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Constitutional Rights of the Insane on Death Row, The--Eighth Amendment: Ford v. Wainwright, 106 S. Ct. 2595 (1986)

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EIGHTH AMENDMENT—THE CONSTITUTIONAL RIGHTS OF THE INSANE ON DEATH ROW

Ford v. Wainwright, 106 S. Ct. 2595 (1986).

I. INTRODUCTION

Although the Supreme Court had previously dealt with the circumstances of purportedly insane prisoners on death row,¹ the Court had never squarely addressed the issue of the constitutional rights of condemned prisoners. In *Ford v. Wainwright*,² the Court held for the first time that the eighth amendment³ prohibits the execution of insane prisoners. Basing their holding upon the fact that at common law the execution of the insane was clearly prohibited, and the fact that no state currently permits such executions, a plurality of the Court held that prisoners sentenced to death have a constitutional right not to be executed if they are insane at the time of execution.⁴ As a result of this holding, the plurality concluded that the Florida procedures for the determination of a prisoner's sanity did not afford Alvin Ford the fair hearing necessary to prevent habeas corpus review in federal court.⁵

The recognition of the constitutional rights of insane prisoners in *Ford* is significant because it requires that state procedures for the determination of sanity and for dealing with allegations of insanity satisfy due process standards. Heretofore, the stay of the execution of an insane prisoner was viewed as an act of mercy by the state, such that the state was required only to provide minimal protections to prisoners alleging that they were insane. Now that insane prisoners have a constitutional right not to be executed, however, states

¹ *Caritativo v. California*, 357 U.S. 549 (1958); *Solesbee v. Balkcom*, 339 U.S. 9 (1950); *Phyle v. Duffy*, 334 U.S. 431 (1948); *Nobles v. Georgia*, 168 U.S. 398 (1897); see *infra* notes 6-25 and accompanying text.

² 106 S. Ct. 2595 (1986).

³ The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

⁴ 106 S. Ct. at 2602.

⁵ *Id.* at 2605. The fourteenth amendment provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

must provide safeguards that comport with this new due process right. Thus, *Ford* will have a major impact on state procedures for the disposition of insanity claims by condemned prisoners.

While the reasoning of the Court in *Ford* is straightforward and a logical extension of the Court's recent eighth amendment jurisprudence, there are still three inherent flaws in the decision. First, the Court did not identify the procedures required by due process to protect the new constitutional right that the holding created. Second, the Court gave no indication of what the appropriate test for insanity should be for a condemned prisoner. Finally, the Court failed to specify the rationale for the exemption of insane prisoners from execution. This Note examines these issues and identifies several factors that may assist in the interpretation of existing procedures for the disposition of insanity claims in light of the Court's holding.

II. PRIOR SUPREME COURT DECISIONS

The United States Supreme Court has considered four previous cases involving prisoners who alleged they were mentally incompetent at the time of their scheduled executions. In none of these instances, however, did the Court squarely address the constitutionality of executing the insane.

The Court first addressed an insanity claim by a death row inmate in *Nobles v. Georgia*⁶ in 1897. In *Nobles*, the Supreme Court was called to resolve the issue of whether a defendant, upon the mere suggestion of present insanity, had a due process right to a full jury trial on the issue of his fitness to be executed. The Court held that the condemned inmate did not have an absolute entitlement to a jury trial and that the procedures of the state of Georgia satisfied the minimal requirements of due process.⁷ Noting that at common law the rule against the execution of the insane was a matter of judicial discretion, the Court wrote that the manner in which the question of insanity should be resolved was a matter for legislative regulation.⁸ The Court refused to recognize a constitutional right⁹ not to be exe-

⁶ 168 U.S. 398 (1897).

⁷ *Id.* Georgia's procedure provided that if a condemned prisoner claimed to be insane, the sheriff was required to summon a jury to determine his sanity. If the prisoner were found insane, his execution was required to be stayed. *Nobles*, 168 U.S. at 402 (citing GA. CODE ANN. § 4666 (1895)).

⁸ *Id.* at 409.

⁹ In *Nobles*, the petitioner contended that his right not to be executed was guaranteed by the fourteenth amendment. At that time, the eighth amendment was not considered by the Court to apply to the states. See *Robinson v. California*, 370 U.S. 660 (1962)(extending the eighth amendment's protections to state procedures).

cuted, and specified that its holding addressed only the narrow issue of whether a full jury trial was required to decide a claim of insanity.¹⁰

The Supreme Court did not hear another case involving an allegedly insane, condemned convict for fifty-three years. In *Phyle v. Duffy*,¹¹ the Court granted certiorari to decide the questions of whether the due process clause of the fourteenth amendment forbade the execution of the insane and whether a person could be executed upon an unreviewable *ex parte* determination of sanity. Because the petitioner in that case had not exhausted his state remedies, however, the Court found that it lacked jurisdiction to hear the petition for habeas corpus and therefore dismissed the writ of certiorari.¹²

Nonetheless, *Phyle* is significant because the Court stated, albeit as dicta, that *Nobles* did not control the petitioner's contentions.¹³ The Court carefully pointed out that *Nobles* decided a very narrow issue and did not stand for the proposition that a state could constitutionally allow a single individual to make an *ex parte* determination of sanity without judicial supervision or review.¹⁴

Although the Court in *Phyle* did not reach the issue of the constitutionality of executing the insane, the Court faced the issue two years later in *Solesbee v. Balkcom*.¹⁵ In *Solesbee*, the Court upheld the state of Georgia's procedures for the disposition of condemned prisoners' insanity claims. Georgia's procedure¹⁶ provided that the Governor decide whether or not to commit a prisoner to a mental

¹⁰ 168 U.S. at 409. The Court did not address the issue of the level of protection required by due process.

¹¹ 334 U.S. 431 (1948).

¹² *Id.*

¹³ *Id.* at 437. "We do not think that either the actual holding or what was said in the opinion in [*Nobles*] . . . would necessarily require a rejection of the contentions made here against the California procedures." *Id.*

¹⁴ *Id.* at 438. In fact, on remand, the Supreme Court of California commented that the United States Supreme Court's opinion "intimat[ed] that due process of law requires some sort of judicial hearing upon the issue of the present sanity of a person under sentence of death." *Phyle v. Duffy*, 34 Cal. 2d 144, 151-52, 208 P.2d 668, 672 (1949).

¹⁵ 339 U.S. 9 (1950).

¹⁶ The Georgia procedure at that time provided:

Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force

GA. CODE ANN. § 27-2602 (1903), quoted in *Solesbee*, 339 U.S. at 10 n.1.

health facility with the aid of such experts as he deemed necessary. Although the petitioner argued that the Georgia procedure violated due process because it did not afford the prisoner an opportunity to cross-examine witnesses and provide evidence in an adversarial hearing, the Court was not persuaded that the procedure was defective.

The Court noted that the petitioner had not shown any refusal by the Governor to consider information submitted by the petitioner. Thus, *Solesbee* may have been decided differently had there been a showing that the petitioner was denied an opportunity to be heard.¹⁷ Moreover, like *Nobles*, the holding in *Solesbee* warrants only limited emphasis because the Court declined to address the issue of whether the execution of the insane is "cruel and unusual punishment" despite the opportunity to decide the issue.¹⁸ Again, the Court explicitly warned that it only intended its ruling to pass upon the specific procedures challenged in the case at bar.¹⁹

Nevertheless, *Solesbee* does deserve considerable attention because of the strong dissent filed by Justice Frankfurter. Justice Frankfurter argued for the first time that the Constitution prohibits the execution of insane prisoners.²⁰ Justice Frankfurter thoroughly examined the common law rule against the execution of the insane and pointed out that no state permitted the execution of insane persons.²¹ As a result, he concluded that an insane convict has a constitutional right not to be executed because the fourteenth amendment protects rights that are "deeply rooted in our common heritage."²²

Eight years after *Solesbee*, the Supreme Court considered another insanity claim by a death row inmate. In *Caritativo v. California*,²³ a condemned prisoner challenged a California law which only permitted a prison warden to take the first step in instituting court proceedings for the determination of a condemned prisoner's sanity. The Court, citing *Solesbee*, upheld the lower court's approval of

¹⁷ *Solesbee*, 339 U.S. at 13. In *Caritativo v. California*, 357 U.S. 549 (1958), see *infra* notes 23-25 and accompanying text, Justice Frankfurter pointed out that "[i]t did not appear in [*Solesbee*] whether, in exercising this function, the governor had declined to hear statements on the defendant's behalf." *Id.* at 557 (Frankfurter, J., dissenting).

¹⁸ *Solesbee*, 339 U.S. at 11.

¹⁹ *Id.*

²⁰ *Id.* at 21 (Frankfurter, J., dissenting) ("In view of the Due Process Clause it is not for the State to say: 'I choose not to take life if a man under sentence becomes insane.' The Due Process Clause says to a State: 'Thou shalt not.'")

²¹ See *infra* note 64.

²² *Solesbee*, 339 U.S. at 20 (Frankfurter, J., dissenting).

²³ 357 U.S. 549 (1958).

the procedure in a one sentence per curiam opinion.²⁴ Nonetheless, three Justices, led by Justice Frankfurter, dissented from the Court's opinion. Justice Frankfurter argued, as he had in *Solesbee*, that the fourteenth amendment prohibits the execution of the insane²⁵ and severely criticized the California procedure because it afforded a prisoner the opportunity to be heard only at the discretion of the warden.

III. FACTS AND PROCEDURAL HISTORY OF *FORD*

On July 21, 1974, Alvin Bernard Ford participated in an armed robbery in Fort Lauderdale, Florida. During the robbery Ford fatally shot a policeman in the back of the head after the officer was wounded and helpless.²⁶ A jury convicted Ford of first-degree murder and he was subsequently sentenced to death.²⁷ No allegations of insanity were made at the time of his offense, trial, or sentencing.²⁸ In early 1982, however, Ford began to behave abnormally.²⁹ Thus, when the Eleventh Circuit Court of Appeals finally denied Ford's appeal of his conviction³⁰ in October of 1983, Ford invoked the procedures of Florida Statute section 922.07³¹ for the determi-

²⁴ *Id.* at 550.

²⁵ This was actually unnecessary because the statutory law of California clearly forbade the execution of insane persons. CAL. PENAL CODE § 3703 (West 1982).

²⁶ *Ford v. State*, 374 So. 2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980).

²⁷ *Id.*

²⁸ 106 S. Ct. at 2598.

²⁹ *Id.* at 2598-99. It appears that Ford's perception of reality became increasingly distorted. He started to believe that a large group of people, including the Ku Klux Klan and the prison guards, among others, was conspiring against him. He then decided that the conspirators were holding hostages in the prison, including his family and several government leaders. Ford was examined for 14 months by a psychiatrist engaged by his counsel. At the end of this time, the psychiatrist concluded that Ford had a severe mental disorder, but Ford refused to see him further, believing that the psychiatrist had joined in the plot against him. Ford eventually came to believe that he could not be executed because he owned the prisons and could control the governor through the use of "mind waves." *Id.*

³⁰ Ford's case has a long history outside of the insanity issue. After Ford's conviction was affirmed, *Ford v. State*, 374 So. 2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), Ford, along with other death row inmates, petitioned the Florida Supreme Court for relief alleging that that court's procedure for review of capital cases was improper. Ford's petition was denied, *Brown v. Wainwright*, 392 So. 2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981). Ford then sought and was denied post-conviction relief in state court. *Ford v. State*, 407 So. 2d 907 (Fla. 1981). After this, Ford filed a motion for habeas corpus in federal court but was again denied. *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983). Ford did not advance his claim of insanity until all of these challenges proved to be unsuccessful.

³¹ Florida Stat. Ann. § 922.07 (West 1985) provides in relevant part:

(1) When the Governor is informed that a person under 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. The Governor shall notify the psychia-

nation of his sanity.

As required by statute, the Governor of Florida appointed a panel of three psychiatrists to evaluate Ford's mental condition.³² By order of the Governor, however, Ford's attorneys were not permitted to cross-examine the psychiatrists or act in any other adversarial capacity.³³ The psychiatrists examined Ford simultaneously during a single thirty minute interview.³⁴ Although each produced a different diagnosis, all of the psychiatrists concluded that Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."³⁵ After the psychiatric examinations, Ford's attorneys tried to submit further information to the Governor, including the report of a fourth psychiatrist who had thoroughly examined Ford and found him to be insane.³⁶ The Governor's office, however, refused to inform Ford's counsel whether the additional psychiatric information would be considered.³⁷ Subsequently, the Governor signed a death warrant without an explanation or statement of his findings.³⁸

Ford's counsel sought a competency hearing in state court, but the hearing was denied.³⁹ Ford's attorneys then filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, again seeking an evidentiary hearing to determine Ford's mental competency. The court denied the petition without a hearing. On appeal, the Eleventh Circuit Court of Appeals stayed Ford's execution and granted a certificate of probable cause, noting that the Supreme Court had never decided whether the execution of the insane violated the eighth amendment.⁴⁰ The

trists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him. (2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

Id. (emphasis added).

³² 106 S. Ct. at 2599.

³³ *Id.* at 2604; *see infra* note 75.

³⁴ *Id.* at 2599.

³⁵ *Id.*

³⁶ *Id.* at 2604.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Ford v. State*, 451 So. 2d 471, 475 (Fla. 1984).

⁴⁰ *Ford v. Strickland*, 734 F.2d 538 (11th Cir. 1984).

State of Florida subsequently attempted to have the stay of execution vacated, but the Supreme Court denied the application to vacate the stay.⁴¹

The three member panel of the court of appeals then ruled on the constitutionality of the execution of the insane, holding that Ford was not entitled to an evidentiary hearing.⁴² Nonetheless, the Eleventh Circuit noted that it would have had "considerable difficulty" with the case absent what it felt was the binding authority of *Solesbee*.⁴³ In a dissenting opinion very similar to the Supreme Court's ultimate holding in *Ford*, one judge argued that *Solesbee* no longer had precedential value due to recent changes in the Supreme Court's eighth amendment jurisprudence.⁴⁴

IV. THE SUPREME COURT DECISION

In a seven to two plurality decision, the Supreme Court reversed the court of appeals and held that the procedures used by the State of Florida violated the due process clause of the fourteenth amendment.⁴⁵ More significantly, a five-justice majority also found that the execution of insane persons constitutes cruel and unusual punishment forbidden by the eighth amendment.⁴⁶

A. MAJORITY OPINION

Justice Marshall, joined by Justices Brennan, Blackmun, Powell and Stevens, announced the judgment of the Court. He concluded that the eighth amendment forbids the execution of the insane.⁴⁷ In the first two parts of his opinion, Justice Marshall examined the issue of the execution of insane prisoners within the framework of the Court's recent decisions involving the eighth amendment. Justice Marshall began by stating that the Court's decision in *Solesbee* was not controlling because in that case the Court never reached the issue of the eighth amendment rights of condemned prisoners.⁴⁸ He also noted that the Court's other decisions dealing with the in-

⁴¹ *Wainwright v. Ford*, 467 U.S. 1220 (1984). In his concurrence to the order of the court, Justice Powell stated that "[t]his Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane. . . ." *Id.* at 1221.

⁴² *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985).

⁴³ *Id.* at 528.

⁴⁴ *Id.* at 534 (Clark, J., dissenting).

⁴⁵ *Ford*, 106 S. Ct. at 2606.

⁴⁶ *Id.* at 2602.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2600.

sanity issue⁴⁹ were inapplicable because they did not involve the eighth amendment.⁵⁰ Thus, Justice Marshall found that *Ford* presented a case of first impression on the eighth amendment issue.⁵¹

Justice Marshall began his analysis of the eighth amendment by pointing out that the eighth amendment's ban on cruel and unusual punishment includes at least those punishments prohibited at the time the Bill of Rights was adopted.⁵² He then set forth the Court's most recent eighth amendment test: that a particular punishment must be evaluated against the "evolving standards of decency that mark the progress of a maturing society"⁵³ and must "comport . . . with the fundamental human dignity that the Amendment protects."⁵⁴

Justice Marshall initiated his evaluation of the societal standards pertaining to the rule against the execution of the insane by investigating the common law authority for the rule,⁵⁵ much as Justice Frankfurter did in his dissent in *Solesbee*. Justice Marshall presented the various reasons which have been used to explain the rule: 1) the execution of the insane is an offense against humanity;⁵⁶ 2) the condemned might be able to think of a reason why he should not be executed were he not insane;⁵⁷ 3) such an execution has no deterrent value because it would not serve as an example to others;⁵⁸ 4) it would offend religious charity to execute someone before he can prepare himself for another world;⁵⁹ and 5) execution serves no purpose because insanity is punishment in itself.⁶⁰ In addition, Jus-

⁴⁹ See *supra* notes 6-25 and accompanying text.

⁵⁰ 106 S. Ct. at 2600.

⁵¹ *Id.*

⁵² *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 285-86 (1983)); see also *Solem*, 463 U.S. at 312-13 (Burger, C.J., joined by White, Rehnquist, and O'Connor, JJ., dissenting); *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring); *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring).

⁵³ 106 S. Ct. at 2600 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

⁵⁴ 106 S. Ct. at 2600. See also *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion); *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion) ("the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

⁵⁵ See 4 W. BLACKSTONE, COMMENTARIES *24-25 (1769); E. COKE, THIRD INSTITUTE 6 (6th ed. 1680); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (1736); 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 2 (7th ed. 1795); J. HAWLES, REMARKS ON THE TRIAL OF MR. CHARLES BATEMAN, [1685] 11 How. St. Tr. *474, *477 (1816); see *infra* notes 139-44 and accompanying text.

⁵⁶ 106 S. Ct. at 2601 (citing E. COKE, *supra* note 55).

⁵⁷ *Id.* at 2600-01 (citing W. BLACKSTONE, *supra* note 55, at *24-25).

⁵⁸ *Id.* at 2601 (citing E. COKE, *supra* note 55).

⁵⁹ *Id.* at 2601 (citing J. HAWLES, *supra* note 55).

⁶⁰ *Id.* at 2601 (citing W. BLACKSTONE, *supra* note 55, at *395).

tice Marshall noted the contemporary objection that the execution of an insane person does not adequately serve society's need for retribution.⁶¹

Justice Marshall summarized the commentators' views by declaring that while conflict exists among the various rationales advanced for the rule against the execution of the insane, almost no authority exists counter to the rule.⁶² Furthermore, he noted that authority suggests that early American courts imported the English common law rule.⁶³ Finally, Justice Marshall pointed out that no state currently permits the execution of insane prisoners.⁶⁴ Thus, Justice Marshall stated that the common law rule "has as firm a hold on the jurisprudence of today as it had centuries ago in England" and concluded that the widespread acceptance of the rule compelled the finding that the eighth amendment prohibits the execution of the insane.⁶⁵

⁶¹ *Id.* at 2601 (citing Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962); see also Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425, 433-41 (1964).

⁶² 106 S. Ct. at 2601.

⁶³ *Id.* (citing 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *761 (5th Am. ed. 1847); 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 59 (8th ed. 1880)).

⁶⁴ Forty-one of the 50 states have a death penalty. Of these, 26 states have statutes which clearly require that the execution of a prisoner who is adjudged incompetent be stayed. See ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. § 13-4023 (1978); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE § 3703 (West 1982); COLO. REV. STAT. § 16-8-112(2) (1986); CONN. GEN. STAT. § 54-101 (1982); FLA. STAT. § 922.07 (1985); GA. CODE ANN. § 17-10-62 (1982); ILL. REV. STAT., ch. 38, § 1005-2-3 (1982); KAN. STAT. ANN. § 22-4006(3) (1981); KY. REV. STAT. § 431.240(2) (1985); MD. ANN. CODE art. 27, § 75(c) (Supp. 1986); MISS. CODE ANN. § 99-19-57(2) (Supp. 1985); MO. REV. STAT. § 552.060 (Supp. 1985); MONT. CODE ANN. § 46-14-221 (Supp. 1985); NEB. REV. STAT. § 29-2537 (1985); NEV. REV. STAT. § 176.445 (1985); N.J. STAT. ANN. § 30:4-82 (West 1981); N.M. STAT. ANN. § 31-14-6 (1984); N.Y. CORRECT. LAW § 656 (McKinney Supp. 1986); N.C. GEN. STAT. § 15A-1001 (1985); OHIO REV. CODE ANN. § 2949.29 (Baldwin 1979); OKLA. STAT. tit. 22, § 1008 (West 1986); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1979); UTAH CODE ANN. § 77-19-13 (1982); WYO. STAT. § 7-13-901 (Supp. 1986). Four states have adopted the common law rule by judicial decision. See *State v. Allen*, 204 La. 513, 516, 15 So. 2d 870, 872 (1943); *Commonwealth v. Moon*, 383 Pa. 18, 22-23, 117 A.2d 96, 99 (1955); *Jordan v. State*, 124 Tenn. 81, 89-90, 135 S.W. 327, 329 (1911); *State v. Davis*, 6 Wash. 2d 696, 717, 108 P. 2d 641, 651 (1940). Seven states have discretionary procedures whereby the prisoner will be transferred to a mental health facility upon being found to suffer a mental illness. See DEL. CODE ANN. tit. 11, § 406 (1979); IND. CODE § 11-10-4-2 (1982); MASS. GEN. LAWS ANN. ch. 279, § 62 (West 1985); R.I. GEN. LAWS § 40.1-5.3-7 (1984); S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1985); TEX. CRIM. PROC. CODE ANN. art. 46.01 (Vernon 1979); VA. CODE ANN. § 19.2-177 (1983). Four states which have the death penalty do not have an explicit procedure governing the insanity of condemned prisoners, but these states have not repudiated the common law rule.

⁶⁵ 106 S. Ct. at 2602. It should be noted that Justice Marshall stated that the rule forbids execution of the insane "[w]hether its aim be to protect the condemned from

After reiterating that insane prisoners have a constitutional right not to be executed, Justice Marshall stated that “[o]nce a substantive right or restriction is recognized in the Constitution . . . its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.”⁶⁶ Thus, Justice Marshall, who was joined in the final sections of the opinion by Justices Brennan, Blackmun, and Stevens, turned to the question of whether the Florida procedures for the determination of the competency of condemned prisoners fulfilled the due process required to protect a constitutional right.

Justice Marshall first found that Alvin Ford was entitled to an evidentiary hearing in federal court because the requirements of the federal habeas corpus statute,⁶⁷ as defined by the Court’s ruling in *Townsend v. Sain*,⁶⁸ had not been met.⁶⁹ In *Townsend*, the Court held that “a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.”⁷⁰ Because the Florida proceeding did not involve the participation of any state court, which is required by the federal statute,⁷¹ Justice Marshall held that Ford was entitled to a *de novo* hearing on the issue of his sanity.⁷²

Moreover, Justice Marshall examined whether Florida’s procedure provided the reliability required by *Townsend* and the federal statute⁷³ to avoid a federal evidentiary hearing in all cases involving the Florida procedure. Justice Marshall found that Florida’s procedures were inadequate in three areas. First, the procedure failed to allow the condemned prisoner to participate in the investigation of his insanity. Specifically, Justice Marshall found the procedure to be inadequate because Alvin Ford and his attorneys were not permitted

fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance. . . .” *Id.*

⁶⁶ *Id.*

⁶⁷ 28 U.S.C. § 2254 (1982).

⁶⁸ 372 U.S. 293 (1963).

⁶⁹ 106 S. Ct. at 2603.

⁷⁰ 372 U.S. at 312-13.

⁷¹ One prerequisite to the denial of an evidentiary hearing is that there have been “a determination after a hearing on the merits of the factual issue, made by a State court of competent jurisdiction” 28 U.S.C. § 2254(d) (1982). See *Ford*, 106 S. Ct. at 2603.

⁷² 106 S. Ct. at 2603.

⁷³ The various sections of § 2254 provide, inter alia, that an evidentiary hearing will be required if: “the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing,” § 2254(d)(2); “the material facts were not adequately developed at the State court hearing,” § 2254(d)(3); or “the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.” 28 U.S.C. § 2254(d)(6) (1982).

to submit information concerning his purported insanity.⁷⁴ Second, Justice Marshall found that Florida's procedure denied the prisoner an opportunity to cross-examine the psychiatric panel appointed by the state.⁷⁵ Finally, Justice Marshall found that the Florida procedure was inadequate because it rested the determination of the prisoner's insanity solely on an unreviewable decision by a member of the same governmental branch that prosecuted the prisoner.⁷⁶

Although Justice Marshall clearly pointed out the problems with the Florida procedure, he declined to identify a specific procedure that would satisfy the requirements of due process. Justice Marshall did suggest that states look for analogies in their own procedures for determining whether a defendant is competent to stand trial or for determining whether a defendant can be involuntarily committed to a mental health institution.⁷⁷ In addition, Justice Marshall noted that some high threshold showing on behalf of the prisoner may be required to weed out nonmeritorious or repetitive claims of insanity.⁷⁸ Finally, Justice Marshall added that he did not intend to suggest that a full trial on the insanity issue would be the only way to satisfy due process.⁷⁹ Thus, Justice Marshall left the burden on the states to develop constitutional procedures for handling the insanity claims of death row inmates.

B. CONCURRING OPINION

Justice Powell agreed that the eighth amendment prohibits the execution of the insane. Because he disagreed with Justice Marshall's view of the required procedures for the disposition of insanity claims, however, and felt that the issue of a standard for determining insanity should have been addressed by the Court, Justice Powell wrote a separate concurrence.⁸⁰

⁷⁴ Justice Marshall stated that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." 106 S. Ct. at 2604. See also *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985)(due to the difficulty of diagnosing mental illness, the factfinder must make his decision by evaluating the evidence presented by all parties); *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(plurality opinion).

⁷⁵ 106 S. Ct. at 2605. In fact, the governor had a "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984).

⁷⁶ 106 S. Ct. at 2605. Justice Marshall stated that "[t]he commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for the reliability in the factfinding proceeding." *Id.*

⁷⁷ 106 S. Ct. at 2606 n.4. See note 137 and accompanying text.

⁷⁸ *Id.* at 2606.

⁷⁹ *Id.* at 2605-06.

⁸⁰ *Id.* at 2606 (Powell, J., concurring).

Justice Powell first addressed the issue of the level of competency required before a prisoner could be executed. He stated that the first justification for the rule exempting insane prisoners from execution, that the prisoner's insanity might prevent him from making arguments to defend himself, has little merit today⁸¹ in light of modern requirements for the effective assistance of counsel⁸² and the requirement that a defendant be mentally competent at the time of trial.⁸³ Justice Powell, however, did find merit in the argument that the execution of an insane person is inherently cruel because it prevents him from mentally preparing for his death. He also stated that such an execution interferes with the penal purpose of retribution since an insane person cannot comprehend the reason for his execution.⁸⁴ Thus, Justice Powell argued that the proper test of sanity in connection with the retributive purpose of criminal law is a test of whether the defendant can understand the connection between his punishment and his crime.⁸⁵

After reiterating the same argument set forth by Justice Marshall as to the due process requirements of *Townsend* and the federal habeas corpus statute,⁸⁶ Justice Powell discussed the type of hearing that he felt due process requires. Noting that the eighth amendment issue arises only after a prisoner has been convicted and sentenced, Justice Powell argued that the heightened due process procedures required at trials and sentencing proceedings do not apply to the case of insanity pleas by condemned prisoners, especially since the issue is merely when, rather than if, the prisoner is to be executed.⁸⁷ As a result, Justice Powell reasoned that the burden should be on the petitioner, as it was at common law,⁸⁸ to overcome

⁸¹ *Id.* at 2607 (Powell, J., concurring).

⁸² See *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984). Justice Powell remarked that because the prisoner has an assurance of effective counsel and the right of appeal, the common law concern that a prisoner will be wrongly executed is very minimal today. 106 S. Ct. at 2607-08 (Powell, J., concurring).

⁸³ See *Drope v. Missouri*, 420 U.S. 162 (1975). Justice Powell apparently believes that since a prisoner has a constitutional guarantee that he will not be tried if insane, his concern that he be able to assist in his own defense is already met. 106 S. Ct. at 2608 (Powell, J., concurring).

⁸⁴ See *Ehrenzweig*, *supra* note 61; *Hazard & Louisell*, *supra* note 61; see also Note, *Insanity of the Condemned*, 88 *YALE L.J.* 533, 533-36 (1979).

⁸⁵ 106 S. Ct. at 2605 (Powell, J., concurring). This test is the same one required by the Florida procedure.

⁸⁶ Justice Powell stated that Florida's procedure was inadequate because no determination by a court was required, information submitted by prisoners was not heard, and the determination of sanity was made solely upon the examination of state appointed psychiatrists. *Id.* at 2609 (Powell, J., concurring).

⁸⁷ *Id.* at 2610 (Powell, J., concurring).

⁸⁸ The Court in *Nobles* stated the common law rule that "[e]very person of the age

a rebuttable presumption of sanity.⁸⁹ Thus, Justice Powell concluded that a proceeding that is less formal than a trial would satisfy due process concerns.⁹⁰ He would merely require that a state provide an impartial board or administrator to hear evidence and argument from the prisoner or his counsel.⁹¹

C. CONCURRING AND DISSENTING OPINION

Contrary to the opinions of Justices Powell and Marshall, Justice O'Connor, joined by Justice White, concluded that the eighth amendment does not prohibit the execution of the insane.⁹² Justices O'Connor and White concurred in the judgment of the Court because they felt that the Florida statute,⁹³ mandating that a prisoner must be transferred to a mental health facility upon being found to be insane, created an entitlement not to be executed while insane.⁹⁴ In addition, Justice O'Connor stated that the Florida procedure violated due process because it did not afford the prisoner his fundamental right to be heard.⁹⁵

Nonetheless, Justice O'Connor argued that due process demands should be reduced because the prisoner has already been convicted and sentenced, and the opportunity for malingering and calculated delay are great.⁹⁶ Justice O'Connor stated that neither

of discretion is presumed of sane memory, until the contrary appears" *Nobles*, 168 U.S. at 408 (citations omitted).

⁸⁹ In this context, Justice Powell correctly distinguishes *Addington v. Texas*, 441 U.S. 418 (1979), where the Court held that for the involuntary commitment of an individual (not necessarily a condemned convict) the state must show by clear and convincing proof that the person is insane. 106 S. Ct. at 2610-11 (Powell, J., concurring).

⁹⁰ *Id.* at 2611 (Powell, J., concurring).

⁹¹ *Id.* (Powell, J., concurring).

⁹² *Id.* at 2611 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor stated that she agreed with Justice Rehnquist that "the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency." *Id.* (O'Connor, J., concurring in part and dissenting in part).

⁹³ Fla. Stat. Ann. § 922.07(3) (West Supp. 1986)

⁹⁴ *Id.* at 2612 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor stated that the Court's "cases leave no doubt that where a statute indicates with 'language of an unmistakable and mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Id.* (O'Connor, J., concurring in part and dissenting in part)(quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)).

⁹⁵ 106 S. Ct. at 2612-13 (O'Connor, J., concurring in part and dissenting in part). In fact, Justice O'Connor quoted the same language from *Grannis v. Ordean*, 234 U.S. 385 (1914), as did Justices Marshall and Powell. In *Grannis*, the Court stated that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Id.* at 394.

⁹⁶ The possibility for indefinite delay is great because no determination can ever be conclusive, since the issue is *present* insanity. Justice O'Connor would argue that the

oral argument nor cross-examination are necessary for a fair hearing.⁹⁷ In fact, Justice O'Connor would require that the decisionmaker consider only the written submissions on behalf of the prisoner.⁹⁸ Thus, Justice O'Connor argued that "the Due Process Clause imposes few requirements on the States in this context."⁹⁹

D. DISSENTING OPINION

Justice Rehnquist, joined by Chief Justice Burger, agreed with Justice O'Connor that due process requires only minimal protections for condemned prisoners. Justice Rehnquist and Chief Justice Burger dissented from the judgment of the Court, however, because they believed that insane prisoners have no constitutional right to a stay of execution.¹⁰⁰ Justice Rehnquist argued that the eighth amendment does not confer any rights upon condemned prisoners alleging present insanity. He criticized the Court's reliance on what he considered a selective common law precedent, and stated that at common law the decision whether to execute a prisoner purporting to be insane was vested solely in the executive branch.¹⁰¹

Justice Rehnquist suggested that *Solesbee* should control the issue and militate against the adoption of an eighth amendment right, particularly because the states' approach to determining condemned prisoners' sanity has not changed since *Solesbee*.¹⁰² Furthermore, Justice Rehnquist disagreed with Justice O'Connor's conclusion that Florida law created a right not to be executed while insane, arguing instead that Florida's statutory procedure only created a right to inform the Governor that the prisoner may be insane.¹⁰³ Finally, Justice Rehnquist stressed the potential for abuse

state interest in carrying out its sentence makes this point crucial, and one that argues for a reduction in the requirements of due process. *See Nobles*, 168 U.S. at 398.

⁹⁷ 106 S. Ct. at 2613 (O'Connor, J., concurring in part and dissenting in part).

⁹⁸ *Id.* (O'Connor, J., concurring in part and dissenting in part).

⁹⁹ *Id.* at 2612 (O'Connor, J., concurring in part and dissenting in part).

¹⁰⁰ *Id.* at 2614 (Rehnquist, J., dissenting).

¹⁰¹ *Id.* at 2613 (Rehnquist, J., dissenting) (citing 1 N. WALKER, CRIME AND INSANITY IN ENGLAND 194-203 (1968)); *see also Solesbee*, 339 U.S. at 11-12 (the power to pardon has been vested almost solely in the executive branch).

¹⁰² 106 S. Ct. at 2614 (Rehnquist, J., dissenting).

¹⁰³ *Id.* (Rehnquist, J., dissenting). Justice Rehnquist evidently believes that the expectation that the Governor will hear a prisoner's claim is not the same as an expectation that he will not be executed if insane. Nevertheless, if the prisoner is in fact insane (in the mind of the Governor), the Florida statute requires that the Governor "shall have him committed to a Department of Corrections mental health treatment facility." FLA. STAT. ANN. § 922.07 (West 1985) (emphasis added). Thus, an expectation that the Governor will hear a claim of insanity is really equivalent to an expectation that an insane prisoner will not be executed because if the prisoner is in fact insane, the Governor cannot order his execution.

that the Court's new constitutional right created,¹⁰⁴ ultimately concluding that it was unnecessary to create a constitutional prohibition against the execution of the insane because no state permitted such an execution anyway.

V. ANALYSIS AND DISCUSSION

A. THE EIGHTH AMENDMENT

The specific holding in *Ford*, that the petitioner was entitled to a *de novo* evidentiary hearing in federal court, is well-grounded. Even Justices O'Connor and White, who argued that insane prisoners do not have an eighth amendment right to a stay of execution, agreed with Justice Marshall and the majority that Florida's procedures did not give Alvin Ford a "full and fair hearing."¹⁰⁵

Moreover, the majority's holding that the eighth amendment prohibits the execution of the insane seems quite logical.¹⁰⁶ Justice Marshall's opinion correctly identified the two major factors of eighth amendment analysis that the Court has considered in recent years: basic human dignity and contemporary standards of decency.¹⁰⁷ The unanimous acceptance of the rule against the execution of the insane by American courts and legislatures demonstrates that the rule comports with our society's view of human dignity.¹⁰⁸ In addition, the Court's acceptance of the rule follows logically from the holding in *Solem v. Helm*,¹⁰⁹ where the Court found that punish-

¹⁰⁴ Justice Rehnquist noted that the new constitutional right "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity." 106 S. Ct. at 2615 (Rehnquist, J., dissenting). See *infra* note 120 and accompanying text.

¹⁰⁵ See *supra* note 95 and accompanying text.

¹⁰⁶ Ford's counsel also argued that the execution of the insane violates the eighth amendment because it is excessive and serves no penological justification. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The argument contends that the only acceptable penological justifications are retribution and deterrence, neither of which are served by the execution of the insane. While it seems clear that the goal of retribution is frustrated by the execution of the insane, see Ehrenzweig, *supra* note 61, at 434-40; Hazard & Louisell, *supra* note 61, at 386-87, it can also be argued persuasively that Coke's view, that execution of the insane has no deterrent value, is wrong. If one accepts the view that the death penalty in general has a deterrent value, then the execution of the insane would appear to have as much, or even more value, because it would be clear that not even insanity would prevent those convicted of capital crimes from receiving the punishment of death.

¹⁰⁷ See *supra* notes 53-54 and accompanying text.

¹⁰⁸ See *supra* note 64; see also Justice Frankfurter's dissent in *Solesbee*: "[N]ot a single State gives any indication of having uprooted the heritage of the common law which deemed it too barbarous to execute a man while insane." 339 U.S. at 22 (Frankfurter, J., dissenting).

¹⁰⁹ 463 U.S. 277 (1983).

ments considered cruel and unusual at common law are forbidden by the eighth amendment.¹¹⁰

In short, recent Supreme Court jurisprudence supports the majority's eighth amendment analysis. Even Justice Rehnquist in dissent could summon no better criticism of Justice Marshall's logic than the argument that it is "unnecessary" to recognize a constitutional right not to be executed because the rule is already uniformly accepted.¹¹¹

Prior to *Ford*, the Supreme Court had never before reached the issue of whether the execution of insane persons is "cruel and unusual punishment." Viewing the Court's previous cases in their most limited sense, these cases hold only that if a prisoner does not have a constitutional right to be spared from execution, he does not have a right to a full jury trial upon a mere suggestion of insanity, and his sanity can be determined *ex parte* by either a governor or an administrative official. Thus, in one sense the holding in *Ford* is consistent with the Court's prior decisions because those cases were decided upon a premise that an insane prisoner had no constitutional right to a stay of execution.

Nevertheless, the constitutional holding in *Ford* makes the Court's previous cases somewhat obsolete. Due to the Court's eighth amendment ruling, state procedures for dealing with claims of insanity must now provide a much higher level of protection than in the past, because, as Justice Frankfurter stated, "[I]n determining what procedural safeguards a State must provide, it makes all the difference in the world whether the United States Constitution places a substantive restriction on the State's power to take the life of an insane man."¹¹² Even so, the reasoning in the Supreme Court's prior opinions may still be of assistance in analyzing the issue of the procedures that a state must employ in order to protect the rights of condemned persons in its penal system.

B. PROCEDURES FOR THE DISPOSITION OF INSANITY CLAIMS

Although the majority in *Ford* left the task of determining what procedures to use to deal with claims of insanity to the states, one fact seems clear: a full jury trial is not required. The Court's decisions prior to *Ford* demand such a conclusion, and even Justice Mar-

¹¹⁰ In *Solem*, the Court stated that "[a]lthough the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . ." *Id.* at 286.

¹¹¹ 106 S. Ct. at 2615 (Rehnquist, J., dissenting).

¹¹² *Solesbee*, 339 U.S. at 15 (Frankfurter, J., dissenting).

shall conceded this point.¹¹³ Nonetheless, what proceedings are required by due process is unclear after the Court's decision in *Ford*.

Justice Marshall apparently draws the line at requiring some sort of adversary hearing, as unrestricted as possible, where the prisoner would have the opportunity to present evidence in support of his claim.¹¹⁴ Justice Powell, on the other hand, would merely require that an impartial decisionmaker hear the claims of the prisoner. Justice O'Connor would mandate only that the prisoner's submissions be considered. Thus, there seems to be a large area of disagreement among the members of the Court over the type of procedural safeguards that must be provided to a condemned inmate who makes a claim of mental incompetency.

Another instructive view of the procedures required by due process can be gleaned from the opinions of Justice Frankfurter, who was the first Supreme Court Justice to argue that the Constitution forbids the execution of the insane. Even though Justice Frankfurter strongly supported the rights of allegedly insane death row inmates, he would apparently not require a full trial or even a judicial proceeding on the issue of present sanity.¹¹⁵ Based upon his dissent in *Solesbee*, Justice Frankfurter would apparently agree with the view now held by Justices Powell and O'Connor, that lesser safeguards are required because the determination of sanity after sentencing "does not go to the question of guilt but to its consequences."¹¹⁶ Thus, Justice Frankfurter suggested that an *in camera* proceeding would satisfy due process requirements.

Still, Justice Frankfurter would require an opportunity for the prisoner to be heard.¹¹⁷ He would mandate that the prisoner be given the opportunity through counsel or next of kin to invoke the protections of due process. He apparently would not support the governor as the decisionmaker and receiver of evidence because of

¹¹³ 106 S. Ct. at 2605-06 ("We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests.").

¹¹⁴ *Id.* at 2605. Justice Powell evidently believes that Justice Marshall would require a "full-scale 'sanity trial.'" 106 S. Ct. at 2610 (Powell, J., concurring).

¹¹⁵ See *Caritativo*, 357 U.S. at 557 (Frankfurter, J., dissenting) ("I make no claim that the Due Process Clause requires an opportunity to persons in the place of petitioners to have their claim tested in a judicial proceeding."); *Solesbee*, 339 U.S. at 24 (Frankfurter, J., dissenting) ("Since it does not go to the question of guilt but to its consequences, the determination of the issue of insanity after sentence does not require the safeguards of a judicial proceeding.").

¹¹⁶ *Id.* (Frankfurter, J., dissenting).

¹¹⁷ "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Id.* at 23 (Frankfurter, J., dissenting).

the potential for bias.¹¹⁸

Although various members of the Court have presented specific ideas about the constraints of due process, in the end each state must balance its own interests with those of the prisoners in its penal system.¹¹⁹ Certainly, the state has a very strong interest in preventing the insanity claim from becoming a tool for the prisoner to use to delay his execution. In fact, the fear of repeated insanity claims was the primary factor that led the Court in *Nobles* to shy away from giving a condemned prisoner the right to a jury trial on the issue of insanity.¹²⁰ Moreover, a state may have a legitimate interest in ensuring that its sentences are carried out¹²¹ and in keeping the administrative costs of its procedures to reasonable levels.

Nonetheless, now that insane condemned prisoners have a constitutional right not to be executed, they cannot be deprived of this right without due process of law. Considering the gravity of the decision whether or not to grant a stay of execution, one could reasonably argue that the risk of undue delay far outweighs the magnitude of the insanity decision. Moreover, although the prisoner's interest at this stage is far less compelling than his interest at trial or sentencing because the prisoner has already been convicted and sentenced to death, if the insane prisoner becomes permanently insane then the issue again becomes whether he will be executed at all, not merely when the execution will occur.

Despite the difficulties of harmonizing the competing interests of the state with those of the individual prisoner, it is clear that the

¹¹⁸ There may be a tendency for a governor to exclude evidence offered by the prisoner because a "Governor might not want to have it on his conscience to have sent a man to death after hearing conflicting views, equally persuasive, regarding the man's sanity." *Id.* at 25 (Frankfurter, J., dissenting).

¹¹⁹ It has been suggested that the three part balancing test proposed in *Mathews v. Eldridge*, 424 U.S. 319 (1975), should be used. See Note, *supra*, note 84 at 546-57. This test identified the following factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used; and, 3) the Government's interest, including the function involved and the administrative and fiscal burdens of additional safeguards. 424 U.S. at 335.

¹²⁰ The Court stated that

[i]f it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

Nobles, 168 U.S. at 405-406.

¹²¹ "To protect itself society must have the power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused." *Solesbee*, 339 U.S. at 13.

common law procedures are no longer adequate. At common law, no uniform procedure existed for handling claims of insanity by a condemned prisoner. Rather, the trial judge had the discretion to employ whatever procedures he felt were required under the circumstances.¹²² Today, a condemned prisoner has a right to greater assurance than this. In order to provide these assurances, every state must develop four specific sets of procedures.

First, the state must establish a procedure for raising a claim of insanity.¹²³ Some states allow anyone to raise the issue of insanity, while others allow only a warden or sheriff keeping the inmate in custody to raise the issue.¹²⁴ For a prisoner's first claim of incompetency, at least, he should be permitted one hearing as a matter of right.

Second, a specific type of hearing for dealing with a properly raised claim of insanity should be identified. The prisoner *must* be given the opportunity to be heard and his evidence must be received by the decision making authority. A full trial is not required, however, because this hearing does not involve a question of guilt or innocence. Moreover, a jury is unnecessary because expert testimony will probably be dispositive, especially considering that juries are likely to accept the judgments of court-appointed experts.¹²⁵ The decisionmaker should not be the governor¹²⁶ because of his potential for bias.¹²⁷ An impartial authority that would hear evidence supplied by a panel of experts would probably suffice.¹²⁸ In addition, the prisoner through counsel should have the opportunity to challenge the findings of the state experts.

Third, the state must designate a procedure for the disposition of repeated claims of insanity. As Justice Marshall alluded to, a rea-

¹²² See *Nobles*, 168 U.S. at 407.

¹²³ There are alternative approaches to a formal sanity hearing. See Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A.J. 651 (1951). One option is the enactment of a law that would require that all prisoners alleging insanity be committed to a mental hospital for observation. A different approach would be to enact a rule such as that adopted by Massachusetts which requires routine psychiatric examinations of all persons convicted of major offenses. *Id.* at 654.

¹²⁴ H. WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 465-66 (1954).

¹²⁵ The following statistics are set forth in an article by Henry Weihofen: In Ohio from 1929 to 1949, the findings in the hospital report were rejected only three times in 894 cases. In Maine, over a thirty year period the state hospital's findings were rejected only once in 208 cases. Weihofen, *supra* note 123, at 710.

¹²⁶ Justice Marshall argued vehemently that the governor should not make the final decision concerning the claim of insanity. See *supra* note 76 and accompanying text. Justice Frankfurter apparently felt the same way. See *supra* note 118 and accompanying text.

¹²⁷ The decision should not be made by a prison warden or hospital administrator for the same reason.

¹²⁸ See *supra* note 115 and accompanying text.

sonable threshold must be employed to weed out nonmeritorious claims. Expedited review after an initial full hearing may be a good alternative.¹²⁹ However, because the issue involved here is present incompetency, the prisoner must not be dismissed without a thorough reevaluation of his case, even though this may cause administrative burdens.¹³⁰ Thus, a high threshold requirement for a hearing may be necessary since successive hearings cannot be rudimentary.

Finally, the state must develop a procedure to determine when a prisoner has returned to sanity. While this issue has received little attention, it is significant because the determination that a prisoner has regained his sanity means that he is again condemned to die. Rather than an act of mercy, the finding that a condemned prisoner is sane actually represents his death warrant. Moreover, the procedures for determining whether a prisoner has regained his sanity should be more stringent than for the initial determination of mental competency, because in the former case the prisoner is examined against a background of a legal insanity, while in the latter case the prisoner's background is that he was already found competent to be tried and sentenced. Therefore, neither an expedited hearing nor a procedure leaving the sanity decision solely to a hospital administrator would adequately protect the prisoner's due process rights.

C. THE TEST OF INSANITY

The test of insanity used to determine whether a prisoner is fit to be executed is a crucial element in the procedures discussed above. The generally accepted common law test for insanity is whether the defendant is aware of his conviction and his impending execution,¹³¹ although it has also been formulated as a question of whether the condemned has the "present mental competency to understand the nature and purpose of the punishment to be executed upon him."¹³² No matter which test represents the common law view, however, it seems clear that there must be a more explicit ar-

¹²⁹ See *supra* text accompanying note 77.

¹³⁰ The Court in *Nobles* was also hesitant to recognize a right to a jury trial because it felt that "[i]f the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict." *Nobles*, 168 U.S. at 407 (quoting *Laros v. Commonwealth*, 84 Pa. 200, 211 (1877)).

¹³¹ *Hazard & Louisell*, *supra* note 61, at 394 n.44 (citing *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955)); cf. 24 C.J.S. *Criminal Law* § 1619 (1961)(citing *In re Smith*, 25 N.M. 48, 59, 176 P. 819, 823 (1918)). See also *supra* note 135.

¹³² H. WEIHOFEN, *supra* note 124, at 466.

ticulation of the rule behind the test in order to give a condemned prisoner a fair hearing on his claim of insanity.

Virtually all of the commentators¹³³ who have examined the issue have have agreed that the test for insanity should be tailored to the purposes of the rule. For example, if the reason for the rule against executing the insane is to ensure that the condemned prisoner has every opportunity to explain why he should not be executed, then the test of insanity should be whether the prisoner has the faculties to think of such a reason and the ability to communicate it to a lawyer. If, however, the purpose of the rule is to let the condemned make his peace with God, then recognition of the moral reprehensiveness of the crime that was committed should be the decisive factor.¹³⁴ Alternatively, if the rationale for the rule is that "he who sins must suffer," then the prisoner must be able to appreciate his impending fate.

Some formulations of a test of insanity have implicitly addressed this problem. For example, the test advocated by Justice Frankfurter focuses on the prisoner's ability to defend himself by being capable of submitting reasons why he should not be executed.¹³⁵ Justice Powell, on the other hand, apparently does not believe there is a need to include the ability of the prisoner to assist in his own defense because there are enough other procedural safeguards available to address that concern.¹³⁶ He would require the defendant to be aware of his punishment and the reason for it, as

¹³³ See M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 433-41 (1952); H. WEIHOFEN, *supra* note 124, at 463-70; Ehrenzweig, *supra* note 61, at 440; Hazard & Louisell, *supra* note 61, at 394-95; Comment, *Execution of Insane Persons*, 23 S. CAL. L. REV. 246, 256 (1950); Note, *supra* note 84, at 561-62. *But cf.* Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980).

¹³⁴ This test "would have absolutely nothing to do with whether he can distinguish right from wrong, whether he can act according to this knowledge, or whether he suffers from a mental disease; or with any other formulation of the insanity test devised for the determination of criminal responsibility." Ehrenzweig, *supra* note 61, at 440.

¹³⁵ After sentence of death, the test of insanity is whether the prisoner has not "from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court."

Solesbee, 339 U.S. at 20 n.3 (Frankfurter, J., dissenting)(quoting *In re Smith*, 25 N.M. 48, 59, 176 P. 819, 823 (1918)). See also Annotation, *Insanity Supervening After Conviction and Sentence of Death*, 49 A.L.R. 804 (1927).

¹³⁶ Justice Powell argued that because no prisoner can be tried who is not sane, and because all prisoners have the right to effective assistance of counsel and the benefit of collateral review, the likelihood that a prisoner would be executed while there existed an unfound error is minimal. 106 S. Ct. at 2608 (Powell, J., concurring).

such a test would satisfy the retributive goal of punishment and allow the prisoner to prepare himself for his death.

One pair of commentators has suggested that the appropriate test should be the same as that used for involuntary commitment to a mental institution,¹³⁷ because this test is relatively easy to use and familiar to judges and psychiatrists.¹³⁸ Whatever test is adopted by a state, it must be in accord with the purpose of the rule against the execution of the insane.

D. THE LOGIC OF THE RULE

The Supreme Court committed a major error in *Ford* by not explicitly identifying the accepted justification for the rule against the execution of the insane. Although Justice Marshall stated that the rule applies as much today as it did at common law, he did not examine the logical force of the proposed justifications for the rule, all but one of which are somewhat dubious. For example, the argument that executing an insane person has no deterrent value is questionable because those who supposedly would be deterred by the death penalty could not envision themselves becoming insane after being tried and sentenced.¹³⁹ In fact, the knowledge that even insanity will not prevent one who commits a capital offense from suffering execution might increase the *in terrorem* effect of the death penalty.¹⁴⁰

Similarly, the reasoning that executing an insane person violates humanity is also flawed. Justice Traynor, of the California Supreme Court, stated his dissatisfaction with this rationale in his concurrence in the lower court remand of *Phyle v. Duffy*:¹⁴¹

Is it not an inverted humanitarianism that deploras as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only if he is

¹³⁷ The commentators would use this test, rather than one tailored to an accepted justification for the rule against the execution of the insane, because they concluded that the only acceptable explanation for the rule is that it avoids the unnecessary taking of life. Hazard & Louisell, *supra* note 61, at 395.

¹³⁸ The commentators pointed out that this test keeps the investigation "in the realm of medical discourse" rather than involving psychiatrists in the interpretation of legal standards. *Id.*

¹³⁹ *Id.* at 385. Because the offender cannot foresee that he will become insane, "he neither supposes he will not be caught or is indifferent to the consequences if he is. Hence, it does not materially dilute the deterrent effect of the death penalty to withhold it if the prisoner becomes insane." *Id.*

¹⁴⁰ See M. GUTTMACHER & H. WEIHOFEN, *supra* note 133, at 437.

¹⁴¹ 34 Cal. 2d 144, 154, 208 P.2d 668, 674 (1949)(Traynor, J., concurring).

not in full possession of his senses?¹⁴²

Moreover, staying the execution of an insane death row inmate because insanity itself is sufficient punishment, ignores the reality that he will be executed as soon as he returns to sanity.¹⁴³

In short, the rule against the execution of the insane can be plausibly justified only by accepting that the execution of an insane person has less retributive value than the execution of a person who is fully aware of the fate he faces.¹⁴⁴ If retribution provides an acceptable reason for imposing capital punishment, the rule adopted by the Court makes sense. Otherwise, the rule against the execution of the presently insane only makes the death penalty appear to be arbitrary and capricious. The lack of an accepted justification for the rule, at a minimum, causes significant problems because it makes the determination of the appropriate test of supervening insanity a difficult, if not futile, task.

VI. CONCLUSION

Although the reasoning of the plurality in *Ford v. Wainwright* makes sense in light of the Supreme Court's recent interpretations of the eighth amendment, the decision is deficient in three ways. The Court neglected to identify what procedures states must use for dealing with the insanity claims of condemned prisoners. Moreover, the Court failed to identify a test of mental fitness to be executed. Finally, the Court erred by not specifying which rationale it accepted for the rule against the execution of the insane. Nonetheless, the holding at least begins to safeguard the rights of prisoners who until now were dependent upon the mercy of the state.

SANFORD M. PASTROFF

¹⁴² *Id.* at 158, 208 P.2d at 676-77 (Traynor, J., concurring).

¹⁴³ See Hazard & Louisell, *supra* note 61, at 384.

¹⁴⁴ See Ehrenzweig, *supra* note 61, at 434-39; see also Hazard & Louisell, *supra* note 61, at 386-87. A frequently cited judicial elaboration of this concept is that "[a]mid the darkened mists of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if [the insane prisoner] were taken to the electric chair, he would not quail or take account of its significance." *Musselwhite v. State*, 215 Miss. 363, 367, 60 So. 2d 807, 809 (1952).