NOTES

Ford v. Wainwright
The Eighth Amendment, Due Process and Insanity on Death Row

I. INTRODUCTION

Throughout history, both English and American Common Law prohibited the execution of the presently insane.1 Nearly all states that continue to enforce the death penalty provide statutory procedures for those who become insane after sentencing.2 Up to this point in


time, however, a majority of the United States Supreme Court has never addressed the question of whether there exists a constitutional basis for a right not to be executed while insane. Explanations for the requirement of sanity at the time of execution vary widely, but there is little question that it is both historically and currently accepted.

Unlike other procedures involved in the capital punishment process, however, the process required when determining a condemned prisoner's sanity has historically been left entirely to the discretion of the states. This is due to the fact that no constitutional basis for the right not to be executed while insane had ever been recognized by the United States Supreme Court before the present case. While the Court has confronted the question, it has never held that such a constitutional right exists. The cases in which the question arose date back to the period in constitutional jurisprudence when the eighth amendment had not yet been applied to the states through the fourteenth amendment and before the eighth amendment was found to affect the procedural aspects of the death penalty. The issue of


3. Wainwright v. Ford, 104 S.Ct. 3498, 3498 (1984) (Justice Powell, concurring) (stated that the Court has never determined whether the Constitution prohibits execution of the insane). The issue was raised but never decided in five cases between 1897 and 1958. See Nobles v. Georgia, 168 U.S. 398 (1897); Phyle v. Duffy, 334 U.S. 431 (1948); Solesbee v. Balkcom, 339 U.S. 9 (1950) (held that “the Georgia statute as applied is not a denial of due process of law” but avoiding issue of whether there is a constitutional guarantee not to be executed while insane); United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953); Caritativo v. California, 357 U.S. 549 (1958).

4. The presently incompetent should not be executed because of their lack of reason. Il H. Bracton, On The Laws and Customs of England 384 (S. Thorne trans. 1968). Coke wrote that it would be a miserable spectacle and would not deter others. E. Coke, Third Institute 4,6 (London 1797) (1st ed. London 1644); Blackstone said that madness was enough punishment and that one who could not offer reasons why he should not be executed should be spared. Blackstone, Commentaries 24.

5. See supra note 2.

6. See supra note 3.


whether and how these current theories will be applied to those insane prisoners awaiting execution takes on particular importance as executions in this country continue to increase in number.9

In recent years the Supreme Court has reviewed the requirements for basic due process as it applies to state capital punishment procedures.10 In Ford v. Wainwright, the Supreme Court extended this analysis to the procedures for determining the present sanity of condemned prisoners and found that the right not to be executed while insane is constitutionally guaranteed through the eighth amendment.12 Since Ford v. Wainwright, state court procedures for determining the validity of claims of insanity from death row inmates must comply, not only with the procedure necessary to withstand a habeas corpus challenge, but with the full procedural safeguards necessary to protect the prisoner’s newly found constitutional right.13

This note will examine existing case law precedent, found by the Court not to control the issue raised by execution of the presently insane, and the historical background of Ford v. Wainwright. The note will then discuss the basis for the Court’s decision in Ford v. Wainwright. Issues raised by the concurring and dissenting opinions which were not specifically addressed by the majority will be analyzed as well. Finally, the probable implications affecting state procedure in the area of executions of the insane in general will be considered, with emphasis on the practical aspects of fulfilling a state’s constitutional duty.

II. PRIOR UNITED STATES SUPREME COURT CASES

In the first of three cases in which the United States Supreme Court considered execution of the presently insane, decided in 1897, recognized that precedent upholding state capital punishment procedures against due process challenges require review when challenged under the eighth amendment).

9. Reinhold. Lawyers Shunning Death Row Appeals, Chi. Daily L.J., Sep. 24, 1986, at 1, col. 2 (there are 1,765 death row prisoners as of Aug. 1, 1986, up from 1,540 one year earlier; and 16 executions have been carried out so far this year, resulting in a total of 66 executions since the states resumed the use of the penalty in 1976).

10. Skipper v. South Carolina, 106 S Ct. 1669 (1986); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Court recognized that precedent upholding state capital punishment procedures against due process challenges requires review when challenged under the eighth amendment).

11. 106 S Ct. 2595 (1986).

12. Id. at 2602.

13. Id. at 2603 ("Thus, the ascertainment of a prisoner's sanity as a predicate to a lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding").
the accused claimed a right to trial by jury to decide present competency. The questioned statute required the sheriff to initiate an inquiry by a jury and, at his discretion, report those findings to the sentencing court. While the procedure to be used by the sentencing court was not set out in the statute, it was implied by the Court that fewer safeguards would be provided than were provided at the original trial. The Supreme Court held that since the common law had not required a jury trial to decide incompetency, the states were under no obligation to provide any particular procedures at this point. The Court also noted that a convicted defendant could raise the insanity issue time and time again, thus making it impracticable to use a longer, more detailed proceeding, as the prisoner could delay execution indefinitely. This would be possible because present insanity was being decided, thus prior findings of sanity would not be dispositive if the issue were raised again.

It was over fifty years later that the Court heard the issue again. Solesbee v. Balkcom involved the same statute, however the wording had been revised to state specifically that no statutory or constitutional right to a trial existed in order to decide sanity after conviction. According to the Court, the Georgia procedure constituted “an act of grace” by the state, much like acts of reprieve or pardon, and was not subject to due process requirements. Dissenting in Solesbee, Justice Frankfurter argued that, because the right not to be executed while insane is constitutionally protected, Georgia should be precluded

14. Nobles v. Georgia, 168 U.S. 398 (1897) (Elizabeth Nobles was the first person to claim a right to jury trial on the issue of her sanity while awaiting execution; her argument was based solely on the fourteenth amendment due process clause. The Court rejected her claim by finding that at common law the decision was a discretionary one; therefore, “the manner in which such question should be determined was purely a matter of legislative regulation.” Id. at 409. The opinion placed great weight on the possibility that by raising the issue again and again, the prisoner could delay the execution indefinitely. The Court stated “[w]ithout analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment.” Id. at 405.).

15. Id. at 402-03 (whether the claim was even considered was completely at the sheriff’s discretion).

16. Id. at 405.

17. Id. at 409.

18. Id. at 405-06. “[A] finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another . . . .” Id. at 405.


20. Id. at 11-12 (Justice Black wrote “[s]eldom, if ever, has this power of executive clemency been subjected to review by the courts”).
from using insufficient procedures under the fourteenth amendment.\footnote{Id. at 17-21 (Frankfurter, J., dissenting) (discussed reasons, under fourteenth amendment analysis at that time, for finding a constitutional right not to be executed while insane). Justice Frankfurter's analysis here and in Caritativo v. California, 357 U.S. 549 (1958) (per curiam) is not unlike that used by the Court in Ford v. Wainwright, 2595 U.S. at 2600-02.}

In 1958 the United States Supreme Court heard \textit{Caritativo v. California}\footnote{Caritativo v. California, 357 U.S. 549 (1958) (per curiam).} and issued a one sentence opinion affirming the California Supreme Court's decision that,\footnote{Caritativo v. Teets, 47 Cal. 2d 304, 303 P.2d 339 (1956), aff'd, 357 U.S. at 550 (1958) (per curiam) ("The judgments are affirmed.") (the California court held that warden must, in his discretion, determine that an appeal is necessary before one is allowed under California procedure).} under California statutory law, the courts could not review a prisoner's sanity unless the warden of the prison had previously initiated an inquiry.\footnote{357 U.S. at 550 (1958).} In his concurring opinion, Justice Harlan added that the California statute required the warden to continually observe the prisoner's mental health and use good faith when determining whether to hold a judicial inquiry.\footnote{Id. at 550.} Justice Frankfurter dissented again, arguing that the prisoner's constitutional right not to be executed while insane requires at least a mandatory hearing on the issue.\footnote{Id. at 552 (Frankfurter, J., dissenting) ("Audi alteram partem-hear the other side-a demand ... spoken with the voice of the due process clause ... It is beside the point that delay in the enforcement of the law may be entailed"). Id. at 558.}

\section*{III. \textit{Ford v. Wainwright}}\footnote{106 S.Ct. 2595 (1986).}

A. THE FACTS OF THE CASE

Alvin Bernard Ford was convicted on December 17, 1974 for the first degree murder of a Fort Lauderdale police officer.\footnote{Ford v. Wainwright, 451 So.2d 471, 473 (Ford was convicted of murdering a helpless, wounded police officer by shooting him in the back of the head after the officer had given Ford the keys to a patrol car in Florida on July 21, 1974).} Following a jury recommendation, Ford was sentenced to death on January 6, 1975. The Florida Supreme Court affirmed.\footnote{Id.}
After several merit appeals and collateral attacks, Ford invoked the Florida statute governing procedures that deal with a person under the sentence of death who appears to be insane. Insanity had not been an issue in any proceeding in Ford's case until this point in 1982. At this time, Ford began to show signs of a deteriorating psyche, worsening steadily.

30. Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, Ford v. Florida, 445 U.S. 972 (1980) (direct appeal); Ford v. State, 407 So.2d 907 (Fla. 1981) (consolidated original habeas corpus and collateral appeal in Florida Supreme Court); Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), aff'd, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), cert. denied, 104 S.Ct. 201 (1983) (federal habeas corpus petition was denied and the denial was affirmed); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981) (case in which Ford was named a party with 122 other death row inmates in a request for relief based upon an accusation that certain documents which were considered by the court were not made available to the defendants' counsel).

31. FLA. STAT. § 922.07 (1986). The relevant portions read as follows:

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it is to be imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility.

(4) When a person under sentence of death has been committed to a Department of Corrections mental health treatment facility, he shall be kept there until the facility administrator determines that he has been restored to sanity. The facility administrator shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

Id.

32. Ford, 106 S.Ct. at 2598-99; see also Brief for Petitioner at 4-8, Ford v. Wainwright, 106 S.Ct. 2595 (1986) (No. 85-5542) (Ford believed that he was the target of a conspiracy by the Ku Klux Klan and others to force him to commit suicide. Ford believed the prison guards had been killing people and putting them in the prison's bed enclosures and that his female relatives were being held and abused there. Ford's delusion developed into what he saw as a hostage crisis, and he believed 135 of his friends, family, and various governmental leaders were being held. Ford began to refer to himself as 'Pope John Paul, III'. He wrote a letter to the Attorney General of Florida in which he appeared to assume control of the hostage crisis by firing prison guards. Ford also claimed to have appointed nine justices to the Florida Supreme Court.

Ford developed the belief that his first psychiatrist had joined the conspiracy against him and his counselor; he procured a new one in 1983. Ford then revealed that he believed he was free to go because his execution would be illegal, and because he believed he had won a landmark case. Ford's psychiatrist found that Ford believed he would not be executed and could not be executed because he had control over the governor and owned the prisons. Moreover, his psychiatrist found that he did not conceive the connection between his crime and execution. His psychiatrist found that the symptoms were authentic. Ford regressed further until he began to speak in incomprehensible code.
The governor followed the statutory procedures, allowing three psychiatrists to examine Ford in a joint meeting for thirty minutes in order to determine whether he understood the death penalty and why he was to be executed. Upon reviewing the two to three page reports submitted by each psychiatrist, each of which contained a different diagnosis but were in agreement on Ford's sanity as defined by state law, the governor signed the death warrant without explanation. Ford next applied to the Florida Supreme Court for a hearing but was denied. Ford then filed a habeas corpus petition in the United States District Court for the Southern District of Florida, and was again denied without a hearing. The United States Court of Appeals, however, granted a certificate of probable cause and stayed the execution. The Supreme Court rejected Florida's attempt to vacate the stay of execution. Upon hearing, the Court of Appeals held that the Florida statute provided the minimum due process required, however, they did so without deciding whether the right not to be executed while insane was constitutionally mandated. The United States Supreme Court then granted certiorari.

B. THE SUPREME COURT OPINION

The Supreme Court decision recognized the underlying eighth amendment right not to be executed while insane, and found Florida's statutory procedure inadequate in light of this right. The Supreme Court remanded the case to the District Court for a hearing de novo on Ford's incompetence claim. The majority began by recognizing that since the Court had last considered the rights of the presently insane awaiting execution,

33. Ford, 106 S.Ct. at 2599.
34. Id.
37. Wainwright v. Ford, 467 U.S. 1220 (1984) (Chief Justice Burger and Justices Rehnquist and O'Connor would have granted the application to vacate the stay of execution).
38. Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985).
40. Ford, 106 S.Ct. at 2595 (authored by Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, and also joined by Justice Powell with respect to parts one and two in which the Court recognized the existence of an eighth amendment right not to be executed while insane). It is interesting to note that the Court did not necessarily have to find an eighth amendment right not to execute while insane in order to find Florida's procedures inadequate. See infra note 72.
41. Id. at 2606.
analysis of fourteenth amendment due process claims and eighth amendment claims had undergone substantial evolution. Under present analysis, the eighth amendment proscribes procedural as well as substantive standards. Thus, the Court reasoned, it must be decided whether a right not to be executed while insane can be found within the bounds of the eighth amendment as applied to the states through the fourteenth amendment.

The Supreme Court then outlined the relevant authority to the effect that execution of the insane was considered cruel and unusual punishment at the time the Bill of Rights was adopted, applying the older, "time of adoption" test in order to show that even using this strict analysis, the right not to be executed while insane is clearly constitutionally mandated. Marshall went on to analyze the issues under the more recently devised test which looks to contemporary values, in order to determine the scope of the eighth amendment. The Court relied heavily on current state law and on the justifications used at common law to define contemporary values, and found that

42. Id. at 2599-600; Furman v. Georgia, 408 U.S. 238 (1972) (develops "contemporary standards of decency" and "dignity of man" criteria as parts of the eighth amendment cruel and unusual test) (this case led states to stop executions for four years); see also Polsby, The Death of Capital Punishment: Furman v. Georgia, 1972 Sup. Ct. Rev. 1 (analyzes the nine opinions in the case).
43. Ford, 106 S.Ct. at 2602. However, the procedural aspect is contemporary, as opposed to historically based law.
44. Ford, 106 S.Ct. at 2600.
45. Solem v. Helm, 463 U.S. 277 (1983). "There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of the Englishmen." Id. at 285-86 n.10. The Court applied a proportionality test which weighed the crime and the penalty, and in so doing relied heavily on what was considered cruel and unusual at the time the eighth amendment was adopted.
all the evidence weighed in favor of finding the execution of the insane to be cruel and unusual.48

The majority continued by distinguishing the historical traditions that give rise to the finding of an eighth amendment right from the contemporary manner in which those rights are enforced.49 This places the procedures due within the realm of those required in other habeas corpus proceedings.50 Marshall goes further, however, by requiring the same type of safeguards utilized in other stages of capital cases.51 The need for these protections is greater still, Marshall reasoned, because of the limited accuracy involved in determining mental state and because the decision will turn on a single fact rather than on equitable considerations.52 For these reasons, the Supreme Court found Florida's statutory procedure inadequate.53 The Court went on to point out the lack of any adversarial process in Florida's statutory scheme, the fact that the process is carried out entirely by the executive branch, and the discretionary nature of the decision, noting these as factors that should prompt a closer inquiry.54

The majority then detailed specific areas where Florida's procedure is deficient. First, the prisoner is not included in the truth seeking process; no relevant material may be submitted on behalf of the prisoner.55 This infringes the prisoner's right to be heard and increases the likelihood that probative information will be ignored in the process of psychiatric evaluation, a process notorious for disagreement even among experts.56

49. Id. (the Court continues now without Justice Powell).
50. Id.; see also Townsend v. Sain, 372 U.S. 293 (1963) (provides presumption of correctness for facts found by a state court); Mattheson v. King, 751 F.2d 1432, 1447 (5th Cir. 1985) (Supreme Court deferred to state court's findings after an evidentiary hearing, thereby avoiding issue of whether execution of insane violates eighth amendment).
51. Ford, 106 S.Ct. at 2603 ("[t]he ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding").
52. Id.
53. Id.
54. Id. at 2604-05.
55. Id.; see Exec. Order No. 83-197 (Dec. 9, 1983) (Governor Graham stated that "Counsel for the inmate and the State Attorney may be present but shall not participate in any adversarial manner").
56. Ford, 106 S.Ct. at 2604; see also Ake v. Oklahoma, 470 U.S. 68, 81 (1984) ("psychiatrists disagree widely and frequently on what constitutes mental illness . . . there often is no single, accurate psychiatric conclusion on legal insanity in a given case").
The second deficiency observed by the Court is the complete lack of opportunity for cross-examination of the state psychiatrists' opinions. The purposes of cross-examining encompasses inquiry into the history and competence of each psychiatrist and the meaning of words used in each psychiatrist's report. Without cross-examination, the Court concluded that the fact-finder's results would be distorted, especially since Florida's single group interview examination procedure is cursory and inflexible to the needs in each case.

The third defect, and the one most alarming to the Court, is the placing of the decision whether to delay execution solely with the discretion of the executive branch. Marshall pointed out that historically the decision was based on law, not discretion, and that no other constitutional right had been left to the unreviewable discretion of the executive branch. The Court found it strikingly inappropriate for the "commander of the State's corps of prosecutors" to be in charge of a procedure such as this in light of the probable lack of neutrality possessed by the one in charge of the entire process which condemned the prisoner in the first instance and whose interest is in enforcing sentences.

Although the Court found the Florida procedure inadequate, it did not adopt a procedure requiring a full trial, but rather left to the states the task of developing procedures that protect the individual's eighth amendment rights while protecting the state's interest in carrying out the death sentence. The Court suggested that the state's own procedure in other areas where insanity is an issue might provide a possible alternative.

Justice Powell joined Parts I and II of the Court's opinion, agreeing that an eighth amendment right exists; however, in his concurring opinion he found it necessary to define the meaning of insanity for a condemned prisoner in order to clearly define that

57. Ford, 106 S.Ct. at 2605.
58. Id. ("Without some question of the experts concerning their technical conclusions, a fact finder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent"). See Barefoot v. Estelle, 463 U.S. 880, 899 (1983).
59. Ford, 106 S.Ct. at 2605; Spaziano v. Florida, 468 U.S. 447, 464 (recognized sensitivity to the individual as a factor in determining whether due process had been served).
60. Ford, 106 S.Ct. at 2605.
61. Id.
62. Id. at 2606; Justice Powell interpreted the Court's opinion to require a full trial. Id. at 2610.
63. Id. at 2606 n.4; See infra note 143.
right. Powell did not find the prisoner's ability to assist in his own defense necessary at this stage in the proceedings. Rather, he found it more persuasive that the punishment is cruel and unusual because the prisoner may be unable to prepare for death, and the state's retributive goal is not served by executing one who cannot comprehend the connection between his crime and the punishment to be imposed for it. Therefore, Powell would allow a stay of execution only for those who do not realize that they are to be executed and do not understand the reason for their punishment. Powell concluded that since Ford believed the death penalty had been invalidated and that he would not be executed, he did not perceive the connection between his crime and the execution. Since this was the standard used by Florida, the question remains as to whether the claim was judged fairly under due process standards.

Powell disagreed with Marshall on the issue of what is required in order to satisfy due process. Powell argued that fewer safeguards are required because the prisoner's guilt is not in question, and for this reason the heightened requirements utilized in other capital proceedings do not apply. Further, there should be a presumption of sanity because the prisoner had been judged competent at earlier stages in the process. Also, the subjective nature of a determination of sanity is not conducive to the adversarial process. Powell concluded that an impartial officer or board observing basic fairness and allowing an opportunity for the prisoner's arguments to be heard would be all that due process requires, leaving the precise limits within the province of state law.

Justice O'Connor, joined by Justice White, disagreed with the Court's conclusion that the right not to be executed while insane is guaranteed by the eighth amendment. However, since the states create by statute a protected liberty interest in granting stays to the presently incompetent death row prisoners, the due process clause requirements must be met.

64. Id. at 2606-07.
65. Id. at 2607-09.
66. Id. at 2609.
67. Id.
68. Id. at 2610. ("the only question raised is not whether, but when, his execution may take place . . . . [I]t is not comparable to the antecedent question whether petitioner should be executed at all").
69. Id. See infra note 144.
70. Ford, 106 S.Ct. at 2611.
71. Id.
72. Id. at 2611-12; See infra notes 101-03 and accompanying text. The majority
Since O'Connor would give wide latitude to the states, due to the nature of the interest, the only way Florida's procedure is deficient is in its failure to allow an opportunity to be heard. She observed that, at least, the petitioner's written submissions should be reviewed.73

Justice Rehnquist, joined by Chief Justice Burger in dissent, argued that the type of procedures Florida uses to determine sanity are more in keeping with the nature of the right as it existed both historically and presently.74 Rehnquist also argued that laws traditionally do not create eighth amendment rights.

The dissenters further found that no basis existed for the right created by the statute other than the discretion of the governor to grant a stay.75 Further, they argued that due process would be satisfied in any event by executive procedures because of the late stage in the proceedings, and the needless complications and postponements which would result from a more detailed process.76

C. ANALYSIS OF THE COURT'S OPINION

The opinion of the Court in Ford v. Wainwright specifically considered, for the first time, the question of whether the right not to be executed while insane is constitutionally guaranteed.77 The Court correctly decided that it is guaranteed; by applying both the older, narrower test which asks whether it was considered cruel and unusual at the time the Bill of Rights was adopted, and by applying the present more liberal "contemporary standards of decency" and "human dignity" test. The Court cites overwhelming evidence that both tests are satisfied.78

Contrary to the dissent's claim, the majority does not "cast aside settled precedent" because the eighth amendment had not been applied to the states at the time the prior cases were decided.79 In light of the eighth amendment's intervening incorporation into the fourteenth

also recognized that even in the absence of the eighth amendment right, Florida's procedure is constitutionally insufficient. Ford v. Wainwright, 106 S.Ct. at 2604.

73. Id. at 2613.
74. Id. at 2613-14.
75. Id. at 2615. (Rehnquist cites "if the Governor decides" as statutory language which precludes the individual from forming a legitimate expectation of anything but the governor's discretion).
76. Id. at 2615.
77. See supra note 3.
78. Ford, 106 S.Ct. at 2602.
79. Robinson v. California, 370 U.S. 660 (1962) (Court applied the eighth amendment to the states).
amendment as against the states,80 the Ford v. Wainwright test of cruel and unusual punishment properly reflects current constitutional standards.81 Since Solesbee and the other cases involving execution of the insane never considered the question,82 the Court was doctrinally compelled to start with a fresh analysis.

The dissent would have the Court recognize a right not to be executed while insane that is "historically"83 tied to executive discretion, as has been employed by the states to implement this right.84 What the dissent fails to recognize, however, is that at common law the decision whether to execute an insane person was in fact not discretionary but one of law.85 In addition, the Court's established tests look only to the punishment and not to procedure. Since the Court has established a clear constitutional basis for the right, that right must be enforced in accordance with modern procedural requirements.86 Execution of an insane prisoner pursuant to insufficient procedural safeguards violates the prisoner's eighth amendment rights.

The dissent finds it unnecessary to constitutionalize the currently accepted view.87 But in the absence of a constitutional basis for the right, the states would be free to execute insane prisoners simply by repealing the state laws that currently grant that right. The state law uniformly providing for such a right is used by the dissent to show that a constitutional basis for the right is not required.88 State accept-

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80. Before this evolution took place, the Court held that the due process clause did not apply to sentencing proceedings. See Williams v. New York, 337 U.S. 241, 245-46 (1949).
81. See supra notes 7, 8.
82. Solesbee v. Balkcom, 339 U.S. 9 (1950) ("At the outset we lay aside the contention that execution of an insane person is a type of 'cruel and unusual punishment' forbidden by the Fourteenth Amendment"); Caritativo v. California 357 U.S. 549 (1958) (one sentence opinion citing Solesbee); Phyle v. Duffy, 334 U.S. 431, (1948) (state judicial remedy available so Court did not decide due process question); Nobles v. Georgia, 168 U.S. 398 (1897) (no right to jury on insanity issue).
83. But see Ex Parte Chesser, 93 Fla. 291, 111 So. 720 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939) (these Florida courts prior to enactment of current statute held that there was a right to a judicial determination by a judge when a condemned person was allegedly incompetent).
84. Ford, 106 S.Ct. at 2613.
86. Ford, 2595 S.Ct. at 2602.
87. Id. at 2615.
88. Id. ("The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate . . . I find it unnecessary to 'constitutionalize' the already uniform view . . . '").
ance of a right should not preclude the Court's finding that the right is constitutionally guaranteed, however. Rather, the uniform view should be evidence of contemporary standards of decency and weigh toward recognizing a constitutional basis for the right. This constitutional basis is important, without it any state could begin to execute the presently insane regardless of any "uniform view" possessed by the other states.

The Court's next logical step was to decide what process is due and whether Florida's statute provides sufficient safeguards. The Court wisely opted to allow the states to determine the specific procedures to be employed, while setting out workable guidelines and suggesting state insanity procedures in other contexts as models.

As Justice Powell pointed out, the court failed to address the crucial issue of how 'insanity' will be defined in the death row context. Perhaps this is because the Court is indecisive about the actual purpose for allowing the stay for those found insane, or perhaps the deficiencies found in Florida's procedure are the only issues requiring consideration because Florida's definition of insane is sufficient. In any event, the right is left undefined, and states will be required not only to adopt proper procedures, but to decipher what is meant by 'insane' according to the federal constitutional law. This approach could have been avoided by adopting Justice Powell's well reasoned analysis of the definition of insanity contained in his concurring opinion. Whether the Court will ultimately accept Powell's definition which "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are about to suffer it" is a question which the Court will, in all likelihood, face again, perhaps when confrontation is more directly required by the facts.

89. Id. at 2601-02.
90. Id. at 2605-06.
91. Id. at 2606 n.4.
92. Id. at 2606-07; Powell v. Texas, 392 U.S. 514, 536-37 (1968) (dictum) (plurality opinion) (Court voices a preference not to set down a uniform test for insanity, for a uniform rule would "reduce, if not eliminate, . . . fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry . . . ").
93. LAFEVE AND SCOTT, HANDBOOK ON CRIMINAL LAW 303 (1972) (the prisoner "must be so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him").
94. Ford, 106 S.Ct. at 2607-09.
95. Id. at 2609.
The only concrete guidelines given by the Court are those that can be gleaned from the Court's recitation of the flaws in Florida's procedure. From this, it is evident that the prisoner must be allowed to present relevant evidence to the finder of fact,96 that some sort of cross-examination of the state's witnesses is required,97 and that the decision must be in the hands of a tribunal that is subject to review.98 In the next section, this note will examine what additional safeguards are implicitly required by Ford v. Wainwright.

IV. THE REQUIREMENTS OF DUE PROCESS

Since there exists a constitutional right through the eighth amendment not to be executed while insane, the actual process utilized in a state proceeding to determine present competency should be analyzed and reconsidered in a manner that recognizes the weight of both the state's interest in capital punishment and the more recently recognized individual interest in the right not to be so executed.99 Prior to Ford v. Wainwright, this right was granted by state law.100 While due process requirements differ between state created rights and constitutionally mandated ones, they are at least analogous. Since the late 1970's, the Court has used a balancing test approach to determine what procedures are due in notice, hearing and other phases of process in cases involving state created rights.101 On one side the Court balances the strength of the private interest that would be affected by the action, the "risk of erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."102 After arriving at some multiplier, the Court balances this factor against the govern-

96. Id. at 2604.
97. Id. at 2605.
98. Id. (Powell believed Marshall required a "full trial" on the issue of present insanity).
99. Id. at 2610.
100. For an excellent overview of the procedures that would be due in the absence of an eighth amendment right, see Note, Insanity of the Condemned, 88 Yale L.J. 533 (1979); For a more conservative view of the same issue, see Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381 (1962).
ment's interest, including the cost and complexity of particular procedural requirements. 103

_Ford v. Wainwright_, however, has elevated the right not to be executed while insane to the level of other capital punishment procedures, so heightened safeguards are necessary. Finding an irremediable life interest at stake, the Court held that such procedures must achieve "a heightened standard of reliability". 104 The procedural safeguards required in this context must closely resemble those standards employed at other stages of capital punishment proceedings. 105

In capital punishment cases the Court traditionally has considered such factors as "social cost", 106 "sensitivity to the individual", 107 and the assurance that the penalty imposed is neither discriminatory nor arbitrary. 108 Similarly, in determining whether an indigent defendant has a right to the assistance of a psychiatrist in preparing a defense at trial, the Court has established three governing factors which

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103. _Id._ at 322. Thus a mathematical formula might be derived such that the probability of error reduction multiplied by the insane prisoner's interest in remaining alive while insane must be greater or equal to the overall cost to the government both administratively and fiscally in order for the Court to require additional procedures. According to this test, present state procedures to determine the mental competency of prisoners on death row are generally insufficient.

104. 106 S.Ct. at 2603; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Solesbee v. Balkom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting) ("It cannot be that the Court is more concerned about property losses that are not irremediable than about irretrievable human claims"). In determining whether a judicial hearing was necessary in this context, one commentator balanced the potential for error, the appropriateness of using a judicial hearing to decide present insanity, and the ability of the courts to ensure compliance with the eighth amendment against the administrative or fiscal benefits derived from a nonjudicial hearing. Note, _The Eighth Amendment and the Execution of the Presently Incompetent_, 32 STAN. L. REV. 765, 801-03 (1980). While this test may give a basis, or bare minimum to argue for certain procedural safeguards, it seems there are more powerful arguments available than the type used in property interest cases, especially when the Court has repeatedly pointed out the severity of the death penalty and then demanded heightened safeguards. _See Ford v. Wainwright_, 106 S.Ct. at 2603; Spaziano v. Florida, 468 U.S. 447 (1984).


106. Spaziano v. Florida 468 U.S. 447, 456 (1984) (case which found that there is no constitutional right to a binding jury determination in the sentencing process of a capital proceeding; the jury's determination is advisory unless state law provides otherwise).

107. _Id._ at 464.

108. _Id._ at 459, 464 (also required a "measured, consistent application and fairness to the accused"); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (joint opinion) (Marshall, J., concurring) ("where life hangs in the balance, a fine precision must be insisted upon").
include the weight of the private interest to be affected, the governmental interest affected if the safeguards are implemented, and the probability of an erroneous deprivation of the affected interest if those safeguards are not provided.\textsuperscript{109} Guided by considerations such as these, then, courts must fashion due process requirements that adequately protect the fundamental life interest of the presently insane death row inmate.

V. Procedure

A. RIGHT TO COUNSEL

At the very base of due process rests the requirement of adequate notice.\textsuperscript{110} The usual acts of notice, however, are entirely insufficient if, in fact, the prisoner is insane.\textsuperscript{111} The purpose of notice is to inform the prisoner of the nature of the procedure about to take place and the time frame in which it will take place, in order to allow the prisoner the opportunity to prepare for this proceeding. Because the insane prisoner may lack the ability to comprehend the situation presented, the purpose of notice will often be frustrated by his inability to utilize the information provided.\textsuperscript{112} Notice of sanity proceedings, of the probable delay of execution, and of the standards against which
sanity will be assessed is meaningless to one who is without adequate understanding. The very individual whose rights are most in need of protection will be the most vulnerable without proper assistance. Indeed it may be argued, that under such circumstances, no notice in fact ever occurred.\footnote{113}

In order to accomplish the purpose intended to be served by notice of proceedings, the mentally incompetent prisoner must be provided with counsel at a point near the execution date.\footnote{114} In the absence of such assistance, reliance on custodial personnel to raise the issue of insanity could conceivably allow an insane death row inmate to be executed simply because no mandatory procedures required that the custodian do so.\footnote{115} An automatic procedure may prove too burdensome in comparison to the relatively effective procedure of appointing counsel to consider each prisoner's need to claim insanity.\footnote{116}

\footnote{113. Psychosis has definite effects on perception. Musselwhite v. State, 215 Miss. 363, 367, 60 So.2d. 807, 809 (1952) ("Amid the darkened mists of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail or take account of its significance.").}

\footnote{114. Looking to a statutory entitlement type balancing test, it can be argued that the high probability of error in attempting to effectively notify an insane prisoner and the prisoner's attempt to effectively utilize this knowledge coupled with the prisoner's interest in life which is at stake far outweighs the cost caused to the government. Thus, even in the absence of an eighth amendment basis, it seems at least as much should be required.}

\footnote{115. Spaziano, 468 U.S. at 459 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110-111 (1982) (Court required "measured, consistent application"). In order to ensure this application the prisoner should not have to depend on the discretion (and diligence) of the custodial officer. This seems self-evident since the Court is not even willing to allow the governor to decide the insanity issue in a discretionary manner after the matter has been investigated and a report made to him. To allow the custodial officer discretion as to when to raise the claim puts an unnecessary roadblock in the way of later procedures. Even the meager procedures followed in Ford's case would be meaningless if his custodial officer had the discretion to and did not raise his claim (if Ford was without counsel and in need of some third party willing to raise the issue on his behalf). 'Assurance' is not provided if ability to raise the insanity issue in the absence of an attorney or a willing third party is dependent on a discretionary decision. This is especially true in light of the recent trend among attorneys to shun death row appeals. Reinhold, LAWYERS SHUNNING DEATH ROW APPEALS, Chi. Daily L.J., Sep. 24, 1986, at 1, col. 2.}

\footnote{116. The issue should be raised through either a mandatory hearing or some other mandatory mechanism. Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 STAN. L. REV. 765, 798-800 (1980) (argues for a mandatory trial on the issue of insanity, a "postconviction mechanism", and permitting someone to assert the issue on the prisoner's behalf as ways to raise the insanity issue).}
Assistance of counsel over the entire death row period will allow the insane prisoner the opportunity and capability to initiate the inquiry under state law or file the proper habeas corpus forms. The attorney can file the forms personally in the proper circumstances, and the state could place some responsibility for frivolous claims upon the attorney. Counsel need not be available for every purpose during this period, but rather should be limited to the pre-trial interview or to those occasions when the question of a prisoner's insanity is raised through another means.

Counsel is also necessary at the point of hearing, whatever form it might take, because the prisoner may not be capable of knowing when or how to challenge either the inadequacy of the process or an alleged erroneous finding. If a judicial hearing is not utilized, the need for counsel increases. In view of the fact that only fifty-four percent of psychiatrists usually agree on a given diagnosis, reliance on impartial expert analysis alone can increase the risk of error. Unlike most other proceedings, errors not immediately discovered at this level become irreversible upon execution of punishment. While the low cost of written records make them appealing, later review is no substitute for the immediate adversarial examination and cross-examination of witnesses.

B. THE FIRST HEARING

A prisoner's claim of insanity while on death row is peculiar in that, upon a finding of sanity, the prisoner may raise the issue again

117. Contra Shriner v. Wainwright, 735 F.2d 1236, 1240-41 (11th Cir. 1984) (habeas corpus petitioner will be held to have waived his right to present facts and claims as were known to him upon counsel's negligent or deliberate failure to assert such facts and claims on his behalf), app. denied, 467 U.S. 1257 (1984). In this case, however, the 'as were known to him' requirement could not be met due to the insane prisoner's effective lack of notice. See supra text accompanying note 112-13.

118. A mandatory pre-execution attorney-prisoner interview would satisfactorily assure that a meritorious claim is not ignored simply because the prisoner is truly incompetent and cannot raise the issue personally. See supra text accompanying note 115.

119. Cf. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299 (1983) (assesses the effectiveness of counsel based on the Supreme Court's procedural guidelines for constitutional imposition of the death penalty and concludes that, in light of the severity of the punishment, the definition of "reasonably competent counsel" in the sentencing stage of a capital proceeding involves more stringent requirements than in other contexts).

120. J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 183 (2d ed. 1975).

121. Cf. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Court recognizes that an execution, once carried out, cannot be corrected or modified).

122. See Ford, 106 S.Ct. at 2605.
Fear that the system will be manipulated in this way has led many courts to conclude that a process designed to protect prisoners' rights must be compromised in order to allow the states to continue to employ capital punishment. Implementation of this conclusion has led to widespread reliance upon a warden's or governor's discretionary judgment in deciding when a prisoner should be allowed to show present incompetency or upon the same discretion in deciding whether the prisoner is, in fact, insane.

In order to ensure that the prisoner's constitutional rights are not infringed, at the very least, a judicial inquiry into present competency should be made on those claims which are most likely to be valid. Since it is the prisoner who insists upon repeated claims and subsequent hearings which tend to cause the greatest delay and expense, if a compromise is to be made, it should be made at the expense of the repeating claimant. In order to accomplish these competing goals, it is necessary to analyze what process is due at a first hearing, and then to decide what safeguards can be retained in a more expedited system dealing with subsequent claims.

A judicial inquiry is the best alternative for the initial hearing for a number of reasons. First, while a panel of psychiatrists can analyze, if not agree upon, factual medical aspects of the prisoner's competency, they should not be expected to apply the law and arrive at formal legal conclusions regarding the prisoner's rights. Present

125. See supra note 2.
126. Gardner v. Florida, 430 U.S. 349, 359 (1977) ("no better instrument has been derived for arriving at the truth"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (explains importance of judicial inquiry) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth . . . . It would seem that frivolous claims are equally likely whether it is the first time a prisoner has raised the claim or not. It is not the first claim that puts the greatest burden on the states' ability to carry out the death sentence, however. It is the continuous raising of claims that could cause endless delay. See supra note 18. Later claims must be heard only when they are most likely valid. This could be effectuated through a certificate of probable cause requirement to raise the issue on subsequent claims.
127. See A. Goldstein, The Insanity Defense 59-60 (1967); Comment, An End
competency in the capital punishment context does not necessarily mean the same thing as psychosis or 'mental illness' generally. Some forms of mental illness do not effect the ability to comprehend or to make decisions, and therefore should not be considered in this context. Psychiatrists' opinions without judicial review can be unreliable and uncertain, tending to err with a bias toward institutionalization. Allowing a warden to review a psychiatrist's report would not appear to add any greater reliability; a warden is not necessarily more aware of the law than a psychiatrist, and may likewise possess an institutional bias. A judicial hearing, however, allows for review in light of existing law and provides an opportunity for the benefits of the adversarial process. Specifically, arbitrary acceptance of psychiatric opinion would be diminished and responsibility for the final decision with respect to the legal question would be placed in the hands of a judge. While a jury trial may not be vital at this stage due to limited factual questions and added expense, it can be fairly stated that a judicial hearing is necessary. A finding of sanity pushes the prisoner down the road to execution as necessarily as the initial death sentence and the prisoner should be afforded whatever due process is possible

128. Some forms of paranoia and infrequent delusions do not effect most forms of comprehension, and 'lucid periods' are recognized in contract law as periods when an incompetent is able to function for purposes of making a contract.

129. This would have especially important affects in the present procedural situation. Without a judicial hearing a psychiatrist could exercise his or her bias without having this bias revealed through the scrutiny of cross-examination.

130. See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 HARY. L. REV. 1690, 1712 (1974) (a discretionary decision makes arbitrariness more likely, especially if prior decisions were made judicially).


132. Other benefits of the adversarial process include increased disclosure of the reasons for decision, the opportunity for one trained in the law and accustomed to applying the law to decide the issue, and the ability to question inconsistent and vague conclusions sometimes reached by psychiatrists. The flaws in Florida's procedure which were noted by the Court are those that are curable through a hearing mechanism. Ford, 106 S.Ct. at 2604-05.

133. D. ROBINSON, PSYCHOLOGY AND LAW 206 (1980) (makes proposal that "[a]ll statements regarding the mental state of the accused or any party to litigation are to be treated as statements of belief or opinion. They are not to be accorded the status of evidence . . . ").
in light of potential abuses. Because little deterrent or retributive value result, the state has no interest in executing an insane prisoner. Rather the states' interests lie in fiscal economy and in the speedy execution of those sentenced to death who are not insane. At least at the time of the prisoner's initial claim, due process will not be served by less than a judicial hearing.

C. SUBSEQUENT CLAIMS

In order to overcome the possibly prohibitive costs of allowing a prisoner to raise repeatedly the issue of insanity, subsequent claims must necessarily be dealt with in a fashion less burdensome to the states' interest in efficiency and in carrying out the death penalty. This will not only hasten the processing of claims, but may diminish incentive for the prisoner to claim insanity when the claim has no merit. While a prior finding of sanity should not impact conclusively on a later inquiry, practicality dictates that this earlier finding must influence the procedures utilized to determine whether a subsequent claim is frivolous. As an additional rationale it could be found that by raising frivolous claims of insanity, a prisoner 'waives' certain procedural rights; for example, the automatic right to a judicial

134. See supra text accompanying note 18.
137. Id. at 802.
138. Ford v. Wainwright, 106 S.Ct. at 2606 ("legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided"). See also Nobles v. Georgia, 168 U.S. at 405-06 (1897); Caritativo v. California, 357 U.S. at 551 (1958).
139. While it may be true that a death row inmate is desperate and may resort to any avenue in order to delay execution, an attorney who is not only responsible for frivolous claims but who may put his or her client in a less advantageous position when the client later actually becomes insane will likely counsel the client to forgo raising the issue until it is reasonably thought to have some merit.
140. Ford, 106 S.Ct. at 2610 ("The State therefore 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") (footnote omitted); Welch v. Beto, 355 F.2d 1016, 1019 (5th Cir.) Cert. denied 385 U.S. 839 (1966) (Prior determinations are "hardly helpful in forming a judgment as to whether there is a reasonable doubt as to the sanity"). See generally Note, Insanity of the Condemned, 88 Yale L.J. 533, 560 n.160 (1979). But see Drope v. Missouri, 420 U.S. 162, 180 (1975) (Earlier medical opinion on competence to stand trial considered when determining whether later inquiry is necessary).
inquiry into the issue of present sanity.\textsuperscript{141} Or it could be analogized to the one time automatic appeal to the state's highest court after a sentence of death, after which the appeals become discretionary.

Regardless of the rationale employed, some precision must ultimately be sacrificed in order to maintain the use of current capital punishment laws.\textsuperscript{142} Under these circumstances, due process requires fewer procedural safeguards after an initial finding of sanity. Of course, by way of the same analysis, a finding of insanity while on death row followed by hospitalization and treatment which leads to reinstatement of the punishment, should not preclude the prisoner from the full procedural protection afforded to his initial claim. Seemingly unfounded subsequent claims, however, may be dealt with through somewhat discretionary procedures similar to those presently used by the states. A panel of appointed psychiatrists could interview the prisoner and submit written findings.\textsuperscript{143} Records from prior insanity proceedings could be reviewed to aid in the determination of whether changes have occurred which merit \textit{de novo} review. In addition, writings submitted by any interested party could become part of the record. The party making the decision to review subsequent claims, perhaps a governor or a warden, should be required to support all decisions with a written record, allowing judicial review of such denial. The reviewing court should be required to give substantial deference to this discretionary determination.\textsuperscript{144} In order to begin the

\textsuperscript{141}. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (right to represent oneself effectively lost through misconduct). In this case perhaps the court could require knowledge that the claim is frivolous before finding waiver. See also North Carolina v. Butler, 441 U.S. 369 (1979) (implicit waiver sufficient to waive constitutional right to Miranda warning).

\textsuperscript{142}. Comment, \textit{Execution of Insane Persons}, 23 So. Cal. L. Rev. 246, 252, 256 (1950) (writes in favor of a statutory presumption of sanity as a “practical expedient”).

\textsuperscript{143}. Ford v. Wainwright, 106 S. Ct. at 2606 n.4 (the Court cites current Florida statutes in other areas of “instructive analogies”). The first of these sections speaks to appointment of an expert panel in competency to stand trial situations; two to three experts may be appointed. FLA. STAT. § 916.11 (1985 and Supp. 1986). Florida case law has established that these experts are to be ‘neutral’. Chapman v. State, 391 So. 2d 744 (Fla. App. 1980). The definition of insanity in competency to stand trial cases hinges on a present ability to aid in one’s defense and an understanding of the proceedings. FLA. STAT. § 916.12 (1985 and Supp. 1986). This would seem to unnecessarily broaden Powell’s definition. Ford, 106 at 2609; see supra text accompanying note 66. These are specifically pointed to as only analogies by the Court and should be used in that context. The prisoner may also be entitled to the assistance of psychiatrist while on death row. See Ake v. Oklahoma, 470 U.S. 68, 83 (1983).

\textsuperscript{144}. Florida law at the present time puts a presumption of sanity on a defendant
appeal process, a certificate of probable cause, placing the burden to show merit upon the prisoner, should be required. This would further expedite the process while continuing to protect the prisoner's rights to the extent necessary to satisfy due process.

VI. CONCLUSION

The Supreme Court in Ford v. Wainwright found that the eighth amendment prohibits execution of the presently insane by looking to both the overwhelming acceptance of the right at common law and current acceptance by the states. The fourteenth amendment provides that this right cannot be limited through processes that fall below those deemed to be constitutionally sufficient. Accordingly, procedural due process standards for death row inmates who are faced with a deprivation of life while insane must be revised to comport with present due process requirements. Like all procedures dealing with life and death situations, sufficient safeguards must be implemented in order to assure that erroneous and discriminatory decisions are not made. This can best be effectuated through a system that utilizes a judicial hearing, the right to counsel, and the right to a psychiatrist, along with an accelerated process for subsequent claims of insanity which are a likely vehicle for attempts to unnecessarily delay execution.

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as to the issue of competence to stand trial. Flowers v. State, 353 So. 2d 1259 (Fla. App. 1978).

145. Gerstein v. Pugh, 420 U.S. 103 (1975) (judicial determination of probable cause may be required but full adversary hearing not necessary in deprivation of liberty case); Bowlen v. Scafati, 395 F.2d 692, 693 (1st Cir. 1968) (probable cause places "a burden of affirmative showing of merit" upon petitioner); Foquette v. Bernard, 198 F.2d 96, 97 (9th Cir. 1952) (found it a mockery of justice to execute a prisoner after a finding of probable cause); See generally Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 803 (1980).

146. Ford, 106 S. Ct. at 2606 ("It may be that some high threshold showing on behalf of the prisoner will be found necessary to control the number of nonmeritorious or repetitive claims of insanity") (emphasis added).