KILLING THE OBLIVIOUS: AN EMPIRICAL STUDY OF COMPETENCY TO BE EXECUTED LITIGATION

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I. INTRODUCTION

In *Ford v. Wainwright*,[1] the Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause bars the execution of individuals who are incompetent at the time of execution.[2] Dissenting in *Ford*, then-Justice Rehnquist and Chief Justice Burger cautioned that creating a right to a sanity determination before execution "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity."[3] Echoing this sentiment sixteen years later, Justice Scalia argued the categorical ban on executing the mentally retarded "promises to be more effective than any of the others in turning the process of capital trials into a game. . . . [W]hereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all."[4] We previously gathered data to determine whether Justice Scalia's concern was borne out by post-*Atkins* litigation and found that it was not. For this article we similarly gathered data to examine the parallel contention with respect to *Ford* claims to determine whether the specter of frivolous litigation materialized. We also report the results of our analysis of several other aspects of competency to be executed litigation based on the same data set.

In Part II of this article, we describe the doctrinal development of incompetency to be executed. In Part III, we explain the data set, how it was collected, and its limitations. Part IV reports our empirical findings, and, finally, in Part V we discuss the implications of those findings and the need for additional research.

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[1] Ford v. Wainwright, 477 U.S. 399 (1986).

[2] The Court actually used the term "insane" but it is in fact competence that is the issue and post-*Ford*, it is ubiquitously referred to as "competency to be executed" as opposed to "sanity to be executed." *E.g.*, Herrera v. Collins, 506 U.S. 390, 439 (1993).

[3] *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

[4] Atkins v. Virginia, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting) (internal citations omitted).

II. THE ROAD TO AND FROM *FORD*

A. The Common Law Tradition

The backdrop of the Supreme Court's decision in *Ford* was a centuries-long common law tradition prohibiting execution of the currently insane.[5] One of the earliest articulations of the rationale behind this tradition came from Sir Edward Coke, who explained that "by intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others."[6] Sir William Blackstone suggested a different reason for the prohibition:

> [I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it . . . . And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed.[7]

Other commentators offered religious underpinnings for the rule, with an underlying premise that everyone should have one last chance to get his religious affairs in order before meeting his maker on judgment day. As one person stated: it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it."[8] It was also said that execution served no purpose in such cases because madness is its own punishment.[9]

B. *Ford v. Wainwright.*

Despite the lengthy tradition against executing the insane, the Supreme Court did not address the issue until 1986. Alvin Ford was convicted of murder and sentenced to death for the murder of a Florida police officer.[10] There was never a suggestion that he was incompetent at the time of the offense or at the time of trial; however, almost eight years after his conviction, he began to exhibit

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[5] *Ford*, 477 U.S. at 406–07 (referring to 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25, and 3 EDWARD COKE, INSTITUTES 6 (6th ed. 1680)).
[6] *Id.* at 407 (internal quotation marks and citations omitted).
[7] BLACKSTONE, *supra* note 5, at *24 .
[8] *Ford*, 477 U.S. at 407 (citing John Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685)).
[9] *Id.* at 407–08 (citing BLACKSTONE, *supra* note 5, at *395.
[10] Ford v. State, 374 So. 2d 496, 497 (Fla. 1979).

behavioral changes that became more serious over time.[11] He started experiencing delusions and became obsessed with the Ku Klux Klan, believing that "he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide."[12] Ford's counsel requested that a psychiatrist that had previously seen Ford continue to see him, and, after about fourteen months of observation and evaluation, the doctor diagnosed Ford with "a severe, uncontrollable, mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential.'"[13] Under existing Florida procedure, when a defendant claimed incompetence to be executed, the Governor appointed three psychiatrists to examine the defendant and make a competency determination.[14] In Ford's case, the experts agreed that he suffered from severe mental illness, but they determined that Ford "under[stood] the nature and effects of the death penalty."[15] Soon after this determination, the governor signed Ford's death warrant "without explanation or statement."[16]

Ford challenged both the competency determination and the procedures which produced it in the Florida state courts.[17] After his claims were rejected, his lawyers filed a petition for writ of habeas corpus in the federal courts asking that his execution be stayed, that the courts recognize that the Eighth Amendment to the United States Constitution prohibited the execution of someone who is currently incompetent, and that he be provided with an evidentiary hearing to establish his incompetency.[18] The district court denied the petition, and a divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed.[19]

The Supreme Court granted certiorari and reversed.[20] The Court concluded that the prohibition against executing the insane was not only a common law rule but also an Eighth Amendment mandate.[21] Justice Marshall, in the section of the opinion that garnered a majority, set forth various rationales, including recognition that "the execution of an insane person simply offends humanity," that it "provides no example to others," that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it," that "madness is its own punishment," and that executing an

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[11] *Ford*, 477 U.S. at 401–02.
[12] *Id*. at 402.
[13] *Id.* at 402–03 (quoting Dr. Jamal Amin) (internal quotation marks omitted).
[14] *Id.* at 403.
[15] *Id.* at 404 (quoting one of the evaluators) (internal quotation marks omitted).
[16] *Id.*
[17] Ford v. Wainwright, 451 So. 2d 471, 475 (Fla. 1984).
[18] Ford v. Strickland, 734 F. 2d 538, 539 (11th Cir. 1984).
[19] *Ford*, 477 U.S. at 404–05. In the interest of full disclosure, one of the authors of this article was a law clerk to the judge, the Honorable Thomas A. Clark, who authored the dissenting opinion in the Eleventh Circuit at the time of the *Ford* argument and opinion and was assigned to assist the judge in the case.
[20] *Id.* at 418.
[21] *Id*. at 409–10.

insane person serves no retributive purpose.[22] This description of multiple rationales was the only part of the decision that secured a majority of the Court's support; neither a formulation of the substantive standard for competency nor the procedural safeguards necessary to enforce that standard did so.[23] Indeed, only Justice Powell addressed the meaning of "insane," finding that an individual who "know[s] the fact of [his] impending execution and the reason for it" is not insane.[24]

The Supreme Court did not determine whether Alvin Ford was insane but simply held that he was entitled to more process in the determination of his competency than he was afforded.[25] On remand, the district court found Ford was competent.[26] Ford died of "natural causes" while an appeal was pending.[27]

In the wake of *Ford*, most state and federal courts treated Justice Powell's narrow, mere "awareness" standard as the constitutional test for determining competency to be executed vel non.[28] Indeed, judges interpreted *Ford* so parsimoniously that most scholars and practicing lawyers maintained that it was "all but impossible" to prevail on a claim of incompetency to be executed.[29] Academia deemed the promise of *Ford* illusory, and the Supreme Court—despite numerous opportunities—refused to intervene.

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[22] *Id.* at 407–08 (internal quotation marks omitted).

[23] The Marshall plurality found that an evidentiary hearing on sanity in federal or state court was required and emphasized several necessary procedural requirements: "unfettered presentation of relevant information," opportunity to question state's experts, *judicial* determinations (as opposed to executive-branch determinations*)*. *Id.* at 414–16. Justice Powell did not see the need for "as elaborate" of procedures, instead finding a "substantial threshold showing of insanity" as a sufficient trigger for the hearing process. *Id.* at 425–26 (Powell, J., concurring). Justice O'Connor's opinion sided with Justice Rehnquist dissent on the larger issue of the constitutionality of executing the insane but also held the procedures at issue to be deficient in regards to due process, recommending a remand to a state court for a hearing that comported with due process. *Id.* at 427, 430 (O'Connor, J. concurring in result in part and dissenting in part).

[24] *Id.* at 422 (Powell, J., concurring).

[25] *Id.* at 410, 418.

[26] Michael Mello, *Executing the Mentally Ill: When Is Someone Sane Enough To Die?*, 22 CRIM. JUST. 1, 7 (2007).

[27] *Id*.

[28] Whether one points to *Penry v. Lynaugh*, which cites *Ford* for the proposition that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed," 492 U.S. 302, 333 (1989) (citing *Ford*, 477 U.S. at 422 (Powell, J., concurring)), or *Marks v. United States*, which holds that the holding of a plurality opinion is the position taken by the concurring justices on the narrowest grounds, 430 U.S. 188, 193 (1977), Justice Powell's standard has been adopted. *See* Christopher Seeds, *The Afterlife of* Ford *and* Panetti*: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309, 325–26 (2009); *see also* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (reaffirming that Justice Powell's concurrence is "clearly established law" and that the concurrence establishes the minimum procedures that must be provided to a prisoner bringing a *Ford*-based claim).

[29] *See, e.g.,* Michael L. Radelet & Kent S. Miller, *The Aftermath of* Ford v. Wainwright, 10 BEHAV. SCI. & L. 339, 339 (1992).

C. *Panetti v. Quarterman*.

After more than twenty years of silence, the Supreme Court returned to the question of competency to be executed in *Panetti v. Quarterman*.[30] This time, the Court could not avoid the question of whether a prisoner must understand that he is being executed as punishment for a crime.[31]

Scott Panetti was deemed competent to stand trial, to waive counsel, and to proceed *pro se* at his Texas capital trial despite his well-documented history of schizophrenia and numerous psychiatric commitments.[32] His bizarre behavior continued during the trial; he wore a Tom Mix cowboy suit to court each day and attempted to subpoena Jesus Christ, John F. Kennedy, and a number of celebrities, some dead and some alive to testify.[33] His court-appointed standby counsel challenged his competency and objected that the trial was a farce.[34] The jury found Panetti guilty and sentenced him to death.[35] After exhausting the normal course of state and federal appeals, his lawyers filed a second federal habeas petition alleging that Panetti was incompetent to be executed because he did not understand the reasons for his execution.[36] The essence of Panetti's claim was that although Panetti, if asked, could parrot that he was on death row and about to be executed and that the state claimed he was being sentenced to death for the murder of his former in-laws, Panetti did not believe that was why he was being executed.[37] Rather, Panetti believed that he was being executed by the state of Texas, acting in league with Satan, to prevent him from preaching the gospel.[38]

The federal district court acknowledged that Panetti was delusional but concluded that "the test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution."[39] The United States Court of Appeals for the Fifth Circuit affirmed the district court's findings based on Panetti's awareness that: (1) he

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[30] Panetti v. Quarterman, 551 U.S. 930 (2007).
[31] *See id.* at 954.
[32] *Id*. at 937.
[33] Brief for Petitioner at 11–12, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407).
[34] *Panetti*, 551 U.S. at 936.
[35] *Id.* at 937. Panetti was diagnosed as suffering from "fragmented personality, delusions, and hallucinations," and prior to the offense, he had been hospitalized multiple times for these disorders. *Id.* at 936. His standby counsel at trial referred to his behavior as "bizarre," "scary," and "trance-like." *Id.* (internal quotation marks omitted).
[36] *Id.* at 935.
[37] Brief for Petitioner, *supra* note 33, at 28-29.
[38] *Id*.
[39] *Panetti*, 551 U.S. at 935, 942 (quoting *Panetti v. Drake*, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004)) (internal quotation marks omitted).

committed the crime, (2) he was to be executed, and (3) his commission of the crime was the reason the state had given for his execution.[40]

The Supreme Court, in an opinion authored by Justice Kennedy, rejected the court of appeals' determination that Panetti's irrational understanding of the reasons for his execution was irrelevant to an assessment of his competency to be executed, but it (again) declined to articulate a standard for assessing competency under *Ford*.[41] The majority agreed that *Ford* does not circumscribe a prisoner's relevant delusions to only those relating to his execution and the reasons for it, and it also agreed that *Ford* "does not foreclose inquiry" into whether a prisoner's understanding of the State's reasons for his execution is a rational one.[42] Recognizing that "rational understanding" was admittedly difficult to define, the Court observed that "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."[43]

After reciting the *Ford* Court's list of possible rationales for exempting the insane from execution, the *Panetti* court focused on the purpose of retribution.[44] Justice Kennedy explained:

> [I]t might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.[45]

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[40] *Id.* at 956.
[41] *Id*. at 930.
[42] *Id.* at 959.
[43] *Id.* at 959–60.
[44] *Id.* at 958–59; *see also* Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 285 (2007) (discussing whether *Panetti* can be interpreted as finding retribution as a constitutional requirement). For a more detailed discussion of the *Panetti* Court's retributive rationale, see Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. UNIV. L. REV. 1163 , 1173–74 (2009). Markel argues that the *Panetti* Court leans toward the view of retributive punishment as a "form of human communicative state action directed at the offender," creating a host of future issues for the constitutionality of punishment. *Id.* at 1164.
[45] *Panetti*, 551 U.S. at 958–59.

This rationale, the Court reasoned, compelled the conclusion that the test applied by the court of appeals was inadequate, for the problem of lack of awareness of the justness of the punishment "is not necessarily overcome once the test set forth by the Court of Appeals is met."[46] Because the record was inadequate, the Court remanded the case to the district court for additional fact development and a new assessment of Panetti's competency to be executed.[47]

While some guidance beats no guidance, in the post-*Panetti* world lower courts and lawyers are still flummoxed as to what showing establishes a death row inmate's incompetency to be executed.[48] Some courts have interpreted *Panetti* as imposing an additional requirement of a rational understanding of death and the reasons for execution in determining competency to be executed,[49] but for the most part, courts have held that *Panetti* only reiterated *Ford*'s requirements.[50] Scholarly criticism of the Court's decision has focused on its inadequate protection of underlying dignity concerns,[51] arguments that there should be a categorical ban in all cases involving persons with mental illness,[52]

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[46] *Id*. at 959.

[47] *Id.* at 961–62. Subsequently, the district court held a new evidentiary hearing in accordance with the Supreme Court's recommendations and found that "Panetti is seriously mentally ill," but that "his delusions do not prevent his rational understanding of the causal connection between th[e] murders and his death sentence." Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at *36 (W.D. Tex. Mar. 26, 2008). The court went on to find:

> Panetti's understanding of the causal connection between his crime and his punishment is most clearly demonstrated by his rationally articulated position that the punishment is unjustified: He believes the State should not execute him because he was mentally ill when he committed the murders. This position is based on and necessarily indicates a rational understanding that the State intends to execute him because he committed the murders.

Id. The Fifth Circuit affirmed. *Panetti v. Stephens,* 727 F.3d 398, 415 (5th Cir. 2013).

[48] *See* MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 78 (2013).

[49] Overstreet v. State, 877 N.E.2d 144, 172 (Ind. 2007) ("As we read *Panetti*, a prisoner is not competent to be executed within the meaning of the Eighth Amendment if (1) he or she suffers from a severe, documented mental illness; (2) the mental illness is the source of gross delusions; and (3) those gross delusions place the 'link between a crime and its punishment in a context so far removed from reality' that it prevents the prisoner from 'comprehending the meaning and purpose of the punishment to which he [or she] has been sentenced.'" (internal citations omitted)).

[50] *See* Thompson v. Bell, 580 F.3d 423, 434 (6th Cir. 2009) ("The *Panetti* Court clarified *Ford*'s competency-for-execution and 'substantial threshold showing' standards."); *see also* State v. Motts, 707 S.E.2d 804, 812 (S.C. 2011) ("In [*Panetti*], the United States Supreme Court reiterated the holding in *Ford*"); State v. Irick, 320 S.W.3d 284, 293–94 (Tenn. 2010) (finding that *Panetti* "explained" and "clarif[ied]" *Ford*); Green v. State, 374 S.W.3d 434, 443 (Tex. Crim. App. 2012) ("Our reading of *Panetti* does not find a mandate regarding how to weigh any particular evidence; instead, we read *Panetti* as instructing that evidence of delusions may not, categorically, be deemed irrelevant. Therefore, we hold that *Panetti* merely clarifies the *Ford* standard for determining whether an inmate is competent to be executed.").

[51] See John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 111 (2010).

[52] *See* Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the*

arguments that *Panetti*'s interpretation of retributivism, if taken seriously, "engender[s] leeriness about the use of the death penalty generally,"[53] and arguments that the standard for competency to be executed, like that of competency to stand trial, should include the ability to assist counsel.[54]

III. OUR DATA SET.

While we agree with many of the criticisms of both *Ford* and *Panetti*, especially those that articulate the need for a more robust legal standard for assessments of competency to be executed, our goal in this article is empirical rather than normative. We present data gathered from cases in which a death-sentenced inmate asserted he[55] was incompetent to be executed. We attempted to gather all of the competency to be executed cases adjudicated since *Ford v. Wainwright* was decided in 1986. To do this, we first compiled all the cases with reported decisions relating to *Ford* (and *Panetti*) claims of incompetence to be executed. We then supplemented this information from other legal filings, scholarly articles (in the legal and psychiatric fields), reports, newspapers, other media coverage, and in some cases, calls to counsel for the inmate.

Our data set does not include every *Ford* claim that has ever been asserted. Some cases are still pending,[56] and there are undoubtedly competency to be executed claims that have been raised and adjudicated but not reported.[57] It is possible that the missing data is skewed either toward findings of competency or incompetency, but it is not possible to know toward which direction.[58]

We then coded the cases we found for basic information (defendant name, date of offense, date of conviction, date of competency determination, date of execution, and jurisdiction), the defendant's background information (date of

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Current Test Fails Mentally Ill Offenders and What To Do About It, 40 U. MEM. L. REV. 423, 430 (2009) (arguing that the same arguments offered and accepted in *Roper* and *Atkins* are applicable to defendants with severe mental illnesses); *see also* Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendants from the Death Penalty*, 44 AKRON L. REV. 529 (2011).

[53] *See* Markel, *supra* note 44, at 1166.

[54] *See* Seeds, *supra* note 28.

[55] We use the male pronoun because virtually all of the competency to be executed cases—like virtually all of the capital cases—involve male defendants.

[56] Through firsthand acquaintance with a case or media reports, we know of six cases that are pending. By "pending," we mean cases that have never been determined on the merits; pending *appeals* of *Ford* determinations are not included in this number.

[57] For some cases, including both those with competent and incompetent results, claims could only be identified through relevant organization reports or newspapers, as the competency determinations were not reported or published online.

[58] While one might speculate that findings of incompetency would be more likely to produce reported decisions, we are not certain that is the case because we found that some of the least-reported cases were those in which death-sentenced inmates were found to be incompetent. *See, e.g.*, *Judge Overturns Killer's Death Sentence*, MOSCOW-PULLMAN DAILY NEWS, Oct. 5 & 6, 1996, at 4A.

birth, race, age at offense and conviction, pre-crime mental health history, presence or absence of mental health evidence offered at trial or in post-conviction proceedings, other prior competency challenges, diagnoses, and delusions, including a description of the delusions if any were present), medications (before, during, and after the determination), outcomes (whether the merits of the case were reached, and, if so, whether the challenge was successful and what the court's rationale was), whether malingering was alleged by the state, and subsequent case history.[59]Despite the gaps, we believe the data we have gathered is sufficient for an initial assessment of post-*Ford* litigation, and, as we will discuss below, sheds light on ways in which a range of factors influence competency to be executed determinations. But first, "let's do the numbers."

IV. FINDINGS.

A. The Rate and Success of *Ford* Litigation

Since *Ford* was decided in 1986, 1,280 individuals have been executed in the Unites States.[60] To understand the frequency of *Ford* claims in capital litigation, we first examined the number of "*Ford*-eligible" individuals who filed *Ford* claims. "*Ford*-eligible" is admittedly not quite accurate. A death-sentenced inmate is truly *Ford*-eligible once an execution date is set. Prior to the state seeking (and obtaining) a death warrant, a claim is premature since the Eighth Amendment ban is a prohibition against execution not a prohibition on sentencing the person to death.[61] Not every state releases comprehensive lists of the number of death warrants that have been signed to date so we do not know the exact number of individuals that are eligible to file *Ford* claims. We use the closest proxy we have, which is the sum of (a) the number of defendants who have successfully challenged their competency to be executed (twenty), none of whom have been found to have regained their competency, (b) the number of defendants who filed *Ford* claims and subsequently died in prison (seven), and (c) the number of defendants who have been executed since *Ford* was decided (1,280).

Of the 1,307 "*Ford*-eligible" defendants, eighty-six (6.6%) argued they were not competent to be executed. In seventy-six of the eighty-six cases, courts addressed the merits of the claim.[62] The prevalence data is reflected in Table I.

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[59] The case information varies in completeness because, in some cases, the information we needed is litigated in pre-trial or post-trial hearings that frequently do not result in published opinions.

[60] *Death Penalty Information Center*, Execution Database, http://www.deathpenaltyinfo.org/views-executions (last updated July 25, 2013) (last visited July 28, 2013).

[61] *See* Panetti v. Quarterman, 551 U.S. 930, 944–46 (2007).

[62] At the same time, 140 total individuals have asserted *Ford* challenges, and ninety-one of those claims were decided on the merits. Of those cases (forty-eight) that did not reach the merits, thirty-seven were dismissed on ripeness grounds, i.e., that the claim was raised too early because there

Table I.
Death Sentences and *Ford* Claims

Defendants	*Number*
Individuals sentenced to death 1986–2012[*]	5,724
Executions 1986–2013[**]	1,280
Ford claims filed 1986–2013	140
Unsuccessful *Ford* claims 1986–2013	120
Unsuccessful *Ford* claims decided on the merits 1986–2013	71
Successful *Ford* claims 1986–2013	20

[*]This number represents the number of death sentences given from January 1, 1986, through December 31, 2012. The number includes some sentences that were imposed in 1986 prior to *Ford* being decided on June 26, 1986, but the only available date is not disaggregated by month.
[**]This number is the number of executions since *Ford* was decided through July 28, 2013.

We also compared both the number of claims raised and the success rate in two different time periods: the six years directly prior to *Panetti* and the six years directly following *Panetti*. We did this for the purpose of determining whether the Court's second foray into the competency to be executed waters had resulted in any change in litigation trends. Table II reflects these findings.

Table II.
Before and After *Panetti*

	Pre-*Panetti*	Post-*Panetti*

was no imminent threat of execution, and the other eleven were dismissed for reasons including: lack of standing, i.e., the action was brought by an improper third party or "next friend," or that the claim was raised too late, i.e., in a second or successive petition. In *Stewart v. Martinez-Villareal*, the Court addressed the "too late" situation holding that § 28 U.S.C. 2244(b), which requires dismissal (with certain exceptions) of second or successive habeas corpus applications, did not apply to petitions that raised only competency-to-be-executed claims. 523 U.S. 637, 639 (1998). Despite *Stewart v. Martinez-Villareal*, defendants continue to raise premature *Ford* claims. *See, e.g.*, Black v. Bell, 181 F. Supp. 2d 832, 882–83 (2001) (finding defendant conceded claim was premature but preemptively filed to ensure claim was not waived). Excluding these premature claims provides a more accurate picture as the unripe claims rarely count as "*Ford*-eligible claims," meaning they rarely appear in the denominator, thus they inflate the filing rate. The filing rate amongst claims that reached the merits is 5.8%.

Twenty of the 140 individuals on death row who have challenged their competency to be executed have been found to be incompetent and their executions stayed or their sentences commuted to life without the possibility of parole. In 22% of the cases where a *Ford* claim was decided on the merits, the death row inmate was found to be incompetent to be executed.

	(2001–2007*)	(2007–2013**)
No. of *Ford* claims filed (*no. of cases that reached merits*)	28 (*16*)	52 (*25*)
No. of successful *Ford* claims out of the claims filed that reached the merits (*Success Rate*)	3 (*18.8%*)	7 (*28%*)
No. of successful *Ford* claims out of all claims (*Success Rate*)	3 (*10.7%*)	7 (*13.5%*)
No. of unsuccessful claims decided on the merits where state alleged malingering *(% of unsuccessful claims decided on the merits*)	3 (*23.1%*)	5 (*27.8%*)
No. of unsuccessful claims decided on the merits where defendant had prior claims of incompetency *(% of unsuccessful claims decided on the merits*)	9 (*69.2%*)	11 (*61.1%*)

*Precisely June 28, 2001, to June 28, 2007.
**Precisely June 28, 2007, to June 28, 2013.

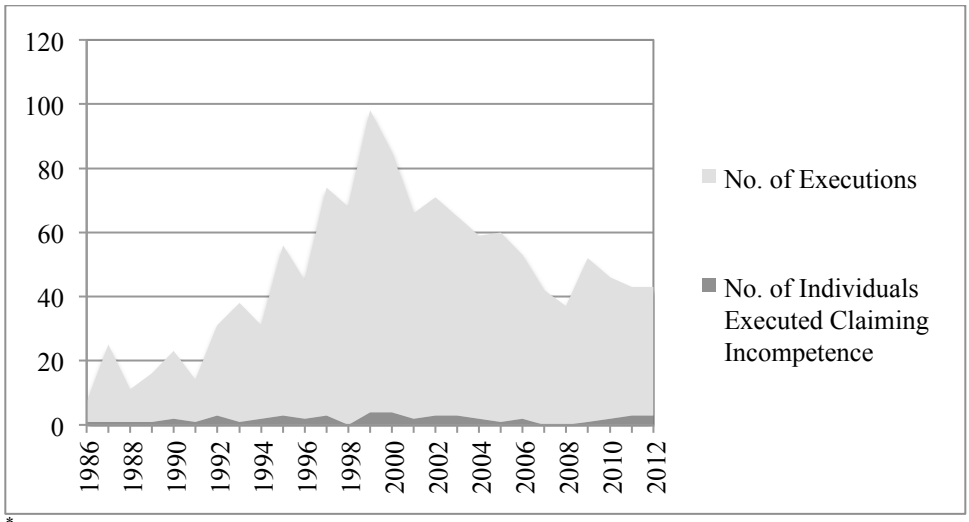
To probe possible *Ford*/*Panetti* implementation differences in another way, we narrowed the focus to cases where defendants were both *Ford*-eligible and there was a definitive outcome (i.e., death or stay of execution). When we compared the number of claims filed by *Ford*-eligible defendants with the total number of defendants who were eligible to file a claim across both time periods, we found, as is reflected in Table III, no meaningful difference in filing rates: 8.4% for the six years leading up to *Panetti* and 6.9% for the six years following it.

Table III.
Filing Rates Pre- and Post-*Panetti*

	Pre-*Panetti* (2001–2007*)	Post-*Panetti* (2007–2013**)
No. of "*Ford*-eligible" defendants	367	261
No. of claims filed by *Ford*-eligible defendants	31	18
Filing Rate	8.4%	6.9%

*Precisely June 28, 2001, to June 28, 2007.
**Precisely June 28, 2007, to June 28, 2013.

Figure 1.
Number of Executed Individuals Claiming Incompetence: 1986*–2012



[*] *Ford* was decided June 26, 1986, so the numbers from 1986 are only those executions and claims made after June 26, 1986.

B. State Variation.

We then looked for any inter- or intra-state patterns. More than one-third of the merits determinations have taken place in Texas, which is not surprising given its well-deserved status as the "nation's death penalty powerhouse."[63] Also unsurprising is the fact that the states that have disproportionately high filing rates, such as Pennsylvania (71.4%), Tennessee (57.1%), and Washington (40%), are jurisdictions with relatively low overall execution rates.[64] On the other hand, states such as Virginia, Oklahoma, and Texas, which execute the most defendants, all have remarkably low filing rates of 0.9%, 2.8%, and 6.4%, respectively.

Success rates also vary significantly by state. In slightly more than half of the states where incompetence claims have been filed, not a single individual has been found to be incompetent, and, in the remaining cases, the success rate ranges from 21.9% to 100%; though for most of the states, the sample size is too small to attribute statistical significance to deviation from the average rate.

Table IV.
Success Rates by State

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[63] Steiker, *supra* note 44, at 285.

[64] This is unsurprising because given the low number of overall execution attempts, and thus the low number of *Ford*-eligible inmates, if only one or two individuals assert incompetency to be executed, the percentage of claimants will be high.

State[65]	Number of "*Ford*-eligible" defendants[66]	Number of incompetency-to-be-executed claims[67]	Filing Rate	Number of incompetency determinations	Success Rate
Alabama	54	2	3.7%	0	0%
Arizona	35	2	5.7%	1	50%
Arkansas	27	3	11.1%	0	0%
California	13	2	15.4%	0	0%
Colorado	1	0	0%	0	--
Connecticut	1	0	0%	0	--
Delaware	16	1	6.3%	0	0%
Florida	62	5	8.1%	0	0%
Georgia	46	2	4.3%	0	0%
Idaho	4	1	25%	1	100%
Illinois	12	0	0%	0	--
Indiana	18	4	22.2%	0	0%
Kansas	0	0	--	0	--
Kentucky	3	1	33.3%	0	0%
Louisiana	23	3	13%	2	66.6%
Maryland	5	0	0%	0	--
Mississippi	21	3	14.3%	1	33.3%
Missouri	69	4	5.8%	1	25%
Montana	3	0	0%	0	--
Nebraska	3	0	0%	0	--
Nevada	10	0	0%	0	--
New Hampshire	0	0	--	0	--

[65] This list includes states currently with the death penalty, states that no longer have the death penalty but did at some point between 1986 and 2013, and the federal government.

[66] *See Death Penalty Information Center*, Execution Database, http://www.deathpenaltyinfo.org/views-executions (last updated July 25, 2013) (last visited July 28, 2013) (providing list of executions by state).

[67] This number includes only those claims that were decided on the merits and does not include pending claims.

State[65]	Number of "*Ford*-eligible" defendants[66]	Number of incompetency-to-be-executed claims[67]	Filing Rate	Number of incompetency determinations	Success Rate
New Jersey	0	0	--	0	--
New Mexico	1	0	0%	0	--
New York	0	0	--	0	--
North Carolina	43	2	4.7%	2	100%
Ohio	52	4	7.7%	1	25%
Oklahoma	106	3	2.8%	1	33.3%
Oregon	2	1	50%	0	0%
Pennsylvania	7	5	71.4%	2	40%
South Carolina	42	4	9.5%	1	25%
South Dakota	3	0	0%	0	--
Tennessee	7	4	57.1%	0	0%
Texas	497	32	6.4%	7	21.9%
Utah	6	0	0%	0	--
Virginia	106	1	0.9%	0	0%
Washington	5	2	40%	0	0%
Wyoming	1	0	0%	0	--
Federal	3	0	0%	0	--
All States	1307	91	7.0%	20	22%

C. Mental Health and Competency Litigation Histories

In examining the *Ford* claimants' case histories, we collected available information on the substantive findings of the competency to be executed hearings (as well as prior competency hearings), including defense and state expert diagnoses and whether there was consensus among the experts. Out of the ninety-one cases that reached the merits, fifty-seven cases (62.6%) had

documented delusions, schizophrenia, or both.[68] We were surprised to find that in only seventeen of the ninety-one cases (18.7%) did the prosecution suggest that the defendant was feigning or exacerbating his mental illness.

In more than half of the cases where *Ford* claims were brought, lawyers for the inmates had challenged the individual's competency during prior stages of the litigation, most commonly by asserting that the defendant was not competent to stand trial. In fifty-five of the ninety-one challenges (60.4%) where there was a merits determination on the issue of competency to be executed, there were prior competency challenges. Approximately half (54.9%) of the individuals whose *Ford* claims were ultimately rejected had also maintained they were not competent to stand trial, and 80% of the cases where the inmate was ultimately deemed incompetent to be executed also had competency challenges at earlier stages of the litigation. Moreover, a significant number of the inmates bringing successful competency to be executed challenges, 25%, had previously been found incompetent to stand trial or proceed.[69]

Table V.
Previous Competency Challenges

	Total Challenges (n=91)	Unsuccessful *Ford* Challenges Decided on the Merits (n=71)	Successful *Ford* Challenges (n=20)
No. of defendants filing previous competency claims	55	39	16
% of defendants filing previous competency claims	60.4%	54.9%	80%

[68] Of these defendants, nine were diagnosed with schizophrenia (with no mention of delusions), nineteen experienced delusions (but were not diagnosed with schizophrenia), and twenty-nine were diagnosed with schizophrenia and experienced delusions. The data underlying these findings is on file with the authors.

[69] Given that these individual's ultimately challenged their competency to be executed, it also necessarily means that a court (or jury) later found the defendant's competency to stand trial had been restored.

Figure 2.
Prior Incompetency Challenges in the *Ford* Challenges Decided on the Merits

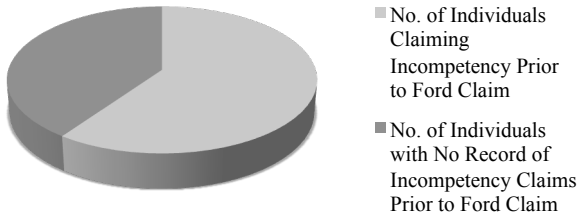


Figure 3.
Prior Incompetency Challenges in Successful *Ford* Challenges

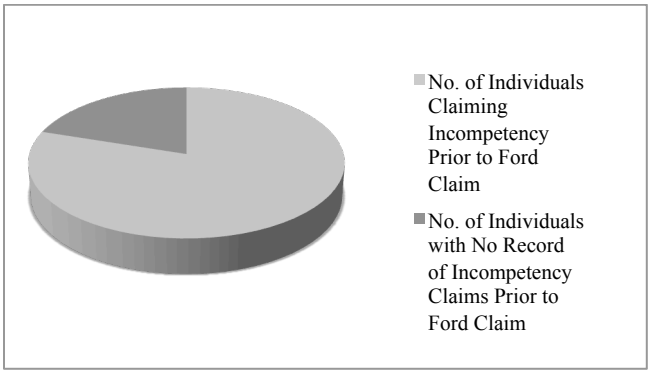
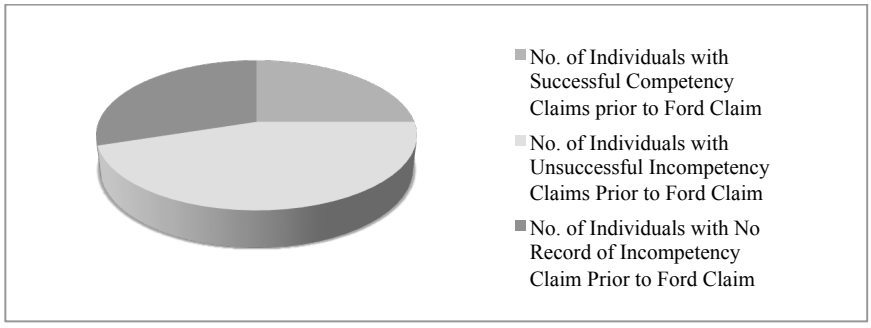


Figure 4.
Prior Successful Incompetency Challenges in Successful *Ford* Challenges



It is important to note that these numbers necessarily underestimate the number of *Ford* claimants who have previously challenged their competency and who have previously been deemed incompetent. Many competency challenges

take place in undocumented, pre- or post-trial proceedings and can only be identified if mentioned or contested in a subsequent published opinion or covered by the media.

D. Race.

Currently, approximately 43.2% of prisoners on death row in the United States are white, 41.9% are African American, 12.4% are Hispanic, and 1.5% are Native American, Asian, or "unknown."[70] The demographics of individuals bringing *Ford* challenges generally mirrors the overall death row population: 46.2% of the claims whose merits were adjudicated were brought by white inmates; 41.3% by African-American inmates; 7.6% by Hispanic inmates; and, 4.3% by Native American, Asian, or "other" inmates. There is a slightly higher percentage of white inmates claiming incompetency to be executed than found in the general death row population, and a somewhat lower percentage of Hispanic inmates bringing *Ford* claims in comparison to death row in its entirety, but the disparity is not dramatic.[71]

On the other hand, when success rates are examined, the differences are significant. White inmates challenging their competency to be executed prevail at a rate of 9.5%, whereas African-American inmates succeed in 31.6% of the cases where *Ford* claims are filed on their behalf. Success rates for Hispanic inmates and Native American, Asian, and other death row inmates (collectively) are 28.6% and 50% respectively, but given the small sample size available, caution in interpreting differences in the smaller groups is necessary. Looked at in another way, 60% of the winning *Ford* claims involved African-American inmates, 20% involved white defendants, 10% involved Hispanic inmates and 10% of the winners were Native America, Asian, or other.[72]

Finally, we analyzed filing and success rates for "*Ford*-eligible" defendants by race. Filing rates (number of claims filed as compared to the approximate number of *Ford*-eligible defendants[73]) for African-American, white, Hispanic, and Native American, Asian, and Other defendants are 8.4%, 5.8%, 6.8%, and 15.4%, respectively.[74] Success rates for African-American, white,

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[70] DEBORAH FINS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. 1 (2013), *available at* http://www.deathpenaltyinfo.org/documents/DRUSAWinter2013.pdf.

[71] *See id.*

[72] *See infra* text accompanying notes 99–103. A similarly disproportionate success rate for African-American defendants was found in *Atkins* claims when looking at the racial composition of the successful claims, though there, the comparison between *Atkins* winners and *Atkins* claimants did not vary by race. *See* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 TENN. L. REV. 625, 637 (2009).

[73] *See supra* Part IV.A (relying in part on demographic information from the *Death Penalty Information Center*, *supra* note 60).

[74] With respect to filing rates, the variation in filing rate for the Native American, Asian, and "Other" group results from the small sample size, and therefore cannot be given too much weight.

Hispanic, and Native American, Asian, and Other defendants are 31.6%, 9.5%, 28.6%, and 50%.[75] This data is captured in Table VI below.

Table VI.
Racial Effects in *Ford*-Eligible Defendants

Race		Totals
African American	No. of *Ford*-eligible defendants	455
	No. of claims filed	38
	Filing Rate	*8.4%*
	Success Rate	*31.6%*
White	No. of *Ford*-eligible defendants	723
	No. of claims filed	42
	Filing Rate	*5.8%*
	Success Rate	*9.5%*
Hispanic	No. of *Ford*-eligible defendants	103
	No. of claims filed	7
	Filing Rate	*6.8%*
	Success Rate	*28.6%*
Native American, Asian, or Other	No. of *Ford*-eligible defendants	26
	No. of claims filed	4
	Filing Rate	*15.4%*
	Success Rate	*50%*

V. DISCUSSION.

Avoiding over-claiming is important in working with relatively small datasets. However, there are some things we can say with confidence. First, the Rehnquist/Burger fear of frivolous competency to be executed litigation has not materialized. Second, *Ford* claimants often reflect a failure of previous competency screening. Finally, as in most areas of capital litigation, race matters.

A. The Dearth of Frivolous Claims

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[75] Again, due to the small number of claims filed by Hispanic and Native American, Asian, or Other defendants, the success rates for these groups should not be given too much meaning.

Although academic scholarship and practitioner literature frequently asserted that the number of successful *Ford* challenges is small,[76] this study is the first effort to systematically and empirically analyze competency to be executed claims.[77] Consequently, the claim by opponents of the presently-insane "exemption"[78] that *Ford* created one more vehicle to game the capital litigation system[79] has gone unanswered. There is some intuitive appeal to the Burger and Rehnquist position: a *Ford* claim is often a death-sentenced inmate's last chance to cheat the executioner. Thus, prisoners would appear to have little to lose in challenging their competency.

We were motivated to examine both the assumption of a floodgate of claims and the assertion that such claims virtually always lose, in part because of the results of a parallel inquiry into *Atkins* claims.[80] When the Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment prohibited the execution of persons with mental retardation,[81] Justice Scalia argued in dissent that death row inmates and capital defendants would feign mental retardation, opening the floodgate to frivolous *Atkins* claims.[82] He opined that "the capital defendant who feigns mental retardation risks nothing at all" and promises to "turn[] the process of capital litigation into a game."[83] Justice Scalia was wrong. An empirical study of the six years following *Atkins* revealed that there was no wave of spurious claims of mental retardation.[84] In fact, only about 7% of death row inmates maintained they were protected by *Atkins*' categorical bar against the execution of persons with mental retardation, and 40% of the defendants that filed *Atkins* claims were, in fact, determined to be a person with mental retardation.[85] As our data demonstrates, the fear of frivolous *Ford* claims, like the fear of frivolous *Atkins* claims, is unfounded. We examine the question of frivolousness in several ways.

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[76] *See supra* note 29 and accompanying text.
[77] *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS 137 (2006), *available at* http://www.amnesty.org/en/library/info/AMR51/003/2006 (acknowledging that the total number of prisoners on death row deemed incompetent due to mental illness is unknown but presuming it "to be well into double figures").
[78] It is important to note that the *Ford* exemption is only a stay of execution contingent on the defendant's being "insane," as compared to an *Atkins* or *Roper* exemption, which if granted, are absolute exemptions from the death penalty because neither a defendant's age at the time of the offense nor his qualifying intellectual disability will change.
[79] *See supra* note 3 and accompanying text.
[80] *See* Blume, Johnson & Seeds, *supra* note 72.
[81] Atkins v. Virginia, 536 U.S. 304, 321 (2002). We recognize that the current clinical term of art is "intellectual disability" rather than "mental retardation." However, in the capital litigation context, the disability is still referred to as mental retardation and we will use the litigation convention.
[82] *Id.* at 353–54 (Scalia, J., dissenting).
[83] *Id.* at 353.
[84] Blume, Johnson & Seeds, *supra* note 72, at 639.
[85] *Id*. at 628.

First, we examined the rate at which claims of incompetence to be executed are asserted. As a reference point, 5-10% of individuals on death row are estimated (conservatively, in our view) to have a severe mental illness.[86] Thus, in the absence of frivolous litigation, one might predict that 5-10% of death row inmates would challenge their competency to be executed due to a documented mental illness.

In fact, the number of *Ford* claimants is slightly less than the lower bound of the estimate generated by the known prevalence of severe mental illness among condemned prisoners. Of the 1,307 people who have certainly been *Ford*-eligible, only 6.6% (eighty-six) of those people filed claims of incompetency to be executed. A total of 140 capital defendants have filed *Ford* claims; ninety-one of those claims have been determined on the merits.[87] This includes claims filed by death row inmates who were ultimately executed, inmates currently on death row, former death row inmates whose convictions and/or sentences were reversed by a court or commuted by the executive, and prisoners who died from natural causes, suicide or homicide while on death row. In sum, capital litigants on the whole are not accepting the "invitation . . . to advance entirely spurious claims of insanity."[88]

A second measure of assessing floodgates is by looking at success rates. While the number of *Ford* claims that have been filed (140) is low, the number of successful challenges in the cases that do reach the merits is in fact quite high (at least as compared to other post-conviction claims in capital cases) at 22%. There are few claims raised by condemned inmates that succeed in roughly one out of four cases.

A third way to gauge whether courts are being deluged with clearly non-meritorious claims is by determining the frequency with which malingering is alleged or found. Here too, the data suggest few spurious claims: the state or its experts alleged malingering in only 18.7% (seventeen) of the cases that are decided on the merits.[89] And indeed, the state's assertion of malingering undoubtedly overestimates its presence, not only because it is so easy to allege, but also because the state claimed that the defendant was malingering in more than one-fourth of the *successful Ford* claims.

A final measure is whether the prisoner has a well-documented history of mental illness. Here, a striking 62.6% (fifty-seven) of the claimants whose

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[86] MENTAL HEALTH AMERICA (formerly known as NATIONAL MENTAL HEALTH ASSOCIATION), "Position Statement 54: Death Penalty and People with Mental Illnesses," Mar. 5, 2011, www.nmha.org/go/position-statements/54.

[87] *See supra* Table I.

[88] Ford v. Wainwright, 477 U.S. 399, 435 (1986) (Rehnquist, J., dissenting). Similarly in *Atkins v. Virginia*, despite the dissenters' concern that courts would be flooded by frivolous claims of mental retardation, the floodgates did not open.

[89] For this figure, we looked only at cases that reached the merits, and of those, only cases where malingering was alleged by the government or one of its experts in the *Ford* proceeding.

claims are decided on the merits have such a history; at least in these cases, the legitimacy of raising a *Ford* claim cannot really be questioned.

Thus, all relevant measures suggest that any fear of floodgates, "sport" litigation, or inmates attempting to game the system with *Ford* claims is unfounded. There are several possible explanations for this restraint. First, some death row inmates do not wish to resist execution. These individuals, often referred to as "volunteers," want to forego their appeals, including any challenge to their competency.[90]

Moreover, even among inmates who do not waive other claims, raising a *Ford* claim may be unattractive. Even a successful *Ford* challenge only stays execution for the duration of incompetency and an unsuccessful one only for the duration of a competency evaluation. For competent prisoners, this option may not be worth the short period of time gained. An additional restraint on the filing of *Ford* claims has to do with the current standard for assessing competency to be executed. Despite its vague contours, the *Ford/Panetti* standard is stringent in theory and very difficult to satisfy in practice.[91] Lawyers for the condemned, many of whom have multiple clients and are familiar with the capital appeals system, are aware of this. They are also familiar with judicial hostility to claims of incompetence to be executed; therefore, they likely limit *Ford* filings to cases where there is a strong factual basis for incompetency. Thus, despite the perception that some judges—including some members of the current Supreme Court—have of attorneys for the condemned as wanting only to throw sand in the "machinery of death,"[92] there is clearly a "winnowing" of claims taking place by counsel for death row inmates. Our data cannot discriminate between these (and other) possible explanations in any particular case, but it does demonstrate that neither *Ford* nor its clarification in *Panetti* has opened the floodgates to frivolous claims of insanity. While there has been a slight uptick in the number of claims

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[90] One hundred and forty-one capital defendants (out of 1,341) have "volunteered" and waived further appeals. *See Death Penalty Information Center*, Execution Database, http://www.death penaltyinfo.org/views-executions (last updated July 18, 2013) (last visited July 23, 2013). *See generally* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

[91] *See* Motion for Leave to File Brief and Brief of *Amicus Curiae* the American Bar Association in Support of Petitioner, at 14–16, Ferguson v. Crews, No. 13-5507, 2013 WL 3866235 (July 26, 2013) (discussing lower courts' inconsistent, and often incorrect (in favor of the state), application of the *Panetti* standard for competency and seeking clarification of the standard from the Supreme Court); Radelet & Miller, *supra* note 29, at 339; *see also* Danielle N. Devens, Note, *Competency for Execution in the Wake of* Panetti*: Shifting the Burden to the Government*, 82 TEMPLE L. REV. 1335, 1363–66 (2010) ("The [district] court [to which Panetti's case was remanded] 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 is also inappropriately applied the Supreme Court's standard by requiring only that the defendant have a rational understanding of the proceedings against him.").

[92] Callins v. Collins, 510 U.S. 1141, 1145 (1994) ("from this day forward, I no longer shall tinker with the machinery of death") (Blackmun, J., dissenting)..

filed after *Panetti* was decided, the percentages of the total *Ford*-eligible defendants that file incompetency to be executed are comparable pre- and post-*Panetti*: 8.4% and 6.9%, respectively.[93]

B. Botched Pre-trial Competency Cases

Alvin Ford was convicted of killing a police officer in 1974, but it was not until almost eight years after his conviction that his mental health began to deteriorate.[94] His case captures the situation that many observers think of as the prototypical claim of incompetence to be executed, i.e., one where there was never a suggestion of the defendant's lack of criminal responsibility in connection with the offense or incompetence at the time of trial but whose mental condition has deteriorated during incarceration.[95] But many real world cases do not comport with that prototype.

In sixteen of the twenty (80%) successful *Ford* claims, the inmate had challenged his competency at the time of trial. However, only five were deemed incompetent for any period of time. Moreover, in 54.9% of the unsuccessful incompetency to be executed cases, the prisoner challenged his competency at the time of trial. Indeed, in 11.3% of those cases the prisoner was found to be incompetent previously, but later "became" competent generally with the assistance of treatment and/or medication.[96] Taken together, these frequencies clearly suggest—but do not conclusively prove—that pretrial determinations of incompetency often fail to screen out seriously mentally ill defendants.

Some skeptics may balk at our use of prior competency challenge rates as supporting an inference that some incompetent individuals are tried—and eventually executed. However, the competency to stand trial standard is very pro-competency. If the old adage that you can indict a ham sandwich is true (and it is), that same ham sandwich would also almost certainly be found competent to stand trial. Furthermore, developments in treatment for mentally ill defendants, especially improved psychotropic medications, allow many defendants with serious mental illness to just slip over the competency threshold, to have their competency restored, and, in some cases, to "mask" their symptomology.[97]

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[93] *See supra* Table III.

[94] Ford v. Wainwright, 477 U.S. 399, 401–02 (1986); Ford v. State, 522 So.2d 345, 345 (Fla. 1988).

[95] *Ford*, 477 U.S. at 401–02.

[96] *See, e.g.*, Brown v. State, 261 Ga. 66, 66–68 (1991). Here, James Willie Brown was only held to be competent to stand trial six years after the crime. In the intervening years, he was sent to a psychiatric hospital, where he was treated and medicated for schizophrenia. *Id.*

[97] J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Courtroom*, 79 TENN. L. REV. 461, 483–84 (2012). For two particularly egregious examples of incompetent defendants found to be competent both at trial and for execution, see James Willie Brown, INT'L JUSTICE PROJECT, http://www.internationaljusticeproject.org/illnessjbrown.cfm (last visited Sept. 8, 2013) (recounting numerous pre-crime hospitalizations and bizarre behavior), and Rania Khalek, *Will Florida Execute a Psychotic Man Who Thinks He Is the "Prince of God"?,*

Finally, as another commentator has observed, many "common appellate court practices work to obscure the extent of [mental capacity]."[98]

C. Race

Our last finding of significance relates to race disparities in competency to be executed litigation. If one examines *Ford* claims that were resolved on the merits, 46.2% of the claims were filed by white inmates, 42.4% by African-American inmates, 6.5% by Hispanic inmates, and 4.3% by Native American, Asian, or other inmates.[99] White defendants are slightly overrepresented compared to their representation on death row (43%), African-American defendants and Native American, Asian, and Other defendants make up approximately the same percentages of *Ford* claims filed as their representations on death row, and Hispanic defendants are somewhat underrepresented as compared to their representation on death row (12%).[100]

However, success rates by race do not track the racial composition of death row or filings. Comparing successful *Ford* cases with *Ford* claimants, we found that white defendants win 9.5% of the time, whereas African-American defendants win three times as often, 31.6% of the time.

Why are African-American defendants significantly more likely to be found to be incompetent? There are a number of possible explanations for this disparity.[101] There could be a greater willingness on the part of attorneys to file claims for white defendants, or there could be a greater judicial willingness to find African Americans incompetent to be executed. It is not obvious to us why either would be true. Or perhaps death row inmates with severe mental illness

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TRUTHOUT (Oct. 9, 2012), http://www.truth-out.org/news/item/12011-will-florida-execute-a-psychotic-man-who-thinks-he-is-the-prince-of-god (recounting a history of delusions beginning at the age of thirteen).

[98] Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 282 (2009).

[99] *But cf.* Blume, Johnson & Seeds, *supra* note 80, at 628 (finding that African-American defendants file and win a disproportionately high number of *Atkins* claims).

[100] *See supra* note 70.

[101] It is unlikely that the underlying prevalence rates (of serious mental illness) among whites and African Americans on death row explain the difference in success rates between the two groups. While we do not have specific data regarding mental illness on death row, we do know a greater percentage of whites have a serious mental illness than African Americans in both the state prison population and the national population. *See* PAUL M. DITTON, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 3 (U.S. Dep't of Justice 1999) (noting that 22.6% of white inmates in state prisons were "mentally ill" (reported either a mental condition or an overnight stay in a mental hospital or treatment program), while 13.5% of African-American inmates in state prisons were "mentally ill"; SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH tbl. 1.7B (Revised) (2010), *available at* http://www.samhsa.gov/data/NSDUH/2k10MH_Findings/2k10MH_DTables/Sect1peMHtabs.htm#Tab1.7B (national survey finding 4.3% of whites have a "serious mental illness," as compared to 3.9% of African Americans in 2010).

may be diagnosed or treated differently based on race, or the effects of long-term incarceration on death row may be different for different racial groups. This is somewhat more plausible.

But, if forced to offer a theory for this phenomena, our best bet is that this is another way in which competency to be executed is influenced by other race effects in the criminal justice system. Most criminal defense lawyers at the trial level are white, and thus, in our experience, sometimes attribute symptoms of mental illness manifested by African-American defendants as cultural rather than pathological. Most trial judges are also white, and implicit racial bias likely leads them to find African-American defendants competent to stand trial even when they are not. And jurors, especially white jurors who in many jurisdictions dominate jury pools, are more likely to use evidence of an African-American defendant's mental illness as aggravating rather than mitigating, and thus choose death over life more often when a severely mentally ill defendant is African American.[102] Thus, we would guess that more African-American defendants with severe mental illness are found competent to stand trial and sentenced to death than white defendants with comparable mental health issues.[103]

VI. CONCLUSION

Our analysis of competency to be executed cases has produced several findings that should be of interest to judges, litigators, and academics. First, despite predictions to the contrary, relatively few death-sentenced inmates assert that they are not competent to be executed. Second, many successful cases, and some unsuccessful ones, are "back end" attempts via competency to be executed litigation to resolve a "front end" competency to stand trial problem. Third, African-American inmates who file *Ford* claims prevail at higher rates than white, Hispanic or "other" inmates. We leave for another day the question of whether significant numbers of "incompetent" defendants are being executed, and a critique of the porous legal standard for adjudicating claims of incompetency to be executed.

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[102] The same phenomena likely also affects prosecutors in the plea bargaining process.

[103] *Cf.* Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1584–85 (citing Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992)) (discussing study showing white jurors tend to weigh aggravating factors more and mitigating factors less when defendant is African American).