CONSTITUTIONAL LAW—EIGHTH AMENDMENT—PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT FORBIDS EXECUTION OF THE INSANE—*Ford v. Wainwright*, 477 U.S. 399 (1986).

Anglo-American case law uniformly rejects execution of insane individuals.[1] This concept originated during medieval times,[2] but still exists in modern American jurisprudence.[3] Currently, no state permits the execution of an incompetent individual.[4] Until 1986, in *Ford v. Wainwright*,[5] the United States Supreme Court had never decided whether such a limitation was

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[1] Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 780 (1980).

[2] *Id.* at 778. During this period a single test was able to determine an individual's mental competency during any portion of the criminal proceedings. *Id.* at 780 n.61.

[3] *Id.* A justification for adherence to the common law rule is "simply that it is unnecessary to put the insane prisoner to death" and that "[i]nquiries beyond this point . . . involve attacks upon capital punishment itself." Hazard & Louisell, *Death, the State and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 389 (1962).

[4] Twenty-six of the forty-one states which have the death penalty have enacted statutes which expressly require the execution of a prisoner be stayed if he is adjudged to be insane and/or incompetent. *See* ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. § 13-4024(B) (1978); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE § 3703 (West 1982); COLO. REV. STAT. § 16-8-112(2) (1986); CONN. GEN. STAT. ANN. § 54-101 (West 1985); FLA. STAT. ANN. § 922.07(1) (West 1985); GA. CODE ANN. § 17-10-62 (1982); ILL. STAT. ANN. ch. 38, para. 1005-2-3 (Smith-Hurd 1982); KAN. STAT. ANN. § 22-4006(3) (1981); KY. REV. STAT. ANN. § 431.240(2) (Michie 1985); MD. CODE ANN. art. 27, § 75(c) (1987); MISS. CODE ANN. § 99-19-57(2) (Supp. 1987); MO. REV. STAT. § 552-060(1) (Vernon 1987); MONT. CODE ANN. § 46-14-221 (1986); NEB. REV. STAT. § 29-2537 (1985); NEV. REV. STAT. ANN. § 176.455 (Michie 1986); 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 (1983); OHIO REV. CODE ANN. § 2949-29 (1987); OKLA. STAT. ANN. tit. 22, § 1008 (1986); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1979); UTAH CODE ANN. § 77-19-13 (1982); WYO. STAT. § 7-13-903 (1987). In four states the judiciary has adopted the common law rule proscribing the execution of incompetent individuals. *See* State v. Allen, 204 La. 513, 516, 15 So.2d 870, 871 (1943); Commonwealth v. Moon, 383 Pa. 18, 22-23, 177 A.2d 96, 99 (1955); Jordan v. State, 124 Tenn. 81, 90, 135 S.W. 327, 329 (1911); State v. Davis, 6 Wash. 2d 696, 717, 108 P.2d 641, 651 (1940). Seven states have enacted statutes which provide procedures for suspending a prisoner's sentence and requiring his transfer to an institution for the insane. *See* DEL. CODE ANN. tit. 11, § 406 (Supp. 1986); IND. CODE ANN. § 11-10-4-2 (West 1982); MASS. GEN. LAWS ANN. ch. 279, § 62 (Supp. 1987); 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). The remaining states have no statutory procedure with regard to the criminally insane, but have not rejected the common law rule. *See* Ward, *Competency For Execution: Problems in the Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 107 (1986).

[5] 477 U.S. 399 (1986).

required by the Constitution.[6] In *Ford*, the Court held that the eighth amendment prohibits execution of an insane prisoner.[7] As such, the Court concluded that a de novo hearing on the issue of insanity was required when it was raised in a habeas corpus petition unless a state court of competent jurisdiction made a reliable determination on the issue after a plenary hearing.[8]

In 1974, Alvin Bernard Ford was convicted of murder by a Florida state court and sentenced to death.[9] In 1982, however, Ford's behavior gradually began to change, and the issue of his competency arose.[10] Ford's attorney had him evaluated by psychiatrist, Dr. Jamil Amin.[11] After fourteen months of evaluation, the doctor concluded that Ford was suffering from a mental disorder which resembled paranoid schizophrenia with suicide potential.[12] Dr. Amin determined that this disorder substantially affected Ford's ability to assist in his own defense.[13]

In 1983, Dr. Harold Kaufman interviewed Ford at his attorney's request.[14] Dr. Kaufman concluded that Ford was incapable

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6 *Id.* at 401. Justifications for prohibiting the execution of the insane include: an insane individual is incapable of assisting in his own defense; insanity, in and of itself, is adequate punishment; humanitarian interests; deterrence would not be served because such an execution has no exemplary value; retribution is not achieved because killing an insane person does not have the moral qualities of killing a sane individual; and the insane are incapable of repenting. Ford v. Wainwright, 752 F.2d 526, 527 n.3 (11th Cir. 1985), *rev'd*, 477 U.S. 399 (1986).

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

8 *Id.* at 417-18 (Marshall, J., plurality opinion); *id.* at 418 (Powell, J., concurring in part and concurring in judgment). In capital punishment cases, heightened standards of reliability in factfinding procedures are required because execution is "irremediable." *See id.* at 411 (Marshall, J., plurality opinion) (citing Spaziano v. Florida, 468 U.S. 447, 456 (1984); Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

9 *See id.* at 401. On July 21, 1974, Ford shot a wounded police officer in the back of the head at close range. *Ford*, 752 F.2d at 526.

10 *Ford*, 477 U.S. at 402 (Marshall, J., plurality opinion). After reading about the Ku Klux Klan rally in the newspaper, Ford became obsessed with the Klan. He developed a delusion that the Klan conspired to force him to commit suicide. *Id.* He also insisted that he had rescued his family from prison officials, who had taken them hostage and were torturing them. *Id.* Additionally, he claimed to have appointed nine justices to the Florida Supreme Court. *Id.* Finally, he referred to himself as Pope John Paul, III. *Id.*

11 *Id.* Dr. Amin had previously examined Ford. *Id.*

12 *Id.* at 403. Dr. Amin's diagnosis was based on a lengthy evaluation, medical records, some of Ford's letters, interviews with those that knew him, and conversations that had been taped between Ford and his lawyer. *Id.* at 402-03.

13 *Id.*

14 *Id.* at 403. Ford's attorney sought the assistance of Dr. Kaufman after Ford refused to continue treatment with Dr. Amin. *Id.* Ford began having delusions that Dr. Amin was also conspiring against him. *Id.*

of understanding why he was to be executed.[15] He asserted that Ford has not drawn a connection between the death penalty and the homicide for which he was convicted.[16]

Ford's counsel invoked statutory procedures for a determination of Ford's competency.[17] As mandated by the statute, the Governor of Florida selected three psychiatrists to evaluate Ford and determine if he had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."[18] The psychiatrists, after a thirty minute interview with Ford, concluded that he was "sane" as defined by Florida

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15 *Id.* During an interview with Dr. Kaufman, Ford stated that he could not be executed as per the landmark case of Ford v. State, which he claimed prevented all executions. *Id.* Ford also asserted that the could not be executed because he could control the Governor's thoughts. *Id.* Additionally, he believed that he owned the prison. *Id.*

16 *Id.*

17 *Id.* The relevant Florida statute provides:

> (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.
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> The Governor shall notify the psychiatrists 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.
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> (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.
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> (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.
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> (4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).
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> (5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

FLA. STAT. ANN. § 922.07 (West 1985).

18 *Ford*, 477 U.S. at 403 (Marshall, J., plurality opinion) (quoting FLA. STAT. ANN. § 922.07(1) (1985)).

statutory law.[19] Therefore, on April 30, 1984, pursuant to the statute, the Governor signed a death warrant ordering that Ford be executed.[20] Application for a state court hearing on the issue of competency and a stay of execution were denied.[21]

Thereafter, counsel unsuccessfully petitioned for habeas corpus relief in the federal district court seeking an evidentiary hearing regarding Ford's sanity.[22] A divided court of appeals panel affirmed the district court's denial of the writ.[23] The United States Supreme Court granted Ford's petition for certiorari.[24] A majority of the Court held that the eighth amendment prohibits the execution of the insane.[25] A plurality of the Court

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[19] *Id.* The three psychiatrists filed separate reports with the Governor. *Id.* Although the psychiatrists believed that Ford was sane, they differed regarding the appropriate diagnosis for his condition. *Id.* One psychiatrist determined that Ford was suffering from psychosis with paranoia, but believed that he had "enough cognitive functioning to understand the nature and the effects of the death penalty, and why it [was] to be imposed on him." *Id.* at 403-04. Another psychiatrist diagnosed Ford as "psychotic," but believed that he did "know fully what [could] happen to him." *Id.* at 404. The third psychiatrist diagnosed Ford as having a "severe adaptational disorder," but concluded that he could "comprehend his total situation . . . and all of the implications." *Id.* He asserted that Ford's illness, "although severe, seem[ed] contrived and recently learned." *Id.*

[20] *Id.* Pursuant to the statute, the final decision regarding the competency of a condemned prisoner rests with the governor. FLA. STAT. ANN. § 922.07 (West 1985). The death warrant was unaccompanied by a statement or explanation. *Ford*, 477 U.S. at 404 (Marshall, J., plurality opinion).

[21] Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984). A Florida trial court summarily denied a motion made by Ford's mother on his behalf for a stay of execution and a hearing to determine his competency. Ford v. Wainwright, 752 F.2d 526, 527 (11th Cir. 1985), *rev'd*, 477 U.S. 399 (1986). After hearing oral arguments on the issue, the Supreme Court of Florida also denied relief. *Id.*

[22] *Ford*, 477 U.S. at 404 (Marshall, J., plurality opinion). The United States District Court for the Southern District of Florida denied relief "on the alternative grounds of abuse of the writ and the merits." *Ford*, 752 F.2d at 527 (footnote omitted). This was the second writ of habeas corpus filed by the petitioner. *Id.* Ford initially sought habeas corpus relief on several grounds including: denial of the right to confront witnesses; failure to disclose exculpatory evidence; denial of the right to assist counsel; denial of the right to a fair trial by an impartial jury; arbitrary imposition of the death penalty in jury instructions; an unconstitutional displacement of the burden of proof at the sentencing phase; unfair and inconsistent imposition of the death penalty; ineffective assistance of counsel; and ex parte review of documents. Ford v. Strickland, 676 F.2d 434, 445 (11th Cir. 1982).

[23] *See Ford*, 752 F.2d at 528. The court of appeals stayed Ford's execution pending the outcome of their decision. Strickland v. Wainwright, 734 F.2d 538, 539 (11th Cir. 1984). The State of Florida appealed to the United States Supreme Court to lift the stay. Wainwright v. Ford, 467 U.S. 1220, 1220 (1984). The Supreme Court rejected the appeal. *Id.*

[24] *Ford*, 477 U.S. at 404 (Marshall, J., plurality opinion). The Court granted the petition for certiorari in order to decide whether execution of the insane is prohibited by the eighth amendment. *Id.* at 405.

[25] *Id.* 408-09 (Marshall, J., plurality opinion). Justice Marshall was joined with

concluded that Ford was entitled to a determination on the issue of his competency.[26]

In *Nobles v. Georgia*,[27] the United States Supreme Court considered the procedural requirements for a stay of execution for a person who allegedly became insane before her sentence was carried out.[28] In 1895, Elizabeth Nobles was convicted of a murder and sentenced to death by a Georgia state court.[29] While awaiting execution, Nobles claimed to have become insane.[30] Relying upon the due process clause of the fourteenth amendment, Nobles petitioned the court for a jury trial on the issue of her sanity.[31] She asserted that the relevant statutory procedures were not judicial in nature and thus inadequate.[32] She further

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respect to this holding by Justices Brennan, Blackmun, Powell and Stevens. *Id.* at 400 (Marshall, J., plurality opinion); *id.* at 418 (Powell, J., concurring in part and concurring in judgment).

[26] *Id.* at 418 (Marshall, J., plurality opinion); *id.* at 427 (Powell, J., concurring in part and concurring in judgment). Justice Marshall joined in his opinion by Justices Brennan, Blackmun and Stevens and Justice Powell in a separate opinion, determined that an individual is entitled to a de novo hearing on the issue of insanity when state procedures do not comport with due process. *Id.* at 418 (Marshall, J., plurality opinion); *id.* at 427 (Powell, J., concurring in part and concurring in judgment). Justice Powell wrote separately because he disagreed with Justice Marshall that a "full-scale 'sanity trial' " was necessary. *Id.* at 425 (Powell, J., concurring in part and concurring in judgment).

[27] 168 U.S. 398 (1897).

[28] *See id.* at 399-400.

[29] *Id.* at 399.

[30] *Id.* The death sentence was suspended by court order. *Id.* Nobles' resentencing hearing occurred on June 23, 1896, at which time it was averred that she was insane. *Id.*

[31] *Id.* at 400. Nobles claimed that due process required the impanelling of a jury and a trial on the issue of her sanity. *Id.*

[32] *Id.* Nobles listed eight reasons why the Georgia statute did not comply with due process. *Id.* at 400 n.1. The proceedings set forth in the statute: (1) did not take place in a court; (2) did not prescribe rules of procedure or evidence, provide for a jury or provide a mechanism for examining witnesses; (3) did not charge a judge or presiding officer with the authority of ruling on the admissibility of tendered evidence; (4) did not provide for a judge or presiding officer to instruct the jury on questions of law; (5) did not establish a method of correcting errors or motion procedures for a new trial; (6) were unknown to common law; (7) did not provide for a mechanism of appeal and (8) did not provide for a method of review. *Id.*

The Court set forth the Georgia statute as follows:

> If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the Ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found by the inquisition of such jury, that such convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution, to the

alleged that upon a judicial determination of incompetency "it [was] contrary to the policy of the law and . . . illegal that the sentence of death . . . be imposed upon her."[33] The Court held that an individual does not have an absolute right to a jury determination on the question of post-sentencing sanity.[34] The Court opined that the issue was better left to legislative regulation.[35] As such, the Court asserted that a state had the right to set forth its own procedures for determining the issue, and posited that the state's statutory procedure satisfied the requirements of due process.[36]

In 1948, in *Phyle v. Duffy*,[37] the issue of a condemned prisoner's sanity arose again.[38] In *Phyle*, a California state court convicted the defendant of murder and sentenced the defendant to death.[39] Prior to execution, the prison warden instituted judicial proceedings to determine the defendant's competency.[40] Upon a

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> presiding judge of the district, who shall cause the same to be entered on the minutes of the Superior Court of the county where the conviction was had. And, at any time thereafter, when it shall appear to the said presiding judge, either by inquisition or otherwise, that the said convict is of sound mind, the said judge shall issue a new warrant, directing the sheriff to do execution of the said sentence on said convict, at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant, and other proceedings in the case to be entered on the minutes of the said Superior Court.

Id. at 402-03 (quoting GA. CODE § 4666 (1882)).

33 *Id.* at 399.

34 *Id.* at 409.

35 *Id.*

36 *Id.* Pursuant to Georgia statute, the sheriff was to appoint a jury of twelve to determine whether a prisoner was competent. *Id.* at 402 (quoting GA. CODE § 4666 (1882)). If the jury concluded the convict was insane, sentence was suspended until such time as the prisoner was of "sound mind." *Id.*

37 334 U.S. 431 (1948).

38 *Id.* at 432-33. The issue involved the procedures by which an individual is adjudged sane or insane. *Id.* at 433.

39 *Id.* at 432.

40 *Id.* at 434-35. Pursuant to the California Penal Code, the warden believed the defendant to be insane and brought this to the district attorney's attention. *Id.* The district attorney immediately instituted proceedings in court to discern the defendant's sanity. *Id.* The court then impanelled a jury to decide the issue. *Id.* The defendant was adjudged insane. *Id.* The relevant sections of the California Code provide:

> 3701. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be in-

finding of insanity, the defendant was placed in a state institution until his reason was restored.[41] After eighteen days of institutionalization, the medical superintendent determined that the defendant had "recovered his reason."[42] Thereafter, the defendant was returned to prison, and a new date for execution was set.[43]

The defendant unsuccessfully sought judicial review in a state court concerning his return to sanity.[44] The California Supreme Court, relying on *Nobles*, held that a prisoner had no absolute right to a hearing on the issue of competency.[45] The United States Supreme Court granted certiorari "because of the serious nature of the due process contentions presented in the petition."[46] The Court reasoned that *Nobles* did not necessarily require it to reject the defendant's contention.[47] The Court noted that the *Nobles* decision turned on the trial judge's discretion to determine the most appropriate procedure for ascertaining competency.[48] The United States Supreme Court, however,

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quired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry.

3702. The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

3703. The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order receiving the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored.

CAL. PENAL CODE §§ 3701-3703 (West 1982).

41 *Phyle*, 334 U.S. at 435.

42 *Id.* at 436. The medical superintendent's conclusion regarding the defendant's competency was based upon "his own *ex parte* investigation, no notice or hearings having been afforded petitioner or any person on his behalf." *Id.*

43 *Id.* This procedure complied with section 3704 of the Penal Code which provides that once a defendant is deemed by the medical superintendent to have recovered his reason this fact must be certified to the governor who must then issue a warrant to the warden appointing a new day for execution. CAL. PENAL CODE section 3704 (West 1982). The defendant must be returned to prison to await execution. *Id.*

44 *Phyle*, 334 U.S. at 437.

45 *Id.* (citations omitted).

46 *Id.* at 434.

47 *Id.* at 437.

48 *Id.* at 438-39. The Court opined that an absolute right would cause punishment of the defendant to "depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial." *Id.* at 438 (quoting Nobles v. Georgia, 168 U.S. 398, 405-06 (1897)).

dismissed the case because the defendant had not exhausted his state law remedies and therefore the constitutional question was not ripe for adjudication.[49]

Two years later, in *Solesbee v. Balkcom*,[50] the United States Supreme Court again upheld a state statutory procedure for determining a condemned prisoner's sanity as not violative of the due process clause.[51] In *Solesbee*, the petitioner was sentenced to death by a Georgia state court.[52] The defendant requested a stay of execution claiming that he had become insane.[53] Acting pursuant to statutory authority, the Governor of Georgia appointed three psychiatrists, who examined the defendant and certified him to be sane.[54] The defendant sought habeas corpus relief from the United States Supreme Court.[55] He maintained that the fourteenth amendment entitled him to a judicial or administrative hearing, the right to have counsel present at such hearing, to cross-examine witnesses and present evidence on the issue of his competency.[56] The defendant further asserted that "if the tribunal was administrative its findings must be subject to judicial review."[57]

The Supreme Court limited review to the issue of whether the Georgia statute provided the requisite procedural due process.[58] The majority noted that the statutory procedure was simi-

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49 *Id.* at 444. The Court dismissed the case because the defendant has a state remedy of mandamus available to him in which he could raise the issue of sanity. *Id.* at 442-44. The defendant contended that mandamus relief would not be granted without a showing that the warden's actions were arbitrary and capricious. *Id.* at 442. The Court noted that pursuant to the applicable Penal Code the warden has a duty to initiate proceedings "not when a defendant is insane but when 'there is good reason to believe' he is insane." *Id.* at 443 (citation omitted).

50 339 U.S. 9 (1950).

51 *Id.* at 14. The statute granted the Governor discretionary authority to determine, with the aid of three physicians, the alleged insanity of a convicted individual. *Id.* at 10 (citation omitted). The Governor also had the discretion of committing an insane individual to an asylum. *Id.* at 10 n.1.

52 *Id.* at 9. Solesbee was convicted of murder and sentenced to death by electrocution. *Id.*

53 *Id.* at 9-10.

54 *Id.* at 10. The relevant statute was repealed in 1960. The current statute provides that if after a conviction, an individual becomes insane, the Department of Human Services shall obtain custody of the person, and he shall be safeguarded and treated as are other adjudged insane individuals. GA. CODE ANN. § 17-10-62 (1982).

55 *Solesbee*, 339 U.S. at 10.

56 *Id.*

57 *Id.*

58 *Id.* at 11.

lar to the executive power to grant clemency or reprieve.[59] The Court observed that such a power rarely had been subject to judicial review.[60] Therefore, the Court held that the statutory provisions for a grant of clemency or reprieve were discretionary and as such were not subject to due process requirements.[61]

In 1953, *United States ex rel Smith v. Baldi*[62] presented the United States Supreme Court with another opportunity to expound upon the process due to a condemned person.[63] In *Smith*, the defendant pled guilty to murder.[64] At sentencing, the defense presented evidence that the defendant was insane at the time of the murder and was presently insane.[65] The trial court, however, disbelieving the evidence of the defendant's incompetency, ordered that he be sentenced to death.[66] The defendant appealed to the United States Supreme Court alleging denial of due process.[67]

The Court determined the defendant's claims to be without merit.[68] The Court maintained that the defendant was not de-

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59 *Id.* at 11-12.

> Postponement of execution because of insanity bears a close affinity . . . to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon. . . . Such power has traditionally rested in governors or the President. Seldom, if ever, has this power of executive clemency been subject to review by the courts.

Id. (citing Ex Parte United States, 242 U.S. 27, 42 (1916).

60 *Id.* at 12.

61 *Id.* at 13-14. The Court noted that postponement of the sentence of an insane individual is an act of conscience and wisdom of the tribunal. *Id.* at 13. The Court asserted that the same trust reposed in judges should be given to governors who make life and death decisions. *Id.* The Court observed no evidence whereby the Governor or the doctors violated Georgia's humanitarian policy prohibiting execution of the insane. *Id.* at 14.

62 344 U.S. 561 (1953).

63 *Id.* at 565. The Court was presented with the questions of whether the state should have allowed the defendant to plead guilty without first adjudicating the issue of his sanity and whether he should have been allowed to plead without the assistance of a psychiatrist. *Id.*

64 *Id.* at 562-63. The defendant appeared for arraignment without counsel on February 25, 1948. *Id.* at 562. The judge requested that an attorney present in the courtroom advise the defendant as to his plea. *Id.* As a result, the defendant pled not guilty. *Id.* Following several continuances, the defendant withdrew his plea of not guilty and a plea of guilty was entered on September 21, 1948. *Id.* at 562-63. The reason for the changed plea was to permit the state to present its evidence of first degree murder and to give defense counsel additional time to obtain support of the contention that the defendant was insane. *Id.* at 563.

65 *Id.*

66 *Id.*

67 *Id.* at 565.

68 *See id.* at 566-70.

nied due process merely because he pled guilty without first having a formal proceeding regarding his sanity.[69] The Court noted that the defendant could have withdrawn his guilty plea and could have entered a plea of not guilty by reason of insanity.[70] The Court, likewise, asserted that due process does not require that a state provide a pre-trial psychiatric evaluation of the defendant.[71] The Court observed that testimony at the sentencing hearing by several physicians sufficed.[72] Finally, the majority rejected the defendant's assertion that he could not be executed because he was insane.[73] The Court posited that although relevant state law prohibited the execution of the insane, the defendant had not proven he was in fact incompetent.[74]

In 1958, the Supreme Court decided *Caritativo v. California*.[75] In *Caritativo*, the petitioners were convicted of murder and sentenced to death.[76] The petitioners challenged a California statute which gave the prison warden the exclusive power to raise the issue of a condemned prisoner's sanity.[77] The petitioners maintained that the statute was violative of due process because if the warden refused to raise the issue of competency, the court lacked jurisdiction to consider the warden's determination.[78] Relying on *Solesbee*, the *Caritativo* Court in a per curiam opinion, summa-

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69 *Id.* at 567-68.

70 *Id.* at 568.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 568-69. The defendant also contended that the district court erred in not holding a plenary hearing on the issue of his sanity. *Id.* at 569. The court considered evidence from state court judges, defense counsel and the prosecutor and determined that the defendant had received a fair hearing on the issue of his sanity, and therefore denied the first petition for a hearing. *Id.* The court denied the second petition because it asserted that a district court should not reverse the highest state court unless special circumstances prevail "in cases where the constitutional issues have been disposed on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law." *Id.* (quoting United States *ex rel.* Smith v. Baldi, 96 F. Supp. 100, 103 (1951)).

75 357 U.S. 549 (1958) (per curiam).

76 *Id.* at 553 (Frankfurter, J., dissenting).

77 *Id.* The warden at San Quentin refused to initiate proceedings to determine their sanity because he saw no reason to question their sanity. *Id.* Section 3700 of the California Penal Code provides: "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." CAL. PENAL CODE § 3700 (West 1982). Section 3701 sets forth the procedure to be followed where a warden has reason to believe that a defendant sentenced to death has become insane. *See supra* note 40.

78 *Caritativo*, 357 U.S. at 552 (Frankfurter, J., dissenting).

rily upheld the statute.[79]

In 1986, in *Ford v. Wainwright*, the United States Supreme Court considered the implications the eighth amendment had upon infliction of the death penalty on the insane.[80] Justice Marshall authored the opinion of the Court.[81] He initially noted that the eighth amendment and the due process clause had "evolved substantially" since the Court's last opportunity to consider the issue of executing the criminally insane.[82] The Court observed that "the Eighth Amendment ha[d] been recognized to affect significantly both the procedural and the substantive aspects of the death penalty."[83] Thus, the majority suggested that the issue of executing the insane had taken on new dimensions.[84] The Court concluded that the adequacy of state procedures to determine competency would depend upon substantive limitations imposed by the Constitution, an issue the Court had not previously confronted.[85]

The Court noted that the eighth amendment prohibits cruel and unusual punishment.[86] As such, the Court observed that the amendment incorporates the "evolving standards of decency that mark the progress of a maturing society."[87] The majority posited that to determine whether a particular punishment was consistent with "fundamental human dignity," the Court must look to "objective evidence of contemporary values."[88]

The Court acknowledged that English common law prohibited the execution of a prisoner who had lost his sanity.[89] The

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79 *Id.* at 550 (citing Solesbee v. Balcom, 339 U.S. 9, 12 (1950)).

80 *Ford*, 477 U.S. at 410-18. In 1962, the Court held that the eighth amendment was incorporated by the fourteenth amendment as a limitation on state power. Robinson v. California, 370 U.S. 660, 666 (1962).

81 *Ford*, 477 U.S. at 401. Justices Brennan, Blackmun, Powell and Stevens joined in Parts I and II of the opinion. *Id.* Justices Brennan, Blackmun and Stevens joined in parts III, IV and V of the opinion. *Id.*

82 *Id.* at 405. The Court last considered the issue of executing the insane in 1958, in Caritativo v. California, 357 U.S. 549 (1958). *See Ford*, 477 U.S. at 405. *See also supra* notes 76-79 and accompanying text.

83 *Ford*, 477 U.S. at 405.

84 *Id.*

85 *Id.*

86 *Id.* 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.

87 *Ford*, 477 U.S. at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

88 *Id.* (citing Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

89 *Id.* The Court asserted that although a variety of rationales had been offered, there was no authority at English common law condoning imposition of the death

majority further noted that the common law proscription against executing the insane had been adopted in America.[90] As such, the Court emphasized that no state permits the execution of an individual adjudged to be incompetent.[91] The Court concluded that, "[f]aced with such widespread evidence of a restriction upon sovereign power," it was compelled to hold that the eighth amendment bars the execution of an incompetent prisoner.[92]

With respect to the issue of whether the district court was compelled to hold an evidentiary hearing regarding Ford's sanity, a plurality of the Court held that in a habeas corpus proceeding an evidentiary hearing was required unless a state court of competent jurisdiction, after a full hearing, had made a reliable determination regarding the relevant facts.[93] Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, noted that a proper state court decision is generally presumed correct, and as such an evidentiary hearing is not required.[94] In the case at bar, however, the Justice asserted that a federal evidentiary hearing was necessary because a state court had not considered the issue of Ford's sanity,[95] and because the factfinding procedures used to determine Ford's sanity did not provide a sufficient assurance of accuracy.[96]

Justice Marshall emphasized that the adequacy of a factfinding procedure is ascertained by reference to the interests at stake.[97] He observed that in capital punishment proceedings the Court has consistently insisted "the factfinding procedures aspire

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penalty on an insane person. *Id.* at 407. For reasons prohibiting execution of the insane see *supra* note 6.

90 *Ford*, 477 U.S. at 406.

91 *Id.* *See supra* notes 1-4 and accompanying text.

92 *Ford*, 477 U.S. at 409. The Court stated that "[w]hether [the prohibition's] aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.*

93 *Id.* at 417-18 (Marshall, J., plurality opinion); *id.* at 423-24 (Powell, J., concurring in part and concurring in judgment).

94 *Id.* at 418 (Marshall, J., plurality opinion) (citing Townsend v. Sain, 372 U.S. 293, 312-13 (1963); 28 U.S.C. § 2254(d) (1982)).

95 *Id.* at 416 (Marshall, J., plurality opinion). The Court noted that no court played any role in the petitioner's claim of insanity and that "if federal factfinding is to be avoided, then in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts." *Id.* at 411 (Marshall, J., plurality opinion).

96 *Id.* at 416 (Marshall, J., plurality opinion).

97 *Id.* at 411 (Marshall, J., plurality opinion).

to a heightened standard of reliability."[98] Thus, the Justice concluded that the cursory form of statutory review afforded to Ford was inadequate.[99]

Justice Marshall stressed that the Florida statute, which precluded the defendant from presenting evidence relevant to his competency, prevents the trier of fact from hearing potentially probative information.[100] As such, the Justice noted that there was a "greater likelihood of an erroneous decision."[101] Additionally, Justice Marshall observed that the statute's failure to afford the defendant a right to clarify or challenge expert testimony regarding his competency, created the possibility that the factfinder's decision, made in reliance upon such testimony, would be distorted.[102] Moreover, the Justice emphasized that the most significant defect in the statutory procedure was the placement of the decision regarding a condemned person's sanity exclusively with the executive branch.[103] Justice Marshall reasoned that the Governor of Florida, as "[t]he commander of the State's corps of prosecutors," can not claim to be neutral.[104] Justice Marshall maintained that the factfinder's neutrality was essential to a reliable determination on the issue of competency.[105] Thus, the Justice concluded that the Florida statutory procedure for determining competency was inadequate to preclude de novo review of the issue.[106]

Justice Powell, concurring in part and concurring in the judgment, concluded that Ford was entitled to a hearing on his

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98 *Id.* (citing Spaziano v. Florida, 468 U.S. 447, 456 (1984)). The Court stated that heightened scrutiny is required because of the irreversible consequences of the death penalty. *Id.*

99 *Id.* at 416 (Marshall, J., plurality opinion). Justice Marshall observed that the procedural review in this case "fail[ed] to achieve even the minimal degree of reliability required for the protection of any constitutional interest." *Id.* at 413.

100 *Id.* at 413-14 (Marshall, J., plurality opinion).

101 *Id.* at 414 (Marshall, J., plurality opinion).

102 *Id.* The Court stated that the statute violated the fundamental principle of law which gives all defendants "the opportunity to be heard." *Id.* at 413 (Marshall, J., plurality opinion) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)). The Court noted its longstanding prohibition against "States . . . limit[ing] the capital defendant's submission of relevant evidence in mitigation of the sentence." *Id.* at 413-14 (Marshall, J., plurality opinion) (citations omitted).

103 *Id.* at 416 (Marshall, J., plurality opinion).

104 *Id.* The Court observed that the Governor appointed the experts responsible for determining the defendant's sanity and also decided whether to carry out the death sentence. *Id.* The "Governor . . . [is] responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing." *Id.*

105 *Id.*

106 *Id.* at 418 (Marshall, J., plurality opinion).

habeas corpus petition because the issue of his sanity was not adjudicated fairly as required by due process and federal statute.[107] Justice Powell observed that federal statute requires deference be given to factual findings of a "State court of competent jurisdiction."[108] He asserted that the term "State court" did not include determinations made by the governor of a state.[109] Thus,

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[107] *Id.* at 427 (Powell, J., concurring in part and concurring in judgment).

[108] *Id.* at 423 (Powell, J., concurring in part and concurring in judgment) (quoting 28 U.S.C. § 2254(d) (1977)). Section 2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1977).

[109] *Ford*, 477 U.S. at 423 (Powell, J., concurring in part and concurring in judgment). Justice Powell stressed that the phrase " 'State court' may have a certain

he concluded that federal statute did not require the Court to defer to the Governor's sanity determination.[110] Moreover, the Justice stated that a presumption of correctness could not attach to the Governor's findings because the state had not given the petitioner "a full and fair hearing" as required by federal law.[111] Finally, Justice Powell observed that Ford was denied due process because the statutory procedure offered him no opportunity to be heard.[112]

Justice Powell disagreed with Justice Marshall regarding the extent of procedural protections that need be afforded a condemned prisoner who alleges insanity.[113] He stated that "the requirements of due process are not as elaborate as Justice Marshall suggests."[114] Justice Powell observed that the state has a "substantial and legitimate interest in taking petitioner's life as punishment for his crime."[115] Additionally, the Justice reasoned that a condemned prisoner's claim of insanity is highly suspicious, in that such an individual was obviously competent to stand trial for his crime, but suddenly asserts incompetency after being sentenced to death.[116] Moreover, the Justice noted that the determination of an individual's competency depends upon psychiatric evidence which is "fraught with 'subtleties and nuances.' "[117] As such, ordinary adversarial procedures may not be the appropriate process for determining a defendant's sanity.[118] Therefore, Justice Powell opined that the Constitution does not require a full trial on the issue of a condemned prisoner's competency, and suggested that an impartial officer or board receiving adequate evidence from interested parties would be acceptable.[119]

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amount of flexibility, but no amount of stretching can extend it to include the Governor." *Id.* (footnote omitted).

110 *Id.*

111 *Id.* (quoting 28 U.S.C. § 2254(d)(2) (1977)). For the text of this statute, see *supra* note 108.

112 *Ford*, 477 U.S. at 424 (Powell, J., concurring in part and concurring in judgment). The determination of the defendant's sanity was based exclusively on the examinations of the state-appointed psychiatrists. *Id.* Such a procedure appeared to be arbitrary and fraught with error because it prevented the defendant from presenting contrary medical evidence or from explaining the flaws in the psychiatrists' reports. *Id.*

113 *Id.* at 425 (Powell, J., concurring in part and concurring in judgment).

114 *Id.*

115 *Id.*

116 *Id.* at 425-26 (Powell, J., concurring in part and concurring in judgment).

117 *Id.* (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).

118 *Id.*

119 *Id.* Justice Powell asserted that "states should have substantial leeway to de-

In a separate opinion, Justice O'Connor, joined by Justice White, concurred in result in part and dissented in part.[120] Justice O'Connor asserted that the eighth amendment did not "create a substantive right not to be executed while insane."[121] She observed that Florida law created the right to avoid execution while incompetent.[122] As such, she noted that the state-created liberty to avoid execution while insane carried with it minimal requirements of due process.[123] The Justice opined that the Florida statutory procedure was constitutionally deficient because it did not afford the petitioner an opportunity to be heard, a fundamental requisite of due process.[124] Justice O'Connor concluded that the judgment below should be vacated, and the case remanded to the state court for a proper assessment of the petitioner's competency.[125] The Justice stressed, however, that the only federal question was regarding the constitutionality of Florida's procedures.[126] Thus, she reasoned that once the Court was satisfied that the state procedures were adequate, the federal court had no jurisdiction to review the state's competency determination regarding a condemned prisoner.[127]

Justice Rehnquist, joined by Chief Justice Burger, dissented.[128] Justice Rehnquist asserted that it was "unnecessary to 'constitutionalize' the already uniform view that the insane should not be executed."[129] Additionally, he disagreed with the majority's assessment of what procedures would be necessary to adequately protect the right they have created.[130] He observed that while it was true that the common law prohibited the execu-

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termine what process best balances the various interests at stake." *Id.* at 427 (Powell, J., concurring in part and concurring in judgment).

120 *Id.* at 427 (O'Connor, J., concurring in result in part and dissenting in part).

121 *Id.* at 428 (O'Connor, J., concurring in result in part and dissenting in part). Justice O'Connor agreed with Justice Rehnquist regarding this proposition. *Id.*

122 *Id.*

123 *Id.* at 429 (O'Connor, J., concurring in result in part and dissenting in part). Justice O'Connor maintained that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." *Id.*

124 *Id.* at 430 (O'Connor, J., concurring in result in part and dissenting in part) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

125 *Id.* (O'Connor, J., concurring in result in part and dissenting in part). She stated that at the very least the defendant's written submissions from his own psychiatrists should be considered by the decisionmaker. *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 431 (Rehnquist, J., dissenting).

129 *Id.* at 435 (Rehnquist, J., dissenting).

130 *See id.* at 434-35 (Rehnquist, J., dissenting).

tion of the insane, it was the executive branch that had traditionally made the determination regarding a condemned prisoner's sanity.[131] Thus, he asserted that the majority's decision did not comport with common law practices.[132] Justice Rehnquist maintained that there was no reason to depart from the sound views expressed in *Solesbee v. Balkcom*.[133] Finally, the Justice cautioned that the majority's decision would invite inmates to make spurious claims of incompetency.[134]

The Supreme Court in *Ford v. Wainwright* held that execution of an insane prisoner is violative of the eighth amendment's mandate against cruel and unusual punishment.[135] As such, the Court required that a full hearing on the issue of sanity be held by a state court of competent jurisdiction when the question was raised by a condemned prisoner. This hearing, the Court asserted, must be conducted in such a way as to be reliable.[136]

The Court, however, did not set forth guidelines regarding the hearing process. The Court merely asserted that the states should institute reliable procedures which comport with due process. Unfortunately, by not prescribing specific guidelines, each state's procedures are susceptible to appeal. Moreover, without uniform guidelines, differing statutory procedures among the states could result in injustice. The geographical location where a person commits a crime for which he receives the death penalty, will determine the type of hearing the person is entitled to should he claim to have become insane while awaiting execution. Additionally, because of the tremendous likelihood that a prisoner awaiting execution may become insane—as he has time to contemplate his punishment for several years before it is ultimately carried out—a bright-line test would have been extremely useful in determining such matters.

An issue closely related to the eighth amendment right rec-

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131 *Id.* at 432 (Rehnquist, J., dissenting). Justice Rehnquist observed that "[t]he defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity." *Id.* at 435 (Rehnquist, J., dissenting).

132 *See id.*

133 *Id.* at 433-35 (Rehnquist, J., dissenting). Justice Rehnquist asserted that procedures involving the executive branch exclusively could satisfy due process requirements. *Id. See also supra* notes 50-61 and accompanying text (discussing Solesbee v. Balcom).

134 *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

135 Id. at 410.

136 *See id.* at 417-18 (Marshall, J., plurality opinion); *id.* at 418 (Powell, J., concurring in part and concurring in judgment).

ognized in *Ford* is the legitimate concern that criminals will assert nonmeritorious claims of insanity to circumvent execution. Admittedly, such claims present difficulties. But, the claims are no more problematic than the insanity defense in an individual's original trial for murder. Moreover, the right to be spared execution if insane must be the primary and controlling concern of the judiciary. The right is too valuable to be lost simply because a number of prisoners awaiting execution may feign insanity.

The *Ford* decision acknowledges an important constitutional right. Anglo-American case law prohibited the execution of the insane. That principle was uniformly applied by the supreme courts of all states pursuant to their state constitutions. *Ford v. Wainwright* merely recognizes what was the standard practice of every state—prohibiting the execution of insane prisoners—but, does not really impact upon the procedures by which most states determine sanity.

Maria A. Wuss