

# Ford v. Wainwright: Warning - Sanity on Death Row May be Hazardous to Your Health

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## NOTES

### ***Ford v. Wainwright*:<sup>1</sup> Warning—Sanity on Death Row May Be Hazardous To Your Health**

After a murder conviction in Florida state court, Bernard Ford was sentenced to death in 1974. In 1982 while in prison he began showing signs of mental weakness, and by 1983 he was experiencing continuous delusions. Ford's counsel invoked Florida's statutory procedure providing for a stay of execution for inmates who become insane<sup>2</sup> while on death row. This procedure required that the Governor appoint a commission of three psychiatrists "[w]hen . . . informed that a person under sentence of death *may be insane*."<sup>3</sup> The commission was required to examine the inmate to determine whether he had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."<sup>4</sup> If the commission concluded that the prisoner was competent the Governor became authorized to sign a death warrant.<sup>5</sup> In *Ford*, after a thirty minute joint interview by the appointed psychiatrists, the commission reported Ford's behavior "seemed contrived and recently learned"<sup>6</sup> upon which and without further inquiry<sup>7</sup>, the Governor signed the death warrant.

Ford's counsel appealed the Governor's decision, but was denied review from both the state court and the United States district court

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1. 106 S. Ct. 2595 (1986).

2. Under the Florida scheme, the test for capacity to be executed is "[whether] the convicted person has the mental capacity to understand the nature of the death penalty and reasons why it was imposed upon him . . . ." Fla. Stat. Ann. § 922.07(2) (West 1985).

3. Fla. Stat. Ann. § 922.07(1) (West 1985) (emphasis added).

4. *Ford*, 106 S. Ct. at 2599 (quoting Fla. Stat. Ann. § 922.07(2) (West 1985)).

5. See generally Fla. Stat. Ann. § 922.07(2) (West 1985).

6. *Ford*, 106 S. Ct. at 2599.

7. In this context the reader should note that "[t]he Governor's order specifically directed that the attorneys should not participate in the examination in any adversarial manner. [Additionally, it was the] . . . Governor's 'publicly announced policy of excluding all advocacy on the part of the condemned from the process' . . . ." *Ford*, 106 S. Ct. at 2604.

on writ of habeas corpus.<sup>8</sup> The United States Eleventh Circuit Court of Appeal granted a certificate of probable cause and affirmed the district court's denial of writ of habeas corpus.<sup>9</sup> The United States Supreme Court granted certiorari to decide "whether the Eighth Amendment prohibits the execution of the insane, and, if so, whether the District Court should have held a hearing on the petitioner's habeas corpus claim."<sup>10</sup>

Five justices<sup>11</sup> concluded that the eighth amendment establishes a substantive prohibition against the execution of the insane. The same five justices also concurred that the district court was obliged to hear the petitioner's claim on writ of habeas corpus because the Florida statutory procedure, as applied, was inadequate to receive a presumption of correctness from the United States District Court.<sup>12</sup> Justice O'Connor, joined by Justice White, filed an opinion concurring in the result but dissenting in part.<sup>13</sup> Although they disagreed with the existence of an eighth amendment substantive right, they felt that the Florida procedure as applied by the Governor was a denial of minimum due process requirements arising from the states' recognition of a protected liberty interest. Justice Rehnquist, joined by Chief Justice Burger, filed a dissenting opinion.<sup>14</sup>

One might assume that the recognition of an eighth amendment right to a stay of execution for an inmate becoming insane would have significant ramifications on state substantive law. All fifty states, however, currently have statutory or jurisprudential prohibitions prohibiting the execution of an insane person.<sup>15</sup> Justice Rehnquist's dissent speculated that the majority's implicit purpose was to afford the convicted capital offender with the utmost in procedural protection. He noted that "the

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8. *Id.* at 2599.

9. *Id.*

10. *Id.*

11. Justices Marshall, Brennan, Blackmun, Stevens, and Powell.

12. The basis of a habeas corpus claim is that the petitioner is aggrieved by an unconstitutional detention. Hence, the recognition of an eighth amendment substantive right by the *Ford* Court necessarily opens the door for habeas corpus review of state determinations of post-conviction insanity claims. On writ of habeas corpus instituted in a federal court "a determination after a hearing on the merits of a factual issue, made by a State court . . . shall be presumed to be correct." 28 U.S.C. § 2254(d) (1982). See *infra* text accompanying and following note 68. Whether or not the habeas corpus issue was reached in the opinions of the various justices depends on whether they concurred in the recognition of the eighth amendment right.

13. *Ford*, 106 S. Ct. at 2611 (O'Connor, J., concurring in result in part and dissenting in part).

14. Justice Rehnquist, and then Chief Justice Burger, dissented on the finding of an eighth amendment protected interest and further asserted disagreement with any finding of a procedural due process infringement. *Id.* at 2613 (Rehnquist, J., dissenting).

15. *Ford*, 106 S. Ct. at 2601 n.2.

real battle being fought in this case is over what procedures must accompany the inquiry into sanity," and recognized that collateral federal review would now become a matter of right.<sup>16</sup>

Because the procedural implications are of greater impact, this article will not scrutinize or elaborate on the Court's recognition of an eighth amendment substantive right. Rather, the focus is on the procedural safeguards which must concomitantly evolve with the recognition of a substantive right to a stay of execution because of insanity.

*Procedural Considerations: Preliminary Showing and Nature of the Adversary Determination of Competency to be Executed*

Given that the state is constitutionally prohibited from carrying out a duly prescribed death penalty on an insane inmate, the first important concern is whether a state is obliged to "hear" every such allegation by death row inmates. After *Ford*, the assertion of incompetence by an inmate raises the issue of what preliminary showing, if any, is required to mandate further state inquiry. The procedural questions raised are when is a right to a hearing triggered and when must such a hearing be adversarial?

It is necessary to understand the procedural background against which *Ford* is framed. Under the Florida procedure Ford's claim<sup>17</sup> triggered a mandatory evaluation by a lunacy commission, upon whose report the Governor had full discretion. He could sign the death warrant or stay the execution without provision for judicial consideration. Seven members of the Court<sup>18</sup> found such complete executive discretion inadequate.<sup>19</sup> It is significant, however, that despite this grant of executive authority, Florida's procedure did provide that every such claim be evaluated by a lunacy commission. In this sense every petitioner was

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16 Id. at 2615 (Rehnquist, J., dissenting). See generally supra note 12.

17. Note that the opinion indicated a substantial factual basis for doubting Ford's sanity. See *Ford*, 106 S. Ct. at 2599 (discussion of the petitioner's extremely bizarre behavior prior to the raising of the claim by Ford's counsel). However, literally, Florida's statutory scheme does not require a finding of doubt as to the condemned's sanity, rather it provides that the condemned be psychiatrically evaluated as a matter of right "[w]hen the Governor is informed that a person under sentence of death may be insane." Fla. Stat. Ann. § 922.07(1) (West 1985). This at least implies that the mere claim of insanity is sufficient to mandate inquiry.

18. Justices Marshall, Brennan, Blackmun, Stevens, Powell O'Connor, and White. However note that Justice O'Connor found that the exercise of the authority in this case was a violation of due process, not that the decision making authority was per se improper. She stated that "the governor's publicly announced policy of excluding all advocacy" violated the "fundamental requisites" of due process. *Ford*, 106 S. Ct. at 2612-13. (O'Connor, J., concurring in result in part and dissenting in part).

19. Id. at 2605; see also, id. at 2610 (Powell, J., concurring in part); and, id. at 2612-13 (O'Connor, J., concurring in result in part and dissenting in part).

given at least a limited opportunity to have his claim heard upon the mere allegation of insanity. In contrast, most state procedures provide for a mental evaluation only *after* the inmate has raised a reasonable doubt of his mental competence.<sup>20</sup> Hence, most state schemes require that the defendant make a showing beyond a mere assertion of insanity before an inquiry is required.

The showing of a reasonable doubt requirement is actually a mechanism by which a claim can be summarily decided.<sup>21</sup> However, because the majority in *Ford* focused so intently on the "striking defect . . . [of] the State's placement of the decision wholly within the executive branch,"<sup>22</sup> it did not delve into the question of whether a state could require that a defendant make a preliminary showing establishing a reason to doubt sanity. Rather the Marshall opinion addressed the procedural issue on the premise that a cognizable claim had been alleged, thus triggering the need for a final determination. It focused on the nature and requirements of this final determination without addressing when a petitioner is deemed to have made an adequate preliminary showing.

The procedural issues diluted Justice Marshall's majority opinion to a plurality. Justice Powell's opinion,<sup>23</sup> in contrast with the majority, addressed the question of requiring a preliminary showing. He approached the question from the standpoint of rebutting a presumption of sanity. The rationale being that the claim is not presented "against a neutral background," but rather, the "petitioner must have been judged competent to stand trial. . . . The State therefore may properly assume that the petitioner remains sane at the time the sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process."<sup>24</sup> Furthermore, Justice Powell believes that it may be proper to require the petitioner to rebut a presumption of sanity by clear and convincing evidence.<sup>25</sup>

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20. 18 of 27 states having statutory procedures apply a presumption of sanity or require some minimal showing. Cf. Nev., Ut., Ok., N.M., Neb., Cn., Ar., Al., Az., Ca., Col., Ga., Mary., Ks., Ill., Ms., Mo., La.

21. It is arguable that in effect Florida's procedure providing gubernatorial discretion is analogous to a summary decision based on the petitioner's failure to establish reasonable doubt.

22. *Ford*, 106 S. Ct. at 2605.

23. Justice Powell concurred only in Parts I and II of the majority opinion relating to the recognition of an eighth amendment substantive right. He wrote separately on the issue of procedure required of the states.

24. *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring in part).

25. *Id.* n.6 (citing, *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804 (1979) which "held that States must require proof by clear and convincing evidence in order to involuntarily commit an individual to a mental hospital for treatment.")

Requiring the inmate to come forward with a preliminary showing of insanity makes it necessary to define the standard of "mental awareness required by the Eighth Amendment as a prerequisite to a defendant's execution."<sup>26</sup> The *Ford* court did not have to address this question, but Justice Powell did so in his partial concurrence. By evaluating the reasons existing at common law for prohibiting the execution of the insane,<sup>27</sup> Justice Powell concluded that the remaining validity of this prohibition today is premised on the notion that "retributive force depends on the defendant's awareness of the penalty's existence and purpose."<sup>28</sup> Hence, Justice Powell distills the proper standard of insanity as a determination of whether the inmates are "unaware of the punishment they are about to suffer and why they are to suffer it."<sup>29</sup>

Justice Powell's opinion points out that only after a standard is established defining insanity, for purposes of a stay of execution, and after the petitioner makes a preliminary showing, then the procedural considerations of the determination itself are relevant. Requiring a threshold showing of incompetence may well serve to curtail fraudulent claims and provide a mechanism for dispensing with frivolous claims. However, it may also prove to be a double-edged sword in that it provides an additional ground for collateral attack.<sup>30</sup> An inmate denied the opportunity to assert a claim of insanity on the grounds of an insufficient preliminary showing could presumably seek a writ of habeas corpus on the denial. The issue then becomes whether the denial is a factual determination, thus entitled to deference by the federal reviewing court.<sup>31</sup>

Notwithstanding the uncertainty of the preliminary showing requirement, the procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive.<sup>32</sup> This

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26. *Ford*, 106 S. Ct. at 2607 (Powell, J., concurring).

27. *Id.*

28. *Id.* at 2608.

29. *Id.* at 2609.

30. See *supra* note 12 and *infra* text accompanying and following note 68.

31. 28 U.S.C. § 2254(d) (1982) provides that state court factual findings shall be presumed correct unless, "(1) . . . the merits of the factual dispute were not resolved in the State court hearing; (2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) . . . the material facts were not adequately developed . . . ; (4) . . . the State court lacked jurisdiction . . . ; (5) . . . the applicant was indigent . . . and the State court failed to appoint counsel . . . ; (6) . . . the applicant did not receive a full, fair, and adequate hearing . . . ; (7) . . . the applicant was otherwise denied due process of law . . . ; (8) . . . such factual determination is not fairly supported by the record."

32. Justice Marshall believed that "the States placement of the decision" in the Governor was "the most striking defect," *Ford*, 106 S. Ct. at 2605. In contrast, Justice Powell found the impropriety in the specific context of a habeas corpus proceeding. He

view is based on the notion that the Governor is the "commander of the State's corps of prosecutors [and therefore lacks] the neutrality that is necessary."<sup>33</sup> The purely executive decision was aggravated by the fact that no evidence or comment was received on behalf of the petitioner. Justice Powell, while agreeing that the authority is not properly executive, hypothesized that an "impartial officer or board [could] receive evidence and argument."<sup>34</sup> Powell implies that neutrality is presumed lacking when the decision maker is executive but that neutrality could be satisfied by a quasi judicial determination.

Beyond consideration of the proper allocation of decision making authority lies the broader question concerning the procedural requirements of the decision making. Both Justices Marshall and Powell refer to the procedural due process standard as the "opportunity to be heard."<sup>35</sup> However, just what this standard entails in the post-conviction context is a matter of divergent views. The Marshall plurality would require virtually full adversarial procedures, asserting that post conviction insanity "procedures [should] aspire to a heightened standard of reliability" just as is demanded of capital proceedings generally.<sup>36</sup> Florida's procedure allowed the Governor complete discretion in the determination of the petitioner's sanity, on the basis of the opinions reported by the lunacy commission without affording an "opportunity to be heard."<sup>37</sup> Hence, Justice Marshall found infirmity in Florida's "failure to include the prisoner in the truth seeking process,"<sup>38</sup> and further concluded that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity . . . is necessarily inadequate."<sup>39</sup>

On the other hand, Justice Powell declined to accept that this post-conviction proceeding demands the rigors of due process commensurate

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reasoned that a gubernatorial determination is not entitled to deference on federal collateral review because 28 U.S.C. § 2254 authorizes deference for factual findings of "courts" and the Governor is not a "court." *Ford*, 106 S. Ct. at 2609 (Powell, J., concurring in part). See infra text accompanying and following note 68 for general habeas corpus discussion.

33. *Ford*, 106 S. Ct. at 2605.

34. "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel. . . ." *Ford*, 106 S. Ct. at 2611 (Powell, J., concurring in part).

35. "[T]he fundamental requisite of due process of law is the opportunity to be heard." *Ford*, 106 S. Ct. at 2604 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914)). Justice Powell cites the same passage from *Grannis*. *Id.* at 2609-10.

36. *Ford*, 106 S. Ct. at 2603.

37. See supra notes 19 and 22.

38. *Ford*, 106 S. Ct. at 2604.

39. *Id.*

with post-arraignment adversarial capital proceedings.<sup>40</sup> He took the position that the infirmity was the failure to consider conflicting evidence not the failure to provide full adversarial proceedings.<sup>41</sup> On the contrary, where “the competency determination depends substantially on expert analysis in a discipline fraught with ‘subtleties and nuances’. . . ordinary adversarial procedures—complete with live testimony, cross-examination, argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant’s sanity.”<sup>42</sup> This reasoning also illustrates a parallel with Justice O’Connor’s view that due process requires that the decision maker afford defendant (or his counsel) an “opportunity to be heard” before deciding whether he possesses the capacity to be executed.<sup>43</sup>

#### *Louisiana’s Procedural Scheme*<sup>44</sup>

By comparison, the Louisiana scheme, like Justice Powell’s proposed model, provides for a mental evaluation only after the petitioner has raised a reasonable doubt of mental competence.<sup>45</sup> Dicta in a recent

40. “I would not require the kind of full-scale ‘sanity trial’ that Justice Marshall appears to find necessary.” Due process “requir[es] only ‘such procedural protections as the particular situation demands.’” *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring in part) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902 (1976)).

41. *Id.* at 2610-11.

42. *Id.* at 2611.

43. Justice O’Connor expressed the view that evidence of the Governor’s “publicly announced policy” not to receive information from the petitioner illustrated that Ford was not given “an opportunity to be heard” which violated “fundamental requisites” of due process. Justice O’Connor further stated “I would not invariably require oral advocacy or even cross-examination.” *Ford*, 106 S. Ct. at 2612-13 (O’Connor concurring in result in part and dissenting in part).

44. The statutory scheme pertaining to competency to stand trial (La. Code Crim. P. art. 641 et. seq.) has been extended by analogy to incapacity arising as an issue throughout the criminal process, including the post-conviction stage. See generally, *State v. Clark*, 367 So. 2d 311 (La. 1979); *State v. Henson*, 351 So. 2d 1169 (La. 1977); *State v. Allen*, 204 La. 513, 15 So. 2d 870 (1943). In short, Louisiana extends the same procedure for raising a claim of insanity to a convicted person as it does to one who is undergoing adversarial proceedings. It is further relevant to note that this jurisprudence evolved concurrently with the common law. The first case to recognize the distinction between post-conviction insanity and insanity at the time of the offense was *State v. Hays*, 22 La. Ann. 39 (1870). Subsequently, there was *State v. Reed*, 41 La. Ann. 581, 7 So. 132, (1889) (citing common law authority for the proposition that “a man cannot plead, or be tried, or convicted, or sentenced, while in a state of insanity . . . [i]ndeed, even after conviction, it may be opposed as a reason why sentence should not be passed.”)

45. La. Code Crim. P. art. 643 (“The court shall order a mental examination . . . when it has reasonable ground to doubt . . . mental capacity to proceed.”); see also, *State v. Perry*, 502 So. 2d 543, 564 (La. 1986), stating that the defendant “bears the burden of providing the trial court with a reasonable ground to believe he is presently insane.”



Louisiana Supreme Court case indicates that in accord with Justice Powell's view,<sup>46</sup> Louisiana would require the petitioner to rebut a presumption of sanity.<sup>47</sup> However, while Justice Powell would require rebuttal of sanity by clear and convincing evidence,<sup>48</sup> Louisiana's jurisprudence does not go this far, indicating that only a preponderance is required.<sup>49</sup>

On the standard of competence, Louisiana's standard<sup>50</sup> has been interpreted by the state supreme court as the failure to understand the nature of the proceedings against him,<sup>51</sup> and more recently as "lack[ing] the capacity to understand the death penalty."<sup>52</sup>

Finally, Louisiana provides that after an inmate has made a preliminary showing sufficient to "raise doubt," a sanity commission shall be appointed by the court, and the petitioner or the district attorney may then seek "an independent mental examination by the physician of his choice."<sup>53</sup> Furthermore, "[t]he issue of the defendant's mental capacity to proceed [shall] be determined by the court in a contradictory hearing," including cross-examination of the sanity commission members by either side.<sup>54</sup> Hence, Louisiana provides a traditional post-arraignment adversarial proceeding. In fact, with the exception of the preliminary showing requirement, the Louisiana scheme closely resembles the strict Marshall standard of "opportunity to be heard."<sup>55</sup>

Given that only four justices<sup>56</sup> ascribe to the stricter interpretation of the "opportunity to be heard," the remaining five justices<sup>57</sup> will probably decide in a future case what constitutional standard (less than full adversarial process) applies to state post-conviction determinations of mental competence. The parameters of this standard can be deduced by summarizing the views among the concurring opinions and predicting the likely response of the dissenters. In short, Justices Powell, O'Connor,

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46. See supra note 25 and accompanying text.

47. "[The] [d]efendant's burden is to show by a preponderance of the evidence that he lacks the mental capacity to undergo execution." *Perry*, 502 So. 2d at 564.

48. See supra note 25 and accompanying text.

49. See supra note 47.

50. La. Code Crim. P. art. 641 ("lack[ing] the capacity to understand the proceedings against him or to assist in his defense").

51. *State v. Allen*, 204 La. 513, 15 So. 2d 870 (1943).

52. *State v. Perry*, 502 So. 2d 543, 564 (La. 1986).

53. La. Code Crim. P. art. 646. See supra note 45.

54. La. Code Crim. P. art. 647.

55. "[A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity . . . is necessarily inadequate." Furthermore, "[c]ross-examination . . . would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs." *Ford v. Wainwright*, 106 S. Ct. 2595, 2604 (1986).

56. Justices Marshall, Brennan, Blackmun, and Stevens.

57. Justices Powell, O'Connor, White, Burger, and Rehnquist.

and White indicated that the the minimum requirement is a procedure conducted by an impartial fact-finding body where contradictory facts are considered.<sup>58</sup> As for now Chief Justice Rehnquist, given his espoused philosophy of "new federalism,"<sup>59</sup> he will probably defer to the state's chosen procedure with little or no call for federal judicial supervision.<sup>60</sup> Justice Scalia, appointed since *Ford*, will likely lean toward minimum procedural requirements.<sup>61</sup> Hence, it is probable that the majority of the Court will find the constitutionally required process to be significantly less than what is already required by Louisiana.<sup>62</sup>

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58. Justice Powell's rationale for requiring less procedural safeguards is the overriding state interest in administering punishment. "[I]n this case the State has a substantial legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place." *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring in part) (emphasis in original). Justices Powell and O'Connor found the due process infirmity to be the Governor's "publicly announced policy of excluding" materials submitted by the petitioner. *Id.* at 2610 (Powell, J., concurring in part) and *id.* at 2613 (O'Connor, J., concurring in result in part and dissenting in part). Furthermore, Justice Powell agreed with Justice Marshall's analogy that the Governor is the "commander of the State's corps of prosecutors" and that therefore the "essence of . . . independence from the prosecutorial arm of the government" was not achieved. *Id.* at 2609 (Powell, J., concurring in part). However, Justice Powell submits that, while for these reasons the Governor was not an appropriate decision maker, an independent board or panel could be. *Id.*, n.4. Justice Powell believes that an administrative model could comport with due process provided it is independent of the executive branch and impartially considers evidence from both sides. Likewise Justices O'Connor and White believed that while "the state-created entitlement . . . unquestionably triggers the demands of the Due Process Clause . . . those demands are minimal in this context. . . . [O]nce 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.* at 2612 (O'Connor, J., concurring in result in part and dissenting in part).

59. In general terms federalism is a philosophy of state autonomy or sovereignty. For a full discussion see Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 *Yale L.J.* 1317, 1331 (1982) (describing a federalist view of the Constitution as "the imposition of a federal system on pre-existing states possessing full governmental powers"). In short, this view dictates extreme deference to state substantive law.

60. For an understanding of Rehnquist's federalist philosophy see, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005 (1985). Justice Rehnquist, joining Justices Powell and O'Connor, dissented from the majority decision in *Garcia* which overruled *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976) and which held that the Federal Fair Labor Standards Act could apply to state transit authority employees without contravening notions of state sovereignty or the Constitution.

61. See, e.g., *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984).

62. Louisiana has applied by analogy the Code of Criminal Procedure articles on capacity to stand trial. See *supra* note 44. These articles provide that "[t]he court shall order a mental examination . . . when it has reasonable grounds to doubt the defendant's mental capacity." La. Code Crim. P. art. 643. In *Perry*, the Louisiana Supreme Court stated in dicta that "subsequent to his conviction . . . [c]ounsel for the defendant may

*Right to Counsel*

In Ford's case the claim was raised by Ford's attorney. The creation of the procedural safeguards for the eighth amendment may presuppose that defense counsel will be available to death row inmates.<sup>63</sup> Hence, the question arises whether a death row inmate has a constitutional right to be represented by counsel. Traditionally, the sixth amendment protection vests only upon the institution of accusatorial processes. Clearly in this context the state has completed all phases of accusatorial inquiry; however, the inmate is arguably still in a mode of confrontation with the government by challenging the state's power to execute a sentence imposed upon him. If the positions occupied by the state and the petitioner are confrontational, a persuasive argument could be advanced that at a minimum, notions of fundamental fairness require representation by counsel. *Ford* is clearly not authority for the notion of an Eighth Amendment right to counsel, but it does pose an interesting issue which may surface in future cases. It is notable in this context that the Louisiana Supreme Court, in dicta, has implicitly recognized that a death row inmate claiming insanity has a right of access to counsel.<sup>64</sup>

*Determination of Regained Competency*

Another issue which arises in the context of a petitioner determined incompetent for purposes of execution relates to the procedures to be followed in determining whether he has regained competency after, for example, a period of treatment and medication. *Ford* did not address the issue of whether a petitioner could be chemically restored to a level of competence for purposes of returning him to death row. In *Ake v Oklahoma*,<sup>65</sup> the Court, suggested that "meaningful access to justice"<sup>66</sup> was not denied where the defendant was artificially restored to a level of mental competence for purposes of standing trial.<sup>67</sup> There is a symmetry between the standard of competence for purposes of standing trial

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apply to the trial court for appointment of a sanity commission . . . [i]ndeed, the allegation of mental incapacity may be raised by the court or the prosecutor. La. C. Cr. P. art. 642." *State v. Perry*, 502 So. 2d 543, 564 (La. 1986). Finally, the Code of Criminal Procedure provides that after a court appointed sanity commission evaluation, "the issue of . . . mental capacity to proceed shall be determined by the court in a contradictory hearing," including cross-examination. La. Code Crim. P. arts. 646, 647.

63. La. Code Crim. P. art. 642 provides that the claim may be raised by "the defense."

64. See *supra* note 62 for a discussion of *Perry*.

65. 105 S. Ct. 1087 (1985).

66. *Id.* at 1094 (Court was discussing an indigent defendant's right to be able to prepare his defense. The standards discussed were applied to the competence issue. *Id.* at 1098).

67. *Id.* at 1098.

and for purposes of execution, and from this standpoint an extension of the dicta in *Ake* would be logical. The more important social question is whether deathrow inmates should be chemically restored to sanity in order to be executed?

### *Collateral Review Considerations*

The remaining issue that surfaced in *Ford* regarded the nature of federal collateral review. The right to federal collateral review could conceivably arise at one of three junctions in the state decision making process: following the denial of a state court hearing on the claim for failure to make a preliminary showing, following the state court determination itself, or after a return to death row upon a finding of regained sanity. It is assumed that the state's objective is to preclude de novo federal review, i.e., to follow a procedure whose fact findings are entitled to receive deference from the federal district court. In accordance with 28 U.S.C. 2254, "factual determinations" made by "state courts" are entitled to a "presumption of correctness" when certain conditions prevailed at the state court hearing.<sup>68</sup> Two questions arise. First, is a determination of sanity for purposes of the eighth amendment a legal or a factual determination?<sup>69</sup> Second, does the term "state court" include administrative tribunals as suggested by Justice Powell's concurrence?<sup>70</sup>

Whether the determination of competence for execution is one of fact or law may best be understood by reviewing recent developments in federal habeas corpus litigation. In *Sumner v. Mata*<sup>71</sup> a convicted capital offender alleged a fourteenth amendment due process violation, challenging the use of pretrial photographic identification on the basis of an impermissible suggestion. The Ninth Circuit Court of Appeal reversed the district courts denial of a writ of habeas corpus, and upon de novo review affirmed the defendant's claim.<sup>72</sup> As pointed out in the dissenting opinion, the majority held that the Ninth Circuit Court of Appeal was in error to review de novo, stating that a "federal habeas court may not grant a petition for writ without stating on the record why it was not bound by § 2254(d) to defer to the state-court judge-

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68. See supra note 31.

69. 28 U.S.C. 2254(d)(2) (1982); see supra note 31.

70. Generally, while Justice Powell believes that the Governor is not a "state court" for purposes of the habeas corpus review presumption of correctness, he is willing to construe the term state court to include an independent panel or board. *Ford v. Wainwright*, 106 S. Ct. 2595, 2609 (1986) (Powell, J., concurring in part). Specifically, he states that "the term 'State court' may well encompass an independent panel of psychiatric experts who might both examine the defendant and determine his legal sanity." *Id.* at 2609 n.4.

71. 449 U.S. 539, 101 S. Ct. 764 (1981).

72. *Id.* at 543, 101 S. Ct. at 767.

ment."<sup>73</sup> The majority did not discuss whether this particular determination was indeed a factual determination entitled to the statutory presumption of correctness under § 2254(d). Rather, the court assumed that this particular determination was factual since only determinations of fact can be granted deference.<sup>74</sup> The *Mata* dissent illustrates the classic dilemma plaguing this area of law; what constitutes a question of fact as opposed to a question of law, or even a mixed question of law and fact? The dissent took the position that the question was a mixed question of law and fact, therefore requiring de novo federal review.<sup>75</sup>

Another recent decision by the Supreme Court illustrates the continuing struggle over the fact-law dichotomy relative to collateral review of a state court's competency determinations. In *Maggio v. Fulford*<sup>76</sup> the Court held that the United States Fifth Circuit Court of Appeal erred in "substitut[ing] its own judgement . . . for that of the Louisiana courts"<sup>77</sup> on the issue of incompetence to stand trial. The opinion noted that "[b]efore a federal habeas court undertakes to overturn *factual* conclusions made by a state court, it must determine that these conclusions are not 'fairly supported by the record.'"<sup>78</sup> This opinion advances the majority position evident in *Mata* and its progeny *Marshall v. Longerberger* which is to simply assume that a given state court determination is a factual one. Both the dissent and even a concurring opinion by Justice White pointed out that "the ultimate question [of] whether a defendant is competent to stand trial [is] at least a mixed question of law and fact."<sup>79</sup> *Maggio* supports a view that the Court

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73. *Id.* at 554, 101 S. Ct. at 772.

74. Relying on *Mata*, the 5-4 decision of *Marshall v. Longerberger*, 459 U.S. 422, 103 S. Ct. 843 (1983), held that a state court's finding that a guilty plea regarding a prior offense was both knowledgeable and informed, and therefore properly admitted in evidence against the accused in a subsequent trial, was to be afforded deference by the federal court because it was fairly supported by the record. Again the majority simply assumed that this was a "factual determination" entitled to the statutory presumption of correctness.

A further indication of the direction which the Court seems to be taking with respect to habeas corpus policy is illustrated by the decision of *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976). The Court held that where a state prisoner had been given an opportunity for a "full and fair litigation" of a fourth amendment unconstitutional search and seizure claim, the petitioner was not entitled to habeas corpus relief. *Id.* at 494, 96 S. Ct. at 3052. Although *Stone* is distinguishable in that it does not reach the issue of whether a statutory presumption of correctness is appropriate and the claim in *Stone* is not a constitutional one but rather one of exclusionary policy, it nonetheless reflects a strong policy of deference to state court determinations.

75. *Mata*, 449 U.S. at 557, 101 S. Ct. at 774 (Brennan, J., dissenting).

76. 462 U.S. 111, 103 S. Ct. 2261 (1983).

77. *Id.* at 113, 103 S. Ct. at 2262.

78. *Id.* at 117, 103 S. Ct. at 2264 (citing 28 U.S.C. § 2254(d)(8) (1982) (emphasis added)).

79. *Id.* at 118-19, 103 S. Ct. at 2265 (White, J., concurring).

will likely treat the determination of competency to execute as one of fact for § 2254(d) purposes.

The way the term "state court" is construed will determine what allocations of decision making authority are likely to be given deference on collateral review, thereby avoiding de novo federal review. The only firm guidance emanating from *Ford* is that a full de novo redetermination of the facts is required if the only previous "factual findings" were made by the Governor. However, Justice Powell expressed the view that determinations by an impartial administrative body could be deemed a "court" for purposes of federal collateral review.<sup>80</sup> The critical factors of such a determination are impartiality and consideration of the competing evidence.<sup>81</sup> So, while Justice Powell did not find that deference was owed to the Governor's determination in *Ford*, this rationale implies that perhaps he would have approved of deference with respect to the lunacy commission's determination. The language<sup>82</sup> employed by Justice Powell infers an administrative decision making model of sorts.<sup>83</sup> Whether Justice Powell can muster majority support for his position is not known from *Ford*. It is unlikely, however, that the dissenting and concurring justices will be inclined to frustrate state procedure which comports with the standards of procedural due process by strictly limiting the availability of the presumption of correctness. The problem will be whether the presumption applies *only* in those instances in which Congress has provided that it will apply,<sup>84</sup> or whether the Court can, in effect, jurisprudentially create a presumption stemming from principles of comity. Metaphorically, it is doubtful that the dissenting and concurring justices will take away with the left what they would have given with the right.

If this rationale prevails it is reasonable to predict that a federal court can presume a "state court's"<sup>85</sup> findings are correct with respect

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80. See supra note 70.

81. "As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of § 2254(d) on federal habeas corpus." *Ford v. Wainwright*, 106 S. Ct. 2595, 2611 (1986) (Powell, J., concurring).

82. See supra note 34.

83. The question of decision making authority for purposes of obtaining a presumption of correctness on habeas corpus review will also arise subsequent to a finding of pre-execution incompetence. When an inmate is found incompetent and hence committed to a state institution following an order staying the execution, additional proceedings to reassess the petitioner's state of mind for return to death row will necessarily follow. If Justice Powell's position stands, a certification of sanity by the state hospital may be sufficient to restore the petitioner to death row and further, such certification may be entitled to a presumption of correctness if the decision to reinstate the sentence is collaterally attacked.

84. See supra note 31.

85. See discussion regarding the construction of "state court" supra note 70.

to the adequacy of the petitioner's preliminary showing, as well as the ultimate finding of mental competence. In effect this is to say that a state court could find as a matter of fact that a petitioner's eighth amendment protections had not been infringed.

*Conclusion—What Procedural Approach Should Louisiana Adopt?*

Louisiana statutory procedure relative to competency to stand trial<sup>86</sup> has been judicially applied by analogy in the post conviction context of competency questions.<sup>87</sup> As discussed, following the procedure would require a preliminary showing<sup>88</sup> after which a judicial determination would be required. In light of the support by various justices<sup>89</sup> for the notion that a quasi-judicial determination would be constitutionally adequate, Louisiana's provision for a purely judicial review would exceed the minimum constitutional requirement should that view command majority support. Likewise, if the preliminary showing requirement obtains majority support in the United States Supreme Court,<sup>90</sup> as it has from the states,<sup>91</sup> Louisiana procedure will survive constitutional attack.

In the absence of legislative reform, the Louisiana courts should continue to apply by analogy the Code of Criminal Procedure provisions on competency to stand to trial.

*Rachelle Deckert Dick*

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86. See supra note 62.

87. See supra note 51.

88. See supra text accompanying note 53.

89. See supra text accompanying note 58.

90. See supra text accompanying note 23.

91. See supra text accompanying note 20.