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Execution of the Insane Criminal: Ford v. Wainwright

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NOTE

EXECUTION OF THE INSANE CRIMINAL: *FORD V. WAINWRIGHT*

THE Florida criminal justice system convicted Alvin Bernard Ford in 1975 of murdering a policeman and sentenced him to death.[1] A federal court upheld both his conviction and sentence.[2] During the trial Ford showed no indication that he might be incompetent to stand trial. In early 1982, however, Ford began to suffer behavioral changes, which became increasingly noticeable as time passed.[3] When Ford's behavior became serious, his counsel sought a psychiatrist's help. After fourteen months of psychiatric evaluation, the psychiatrist concluded that Ford suffered from a serious mental disease that could affect his ability to assist in the defense of his life.[4] Ford's counsel sought the services of another psychiatrist after Ford refused to see the original psychiatrist again. The second psychiatrist concluded that Ford had no comprehension of why he was to be executed; indeed, Ford believed he was incapable of being executed because of his ability to control the mind of the Governor of Florida. Within a month after the second psychiatrist's examination, Ford had become completely incomprehensible.[5]

Based upon the competency of his client and the two psychiatric reports,

1. Ford v. State, 374 So. 2d 496, 503 (Fla. 1979). The trial court issued the death penalty pursuant to FLA. STAT. ANN. § 921.141 (West 1985).

2. Ford v. Strickland, 696 F.2d 804, 820 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983).

3. Ford began experiencing a variety of delusions. One of these delusions caused an obsession with the Ku Klux Klan. Ford believed that a conspiracy, created solely to pursue his death, existed between the Ku Klux Klan and the prison guards. Ford believed that the prison guards had taken 135 of his friends and family hostage within the prison. In 1983 Ford sent a letter to the Attorney General of Florida claiming that he had taken control of the prison and ended the crisis. Additionally, Ford began to refer to himself as Pope John Paul III.

4. The Supreme Court cited testimony in which the psychiatrist described Ford's condition as "a severe, uncontrollable, mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential.'" Ford v. Wainwright, 106 S. Ct. 2595, 2598, 91 L. Ed. 2d 335, 342 (1986). Paranoid schizophrenia is a specific type of schizophrenia characterized "by the presence of delusions of persecution or grandeur." 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1168 (H. Kaplan 3d ed. 1980). A person who is diagnosed with paranoid schizophrenia typically is hostile and aggressive. *Id.* A paranoid schizophrenic may resort to an act of violence in an attempt to strike out at his imaginary persecutors. W. NEUSTATTER, PSYCHOLOGICAL DISORDER AND CRIME 58-59 (1953).

5. Ford began speaking in a code in which he followed each word with the word "one." This code caused him to speak in incomprehensible phrases such as "God one. Father one. Pope one." 106 S. Ct. at 2599, 91 L. Ed. 2d at 342.

Ford's counsel invoked section 922.07 of the Florida statutes.[6] The statute provides that a three-member commission of psychiatrists examine Ford to determine whether he comprehended the death penalty and whether he understood his death sentence.[7] Although the three doctors disagreed regarding Ford's exact mental state, they did agree that Ford was sane as defined under the Florida state statute. Following the examination, the Florida Governor signed a death warrant for Ford's execution.

Ford's counsel attempted to stay the execution and sought a new competency hearing in the Florida court system, but the Florida Supreme Court denied the stay.[8] In response to the state's inaction, Ford then filed a writ of habeas corpus in the federal court for the Southern District of Florida. The district court denied the petition without a hearing.[9] On appeal, the Eleventh Circuit Court of Appeals stayed Ford's execution.[10] The State of Florida appealed the stay of the execution to the United States Supreme Court. The Supreme Court denied Florida's application to vacate the stay.[11] The court of appeals then confronted the merits of the case. In a per curiam opinion the Eleventh Circuit affirmed the district court's holding that Ford should be denied a stay of his execution.[12] Ford appealed the court's holding, and the United States Supreme Court granted the writ of certiorari to confront the issue of whether the execution of an insane criminal is cruel and unusual punishment under the eighth amendment to the United States Constitution.[13] The Court also examined whether section 922.07 of the Florida statutes provides sufficient due process in determining the competency of a criminal. *Held, reversed*: The eighth amendment prohibits a state from inflicting the death penalty upon a prisoner who is insane; furthermore, section 922.07 of the Florida statutes fails to provide adequate assurances of accuracy to satisfy the necessary due process requirements set out in earlier Supreme Court decisions. *Ford v. Wainwright*, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

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6. The statute provides in part: "When the Governor is informed that a person under the sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." FLA. STAT. ANN. § 922.07(1) (West 1985).

7. The critical question asks whether the prisoner "understands the nature and effect of the death penalty and why it is to be imposed upon him." *Id.*

8. Ford v. Wainwright, 451 So. 2d 471, 475 (Fla. 1984). The Florida Supreme Court stated that the statute provides the final decision on a person's competency. *Id.* The Governor makes the final decision over a criminal's competency, and the court cannot review his decision. *Id.*; Goode v. Wainwright, 448 So. 2d 999, 1002 (Fla. 1984).

9. Ford v. Strickland, 734 F.2d 538, 539 (11th Cir. 1984).

10. *Id.* at 543.

11. Wainwright v. Ford, 467 U.S. 1220 (1984).

12. Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985). The court relied upon Goode v. Wainwright, 448 So. 2d 999, 1002 (Fla. 1984), and Solesbee v. Balkcom, 339 U.S. 9, 13-14 (1950). More importantly, the court recognized that if it had interpreted the two aforementioned cases incorrectly, then the Supreme Court would have to reexamine the cases' true meaning. Ford v. Wainwright, 752 F.2d at 528.

13. U.S. CONST. amend. VIII.

I. THE HISTORICAL PERSPECTIVE OF EXECUTING THE INSANE PRISONER UNDER THE EIGHTH AMENDMENT

A. The Eighth Amendment Issue

The Supreme Court has directly confronted the issue of the execution of the insane on five previous occasions.[14] The most notable case is *Solesbee v. Balkcom*,[15] in which the Supreme Court upheld the Governor's discretionary power in determining the competency of a prisoner to be executed.[16] In *Ford* the Supreme Court went further in its analysis of *Solesbee* and distinguished it from the case at bar.[17] The Court cited the eighth amendment as the differentiating factor.[18] The only fourteenth amendment[19] issue that the *Solesbee* Court addressed was that of due process; the Supreme Court did not actually confront the issue of cruel and unusual punishment in light of the fourteenth amendment[20] because the Court did not recognize until 1962 that it must incorporate the eighth amendment[21] into the analysis of the due process issues provided under the fourteenth amendment.[22]

This new form of analysis led the Supreme Court to reconsider some pre-

14. Caritativo v. California, 357 U.S. 549, 550-51 (1958) (Harlan, J., concurring) (specifically citing to the due process clause of the fourteenth amendment); Smith v. Baldi, 344 U.S. 561, 569-70 (1953) (refusing to hold plenary hearing on sanity based upon due process); Solesbee v. Balkcom, 339 U.S. 9, 13-14 (1950) (Georgia statute does not offend due process by allowing Governor to decide criminals' competency for execution); Phyle v. Duffy, 334 U.S. 431, 440 (1948) (failing to reach constitutional issues because state remedy exists); Nobles v. Georgia, 168 U.S. 398, 409 (1897) (referring to ancient treatises on issue of right to jury trial after conviction and before execution). The Court indirectly addressed the issue of sanity before execution in three other cases. *See* Lenhard v. Wolff, 444 U.S. 807, 807-08 (1979) (Rehnquist, J.) (denying stay of execution after deliberating the competency to waive challenge to execution); Evans v. Bennett, 440 U.S. 1301, 1306-07 (1979) (Rehnquist, Circuit Justice) (granting stay of execution pending further inquiry); Gilmore v. Utah, 429 U.S. 1012, 1013 (1976) (Burger, C.J., concurring) (addressing issue of competency and ability to waive rights to delay execution).

15. 339 U.S. 9 (1950).

16. *Id.* at 13-14. The Court went on to note that courts historically have held that a Governor's decision is nonreviewable. *Id.* at 13. In *Solesbee v. Balkcom* the Court cited Nobles v. Georgia, 168 U.S. 398, 405-06 (1897), for the proposition that if judicial review were automatic, the review could then prohibit the states from carrying out a death sentence. Solesbee v. Balkcom, 339 U.S. at 12. Since a prisoner could claim at any time up to the precise moment of execution that he was insane, the appeals for a sanity determination could be endless. Theoretically, a prisoner could postpone his execution forever. *See* Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 399-400 (1962); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 789-90 (1980). *Solesbee* might, therefore, lead to a logical conclusion that would prevent the Supreme Court from staying Ford's execution.

17. 106 S. Ct. at 2600, 91 L. Ed. 2d at 343-44.

18. *Id.*, 91 L. Ed. 2d at 344.

19. U.S. CONST. amend. XIV.

20. 106 S. Ct. at 2600, 91 L. Ed. 2d at 344; Note, *supra* note 16, at 765-66.

21. The men initially implementing the United States Constitution drafted the Bill of Rights to protect individual liberties from federal government intrusion and not to limit states' governments. R. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 4 (1981). Through interpretation of the fourteenth amendment, the Supreme Court on several occasions has used the due process clause of that amendment as the vehicle for incorporating these governmental limitations and thereby prevented state governments from infringing certain individual rights. *Id.* at 301.

22. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).

vious holdings.[23] Thus, Justice Powell correctly indicated in *Wainwright v. Ford*[24] that the Supreme Court had "never determined whether the Constitution prohibits execution of a criminal defendant who is currently insane."[25] *Ford v. Wainwright*, therefore, constituted a case of first impression, at least under the scrutiny of the eighth amendment.

B. The Objective and Subjective Tests of the Eighth Amendment

The Objective Test: Historical Explanations. The eighth amendment provides in part that government shall not inflict "cruel and unusual punishments."[26] The framers of the Bill of Rights took this language verbatim from the English Bill of Rights.[27] More importantly, the framers also carried across the sea the intent behind the language, which they incorporated into the eighth amendment.[28] Based upon the language and the intent, American courts have established an objective test in determining whether the specific punishment in question was considered cruel and unusual in 1789, the year in which the Bill of Rights was adopted.[29]

The United States Supreme Court took this basic premise and applied it in determining whether, in 1789, the execution of the insane was considered cruel and unusual punishment.[30] The historical conclusion seemed unanimous, although the rationale behind the conclusion that such executions were cruel and unusual was far from uniform.[31] Researchers have univer-

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23. The Court has on several occasions reexamined its fourteenth amendment decisions in light of the incorporation of the eighth amendment. Lockett v. Ohio, 438 U.S. 586, 597-99 (1978); Gardner v. Florida, 430 U.S. 349, 355-58 (1977); Gregg v. Georgia, 428 U.S. 153, 195 n.47 (1976). In *Gregg* the Court explicitly discussed how the holding in McGautha v. California, 402 U.S. 183, 185-86 (1971), was redefined under Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam), by applying the eighth amendment in correlation with the fourteenth amendment. Gregg v. Georgia, 428 U.S. at 195 n.47.

24. 467 U.S. 1220 (1984).

25. *Id.* at 1220.

26. U.S. CONST. amend. VIII.

27. *See* Solem v. Helm, 463 U.S. 277, 285 n.10 (1983). George Mason had earlier authored the Virginia Declaration of Rights in 1776, which became a basis for the first ten amendments to the United States Constitution, by adopting verbatim the language of the English Bill of Rights. *Id.*

28. *See* A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 205-07 (1968). George Mason took the tenth section of the English Bill of Rights and transformed it word for word into his own writings. *Id.* at 207. The spirit and liberties that prevailed in the Magna Carta were subsequently transformed into Mason's Declaration, and this spirit exists in today's eighth amendment. *Id.* at 205-07.

29. Under the objective test, if the punishment in question was considered cruel and unusual in 1789, then the punishment would still be considered a violation of the eighth amendment. *See* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 471-73 (7th ed. 1903). Justice Brennan recognized this test in his concurring opinion in Furman v. Georgia, 408 U.S. 238, 264 (1972).

30. 106 S. Ct. at 2600-01, 91 L. Ed. 2d at 344-45.

31. Legal historians have identified five major rationales for the common law rule. First, Blackstone asserted that the criminal's madness acted as sufficient punishment in itself. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 388-89 (Oxford 1769) ("furiosus solo furore punitur" means "madness is punishment in itself"); 1 N. WALKER, CRIME AND INSANITY IN ENGLAND 197 (1968). Coke enunciated the second theory when he explained that killing a madman served no deterring value for the rest of society because executing the

sally concluded that throughout history society has considered the execution of the insane to be cruel and unusual.[32] The common law characterized the act as "savage"[33] and "inhuman."[34] This characterization dates back to early English history,[35] when the execution was mandatorily stayed if the criminal was found to be insane.[36]

Regardless of the reasoning behind the historical rule that society should not execute insane criminals, historians agree that such executions constitute cruel and unusual punishment.[37] Prior to 1789, society had uniformly formulated and adopted a common standard of decency that prohibited the execution of the insane.[38] The Court concluded that under the objective test, execution of insane criminals constituted cruel and unusual punishment prior to the critical date of 1789.[39]

The Subjective Test: The Evolving Standards of Decency. The United States Supreme Court expressly recognizes that courts must interpret the eighth amendment in a "flexible and dynamic manner."[40] The Court bases this recognition upon the understanding that society's standards are not static, but evolve and mature.[41] Thus, the Court redefines the cruel and unusual

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insane so repulsed society that few would learn and be deterred. E. COKE, THIRD INSTITUTE 6 (1644). *But see* Hazard & Louisell, *supra* note 16, at 385 (criticising Coke's argument). Hawles ascribed to a third theory founded upon a mixture of superstition and Christianity. Hawles, *Remarks on the Trial of Mr. Charles Bateman*, in 11 STATE TRIALS 473, 477 (T. Howell ed. 1816). People believed that the gods would punish the executioner of a madman; more importantly, Christians believed that a mentally incompetent person could not make peace with his maker nor prepare for death. *Id.*; *see also* Solesbee v. Balkcom, 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting) (quoting Hawles's theory); N. HURNARD, THE KING'S PARDON FOR HOMICIDE: BEFORE A.D. 1307, at 159 (1969) (concerned with both executioner and incompetent); 1 N. WALKER, *supra*, at 197 (Christian charity requires that person be sane before he is executed); Hazard & Louisell, *supra* note 16, at 387 (discussing writing of St. Thomas Aquinas). Bracton posed a fourth rationale on the simple explanation that the incompetent person lacked sufficient reason to comprehend his fate. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (S. Thorne trans. 1968). Hale posed the final justification by asserting that a madman could not defend himself. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (The Savoy 1736). Hale contended that until the precise moment of execution the criminal had the opportunity to stay his judgment by providing any information that might prove his innocence. *Id.*

32. Note, *supra* note 16, at 778. Justice Frankfurter in his dissenting opinion in *Solesbee v. Balkcom* highlighted the historical perspective of execution of the criminally insane. Solesbee v. Balkcom, 339 U.S. at 17-19 (Frankfurter, J., dissenting). A variety of historians and lawyers have reached the same conclusion. N. HURNARD, *supra* note 31, at 159; 1 N. WALKER, *supra* note 31, at 197 (discussing the five historical theories); Hazard & Louisell, *supra* note 16, at 383 (discussing numerous theories).

33. 4 W. BLACKSTONE, *supra* note 31, at 24-25.

34. *Id.*; E. COKE, *supra* note 31, at 6 (characterizing the execution of insane criminals as both cruel and inhumane).

35. *See* W. BLACKSTONE, *supra* note 31, at 25; 1 M. HALE, *supra* note 31, at 35.

36. 1 N. WALKER, *supra* note 31, at 196.

37. *See supra* note 31 and accompanying text.

38. *See supra* note 32 and accompanying text.

39. 106 S. Ct. at 2606, 91 L. Ed. 2d at 351.

40. Gregg v. Georgia, 428 U.S. 153, 171 (1976) (plurality opinion) (eighth amendment prohibition of cruel and unusual punishment must be interpreted with reference to modern standards); *see* Weems v. United States, 217 U.S. 349, 378 (1910) (interpretation must evolve with public opinion).

41. Trop v. Dulles, 356 U.S. 86, 100-01 (1958); *see* Gregg v. Georgia, 428 U.S. at 172-73.

punishment clause of the eighth amendment as public attitudes evolve.[42] These attitudes serve as an aid in the Court's interpretation of the eighth amendment.

II. *FORD V. WAINWRIGHT*

A. The Conclusion Under the Eighth Amendment Analysis

In applying the objective test in *Ford*, the Court came to the conclusion that executing Ford constituted cruel and unusual punishment.[43] Since society historically had prohibited the execution of the mentally incompetent prior to 1789,[44] the objective test characterized such punishment as cruel and unusual in modern society.

In applying the subjective test, the Court came to the same conclusion that executing Ford resulted in cruel and unusual punishment in light of society's evolving standards.[45] In applying the evolving standards of society, the Court noted as evidence of the public attitude against the execution of the criminally insane that not one state in the Union permitted the execution of the insane.[46] In support of this assertion the Court observed that of the forty-one states that utilize the death penalty,[47] twenty-six states by statute expressly prohibit the execution of the insane,[48] four states have done so by judicial decision,[49] seven states have discretionary rules,[50] and the remaining

42. Gregg v. Georgia, 428 U.S. at 173. Public attitudes, such as attitudes of legislatures and juries, must be consulted in eighth amendment cases. Coker v. Georgia, 433 U.S. 584, 592 (1977).

43. 106 S. Ct. at 2602, 91 L. Ed. 2d at 346.

44. *See supra* notes 26-39 and accompanying text.

45. 106 S. Ct. at 2601-02, 91 L. Ed. 2d at 346.

46. *Id.*

47. The forty-one states that have adopted the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. The nine states that have not adopted the death penalty are: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia, and Wisconsin.

48. ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN § 13-4024(B) (1978); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE § 3704 (West 1982); COLO. REV. STAT. § 16-18-112(2) (1986); CONN. GEN. STAT. § 54-101 (1985); FLA. STAT ANN. § 922.07(1) (West 1985); GA. CODE ANN. § 27-2603 (1983); ILL. ANN. STAT. ch. 38, ¶ 1005-2-3 (Smith-Hurd 1982); KAN. STAT. ANN. § 22-4006(3) (1981); KY. REV. STAT. ANN. § 431.240(2) (Michie/Bobbs-Merrill 1985); MD. ANN. CODE art. 27, § 75(c) (Supp. 1986); MISS. CODE ANN. § 99-19-57(2)(a) (Supp. 1986); MO. ANN. STAT. § 552.060(1) (Vernon Supp. 1987); MONT. CODE ANN. § 46-14-221(2) (1985); NEB. REV. STAT. § 29-2537 (1985); NEV. REV. STAT. § 176.455(1) (1985); N.J. STAT. ANN. § 30:4-82 (West 1981); N.M. STAT. ANN. § 31-14-7 (1984); N.Y. CORRECT. LAW § 656 (McKinney Supp. 1987); N.C. GEN. STAT. § 15A-1001(a) (1983); OHIO REV. CODE ANN. § 2949.29 (Anderson 1982); OKLA. STAT. ANN. tit. 22, § 1008 (West 1986); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1979); UTAH CODE ANN. § 77-19-13(1) (1982); WYO. STAT. § 7-13-902 (Supp. 1986).

49. State v. Allen, 204 La. 513, 15 So. 2d 870, 871 (1943); Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96, 99 (1955); Jordon v. State, 124 Tenn. 81, 135 S.W. 327, 328-29 (1911); State v. Davis, 6 Wash. 2d 696, 108 P.2d 641, 651 (1940).

50. DEL. CODE ANN. tit. 11, § 406 (1979); IND. CODE ANN. § 11-10-4-2 (Burns 1981); MASS. ANN. LAWS ch. 279, § 62 (Law. Co-op. Supp. 1986); R.I. GEN. LAWS § 40.1-5-3(7)

four are silent on the issue.[51] The Court relied upon these figures as strong support of the prevailing public attitude opposing the execution of the insane criminal.[52] The Court also relied upon some historic theories that they believed applied as well today as they did in 1789.[53]

The application under both the objective test and subjective test led the Court to the same conclusion. The Supreme Court thus held that the state cannot, consistent with the eighth amendment, carry out the death penalty against an insane convict.[54]

B. The Sufficiency of the Florida Statute in Providing an Evidentiary Proceeding

The Writ of Habeas Corpus Proceeding. Having concluded that the eighth amendment prohibits execution of an insane prisoner, the Court confronted its next hurdle. Since under the Florida statute[55] the court already had judged Ford to be mentally competent for execution, the Supreme Court had to determine whether it had the power to review the sanity proceeding. Ford's counsel petitioned the Supreme Court, by a writ of habeas corpus, to review Florida's evidentiary process. Ford's counsel argued that Florida's process failed to provide adequate assurances of reliable fact-finding and thereby violated the Constitution.[56]

The Supreme Court relied heavily upon *Townsend v. Sain*[57] in its determination. In *Townsend* the Supreme Court held that, in a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."[58] In addition, if a state court has held a full hearing and found the relevant facts, then the court's findings are presumed correct.[59] In such a case no evidentiary hearing is required.[60] Taking these constitutional premises, the Court concluded that Ford deserved a federal hearing because no Florida court had been involved in the initial competency hearing.[61] The only ruling by a

(1984); S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1985); TEX. CODE CRIM. PROC. ANN. art. 46.01 (Vernon 1979); VA. CODE ANN. § 19.2-177 (1983).

51. The four states that stand either silent or undetermined on the execution of the mentally incompetent are Idaho, New Hampshire, Oregon, and Vermont.

52. 106 S. Ct. at 2601-02, 91 L. Ed. 2d at 346.

53. *Id.* The Court recognized that killing an insane criminal allowed for no retributional value because the mentally incompetent could not comprehend what was occurring. *Id.* The Court also emphasized the need to allow a criminal sufficient time to come to peace with his conscience and deity. *Id.* The Court noted that the idea of executing a mentally incompetent person offends humanity. *Id.* Historians used the same theories to explain the common law rule. *See supra* note 31 and accompanying text.

54. 106 S. Ct. at 2602, 91 L. Ed. 2d at 346.

55. FLA. STAT. ANN. § 922.07 (West 1985).

56. Ford's counsel petitioned the court for a writ of habeas corpus on the assertion that the evidentiary hearing provided an insufficient adjudication of Ford's competency by failing to give him a chance to cross-examine and actively participate in the process.

57. 372 U.S. 293 (1963).

58. *Id.* at 312-13.

59. 28 U.S.C. § 2254(d) (1982).

60. 106 S. Ct. at 2602, 91 L. Ed. 2d at 347.

61. *Id.* at 2602-03, 91 L. Ed. 2d at 374.

Florida court occurred in *Ford v. Wainwright*,[62] in which the Florida Supreme Court stated that a judical determination was not in order because the Florida statutory procedure sufficiently determined competency and that the court could not review the Governor's decision.[63] Since there was no prior judicial review, the Supreme Court held that it had authority to review Ford's case.[64]

The Court went on to hold that even if a state court had heard the evidence of Ford's competency, the federal court must grant an evidentiary hearing if any of the six occurrences described in *Townsend v. Sain* were missing.[65] The Court recognized that the importance of the hearing in question bears a direct relationship to the adequacy of the state court procedure.[66] At the minimum the criminal must have "an opportunity to be allowed to substantiate a claim before it is rejected."[67] Armed with these minimum due process requirements, the Supreme Court confronted the specific Florida statute in question and the fact-finding process.

The Evidentiary Process Provided Under Florida Law. Section 922.07 of the Florida statutes provides the guidelines for the proceedings to determine the competency of the criminal to be executed.[68] Although the statute provides for the attorney to be present, the role of the attorney is nonadversarial in nature.[69] The court pointed to this lack of involvement of the attorney, in both asserting the rights of his client and challenging the opinions of the

62. 451 So. 2d 471 (Fla. 1984).

63. *Id.* at 475 (decision based upon court's previous holding in Goode v. Wainwright, 448 So. 2d 999, 1002 (Fla. 1984)).

64. 106 S. Ct. at 2602-03, 91 L. Ed. 2d at 347.

65. *Id.* The federal court must grant an evidentiary hearing if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. at 313.

66. 106 S. Ct. at 2603, 91 L. Ed. 2d at 347-48. The Court has recognized the obvious gravity in the determination of the death penalty because of the punishment's finality. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (qualitative difference exists between imprisonment and execution); *see also* Solesbee v. Balkcom, 339 U.S. 9, 23-24 (1950) (Frankfurter, J., dissenting) (decision on whether to execute is at best a truly informed guess that requires due process).

67. Solesbee v. Balkcom, 339 U.S. at 23 (Frankfurter, J., dissenting).

68. FLA. STAT. ANN. § 922.07 (West 1985). The guidelines are as follows: after being informed of the criminal's potential insanity, the Governor of the State of Florida must provide a commission of three psychiatrists to examine the criminal; the three psychiatrists examine the criminal in the presence of each other; the commission reports its findings to the Governor; the Governor then gains the responsibility of determining whether the convicted person is mentally capable of comprehending the death penalty and why it is being imposed on him; the Governor must issue a death warrant if the Governor decides the prisoner meets the competency test; if, however, the prisoner does not meet the competency test, then the Governor is to commit the convict to a mental hospital until such time as his sanity is restored; both the counsel for the convict and the state attorney may be present during the examination. *Id.*

69. *See* Goode v. Wainwright, 448 So. 2d 999, 1001-02 (Fla. 1984) (Governor's policy).

psychiatrists, as a deficiency in Florida's statute.[70]

The Court further criticized the Florida statute for its procedure that failed to involve the prisoner in the truth-seeking process.[71] The cornerstone of due process is the chance to be heard.[72] The Florida statute prevented the prisoner from asserting his full rights by keeping him from submitting evidence to help pursue the truth-seeking process in the determination of his sanity.[73] The Supreme Court has previously held that courts should admit all relevant information that would shed light on the factual scenario.[74] The fact that admission of evidence might cause a delay in the fact-finding process is of little concern when such a crucial decision as life or death is involved.[75] The Court noted that the need for all relevant information is compounded when the state's experts disagree on the mental competency of the prisoner.[76]

The Court emphasized that the most alarming deficiency in the Florida statute was the fact that the sole decision was vested in the executive branch.[77] The Governor of Florida not only initiated the evidentiary process by setting up a commission, but he was also responsible for the ultimate decision on the prisoner's sanity. The true conflict lay in the fact that the Governor was also in charge of the state's prosecutors. The potential partiality of the Governor was more than evident. The Court was greatly concerned about the nonreviewable discretion that the Florida courts entrusted to the Governor.[78]

After close scrutiny of the Florida scheme, the Court concluded that the procedures were inadequate.[79] The Court held that section 922.07 provided insufficient assurances of accuracy in the determination of a criminal's sanity

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70. 106 S. Ct. at 2604, 91 L. Ed. 2d at 348-49. "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege." C. MCCORMICK, EVIDENCE § 19 (E. Cleary 3d ed. 1984); *see also* 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974) (highlights importance of cross-examination). This right is particularly important in competency hearings because psychiatrists frequently disagree. Ake v. Oklahoma, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53, 64-65 (1985).

71. 106 S. Ct. at 2604, 91 L. Ed. 2d at 349.

72. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

73. 106 S. Ct. at 2604, 91 L. Ed. 2d at 349. Ford's counsel on several occasions attempted to submit the psychiatric findings of both psychiatrists, but he was refused.

74. Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (joint opinion) (states can rarely limit evidence regarding the mitigation of a sentence).

75. Gardner v. Florida, 430 U.S. 349, 360 (1977); *see* Solesbee v. Balkcom, 339 U.S. at 25 (Frankfurter, J., dissenting).

76. 106 S. Ct. at 2604-05, 91 L. Ed. 2d at 349. The three-member psychiatric commission came to three different conclusions on Ford's mental diagnosis. All three, however, came to the same conclusion on his sanity as defined under FLA. STAT. ANN. § 922.07 (West 1985). This discrepancy requires both time and all relevant information for a proper adjudication on the issue of the competency of the prisoner. *See* Ake v. Oklahoma, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53, 64-65 (1985).

77. 106 S. Ct. at 2605, 91 L. Ed. 2d at 350.

78. *Id.*; *see supra* note 63 and accompanying text.

79. 106 S. Ct. at 2605, 91 L. Ed. 2d at 351.

to meet the due process requirements set out in *Townsend v. Sain*.[80] The Court then granted an evidentiary hearing, de novo, in federal district court on the issue of Ford's competency to be executed.[81]

The Guidelines for a State's Evidentiary Process. After invalidating the Florida statute, the Court attempted to outline some criteria for a constitutionally sound scheme.[82] The Court preceded its dictum by stating that it did not require a complete trial on the sanity issue, but left specific and appropriate enforcement measures to the state.[83] With that warning, the Court established some guidelines.[84] The Court noted that the main thrust of the proceeding should be to promote accuracy in the fact-finding hearing.[85] The scheme should thus allow an uninhibited flow of all relevant information for consideration.[86] The process for choosing the experts must be neutral and provide for sound judgments.[87]

C. *Opinions by the Remaining Justices*

Justice Powell: Definition of Insanity. Justice Powell concurred in the judgment, but only in part with the opinion. Justice Powell asserted that the majority left unanswered the definition of insanity in the context of the execution of a criminal.[88] The Florida statute based its definition of insanity upon a showing that the prisoner understood what the death penalty was and why the state was inflicting it upon him.[89] Justice Powell claimed that the definition of insanity must, at a minimum, trigger the constitutional protection of the eighth amendment.[90] The eighth amendment should protect people from execution if they are "unaware of the punishment they are about to suffer and why they are to suffer it."[91] Justice Powell left open the possibility for the states to broaden the definition of insanity that would lower the threshold required to establish insanity.[92] This approach would extend the eighth amendment protection to a wider range of criminals.

Justice Powell expressed his view that the Constitution does not require a full-scale sanity trial for minimum due process.[93] He based his conclusion upon three major assertions. First, the issue in a sanity trial is not *whether* a prisoner is to be executed, but *when*.[94] Justice Powell thus disagreed with

80. *Id.* at 2605-06, 91 L. Ed. 2d at 351; *see supra* note 65.
81. *Id.*
82. *Id.* at 2606, 91 L. Ed. 2d at 351.
83. *Id.* at 2605-06, 91 L. Ed. 2d at 351.
84. *Id.* at 2606, 91 L. Ed. 2d at 351.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 2606-07, 91 L. Ed. 2d at 352.
89. *See* FLA. STAT. ANN. § 922.07(1) (West 1985).
90. 106 S. Ct. at 2608, 91 L. Ed. 2d at 354.
91. *Id.* at 2609, 91 L. Ed. 2d at 354.
92. *Id.* at 2608 n.3, 91 L. Ed. 2d at 354 n.3.
93. *Id.* at 2610, 91 L. Ed. 2d at 356.
94. *Id.*

the majority as to the importance of the evidentiary hearings.[95] This approach led him to disagree further with the majority's view that increased procedural requirements were necessary.[96] Second, Justice Powell asserted that a presumption should stand against the prisoner's claim of insanity because the claimant had already been subjected to a sanity test and been determined competent to stand trial.[97] This high threshold would prevent the repetitious and nonmeritorious claims to which the majority alluded in its opinion.[98] Finally, a hearing on a criminal's sanity requires subjective judgment and not specific issues such as those commonly asserted in a normal trial or hearing.[99] Justice Powell argued that the objective findings of a court may provide little aid in the subjective process of determining sanity.[100] In light of these three assertions, Justice Powell returned to his initial conclusion that the Constitution does not require a full evidentiary trial to determine sanity before execution.[101]

Justices O'Connor and White: Protection of the Insane a State-Initiated Right. Justice O'Connor concurred in part in the result and dissented in part. Justice White joined in her opinion. At the outset, the two Justices did not believe that the eighth amendment prohibits the execution of the insane as an independent substantive right.[102] They recognized, however, that the laws of the individual states might trigger the requirements of due process.[103] Both Justices contended that Florida's statute provided an exercisable right to due process.[104] The mandatory language that the state "*shall* have [insane prisoners] committed to the state hospital for the insane"[105] invoked the protection provided under the fourteenth amendment.[106] They believed that the right to keep the insane from being executed was not an independent right, but a state-protected right that arises upon the state's own initiative in the statutory language that expressly prevents the execution of the insane.[107] This fourteenth amendment protection extends only as far as the situation requires. Although due process may be of great importance to the prisoner, the fact that he has been convicted dramatically reduces the extent of protection provided under the fourteenth amendment.[108]

Justice O'Connor's opinion indicated that a state-created right existed

95. *Id.*
96. *Id.*; *see supra* notes 66-67 and accompanying text.
97. 106 S. Ct. at 2610, 91 L. Ed. 2d at 356-57.
98. *Id.* at 2606, 91 L. Ed. 2d at 351.
99. *Id.* at 2610-11, 91 L. Ed. 2d at 357; *see* Addington v. Texas, 441 U.S. 418, 429-30 (1979) (determination of sanity is not merely factual; it requires expert diagnosis such as psychiatric or psychological examinations).
100. 106 S. Ct. at 2611, 91 L. Ed. 2d at 357; *see* Addington v. Texas, 441 U.S. 418, 430 (1979).
101. 106 S. Ct. at 2611, 91 L. Ed. 2d at 357.
102. *Id.*, 91 L. Ed. 2d at 358.
103. *Id.* (citing Hewitt v. Helms, 459 U.S. 460, 466 (1983)).
104. *Id.* at 2611-12, 91 L. Ed. 2d at 358-59.
105. FLA. STAT. ANN. § 922.07(3) (West 1985) (emphasis added).
106. *See* Hewitt v. Helms, 459 U.S. 460, 471-72 (1983).
107. 106 S. Ct. at 2611-12, 91 L. Ed. 2d at 358-59.
108. Meachum v. Fano, 427 U.S. 215, 224 (1976).

under the fourteenth amendment, but the belief that the right to punish should be restricted only by the statutes and a minimal requirement of due process proportionally reduced the importance of assuring an accurate finding of incompetency.[109] Both Justices agreed with the majority, however, that the opportunity to be heard is the hallmark of justice and a minimum due process requirement that must be protected.[110] Justice O'Connor and Justice White, therefore, would have found execution of the insane in violation of the criminal's right to due process, but only because of section 922.07 of the Florida statute, which created that constitutional right.[111] In accordance with their conclusion, the two Justices would have remanded the case to the state for reexamination of Ford's competency in light of the fourteenth amendment.[112]

Justice Rehnquist and Chief Justice Burger: Historical Precedent. Justice Rehnquist, joined by Chief Justice Burger, dissented from Justice Marshall's majority opinion. The two Justices asserted that a more detailed reading of history would result in quite a different conclusion.[113] Although they noted that throughout history society rarely executed insane criminals, they claimed that the executive branch possessed such discretion.[114] The dissenters cited *Solesbee v. Balkcom*[115] as authority for the proposition that the executive branch controls the destiny of the insane criminal.[116] The dissenters also indicted the majority's opinion by pointing to the absurdity that judicial review could create by postponing the finality of the law.[117] Justice Rehnquist expanded on the majority's concern for finality by emphasizing the inherent need for a society to be able to "try, convict, and execute sentences."[118]

The dissenters actually were waging a procedural battle. They found it unnecessary for the Court to rule on the constitutionality of executing the insane since a uniform view exists throughout the states.[119] Based upon what the dissenters claim as historical precedent, they would have upheld Florida's process of allowing the Governor to preside over the sanity hearings.[120]

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109. 106 S. Ct. at 2612, 91 L. Ed. 2d at 359.

110. *Id.*

111. *Id.* at 2613, 91 L. Ed. 2d at 359-60.

112. *Id.*

113. *Id.*, 91 L. Ed. 2d at 360-61.

114. *Id.* (citing 1 N. WALKER, *supra* note 31, at 194).

115. 339 U.S. 9, 11-14 (1950).

116. The power to determine insanity has traditionally been vested in the executive branch, headed by the Governor or the President; the courts have seldom reviewed this power. *Id.* at 11-12.

117. 106 S. Ct. at 2614, 91 L. Ed. 2d at 361-62; *see* Nobles v. Georgia, 168 U.S. 398, 405-06 (1897).

118. 106 S. Ct. at 2614, 91 L. Ed. 2d at 362. The majority had outlined possible ways to dispose of repetitive and unmeritorious claims. *Id.* at 2606, 91 L. Ed. 2d at 361.

119. *See supra* notes 46-51 and accompanying text.

120. 106 S. Ct. at 2615, 91 L. Ed. 2d at 362-63.

III. CONCLUSION

The majority opinion ultimately concluded that, based on the objective and subjective tests, the eighth amendment prohibits execution of the insane. The majority also invalidated section 922.07 of the Florida statutes because it failed to provide adequate assurances of due process in accordance with *Townsend v. Sain*. The Court cited the lack of cross-examination, attorney involvement, and the opportunity to be heard as fatal flaws in the Florida law. The majority noted that the main deficiency in the statute was that the sole decision rested in the executive branch and was not reviewable by the courts. The three additional opinions focused upon a wide variety of topics and concerns.

Since no state has executed an insane prisoner, the holding in *Ford v. Wainwright* on the eighth amendment merely reaffirms the current law among the states. The striking of the Florida statute as an unconstitutional infringement of due process, however, will cause the states to reassess their existing statutes. The Court provides little guidance for the states, although it attempts to establish some general standards for the evidentiary process in the determination of sanity. The matter of what constitutes a sufficient evidentiary process in the eyes of the Constitution, therefore, remains to be seen.

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