vernon 2005) (placing burden on defendant to establish initial showing of incompetence that would trigger hearing).

162. Placing the burden of proof on the defendant to trigger the initial inquiry into his mental state is rational because without any obstacles to litigating his competency, nothing would stop the defendant from continually litigating his mental state. This would cause incessant delays and overload the court system with competency determinations. *Cf.* Brett F. Kinney, Comment, *An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings*, 43 U.C. Davis L. Rev. 683, 704 (2009) (arguing initial burden on defendant is appropriate because it forces defendant to weigh value of raising incompetency issue against heavy burden that attaches only if such issue is raised).

163. *See* Ford v. Wainwright, 477 U.S. 399, 425–26 (1986) (Powell, J., concurring) (stating that state may presume prisoner remains sane for execution unless prisoner can make substantial threshold showing of insanity to trigger hearing process).

placing the subsequent burden on the defendant to establish his incompetency to be executed by a preponderance of the evidence is not only unsupported by case law, but runs contrary to it and the underlying principles of justice.

In *Ford v. Wainwright*,[164] the Supreme Court unequivocally determined that the insane are constitutionally protected from execution.[165] Placing a double presumption against the defendant as the district court did in *Panetti II* runs contrary to *Ford* by increasing the risk that an insane defendant will ultimately be executed.[166] An examination of precedent reveals that so heavy a burden is rarely placed on the defendant, and in the rare instances such presumptions do exist, it is only against defendants attempting to litigate past information and conduct.[167] So heavy a burden is never placed on a defendant arguing a claim based on contemporary information.

Furthermore, Supreme Court precedent emphasizes that increased protection should be afforded to a capital defendant.[168] The double presumption not only fails to afford that level of protection required by the Supreme Court, but actually lowers the protection afforded to the capital defendant to so low a level as to create a significant risk of unconstitutionally executing an insane prisoner.[169] In a competence-for-execution case, it is appropriate for the prisoner to bear the burden of showing his or her competence has deteriorated to such a point as to raise a substantial doubt as to his competency.[170] Once this burden is met, however, in order to protect the constitutional rights of the defendant, the ultimate burden in the competence hearing should shift to the prosecution to prove the defendant is in fact competent for execution.

A. Where a New Competency Issue Is Being Litigated, the Burden Is Appropriately Placed on the Government.

An examination of burden allocation in other areas of trial proceedings reveals that there is no comparable situation in which such a heavy burden is placed on the defendant.[171] In examining the burden of proof in competency to

164. 477 U.S. 399 (1986).

165. *Ford*, 477 U.S. at 409–10.

166. See *infra* Part III.B for a discussion of the increased risk of execution based on the higher burden placed on defendants.

167. *See* Strickland v. Washington, 466 U.S. 668, 696 (1984) (placing burden on defendant of proving counsel was ineffective at time of trial). See also *infra* Part III.A for a discussion of the burdens involved in proving new issues of competency.

168. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 362 (2004) (Breyer, J., dissenting) (stating risk of error which is legally tolerable diminishes in capital proceeding). See also *infra* Part III.B for a discussion of why the burden placed on a defendant challenging his competency for execution does not protect the capital defendant's interests.

169. See *infra* Part III.B for a discussion of the increased protection that must be afforded to capital defendants.

170. See *supra* Part II.D for a description of the reasoning of the district court in *Panetti* in placing the burden to trigger a competence hearing on the defendant.

171. *See, e.g.*, Porter v. McKaskle, 466 U.S. 984, 985 (1984) (Marshall, J., dissenting) (stating when there is doubt as to defendant's competency for trial, judge must order-competency evaluation).

stand trial proceedings, federal law is split.[172] The Fifth Circuit stated, "[t]here can be no question that in federal criminal cases the government has the burden of proving defendant competent to stand trial."[173] This position was adopted by the Third and Ninth Circuits.[174] In contrast, the Fourth and Eleventh Circuits place the burden on the accused,[175] a practice which has been held constitutional by the Supreme Court so long as the standard is no greater than a preponderance of the evidence.[176]

However, even in circuits that place the burden of proof on the accused, a judge is constitutionally required to order an independent competency assessment where the evidence raises the issue.[177]-Justice Marshall, dissenting to the Supreme Court's denial of certiorari in *Porter v. McKaskle*,[178] provided:

> [i]t is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency, even if the defendant does not request such an exam.[179]

If the facts known to a trial court are sufficient to raise "a 'bona fide doubt' as to a defendant's competence to stand trial," the trial court *must* hold an evidentiary hearing to determine the question, even if the defendant does not make such a request.[180] Thus, in an inquiry involving a defendant's competence to stand trial, while some courts place the ultimate burden on the defendant to prove his incompetence, no burden is placed against the defendant to make a showing of incompetence to trigger the hearing process.[181] Further, by stating that the insane cannot constitutionally be executed, the Supreme Court made it clear that in every court great precautions must be taken to avoid such a result.[182] Accordingly, it is

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172. *See* Kinney, *supra* note 162, at 686, 688–700 (noting some circuits place burden on government while others place burden on defendant and discussing roots of circuit split). *Compare* United States v. Makris, 535 F.2d 899, 906 (5th Cir. 1976) (stating government must prove defendant competent to stand trial), *with* United States v. Robinson, 404 F.3d 850, 856 (4th Cir. 2005) (placing burden to prove incompetence to stand trial on defendant).

173. *Makris*, 535 F.2d at 906.

174. *See* United States v. Hoskie, 950 F.2d 1388, 1392 (9th Cir. 1991) (noting that in retrospective competence determinations government has burden of showing that defendant was competent to stand trial); United States v. Hollis, 569 F.2d 199, 205 (3d Cir. 1977) (same).

175. *See Robinson*, 404 F.3d at 856 (noting Congress subscribes to placing proof of incompetence burden on defendant); Battle v. United States, 419 F.3d 1292, 1298 (11th Cir. 2005) (stating that defendant must demonstrate his incompetence by preponderance of evidence).

176. Medina v. California, 505 U.S. 437, 446 (1992).

177. Porter v. McKaskle, 466 U.S. 984, 985 (1984) (Marshall, J., dissenting).

178. 466 U.S. 984 (1984).

179. *Porter*, 466 U.S. at 985 (Marshall, J., dissenting).

180. *See* Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding constitutional rights violated where evidence called competency into question and judge did not order evaluation).

181. *See Porter*, 466 U.S. at 985 (Marshall, J., dissenting) (stating court must hold evidentiary hearing to determine defendant's competence for trial where factual issue exists even if defendant does not request hearing).

182. *See* Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (stating that execution of insane is abhorrent in civilized societies and offends humanity).

inconsistent with Supreme Court precedent to impose a double burden of proof on the allegedly incompetent defendant to prove his incompetency.[183]

It may be argued that there are areas in which heavy burdens are placed on the defendant, such as an ineffective assistance of counsel claim or the withdrawal of a guilty plea. With respect to an ineffectiveness claim, in *Strickland v. Washington*,[184] the Supreme Court decided that counsel is presumed effective and so the burden is placed on the defendant alleging ineffectiveness.[185] The defendant must show that his or her attorney was deficient and that such deficiency affected the outcome of the case.[186] In another example of a heavy burden, in withdrawing a guilty plea, the Eleventh Circuit requires a defendant to bear the burden of showing he has a fair and just reason for withdrawing the plea, even if such withdrawal is based on incompetency.[187]

However, there are distinct differences between the ineffectiveness and guilty plea withdrawal context and a challenge to competency for execution. First, unlike withdrawal of a guilty plea or an ineffectiveness of counsel claim, the inquiry here is of a contemporary nature.[188] Panetti and defendants like him are not attempting to prove an issue that was already resolved, rather the claim is based on current information and thus by definition was unavailable to the defendant to litigate prior to the competence-for-execution claim.[189] When a defendant chooses to argue that he should be able to withdraw his guilty plea because he was incompetent at that time, his essential argument is, "I *was* incompetent at that time." A defendant claiming his counsel was ineffective is essentially waiting until his case is resolved unfavorably and then saying, "My counsel *was* ineffective at trial."[190] Thus, in these instances it is appropriate that a presumption exists against the defendant. In competence for execution however, the defendant is arguing based on his *current* mental state and limitations which frustrate his ability to rationally understand the connection between his crime and punishment.[191] His argument is not related to how he *was*, instead, his argument is, "at this time, right now, I *am* incompetent."

It is reasonable that an initial presumption exists against the defendant as a defendant is generally presumed sane in criminal proceedings[192] and additionally because there must be some gatekeeping in order to avoid constant litigation of

183. *Cf.* Jacob v. City of New York, 315 U.S. 752, 752–53 (1942) (observing right to stand trial should be "jealously guarded").

184. 466 U.S. 668 (1984).

185. *Strickland*, 466 U.S. at 687–88.

186. *Id.* at 687.

187. *See* United States v. Izquierdo, 448 F.3d 1269, 1276 (11th Cir. 2006) (finding defendant bears burden of showing reason for plea withdrawal).

188. *See* Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *33 (W.D. Tex. Mar. 26, 2008) (noting prisoner's competence must be assessed when execution is "imminent").

189. *See* Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 934–35 (2007) (stating prisoner's mental state is subject to deterioration so *Ford* claim is not always ripe at time of first habeas petition).

190. *See Strickland*, 466 U.S. at 687 (holding to prevail on ineffectiveness of counsel claim defendant must show outcome of trial was prejudiced).

191. *See Panetti I*, 551 U.S. at 934–35 (discussing immediate nature of *Ford* claim).

192. Clark v. Arizona, 548 U.S. 735, 766 (2006).

the same issue.[193] However, creating a double presumption against the defendant by placing on him the additional burden to prove by a preponderance of the evidence that he is incompetent to be executed is inappropriate in light of the fact that the inquiry is based on new and not yet litigated information.[194] The determination that the defendant was found competent to stand trial is based on a standard that does not require rational understanding of the relation between the crime and the punishment.[195] Additionally, the competency to stand trial determination is made years prior to this new, contemporary inquiry. Thus, using the competency for trial determination is inappropriate as at the time of the competency to stand trial inquiry, no presumption could have been created showing the defendant is competent for execution. The *Panetti II* standard places a double presumption against the defendant for something he has not yet litigated and moreover for something he did not have the opportunity to litigate.

The *Panetti II* court's major justification for placing both presumptions against the defendant is Justice Powell's statement in *Ford* that "the States should have substantial leeway to determine what process best balances the various interests at stake."[196] There is clear evidence from the *Panetti I* Court itself however that this "substantial leeway"[197] does not allow the district court the degree of liberty it has taken. The majority in *Panetti I* stated that the district court was not entitled to "substantial leeway" because by refusing to provide a competency hearing the court failed to afford Panetti an appropriate opportunity to submit evidence and because it made its decision based only on the opinions of state-appointed experts.[198] While Panetti was afforded the unlimited opportunity to submit evidence, what he was denied was funding for his pursuit of more evidence.[199] Accordingly, though it is unclear what the minimum procedural requirements actually are, it appears that where the Supreme Court determines that minimum procedural requirements have been denied to the allegedly incompetent defendant, the "substantial leeway"[200] relied on so heavily by the district court may not actually apply. Certainly instituting a procedure where a burden is placed on the defendant that runs contrary to precedent[201] and the Constitution[202] might then disentitle a court to Justice Powell's "substantial leeway."[203]

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193. *See Panetti II*, 2008 WL 2338498, at *33 (finding documented mental illness requirement is not gatekeeper preventing endless competency litigation).

194. *See, e.g.*, *id.* (noting imminent nature of factual inquiry results in constant flow of new information).

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

196. Ford v. Wainwright, 477 U.S. 399, 427 (1986) (Powell, J., concurring).

197. *Id.*

198. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 950–51 (2007).

199. *Id.* at 976 (Thomas, J., dissenting).

200. *Ford*, 477 U.S. at 427 (Powell, J., concurring).

201. See *supra* Part III.A for a discussion of how Supreme Court precedent runs contrary to placing such a heavy burden on a defendant arguing contemporary information.

202. See *infra* Part III.B for a discussion of how the Constitution requires increased protection and accuracy in capital cases.

203. *Ford*, 477 U.S. at 427 (Powell, J., concurring).

Placing the burden of proof twice on the defendant challenging his competency does not fit with the nature of the incompetence-for-execution inquiry. In its recent decision in *Indiana v. Edwards*,[204] the Supreme Court stated: "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways."[205] The *Edwards* Court cited to the American Psychological Association to illustrate its point that deficits in functioning may affect a defendant's competence to play one legal role while not interfering with his or her ability to play a different role at trial.[206]

The MacArthur studies, performed by the Research Network on Mental Health and the Law, illustrate the point further.[207] These studies were intended to present information and develop measures to address adjudicative competence on the part of mentally ill defendants.[208] In a study of 472 prisoners, researchers found that a person competent for one legal purpose may nonetheless be impaired for other legal purposes.[209] The MacArthur studies also found that with treatment, over time the competence level of a defendant may change markedly.[210] These findings illustrate the concepts stated by both the American Psychological Association and the *Edwards* Court.

Psychological research also confirms the idea that symptoms and functioning in a person with schizophrenia or other psychotic illnesses change over time. Research shows that when untreated, symptoms of schizophrenia tend to worsen over time and may worsen regardless of treatment.[211] Overall, research supports the idea that it is essential that the competence inquiry focuses on the contemporary condition of the mentally ill prisoner rather than any past findings or behavior.

This research is especially relevant when one considers the substantial passage of time that occurs between sentencing and execution.[212] The Supreme Court has unequivocally stated, "[c]onsistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence."[213] Statistics

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204. 128 S. Ct. 2379 (2008).

205. *Edwards*, 128 S. Ct. at 2386.

206. *Id.* at 2387.

207. POYTHRESS ET AL., *supra* note 73, at 104.

208. *Id.*

209. *Id.* at 103.

210. *Id.*

211. *See, e.g.*, VirtualMedicalCentre.com, Schizophrenia, http://www.virtualmedicalcentre.com/diseases. asp?did=74&title=Schizophrenia&centre=neu (last visited Jan. 19, 2011) (stating schizophrenia symptoms worsen over time without treatment); Bupa, Schizophrenia, http://www.bupa.co.uk/individuals/ health-info rmation/directory/s/schizophrenia (last visited Jan. 19, 2011) (stating about ten percent of schizophrenics will find their condition worsens over time).

212. *See* Knight v. Florida, 528 U.S. 990, 991–92 (1999) (Thomas, J., concurring) (stating delay between sentencing and execution due to Supreme Court's "Byzantine" jurisprudence).

213. *Id.* at 992; *see also* Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) ("However critical one may be of these protracted post-trial procedures, it seems inevitable that there

from the Justice Department show that the wait on death row between sentencing and execution rose from seven years in 1986 to twelve years in 2006.[214] In certain states the statistics are even higher, reaching as high an average as twenty-three years.[215] In this period of time a prisoner's mental state will likely vary from his state at the time of trial.

Schizophrenia often results in the patient being hospitalized in a psychiatric facility.[216] Though most patients are discharged when they attain a level of functioning appropriate for residing in the general community, many patients are then unable to maintain that level of functioning and are readmitted into the hospital several subsequent times within the year.[217] These statistics suggest that schizophrenic patients frequently experience significant decreases in their psychiatric abilities.

It has been estimated that half of all prisoners on death row suffer from a serious mental illness.[218] While on death row, much of the prisoner's time is spent in complete isolation,[219] and research shows that isolation is likely to exacerbate a schizophrenic person's symptoms.[220] Combined with the research showing that a death row prisoner will wait an average of twelve years between his sentencing and his execution,[221] the logical conclusion is that a mentally ill prisoner on death row is likely to have significant fluctuations in his psychiatric condition while awaiting his execution. The *Edwards* Court understood this,[222] while the district court in *Panetti II* missed the mark.[223] By placing two presumptions against the prisoner based on his competence as assessed using a different standard many years prior, the district court in *Panetti II* failed to incorporate the principles identified in *Edwards* and proven in the aforementioned studies.

In some ways, the district court in *Panetti II* seemed to understand the importance of evaluating the current mental condition of the defendant rather

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must be a significant period of incarceration on death row during the interval between sentencing and execution.").

214. *See* Johnson, *supra* note 150, at A1 (reporting statistics relating to average time spent on death row).

215. *Id.* Prisoners in California waited an average of nearly twenty years and the three prisoners executed in Alabama in 2007 spent an average of twenty three years on death row. *Id.*

216. Schizophrenia.com, *supra* note 18.

217. *See* Henigsberg & Folnegović-Šmalc, *supra* note 29, at 113 (finding schizophrenic patients must frequently be readmitted to hospital after discharge because of difficulty functioning in society).

218. Terry Kupers, *Conditions on Death Row, Terrell Unit, Texas*, *in* WRITING FOR THEIR LIVES: DEATH ROW USA 69, 77 (Marie Mulvey-Roberts ed., 2007).

219. *See* TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT, at xviii (1999) (discussing isolation of death row inmates).

220. Schizophrenia.com, Schizophrenia and Social Isolation, http://www.schizophrenia.com/prevention/ social.isolation.html (last visited Jan. 19, 2011).

221. *See* Johnson, *supra* note 150, at A1 (reporting Justice Department statistics).

222. The *Edwards* Court articulated its understanding by saying "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008).

223. *See* Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *32 (W.D. Tex. Mar. 26, 2008) (stating because Panetti was found competent to stand trial, he must show his rational understanding has since deteriorated).

than basing his competence-for-execution determination on past findings. The *Panetti II* court cited *Ford* to provide: "[i]t is . . . well-settled that a claim of incompetence to be executed must be evaluated at the time execution is 'imminent,' regardless of a prisoner's prior mental state."[224] When Panetti argued that the results of his 2004 competency determination were entitled to a presumption of correctness, the district court stated that the relevance of those findings were tempered by the fact that a claim of incompetence must be evaluated at the time execution is imminent and so such a presumption would not lighten Panetti's burden.[225]

The court then went on, however, to apply a presumption of sanity against Panetti based on its finding that he was competent to stand trial despite the fact that competency to stand trial is based on a completely different standard.[226] The court also did not address the fact that the competency for trial determination was made approximately fourteen years prior to the current decision on Panetti's competence for execution.[227] This is in direct contrast to the contemporary nature of the competence-for-execution inquiry and is also in direct contrast to the *Edwards* warning against using one competency determination to inform a different competency challenge which requires a different standard.[228]

B. The Double Burden Placed on a Defendant Challenging His Competency for Execution Is Too High to Adequately Protect the Interests at Stake in a Capital Proceeding.

Placing such a heavy burden on the defendant challenging his competency for execution is inappropriate in light of the interests at stake. In discussing competency to stand trial, the Supreme Court stated, "[b]y comparison to the defendant's interest, the injury to the State of the opposite error—a conclusion that the defendant is incompetent when he is in fact malingering—is modest."[229] This statement is even more appropriate in the competency for execution context. In a *Ford* statement that was cited by the *Panetti I* Court, the plurality stated "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding" due to the "high regard for truth that befits a decision affecting the life or death of a human being."[230] While the state has an interest in carrying out its criminal punishment,[231] its interest is countered by the government interest in

224. *Id.* at *33 (quoting Ford v. Wainwright, 477 U.S. 399, 407 (1986)).

225. *Id.*

226. *Id.* at *35.

227. Panetti was found competent to stand trial on September 9, 1994. *Id.* at *12.

228. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008) (noting different determinations must be made with regard to competence to stand trial and competence for self-representation, and different standards apply to each determination).

229. Cooper v. Oklahoma, 517 U.S. 348, 365 (1996).

230. Ford v. Wainwright, 477 U.S. 399, 411–12 (1986).

231. *See id.* at 425 (Powell, J. concurring) (recognizing state's "substantial and legitimate" interest in carrying out capital punishment after valid conviction and sentence).

maintaining the legality of the execution system[232] and most importantly, the ultimate interest of life or death at stake for the defendant.

"The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."[233] The Supreme Court has made clear that in a capital case "the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case."[234] "Hence, the risk of error that the law can tolerate is correspondingly diminished."[235] Accordingly, the Supreme Court has made clear that in a capital case the Eighth Amendment requires that the burden of proof not be set so high that the defendant bears a significant risk of being erroneously sentenced to death. The creation of a double presumption against the defendant as compared to only one presumption certainly makes an erroneous death sentence a significant possibility.

The risk of error is particularly high when the procedure of the competency hearing is considered. Expert testimony from psychological experts is the main determinant as to whether a defendant is competent.[236] The *Panetti II* court recognized the need for expert testimony in such situations, but also stated that "'[t]he question of competency calls for a basically subjective judgment. . . . The competency determination depends substantially on expert analysis in a discipline fraught with subtleties and nuances.'"[237] This is demonstrated clearly in Panetti's case. Panetti's three experts seemed to believe it was unlikely he was malingering and was likely incompetent.[238] The state's experts believed the likelihood of malingering was high and that Panetti understood the rational connection between his crime and his punishment.[239] Panetti bore the burden of proving by a preponderance of the evidence that he was incompetent to be executed and so this relatively even division of opinions resulted in a death sentence.[240] Situations like this are not uncommon. Experts frequently take the position that benefits the side that hired them.[241]

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232. *See* WHITE, *supra* note 92, at 4–18 (discussing Supreme Court holdings that ensure adequate procedural and substantive protections in capital punishment cases).

233. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990).

234. Gilmore v. Taylor, 508 U.S. 333, 342 (1993).

235. Schriro v. Summerlin, 542 U.S. 348, 362 (2004) (Breyer, J., dissenting).

236. *See* Brown v. Dodd, 484 U.S. 874, 876–77 (1987) (Marshall, J., dissenting) (suggesting Due Process Clause protects right to mental evaluation by competent medical expert as part of fair trial).

237. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *31 (W.D. Tex. Mar. 26, 2008) (quoting Lagway v. Dallman, 806 F. Supp. 1322, 1340 (N.D. Ohio 1992)).

238. *Id.* at *19–22.

239. *Id.* at *23–26.

240. *Id.* at *35–37.

241. Harris, *supra* note 33, at 1. The other leading case in competency for execution, *Ford v. Wainwright*, involved a similar situation where the defendant's experts found him incompetent while the state experts found the defendant competent for execution. 477 U.S. 399, 402–04 (1986). Three state-appointed physicians examined Ford simultaneously for thirty minutes and each found that Ford was able to understand the nature of the death penalty and why it would be imposed on him. *Id.* at 403–04. Ford had two psychiatrists examine him and after years of evaluation his experts found that Ford was severely mentally ill with no understanding of his crime or the death penalty. *Id.* at 402–03. Ford was sentenced to execution prior to reversal by the Supreme Court. *Id.* at 404, 418.

"[T]he ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding."[242] Perhaps the only example in law in which a defendant's protection is so diminished as to rival *Panetti II*'s double burden is the habeas limitation found in the Antiterrorism and Effective Death Penalty Act[243] ("AEDPA"). In an effort to make death penalty jurisprudence more effective, AEDPA actually makes habeas review more difficult to obtain for capital defendants than for noncapital defendants.[244] Under AEDPA, a capital defendant may not obtain federal habeas review on the merits of any decision in his capital trial that was not properly preserved.[245]

While this runs contrary to the argument that greater care must be taken in capital cases, AEDPA has been highly criticized by judges and scholars alike. Many scholars believe that AEDPA creates an excessive risk that capital defendants will be executed where death is not a lawful penalty or for crimes they did not commit.[246] Federal courts on their own motion have questioned the constitutionality generally of AEDPA and expressed frustration with the statutes.[247]

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242. *Ford*, 477 U.S. at 411–12.

243. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 28, and 42 U.S.C.).

244. *Compare* 28 U.S.C. § 2264 (2006) (stating capital defendant may not obtain habeas review on merits of his prior capital proceedings, except in limited exceptions), *with* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding noncapital defendant may obtain habeas relief where he makes showing of actual innocence). 28 U.S.C. § 2264 states,

> (a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
>
> (b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

28 U.S.C. § 2264.

245. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 28, and 42 U.S.C.).

246. *See, e.g.*, WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 177 (2005) (discussing how AEDPA may have caused many judges to believe "carefully scrutinizing capital cases was unnecessary"); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 423 (2001) (alleging that by attempting to speed up executions, AEDPA has diminished integrity of capital punishment system by lowering procedural safeguards against wrongful execution); Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1837 (2002) (stating that strict procedural requirements of AEDPA are likely to preclude valid claims of actual innocence and mental incompetence by capital defendants from ever being heard).

247. *See* Irons v. Carey, 505 F.3d 846, 854–59 (9th Cir. 2007) (Noonan, J., concurring) (expressing frustration with restrictiveness of AEDPA); *id.* at 859 (Reinhardt, J., concurring) (same).

While the Supreme Court has upheld AEDPA thus far, it has chipped away at it in cases that would yield particularly harsh results. In *Panetti*, for example, the State argued that the federal courts lacked jurisdiction under AEDPA because Panetti's first federal habeas petition had not included a *Ford* claim.[248] The Supreme Court held that the AEDPA restriction on successive habeas claims did not include claims that were not ripe at the time the defendant filed the first habeas claim, such as competence-for-execution claims.[249] The Supreme Court also disposed of the government's argument that the state court findings as to Panetti's competency were entitled to deference under AEDPA.[250] To reach this result, the Court made an expansive holding that despite *Ford*'s requirements being "stated in general terms," and Panetti's facts being different from those in *Ford*, because Panetti was not afforded the minimum procedures required by *Ford*, the AEDPA restrictions did not apply.[251] Thus the Supreme Court, along with scholars and appellate judges, has sought to mitigate the harsh effects of AEDPA through narrowly construing procedural defaults.

The principle of taking additional precautions in capital cases is firmly established in American jurisprudence.[252] AEDPA runs contrary to this precedent, but it is nothing more than an outlier that is looked down on by scholars and judges alike.[253] Considering the interests at stake in a capital proceeding and the problems inherent in a battle of the experts, it is clear that placing a double presumption against a capital defendant arguing incompetency for execution flies in the face of death penalty jurisprudence. If the "risk of error that the law can tolerate [in a capital case] is . . . diminished," placing a presumption against the defendant both to trigger a hearing and ultimately to prove incompetency to be executed should be a risk the law is not willing to take.[254]

C. Sanity Is the Functional Equivalent of an Aggravating Factor and Must Be Proved Beyond a Reasonable Doubt by the Prosecution.

In *Ring v. Arizona*,[255] the Supreme Court examined the protections that must be granted to defendants in a capital proceeding in the determination of aggravating and mitigating factors in sentencing.[256] The Court held that aggravating factors in a capital sentencing operate as the "functional equivalent" of a greater offense and so such factors must be proved by the prosecution beyond a reasonable doubt.[257] Applying this logic to the sanity determination in a capital

248. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 942 (2007).

249. *Id.* at 946–47.

250. *Id.* at 953–54.

251. *Id.*

252. *See, e.g.*, Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (stating that capital cases "require[] a greater degree of accuracy").

253. *See, e.g.*, Liebman, *supra* note 246, at 423 (discussing AEDPA's effect of diminishing integrity of capital punishment system).

254. Schriro v. Summerlin, 542 U.S. 348, 362 (2004) (Breyer, J., dissenting).

255. 536 U.S. 584 (2002).

256. *Ring*, 536 U.S. at 588–89.

257. *Id.* at 609.

proceeding, the sanity of a prisoner challenging his competency for execution should be considered a functional equivalent of an essential element of the offense and should be proved by the prosecution beyond a reasonable doubt.

In *Walton v. Arizona*,[258] the defendant challenged his death sentence claiming Arizona procedure violated his constitutional rights.[259] As required by Arizona law, a judge rather than a jury determined beyond a reasonable doubt that two aggravating circumstances existed and decided the mitigating circumstances proposed by the defendant were not sufficient to call for leniency.[260] The Supreme Court affirmed the conviction stating that though all essential elements of a crime must be proved beyond a reasonable doubt by the prosecution, aggravating circumstances are not an essential element of the crime.[261]

Shortly thereafter, the Supreme Court decided in *Apprendi v. New Jersey*[262] that essential elements of a crime must be proved beyond a reasonable doubt by the prosecution.[263] In so holding, the Court stated that whether a finding is an essential element is based on the effect of the element and not the form of the relevant criminal statute.[264] "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt."[265]

The Supreme Court then overruled *Walton* in *Ring v. Arizona*.[266] The Court stated that "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'"[267] It reasoned that absent a finding of one of the aggravating factors, Ring could not be sentenced to death and accordingly the aggravating factors must be treated as akin to an essential element of a crime.[268] According to the *Ring* Court, the prosecution must prove essential elements of a crime beyond a reasonable doubt.[269]

Had the logic in *Ring* been applied to Panetti's case, Panetti would have been found incompetent to be executed and he could not have been sentenced to death based on the constitutional protection afforded to the insane in *Ford*.[270] Like in *Ring*, whether Panetti is competent to be executed is the functional equivalent of an essential element of his offense. Ring could not have been sentenced to death absent the finding of aggravating factors, and under the Eighth Amendment, Panetti could not have been sentenced to death absent a finding of competency for

258. 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

259. *Walton*, 497 U.S. at 642.

260. *Id.* at 643–45.

261. *Id.* at 649.

262. 530 U.S. 466 (2000).

263. *Apprendi*, 530 U.S. at 478.

264. *Id.* at 494.

265. *Id.* at 490.

266. Ring v. Arizona, 536 U.S. 584, 601, 609 (2002).

267. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

268. *Id.* at 606–07.

269. *Id.* at 600.

270. *See* Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (holding Eighth Amendment prohibits capital punishment of insane).

execution.[271] In the wake of *Ring*, once Panetti triggered the hearing process as to his competency, overcoming the sanity presumption, the prosecution should have been required to prove Panetti's competence to be executed beyond a reasonable doubt. If sanity is considered the functional equivalent of an element of murder, as should be the case based on the reasoning set forth in *Ring*,[272] the failure to use this standard amounted to a violation of Panetti's constitutional rights.

The Supreme Court has squarely held that sanity is not an essential element of a crime.[273] The Court has not addressed, following the *Ring* holding, whether sanity is the functional equivalent of an essential element of the crime in a capital proceeding. Several lower courts have addressed this issue in the context of mental retardation and most have refused to apply the functional equivalency rule to mental retardation.[274] The Texas Court of Criminal Appeals for example stated that "[a] lack of mental retardation is not an implied element of the crime of capital murder which the State is required to prove before it may impose a sentence above the maximum statutory punishment for that crime."[275]

Other lower courts including the Eastern District of Texas have left the door open for claims that mental retardation constitutes the functional equivalent of an essential element of the crime in a capital proceeding.[276] Additionally, under the *Panetti II* court's competency-for-execution procedures, the prisoner must first prove his competency has deteriorated in order to overcome the initial presumption of sanity and trigger a competency hearing.[277] At this point, the situation should be viewed as analogous to *Ring*—under *Ring*, the prosecution must prove aggravating factors beyond a reasonable doubt in order for the death penalty to apply.[278] In a competence-for-execution case, if the prisoner triggers the hearing, he has overcome the presumption of competency. Thus the prosecution should then have the burden of proving beyond a reasonable doubt that the prisoner is competent for execution in order to increase the applicable allowable penalty to death. Accordingly, the failure to use this standard amounted to a violation of Panetti's constitutional rights.

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271. *See id.* at 410–11 (requiring courts to make finding regarding competency of capital defendants before sentencing death).

272. *See Ring*, 536 U.S. at 600–02 (reasoning that where defendant could not be sentenced to death absent particular factor, that factor is equivalent to essential element of offense and must be proved by prosecution beyond reasonable doubt).

273. *See* Leland v. Oregon, 343 U.S. 790, 798–99 (1952) (holding that state could require accused to prove insanity).

274. *See* Ellen Kreitzberg & Linda Carter, *Innocent of a Capital Crime: Parallels Between Innocence of a Crime and Innocence of the Death Penalty*, 42 TULSA L. REV. 437, 448 (2006) (describing lower court reluctance to extend essential element logic to mental retardation).

275. *Ex parte* Briseno, 135 S.W.3d 1, 10 (Tex. Crim. App. 2004).

276. *See* Simpson v. Dretke, No. 1:04CV485, 2006 WL 887384, at *3 (E.D. Tex. Mar. 27, 2006) (deciding case on procedural grounds and leaving open possibility that mental retardation is functional equivalent of essential element of crime); State v. Jimenez, 880 A.2d 468, 483–89 (N.J. Super. Ct. App. Div. 2005) (applying *Apprendi* and *Ring* in determining that mental retardation is functional equivalent of element of offense), *rev'd on other grounds*, 908 A.2d 181 (N.J. 2006).

277. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *33 (W.D. Tex. Mar. 26, 2008).

278. Ring v. Arizona, 536 U.S. 584, 604 (2002).

D. The Standard Announced for Competence for Execution Was Appropriate but the Court's Application of that Standard Rendered It Meaningless.

In proposing a standard for competence for execution, psychologists have stated that in order to be executed, a prisoner must understand "the nature of capital punishment and the reasons for its imposition."[279] The American Bar Association ("ABA") has proposed a test to determine competency for execution based on the requirements discussed in Powell's concurrence in *Ford*.[280] The ABA proposed:

> "A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reasons for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to the court."[281]

Thus the standard proposed by the ABA closely parallels the psychologists' proposal as both focus on the reasons for and nature of the punishment.

This definition is consistent with the Supreme Court's opinion in *Panetti*.[282] Requiring the prisoner to understand the proceedings, the rationale for and nature of his punishment, and any fact that makes the punishment unjust is consistent with the *Panetti* Court's requirement that the defendant must have a rational understanding of the rationale for his execution.[283] Further, the proposed standard is consistent with the rationales given by the Supreme Court in *Ford* for the prohibition on execution of the insane.[284] There can be no retributive purpose where the defendant lacks understanding of the crimes he has committed.[285] The standard also addresses *Ford*'s concern with the incompetent defendant being unable to assist in his own defense due to his mental condition by requiring that the defendant be aware of and able to communicate any fact making his punishment unjust or unlawful.[286] Finally, the requirement that a defendant understand the nature of his punishment alleviates the concern that it offends

279. HANDBOOK OF PSYCHOLOGY, *supra* note 33, at 432.

280. Ackerson et al., *supra* note 33, at 169.

281. *Id.* (quoting ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 290 (1989)).

282. The Supreme Court in *Panetti* stated that mere awareness on the part of the prisoner as to the reasons for his execution is not enough; a prisoner must rationally understand the State's rationale for his execution notwithstanding his relevant delusions. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 958–59 (2007).

283. *Id.*

284. *See* Ford v. Wainwright, 477 U.S. 399, 406–11 (1986) (outlining historical prohibitions on execution of insane persons).

285. *See id.* at 409 (questioning retributive value of capital punishment where defendant lacks understanding of crimes committed).

286. *See id.* at 406–07 (citing English and American common law for principle that accused should be able to assist in own defense).

human decency to send an insane prisoner incapable of spiritual preparation to meet his creator.[287]

As the *Panetti I* standard as written is similar to these proposed standards and follows the mandate from *Ford*, the question then becomes whether the *Panetti* district court appropriately applied the standard. The *Panetti II* court stated that in order to be competent for execution, Panetti must have had a rational understanding of "(1) the fact that he murdered Joe and Amanda Alvarado; (2) the fact of his impending execution; and (3) the causal connection between his crime and his execution."[288] The Supreme Court in *Panetti* made it clear that to determine rational understanding, the court must examine whether the prisoner's understanding of the link between the crime and punishment is out of touch with reality due to gross delusions stemming from a mental illness.[289]

It is fairly clear in the *Panetti* case that Panetti did rationally understand that he committed murder as well as the fact that the State intended to execute him.[290] Where the inquiry becomes thornier is in the determination of whether Panetti was able to rationally understand that he was being executed *because* he committed murder. The district court's analysis did not appropriately apply rational understanding to this inquiry as the evidence cited by the district court showed only that Panetti rationally understood court procedure, not that he rationally understood the relation between his crime and punishment.

Panetti's counsel argued the defendant's delusions of a "State-Satan conspiracy," his belief that the State really wanted to execute him to stop him from preaching rather than because of the murders, substantially interfered with his ability to rationally understand his punishment.[291] To address this argument, the *Panetti* district court enumerated the evidence that it stated in support of its view that Panetti possessed the rational understanding required of him.[292] First, the district court mentioned that Panetti referenced a "character witness" and told his parents the hearing would be appealed to the Supreme Court.[293] In addition, the court discussed Panetti's refusal to cooperate with experts until he had asked if they were "for us or them."[294]

However, such understanding could rationally co-exist with Panetti's delusion, because it is logical that Panetti would choose not to cooperate with state experts where he believed the State wanted to execute him because of his preaching. In fact, the evidence as presented by the district court in favor of Panetti's rational understanding is actually *more* consistent with Panetti's argument that he refused to cooperate because of his delusions than the district

287. *See id.* at 407 (discussing common law, moral, and ethical concerns with death penalty).

288. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *35 (W.D. Tex. Mar. 26, 2008).

289. Panetti v. Quarterman (*Panetti I*), 551 U.S. 930, 960 (2007).

290. *See Panetti II*, 2008 WL 2338498, at *35–36 (noting Panetti's "fairly sophisticated understanding of his case").

291. *Id.* at *35.

292. *Id.* at *35–37.

293. *Id.* at *35.

294. *Id.* at *36.

court's contention that the evidence showed that Panetti rationally understood the reasons for his punishment. The evidence shows little about Panetti's rational understanding that he is being executed because he murdered the Alvarados. The *Panetti II* court itself stated that this evidence shows "nothing more exotic than a rational understanding that Panetti's legal defense is an adversarial process, and the State is on the 'other side.'"[295] But, the court then also stated that this evidence shows Panetti rationally understands "that the state is seeking to prove he is mentally competent to be executed *for the murders* and his defense team is seeking to prove his life should be spared because he is insane."[296] Yet the court failed to show how these statements amount to evidence that Panetti understood he will be executed for the murders rather than for preaching.

In support of its holding that Panetti did have a rational understanding of the relation between his crime and punishment, the district court cited an exchange Panetti had with a state-appointed psychiatrist.[297] "When asked what happens to people leaving" his unit in jail, Panetti answered, "[t]hey're trying to rub me out, it's unjust."[298] "When asked why it was unjust, Panetti stated, '[y]ou treat mental illness'" and refused to elaborate in any coherent manner.[299] According to the district court, this statement showed that "Panetti [understood that] he [was] being executed to punish him for killing his in-laws, but [felt] the state [was] not justified in taking this position because of his mental illness."[300]

In context however, this exchange with Panetti did not involve any discussion of the murder of his in-laws.[301] While the statements do again show that Panetti rationally understood court procedure and that he was mentally ill, they in no way demonstrate that Panetti rationally understood the relation between murdering the Alvarados and being executed. Further, the court failed to explain how these statements demonstrated that Panetti's delusion that the state was executing him for preaching did not interfere with his rational understanding of his crime and punishment. Panetti could have believed that his punishment was unjust because the State was executing him for preaching.

Thus, while appropriately determining that a prisoner must rationally understand the fact of his criminal act, the fact of his impending execution, and the causal connection between the two, the district court failed to apply the standard in such a way as to prove Panetti did in fact have this rational understanding. By failing to engage in the most important part of this inquiry—a rational understanding of the connection between the crime and the punishment—the district court failed to protect the rights of the prisoner as competency standards

295. *Id.*
296. *Id.* (emphasis added).
297. *Id.* at *25.
298. *Id.*
299. *Id.*
300. *Id.* at *36.
301. *Id.* at *25.

are intended to do.[302] The district court determined nothing more than that Panetti had a factual and rational understanding of the trial proceedings. The *Panetti II* court essentially limited the standard for competence to be executed from the more stringent rational understanding of the relation between the facts and the punishment to only the requirement of the first prong of *Dusky*, rational understanding of the trial proceedings.[303] This holding directly contradicts *Edwards*'s caution against the use of a single standard for different competency determinations.[304]

This error in application allowed the district court to inappropriately use its prior finding that Panetti was competent to stand trial against him in his claim that he was incompetent to be executed. It is clear throughout Supreme Court jurisprudence that capital proceedings often require more stringent standards and greater protection for the defendant than noncapital proceedings.[305] The *Panetti II* court not only set the requisite presumptions, burdens, and standards so high as to create a virtually insurmountable obstacle for a defendant challenging his competency to be executed, but it also inappropriately applied the Supreme Court's standard by requiring only that the defendant have a rational understanding of the proceedings against him.[306]

Had the *Panetti II* court shifted the ultimate burden to the government to prove Panetti's competence for execution once Panetti had appropriately triggered the competency hearing, this case would have likely had a different outcome. The government alleged that Panetti had a rational understanding of his crime, punishment, and the relation between the two, while Panetti argued he lacked this rational understanding.[307] As in many competency cases, the evidence presented was conflicting and led to no clear result.[308] Had the court placed the ultimate burden on the government, it is likely Panetti would not have been sentenced to death based on ambiguous evidence such as Panetti's unwillingness to cooperate with state experts.[309] In future cases where evidence is conflicting

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302. *See, e.g.*, Wolfe v. Weisner, 488 F.3d 234, 238 (4th Cir. 2007) (stating standard governing mental competency determinations is in place pursuant to Fourteenth Amendment in order to protect rights of prisoners).

303. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (requiring defendant to have factual as well as rational understanding of trial proceedings).

304. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (stating that *Dusky* standard alone is insufficient to determine competency and that trial judges are more able to make fine-tuned mental capacity determinations tailored towards individual defendants' unique circumstances).

305. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 522–23 (2000) (Thomas, J., concurring) (stating only in area of capital punishment is legislature limited in determining what facts will lead to particular punishments); McFarland v. Scott, 512 U.S. 849, 854 n.2 (1994) (stating counsel representing capital defendants must meet more stringent experience requirements than counsel representing noncapital defendants); Sawyer v. Whitley, 505 U.S. 333, 366 (1992) (Stevens, J., concurring) (stating it is "heartlessly perverse" to place "more stringent standard of proof" on capital defendant than noncapital defendant).

306. *See Panetti II*, 2008 WL 2338498, at *35–37 (discussing rationale for finding Panetti competent for execution).

307. *Id.* at *14–29.

308. See *supra* Part III.B for a discussion of the expert opinions in *Panetti*.

309. *Panetti II*, 2008 WL 2338498, at *36.

and experts for the parties disagree on the defendant's level of competence, maintaining the double burden created by the *Panetti II* court will result in repeated Eighth Amendment violations.[310] Where a defendant is capable of proving he is just as likely incompetent as competent but is not able to prove his incompetency by a preponderance of the evidence, that defendant will be sentenced to death. The *Panetti II* court essentially makes the default position death, a result which is both unconstitutional[311] and inconsistent with Supreme Court precedent.[312]

IV. CONCLUSION

In conclusion, on appeal the Fifth Circuit, and eventually the Supreme Court, should recognize the effect the district court holding would have on defendants alleging incompetence for execution.[313] Placing a double burden against the defendant runs contrary to precedent by forcing a defendant to overcome significant evidentiary hurdles in litigating contemporary information.[314] Additionally, it is fairly clear that when the Supreme Court asserted that "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding,"[315] a double presumption against an allegedly incompetent defendant sentenced to death was not what the Court had in mind.[316] Based on *Ring v. Arizona*,[317] the courts should consider sanity an essential element of a crime for a defendant alleging incompetence for execution, and the prosecution should prove sanity beyond a reasonable doubt.[318] In the alternative, in order to protect the constitutional rights of the capital defendant and the insane, the courts should lower the evidentiary standard below that of reasonable doubt, but nonetheless shift the burden of proof to the prosecution in competence-for-execution hearings.

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310. See *supra* Part III.B for a discussion of the frequency of conflicting expert testimony.

311. *See* Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (stating in capital cases Eighth Amendment requires increased degree of accuracy); Ford v. Wainwright, 477 U.S. 399, 411–12 (1986) (stating where execution is contingent on particular fact, Constitution requires determination is made with high regard for truth that befits decision affecting life or death of human being).

312. See *supra* Part III.A for a discussion of Court decisions where less significant burdens are placed on the defendant litigating contemporary information and *supra* Part III.C for a discussion of a line of cases stating that the factors necessary for a death sentence should be proved by the prosecution beyond a reasonable doubt.

313. Panetti v. Quarterman (*Panetti II*), No. A-04-CA-042-SS, 2008 WL 2338498, at *33 (W.D. Tex. Mar. 26, 2008).

314. See *supra* Part III.A for a discussion of the problems with placing the burden of proof on a defendant arguing contemporary information.

315. Ford v. Wainwright, 477 U.S. 399, 411–12 (1986).

316. See *supra* Part III.B for a discussion of the increased protection afforded to capital defendants.

317. 536 U.S. 584 (2002).

318. *Ring*, 536 U.S. 584 at 601, 609. See *supra* Part III.C for a discussion of the cases holding a factor required to sentence a defendant to death must be proved beyond a reasonable doubt by the prosecution.

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