



1986

## Constitutional Law—Criminal Procedure—Eighth Amendment Bars Execution of the Insane

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### Recommended Citation

Jonathan Taylor, *Constitutional Law—Criminal Procedure—Eighth Amendment Bars Execution of the Insane*, 9 U. ARK. LITTLE ROCK L. REV. 385 (1987).

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CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — EIGHTH AMENDMENT BARS EXECUTION OF THE INSANE. *Ford v. Wainwright*, 106 S. Ct. 2595 (1986).

A Florida state court convicted Alvin Bernard Ford of murder in 1974 and sentenced him to die. At the time of the trial, Ford appeared to be mentally competent. After sentencing, he began to manifest mental and behavioral changes. Ford's counsel requested psychiatric examination of Ford. One of the two examiners determined that Ford was not competent to suffer execution. Counsel then invoked a Florida statute that provided for a determination of a condemned prisoner's competency.<sup>1</sup>

Pursuant to the statute, the Governor of Florida appointed three psychiatrists to examine Ford. Each examined Ford at the same time for thirty minutes. The psychiatrists reached different diagnoses, but all three concluded that Ford was competent to suffer execution. Defense counsel submitted to the Governor the reports of the two psychiatrists who had previously examined Ford. The Governor then signed a death warrant without mention of his considerations.<sup>2</sup>

Defense counsel requested a hearing in state court to redetermine Ford's competency, but was unsuccessful.<sup>3</sup> He then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on Ford's competency. The district court denied the request without a hearing.<sup>4</sup> The Court of Appeals for the Eleventh Circuit issued a certificate of

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1. FLA. STAT. ANN. § 922.07 (West 1985) provides in relevant part:

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the 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 . . . .

(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.

2. It was unclear whether the Governor had considered Ford's two previous examinations.

3. *Ford v. Wainwright*, 451 So. 2d 471 (Fla. 1984).

4. The district court's opinion was not published.

probable cause and stayed Ford's execution.<sup>5</sup> The United States Supreme Court rejected the state's effort to vacate the stay of execution.<sup>6</sup> After addressing the merits of Ford's claim, a divided court of appeals affirmed the district court's denial of the writ.<sup>7</sup> Having concluded that the diagnoses of sanity were not conclusive, the Supreme Court granted certiorari and held that execution of the insane constitutes cruel and unusual punishment which is barred by the eighth amendment. *Ford v. Wainwright*, 106 S. Ct. 2595 (1986).

As early as 1879, the Supreme Court ruled that public execution was not prohibited by the eighth amendment.<sup>8</sup> In *In re Kemmler*<sup>9</sup> the Court held that punishment of death by electrocution was constitutionally permissible.<sup>10</sup>

Almost one hundred years after the Supreme Court first upheld the constitutionality of the death penalty, it was challenged again in *Furman v. Georgia*.<sup>11</sup> In a one-paragraph per curiam opinion, the Court held that the defendants could not be executed constitutionally under either the Georgia or Texas statutes involved.<sup>12</sup> The 5-4 split resulted in nine separate opinions, covering 230 pages of the *United States Reports*, with none of the justices joining in the opinion of any other.<sup>13</sup> This decision effectively invalidated all death penalty statutes in effect at the time.

Four years later, the Supreme Court returned to the issue of the constitutionality of the death penalty in *Gregg v. Georgia*.<sup>14</sup> Although there was no majority opinion, the thrust of the decision was that the punishment of death does not violate the eighth amendment in all circumstances.<sup>15</sup> Justice Stewart announced the judgment of the Court and stated that a carefully drafted statute that satisfies the concerns of *Furman*<sup>16</sup> may be constitutional.<sup>17</sup> Although the rule of *Gregg* is un-

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

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

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

8. *Wilkerson v. Utah*, 99 U.S. 130 (1879).

9. 136 U.S. 436 (1890).

10. *Id.* at 447.

11. 408 U.S. 238 (1972).

12. *Id.* at 239-40.

13. See Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 for an analysis of the opinions.

14. 428 U.S. 153 (1976).

15. *Id.* at 169.

16. Justice Stewart believed that the concern of *Furman* was "centered on those defendants who were being condemned to death capriciously and arbitrarily." 428 U.S. at 206.

17. 428 U.S. at 195.

clear, seven members of the Court<sup>18</sup> affirmed the Georgia death penalty procedure. Briefly, that procedure required (1) a bifurcated trial;<sup>19</sup> (2) a presentence hearing;<sup>20</sup> (3) a finding, beyond a reasonable doubt, that at least one of ten aggravating circumstances specified in the statutes existed;<sup>21</sup> (4) an automatic appeal, in which the state's highest court was to determine that the sentence was not imposed under any arbitrary factors;<sup>22</sup> and (5) the decision by the state's highest court was to include references to similar cases that the court took into consideration.<sup>23</sup>

Later decisions served to establish the boundaries of the constitutionality of the death penalty. Since *Gregg*, the Court has found the death penalty unconstitutional when it was imposed mandatorily for first degree murder, which included any murder committed in perpetrating or attempting to perpetrate a felony.<sup>24</sup> The penalty was overturned in cases in which mitigating factors were not considered as to a murder of a peace officer engaged in the lawful performance of his duties.<sup>25</sup> The death sentence has also been decreed unconstitutional as to a person convicted of rape<sup>26</sup> or a person who aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill.<sup>27</sup>

The relationship between the death penalty and insane persons has its roots in English common law. At common law, the rule was that insane persons should not be executed.<sup>28</sup> There are several reasons for

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18. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, Stevens, Stewart, and White.

19. For text of 1973 Ga. Laws 162 see *Gregg v. Georgia*, 428 U.S. 153, 209 n.2 (1976).

20. *Id.*

21. *Id.* at 197 (citing GA. CODE ANN. § 27-2534.1(b) (Supp. 1975) (codified as amended at § 17-10-30(c)(1982)).

22. *Id.* at 204 (citing GA. CODE ANN. § 27-2537(c) (Supp. 1975) (codified as amended at § 17-10-35 (a) and (c)(1982)).

23. *Id.* at 204 n.56 (citing GA. CODE ANN. § 27-2537(e) (Supp. 1975) (codified as amended at § 17-10-35(e)(1982)).

24. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

25. *Roberts v. Louisiana*, 431 U.S. 633 (1977).

26. *Coker v. Georgia*, 433 U.S. 584 (1977).

27. *Enmund v. Florida*, 458 U.S. 782 (1982).

28. 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 2 (1716 & photo. reprint 1978). "And it seems agreed at this day, that if one who has committed a capital offense, become non compos . . . after conviction . . . he shall not be executed." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1783 & photo. reprint 1978). "If, after he be tried and found guilty . . . and he becomes of non-sane memory, execution shall be stayed." Larkin, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 778 (1980). "[I]t has been a cardinal principle of Anglo-American jurisprudence since the medieval period that the presently incompetent should not be executed."

the common law rule barring execution of the insane. First, a sane person might be able to allege some facts or circumstances that should stay his execution.<sup>29</sup> Second, insanity was thought to be punishment in itself.<sup>30</sup> Third, the practice is cruel and is no deterrent to others.<sup>31</sup> Finally, there may be some religious justification for the rule.<sup>32</sup>

The intent of the framers of the Bill of Rights was to ensure that Americans had, at least, the rights of Englishmen at common law.<sup>33</sup> This is so because the Bill of Rights was based directly on English principles and values.<sup>34</sup> In *Solem v. Helm*<sup>35</sup> the United States Supreme Court noted that there is convincing proof that the framers of the eighth amendment, through their use of the language of the English Bill of Rights,<sup>36</sup> intended to provide at least the same protection for Americans as the Englishmen had under the English Bill of Rights,<sup>37</sup> which included the right not to be executed while insane.<sup>38</sup>

Many state courts adopted the English common law rule of staying execution of the insane.<sup>39</sup> In *Ex parte Chester*<sup>40</sup> the Florida Supreme Court held that if a trial judge has doubts concerning the sanity of one who has been convicted and sentenced to death, the trial judge

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29. 1 M. HALE, PLEAS OF THE CROWN 34 (1847). *Accord*, 4 W. BLACKSTONE, *supra* note 28, at 24-25.

30. "[F]uriosus solo furore 'punitur.'" 4 W. BLACKSTONE, *supra* note 28 at 395-96. This Latin phrase loosely translates to "madness is its own punishment." *See Ford*, 106 S. Ct. at 2601.

31. 3 E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 6 (1628 & photo. reprint 1978).

32. Some writers have thought the rule to be based upon religion; it is inappropriate to send an offender "into another world, when he is not of a capacity to fit himself for it." *Ford*, 106 S. Ct. at 2601 (citing *Hawles' Remarks on the Trial of Mr. Charles Bateman*, (1685) 11 How. St. Tr. 474, 477 (1816)).

33. *Solem v. Helm*, 103 S. Ct. 3001, 3007 (1983) (citing 1 American Archives 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774)). "[H]is Majesty's subjects in *America* . . . are entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*."

34. "[T]he Bills of Rights, starting with Mason's in 1776, were the repository of English values," and, "the Virginia Declaration of Rights and the other bills of rights which followed it, were in good part 'restatements of English principles.'" A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 206 (1968).

35. 103 S. Ct. 3001 (1983).

36. "The Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of English men. *See A. Nivens, The American States During and After the Revolution*, 146 (1924)." 103 S. Ct. 3001, 3007 n.10 (1983).

37. 103 S. Ct. at 3007.

38. *See supra* note 28.

39. *See, e.g.*, *People v. Scott*, 326 Ill. 327, 353, 157 N.E. 247, 258 (1927); *Howie v. State*, 121 Miss. 197, 216-18, 83 So. 158, 159-60 (1919); *In re Grammer*, 104 Neb. 744, 746-49, 178 N.W. 624, 625-26 (1920); *In re Smith*, 25 N.M. 48, 56-57, 176 P. 819, 822 (1918).

40. 93 Fla. 590, 112 So. 87 (1927).

should inquire into the sanity of the convict to determine whether the sentence should be carried out.<sup>41</sup>

In *Nobles v. Georgia*<sup>42</sup> the United States Supreme Court first addressed the application of a state prohibition against execution of an insane person.<sup>43</sup> The defendant was accused of murder, found guilty, and sentenced to die by a Georgia state court.<sup>44</sup> A Georgia statute provided that the insanity issue was to be determined by a jury inquest conducted by and on the initiative of the warden or sheriff having custody of the defendant.<sup>45</sup> The defendant argued that she had a due process right to have the claim heard by a jury,<sup>46</sup> but the Court held that a jury trial was not required.<sup>47</sup> After acknowledging the common law rule barring execution of the insane,<sup>48</sup> the Court reasoned that the state must do no more than place responsibility on some appropriate official to conduct an inquiry into the competency of the defendant when it seems necessary.<sup>49</sup>

The Supreme Court next addressed the issue in *Phyle v. Duffy*.<sup>50</sup> In that case a California state court sentenced the defendant to die for first degree murder.<sup>51</sup> The defendant argued that the California statutory procedure<sup>52</sup> for determining sanity violated his due process rights.<sup>53</sup> The United States Supreme Court indicated that the *Nobles* decision did not necessarily require rejection of the defendant's due process claim.<sup>54</sup> The gravity and importance of the defendant's claim was recognized by the Court;<sup>55</sup> however, the Court decided that the defendant had not exhausted his state law remedy.<sup>56</sup> Thus, the constitutional question was not ripe for review.<sup>57</sup>

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41. *Id.* at 594, 112 So. at 89.

42. 168 U.S. 398 (1897).

43. *Id.*

44. *Id.* at 399.

45. *Id.* at 402.

46. 168 U.S. at 400.

47. *Id.* at 409.

48. *Id.* at 406.

49. *Id.* at 409.

50. 334 U.S. 431 (1948).

51. *Id.* at 432.

52. *Id.* at 434-37 nn.2-6 (quoting CAL. PENAL CODE §§ 3700-04 (1941)).

53. 334 U.S. at 433-34.

54. *Id.* at 437.

55. *Id.* at 441.

56. *Id.* (defendant could have sought writ of mandamus to compel warden to initiate sanity proceedings).

57. *Id.* at 444.

In *Solesbee v. Balkcom*<sup>58</sup> a Georgia state court sentenced the defendant to the death penalty for murder. The defendant claimed to be insane.<sup>59</sup> Pursuant to the state procedure for determining insanity, the Governor was entrusted with the responsibility of making the decision on competency.<sup>60</sup> The defendant contended that the due process clause guaranteed him a right to have his sanity determined by a judicial or administrative tribunal after notice and a hearing in which he could have counsel present, cross-examine witnesses, and offer evidence.<sup>61</sup> With only one justice dissenting, the Supreme Court rejected this contention, holding that the mode of procedural determination of insanity was a matter of grace, not of right,<sup>62</sup> and that the state was thus under no obligation to provide a hearing.<sup>63</sup>

In *Robinson v. California*<sup>64</sup> the Supreme Court recognized that the eighth amendment was applicable to the states via the fourteenth amendment.<sup>65</sup>

In *Ford v. Wainwright*<sup>66</sup> Justice Marshall spoke for the majority and began by noting that the due process clause and the eighth amendment have evolved substantially since the days of *Solesbee v. Balkcom*.<sup>67</sup> In order to test the adequacy of the state procedures for determining sanity, the Court found it necessary to determine first whether the Constitution places a substantive restriction on the state's power to take the life of an insane prisoner.<sup>68</sup>

The Court's historical analysis revealed that the eighth amendment was meant to embrace everything that was considered cruel and unusual at the time the Bill of Rights was adopted.<sup>69</sup> In order to determine what was considered cruel and unusual at that time, Justice Marshall turned to the common law. The Court noted that execution of the insane was prohibited at the common law.<sup>70</sup>

The Court next examined the reasons for the common law rule

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58. 339 U.S. 9 (1950).

59. *Id.* at 10.

60. *Id.* n.1 (quoting GA. CODE ANN. § 27-2602 (codified as amended at GA. CODE ANN. § 17-10-61 (1982))).

61. 339 U.S. at 10.

62. *Id.* at 12.

63. *Id.* at 14.

64. 370 U.S. 660 (1962).

65. *Id.* at 667.

66. 106 S. Ct. 2595 (1986).

67. *Id.* at 2599-2600 (citing *Solesbee v. Balkcom*, 339 U.S. 9 (1950)).

68. 106 S. Ct. at 2600.

69. *Id.*

70. *Id.* at 2601.

barring execution of the insane. One explanation was that execution of the insane simply offends humanity.<sup>71</sup> The Court discussed other explanations<sup>72</sup> and concluded by noting that the reasons for the law may not be clear and uniform, but it is clear that at common law, insane people were not executed.<sup>73</sup>

The Court then noted that no state permits execution of the insane.<sup>74</sup> This was evidence to the Court that the common law rule has as firm a hold upon the jurisprudence of today as it had centuries ago in England.<sup>75</sup> The Court held that the restriction against execution of the insane finds support in the eighth amendment whether the aim is "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 . . . ." <sup>76</sup>

Having thus concluded that the Constitution bars execution of the insane, the Court next addressed the question of whether the Florida procedure was adequate so as to preclude the need for an evidentiary hearing in the district court.<sup>77</sup>

The Court began this inquiry by noting that in a habeas corpus proceeding, an evidentiary hearing is required by the federal court unless the state court trier of fact has, after a full hearing, reliably found the relevant facts<sup>78</sup> as required by *Townsend v. Sain*<sup>79</sup> and the habeas corpus statute.<sup>80</sup>

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2602.

76. *Id.*

77. *Id.*

78. *Id.* (citing *Townsend v. Sain*, 372 U.S. 293 (1963)).

79. 372 U.S. 293 (1963).

80. 106 S. Ct. at 2602 (citing 28 U.S.C. § 2254(d) (1977)). The statute provides:

(d) 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—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court

The Court then examined the statutory procedures required by Florida law. The Court found that sanity must be determined with the high regard for truth that befits a decision affecting the life of a human being.<sup>81</sup> The Florida law was deficient because it precluded Ford or his counsel from presenting material relevant to the prisoner's sanity, denied Ford the opportunity to challenge or impeach state-appointed psychiatrists' opinions, and placed the decision wholly within the executive branch.<sup>82</sup>

In a concurring opinion, Justice Powell agreed that the Constitution barred execution of the insane.<sup>83</sup> He added that this is so only when the execution is of those who cannot appreciate the punishment they are about to suffer and why they are to suffer it.<sup>84</sup> Justice Powell also believed that a full-scale sanity hearing should not be required,<sup>85</sup> but nevertheless found that the claim of insanity was not adjudicated fairly within the meaning of due process.<sup>86</sup>

Justice O'Connor, joined by Justice White, concurred in the result

hearing;

(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).

81. 106 S. Ct. at 2603.

82. *Id.* at 2604-05.

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

84. *Id.* at 2609.

85. *Id.* at 2610.

86. *Id.* at 2611.

in part, and dissented in part. Justice O'Connor believed that the eighth amendment did not create a substantive right not to be executed while insane.<sup>87</sup> Her position was that Florida positive law created a protected liberty interest in avoiding execution while incompetent, and that Florida did not provide even those minimum procedural protections required by due process in this area.<sup>88</sup> Justice O'Connor would have remanded to a state court to determine Ford's competency in a manner that comported with due process.<sup>89</sup>

Justice Rehnquist, joined by Chief Justice Burger, dissented. Justice Rehnquist did not believe that the eighth amendment created a substantive right not to be executed while insane.<sup>90</sup> He re-examined the common law basis for the majority's eighth amendment proscription and concluded that at common law, it was the executive who determined the sanity pursuant to a sentence of death.<sup>91</sup> Thus, Justice Rehnquist did not believe that the majority was keeping faith with the common law heritage.<sup>92</sup> He believed that wholly executive procedures could comport with due process.<sup>93</sup>

The Supreme Court's decision in *Ford* is significant<sup>94</sup> because the Court has now found a right that had not been recognized in the two-hundred-year history of our Constitution. Arguably, however, the eighth amendment proscription was not needed to reach the Court's holding. Justices O'Connor and White, who found that there was not an eighth amendment right not to be executed while insane, would have found for Ford anyway, because the Florida statute violated due process. Presumably then, even if Justices Brennan, Marshall, Blackmun,

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

88. *Id.*

89. *Id.* at 2612.

90. *Id.* at 2615 (Rehnquist, J., dissenting).

91. *Id.* at 2613.

92. *Id.*

93. *Id.* at 2615.

94. The significance of the case appears to extend beyond its effect upon convicted criminals sentenced to die and the lawyers charged with representing such individuals. The *Ford* decision received a large amount of attention in the press when announced. See PRESS, A. & MCDANIEL, A., *A Supreme Court Stay of Death*, NEWSWEEK, July 7, 1986 at 63; NATION, July 19-26, 1986, at 37.

In his concurring opinion, Justice Powell noted that "if petitioner is cured of his disease, the State is free to execute him." 106 S. Ct. at 2610 n.5 (Powell, J., concurring). This presents an interesting conflict of interest for psychiatrists and other mental health workers. Should a psychiatrist uphold his duty to his patient to relieve mental pain, confusion and anguish, when that relief will result in the execution of his patient? An article on the *Ford* decision in *Nation* magazine states, "Mental health workers are thus faced with the Kafkaesque dilemma of trying to help someone become a functioning member of society so that he or she can be killed." NATION, AT 37.

and Stevens had not been able to gather a majority on the eighth amendment issue, the result would have been the same, for they would have at least found that the Florida statute violated due process.

The Supreme Court had already stated in *Hewitt v. Helms*<sup>95</sup> that protected liberty interests may arise from the laws of the States. No member of the Supreme Court believed that the due process clause independently created a protected interest in avoiding execution while insane. On this issue, Justice O'Connor believed that the laws of Florida had entitled Ford to a protected liberty interest in avoiding execution while insane.<sup>96</sup> Apparently, for the majority, Justice O'Connor's reasoning merely begged the question of what happens to a prisoner when the State has not created such a liberty interest.

It is precisely this contingency which made it necessary for the majority to find that the United States Constitution prohibits execution of the insane. In a situation in which a state has not created a protected liberty interest in avoiding execution while insane, the eighth amendment will now prohibit such an execution. In finding such a constitutional right, the majority mooted any questions concerning whether a state has created such a protected liberty interest.

The *Ford* decision is also significant because it provides an escape for some defendants who have been validly convicted and constitutionally sentenced to die. Placed in its historical context, the *Ford* decision may be the most severe restriction posited upon the states in meting out capital punishment.

Given the Court's attitude toward the arbitrary and capricious nature of death penalties in *Furman v. Georgia*,<sup>97</sup> and the limitations imposed by *Woodson v. North Carolina*,<sup>98</sup> *Roberts v. Louisiana*,<sup>99</sup> *Coker v. Georgia*,<sup>100</sup> and *Enmund v. Florida*,<sup>101</sup> it may be that the Court has no intention of expanding the applicability of the death penalty further. In fact, a narrowing process may have begun. It is against this background that the significance of the Court's holding in *Ford* should be viewed.

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95. 459 U.S. 460, 469-71 (1983).

96. 106 S. Ct. at 2611.

97. 408 U.S. 238 (1972).

98. 428 U.S. 280 (1976) (death penalty unconstitutional when imposed mandatorily for first degree murder which includes any murder committed in a felony).

99. 431 U.S. 633 (1977) (mandatory death penalty statute for murder of peace officer held unconstitutional).

100. 433 U.S. 584 (1977) (no death sentence for person convicted of rape).

101. 458 U.S. 782 (1982) (no death penalty for person sentenced under the felony murder rule when such person did not actually commit murder).

The meaning of the decision in *Gregg v. Georgia*<sup>102</sup> has never been clear. It is clear, however, that under its holding the death penalty may be constitutionally imposed in some situations.<sup>103</sup> The task of the Supreme Court since *Gregg* has been to outline the parameters of the constitutionality of the death penalty and to determine in which situations it may be imposed.

*Ford* is significant because, unlike the Supreme Court's most recent limitations on capital punishment,<sup>104</sup> it deals with a situation wherein a defendant may have actually committed a heinous murder with his own hands.<sup>105</sup> The *Ford* decision prevents the state from taking the life of a murderer if that murderer is found to be insane, even if the murder was premeditated and the defendant who committed the murder was completely sane at the time of the offense.

Given the state of mental health of many death row inmates, the new *Ford* rule may grant a constitutional reprieve for many inmates. While Justice Marshall may have lost in *Gregg*<sup>106</sup> over the constitutionality of the death penalty, his analysis in *Ford* may have constitutionally pruned back the Court's previous holding in *Gregg*, and thus limited the applicability of the death penalty even further.

Jonathan Taylor

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102. 428 U.S. 153 (1976).

103. *Id.*

104. *Enmund*, 458 U.S. at 782; *Coker*, 433 U.S. at 584. See also *supra* notes 100-01.

105. "I have no remorse whatsoever. I'm extremely proud of knowing that I, Arthur Frederick Goode, was the last person to see Jason alive or any of the other victims which I have murdered. Also, that I was the last person who heard the sweet, sexy voice. I was also the last person who had kissed his precious warm lips, before I, Arthur Goode, had murdered him. These are some of the things I'm proud of. Jason was so cute and sexy-looking that I raped him while I beat him with my belt. I didn't want anybody else to see Jason's beautiful body again before I, Arthur Goode 3d, fucked him up. I'm ready right now to murder a little boy . . . I would have the nerve to murder a little boy right here in this courtroom, in front of this jury just to prove that I would do such a thing, only if it was authorized by the Court, which I know it is not." SHERRILL, R., *In Florida, Insanity is no Defense*, Nation, \_\_\_\_\_, 553, Nov. 24, 1984. In *Wainwright v. Goode*, 464 U.S. 78 (1983), the United States Supreme Court upheld the penalty of death for the maker of this statement. Presumably, under the *Ford* holding, such a defendant could not be executed if determined to be insane.

106. 428 U.S. at 231. Justice Marshall dissented believing that the death penalty was not a deterrent and had no retributive value. *Id.* at 241.

