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Ford v. Wainwright, Statutory Changes and a New Test for Sanity: You Can't Execute Me, I'm Crazy

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FORD v. WAINWRIGHT, STATUTORY CHANGES AND A NEW TEST FOR SANITY: YOU CAN'T EXECUTE ME, I'M CRAZY!

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I. INTRODUCTION

In the history of the death penalty in the United States, the Supreme Court has never held that a person has a constitutional right not to be executed while insane, yet the non-execution of the insane has always been a common law rule in the United States.

In *Ford v. Wainwright*,¹ the Supreme Court addressed the issue of whether the Eighth Amendment prohibits the execution of an insane inmate. In answering this query, the Court created a constitutional right not to be executed while incompetent. However, the *Ford* decision is not only important for its creation of a "new" constitutional right, it also has the potential of nullifying several state statutes in regards to the due process requirements of hearings addressing the issue of insanity at the time of execution.²

The *Ford* decision also requires that a new test of sanity be created—the test of whether one is competent enough to suffer death.³ This test

¹ 106 S.Ct. 2595 (1986).

² See *infra* note 68.

³ There are thirty-six states that currently have standards of competency for execution. The following survey was cited in Ward, *Competency For Execution: Problems in Law and Psychiatry*, 14 FLA. ST. L. REV. 35 (1986). The year next to the state name indicates the year the statute was enacted or the case decided.

Seventeen States which have instituted, by statute, the term "insane" as their applicable standard: Alabama (1982), Arizona (1978), Arkansas (1977), California (1982), Connecticut (1983), Georgia (1982), Kansas (1981), Maryland (1982), Massachusetts (1985), Mississippi

will join other sanity tests employed in criminal law, for instance, the test of whether one was sane at the time of the crime,⁴ and the test for sanity at the time of trial.⁵ The test for sanity in order to be executed, according to *Ford*, will be a less rigid standard than the previously mentioned two.⁶ The *Ford* ruling on insanity goes to the core of the death penalty's justification, and will also act in the long term to restrict the exercise of capital punishment by the states. This new standard will require additional state statutes to efficiently comply with the *Ford* decision. The purpose of this work is to propose the type of pre-hearing procedure necessary to determine whether the insanity claim has merit, the test needed to declare one sane enough to suffer death, and the type of statute needed to constitutionally carry out the test by the use of a hearing.

II. HISTORY OF INSANITY AND EXECUTION

"It is the rule in all jurisdictions that a sentence of execution cannot be carried out if the prisoner is insane at the time set for the execution."⁷ A

(1985), Nebraska (1979), Nevada (1983), New Mexico (1984), New York (1984), Ohio (1982), Oklahoma (1958), and Wyoming (1985).

Four states which have recently repealed their statutes indicating a standard for competency and now rely on cases to employ the "insane" test: Colorado (1916), Kentucky (1923), New Jersey (1908), and Texas (1924).

Five states which, by judicial adoption, use the term "insane" as a standard for competency: Louisiana (1943), Tennessee (1911), Washington (1940), Rhode Island (1984), and Virginia (1983).

Delaware (1979), Indiana (1981), North Carolina (1983), and South Carolina (1985) all define, by statute, incompetency as "mentally active."

The six remaining states have a variety of standards. Florida in 1985 enacted a statute which set the test as "whether [the convict] understands the nature and effect of the death penalty and why it is to be imposed on him." See *infra* note 26 for the full text of this statute.

Illinois (1982) uses a statutory test that states: "Because of a mental condition he is unable to understand the nature and purpose of [the death] sentence." "As a result of mental disease . . . [the convict] lacks capacity to understand the nature and purpose about to be imposed on him" is the statutory test passed in Missouri (1986). Montana's statute (1985) merely asks whether the inmate "lacks mental fitness."

In Utah (1979), the statutory test is whether the convict is "suffering from a mental disease or defect resulting either: (1) an inability to comprehend the nature of the proceedings against him or (2) inability to assist counsel in his defense." Pennsylvania's standard for competency comes from case law (1955), which holds "the controlling factor is the degree or extent to which the mind is affected by the mental disorder and not bare existence of symptoms which would induce a psychiatrist to diagnose mental illness."

⁴ See *infra* note 86.

⁵ See *infra* note 92.

⁶ *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring). Justice Powell's opinion was central to the disposition of the *Ford* case because his vote made the 5-4 decision possible.

⁷ LAFAVE AND SCOTT, CRIMINAL LAW 340 (2d ed. 1986)(hereinafter cited as LAFAVE). See,

variety of reasons have been given for this rule. The traditional explanation in old English common law was that "if the defendant were sane he might be in a position to urge some reason why the sentence should not be carried out."⁸ Today this rationale has been replaced with a test for sanity at the time of trial.⁹

Another reason for non-execution of the insane is that "madness is its own punishment,"¹⁰ but this rationale no longer stands in light of the retributive goal of the death penalty.¹¹ "Yet another reason is that it is a rule of humanity—a refusal to take the life of an unfortunate prisoner."¹² Justice Traynor, formerly of the California Supreme Court, supported this rationale, and has defended it in an opinion.¹³

A theological rationale may have more support than any of the above reasons, and although it has ancient roots, it is still valid.¹⁴ This explanation holds that "a person should not be put to death while insane because he is unable to make his peace with God while in that condition."¹⁵

e.g., Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979); Hazard & Louisell, *Death, the State, and the Insane; Stay of Execution*, 9 U.C.L.A. L. REV. 361 (1962).

⁸ 4 BLACKSTONE, COMMENTARIES 395-96 (13th ed. 1800), cited in LAFAYE, *supra* note 7, at 340.

⁹ See *infra* note 92.

¹⁰ Ford, 106 S. Ct. at 2600 (citing Blackstone).

¹¹ See *infra* note 75.

¹² E. COKE, THIRD INSTITUTE 7 (1797), cited in LAFAYE, *supra* note 7, at 340.

¹³ Justice Traynor, concurring in *Phyle v. Duffy*, 34 Cal.2d 144, 208 P.2d 668 (1949), stated: "Is it not inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only if he took leave of his senses? *Id.*, 34 Cal.2d at 153, 208 P.2d at 676-677.

The *Phyle* case is important because it illustrates a situation that Justice Marshall was concerned with and which may frequently arise in light of the *Ford* decision—frivolous claims of insanity to forestall execution.

Phyle was convicted of murder and sentenced to death. While awaiting execution, the warden pursuant to a California statute, notified the County court that imposed the sentence that there was "good reason to believe *Phyle* was insane." 208 P.2d at 699. After a jury trial on the issue of his competency, *Phyle* was committed to a mental institution. He was subsequently restored to sanity and was then given a date for execution.

A few days before his execution, *Phyle's* mother filed a petition to reconsider his sanity. *Phyle* argued that since a jury previously declared him insane, a jury must review his sanity again. The California Supreme Court dismissed the petition as frivolous.

The *Phyle* case also demonstrates that no matter how baseless, once the question of sanity has been raised by a condemned inmate, considerable judicial resources are used to resolve the issue. For instance, in *Phyle* a state supreme court decision was needed. This waste of judicial time can be avoided by having adequate procedures to dismiss frivolous claims of insanity by death row prisoners. See p. 16.

¹⁴ The *Ford* opinion cites this rationale. See *Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986).

¹⁵ Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 STATE TRIALS 474 (Howell Ed. 1816). Cited in *Ford*, 106 S.Ct. at 2601 and LAFAYE, *supra* note 7, at 340.

The most persuasive explanation for not executing incompetent inmates is that it is "simply . . . unnecessary to put the insane prisoner to death."¹⁶ The main argument for this position is that the death penalty is based upon retribution, and an insane person's life is not "worth" as much as his sane victim's.¹⁷

III. FACTS OF THE FORD CASE

On July 21, 1974, Alvin B. Ford murdered a wounded police officer by shooting him in the back of the head at close range.¹⁸ Ford was tried and sentenced to death. There was no suggestion, at any time, that Ford was incompetent at the time of the murder, trial, or sentencing.¹⁹

In early 1982, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time.²⁰ After reading a newspaper article on the Ku Klux Klan, Ford became obsessed with the Klan and told long stories of his Klan work. Ford also had at the time an increasingly pervasive delusion that he had become the target of a complex conspiracy involving the Klan and assorted others, designed to force him to commit suicide.²¹

Ford also began an extensive hostage delusion involving members of his family and members of the Senate. Ford ended the hostage crisis by firing a number of prison officials. He then began to refer to himself as "Pope John Paul III" and reported having appointed nine new justices to the Florida Supreme Court.²²

Ford's counsel asked a psychiatrist, Dr. Amin, who examined Ford previously, to examine him again and to recommend appropriate treatment. After fourteen months of evaluation, Dr. Amin concluded in 1983 that Ford suffered from a severe, uncontrollable, mental disease which closely resembles Paranoid Schizophrenia with Suicide Potential—a major mental disorder.²³

Ford refused to see Dr. Amin further, believing he was part of the conspiracy against him, so other doctors were brought in. During one session Ford stated: "I know there is some sort of death penalty, but I'm free to go whenever I want it would be illegal and the executioner would

¹⁶ See, e.g., Hazard & Louisell, *supra* note 7.

¹⁷ See *infra* note 75.

¹⁸ Ford v. Wainwright, 752 F.2d 526, 527 (8th Cir. 1985). See *infra* note 38 for a discussion of the Eighth Circuit's opinion.

¹⁹ Ford v. Wainwright, 106 S. Ct. 2595, 2598 (1986).

²⁰ *Id.*

²¹ *Id.* at 2599.

²² *Id.*

²³ *Id.*

be executed."²⁴ When Ford was asked if he would be executed, Ford replied, "I can't be because of the landmark case I won. *Ford v. State* will prevent executions all over."²⁵ These statements were made rapidly during long streams of babbling and seemingly unrelated thoughts.

A few months later, Ford had regressed until he became completely incomprehensible, speaking only in codes and numbers. Counsel for Ford invoked the procedures under a Florida statute which governs the determination of competency of a condemned inmate.²⁶ Following the procedures of the statute, the Governor of Florida appointed a panel of three psychiatrists to evaluate whether, under the statute, Ford had the "mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."²⁷

Following a thirty minute meeting with Ford, the three psychiatrists each filed a short report to the governor. The psychiatrists, although having three different diagnoses, all found Ford capable of understanding

²⁴ *Id.*

²⁵ *Id.* It is interesting to note that this conversation took place three years prior to this appeal.

²⁶ The following is the Florida statute which was held unconstitutional in *Ford*. Fla. Stat. § 922.07 (1985) states:

"(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. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at the time designated in the warrant.

(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 a Department of Corrections mental health treatment facility.

(4) When a person under sentence of death has been committed to a Department of Corrections mental health facility, he shall be kept there until the facility administrator determines that he has been restored to sanity. The facility administrator shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

²⁷ 106 S. Ct. 2595, 2599.

the implications of the death penalty and therefore sane enough to suffer death.²⁸

The Governor, without statement or explanation, announced that he had signed Ford's death warrant for execution.²⁹ Ford's counsel unsuccessfully tried to get a state court hearing to determine Ford's sanity and competency to be executed. Ford's counsel filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on the question of Ford's sanity.³⁰ The District Court denied the writ, and the Eleventh Circuit Court of Appeals addressed the merits of Ford's claim and a divided panel affirmed the District Court's denial of the writ.³¹ The Supreme Court granted certiorari.

IV. THE *FORD* OPINION

The Supreme Court in *Ford* reversed the Eleventh Circuit decision on both substantive and procedural grounds. The majority was comprised of Justices Brennan, Stevens, and Blackmun, with Justice Marshall writing for the Court. Justice Marshall began by saying that "since the last time the Court was presented with an issue involving the infliction of the death penalty on the insane, interpretations of the Eighth Amendment and the Due Process Clause had changed substantially."³² The last time the Court was presented with an issue similar to that in *Ford* was in *Sollesbee v. Balkom*,³³ a 1950 case. Justice Marshall further stated "[n]ow

²⁸ *Id.* One doctor believed that Ford's disorder, "although severe, seemed contrived and recently learned." *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* See *infra* note 38 for a discussion of the Eighth Circuit decision.

³² *Id.*

³³ 339 U.S. 9 (1950). In *Sollesbee*, an inmate, awaiting execution, claimed that he had become insane after conviction and sentence; on that ground he requested the Governor of Georgia to stay the execution. The Governor followed a Georgia statute, similar to the Florida statute overturned in *Ford*, and appointed three physicians who declared Sollesbee sane.

Justice Black wrote the opinion for the seven member majority and held that:

The postponement of execution because of insanity bears a close affinity not to trial for a crime but rather the reprieves of sentence 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, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts.

Id. at 11.

Since Justice Douglas did not take part in the consideration of the decision, Justice Frankfurter was the sole dissenter. In his dissent Frankfurter stated that executing an

that the Eighth Amendment has been recognized to affect significantly both the procedural and substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion."³⁴

The Court begins its inquiry by looking at the common law of England from the seventh century. From its examination of the old common law the Court concludes, for various reasons, that the common law has always forbidden the execution of the insane.³⁵

Justice Marshall then turns to American common law and says that "this solid proscription was carried to America, where it was early observed that the 'judge is bound to stay the execution upon insanity of the prisoner.'"³⁶

Looking at modern state statutes, the Court observed that, "[t]oday, no State in the union permits the execution of the insane."³⁷ The Court went on to summarize its Eighth Amendment rationale:

It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common law restrictions have no less logical, moral, and practical force than when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person

insane person violates the due process clause of the Fourteenth Amendment. In support of this contention Frankfurter stated:

If the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself. And the minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim.

Id. at 23.

³⁴ *Ford*, 106 S. Ct. at 2600.

³⁵ Justice Marshall quotes from 4 BLACKSTONE COMMENTARIES. *See supra* note 8:

If, after he [a prisoner] be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for preadventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

106 S. Ct. at 2601.

³⁶ *Ford*, 106 S. Ct. at 2601. Here Justice Marshall quotes from 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW, 761 (5th Amer. Ed. 1847).

³⁷ *Ford*, 106 S. Ct. at 2602. This statement was footnoted in the *Ford* opinion as footnote #2, which notes: "Of the 50 states, 41 have a death penalty or statutes governing execution procedures. Of those, 26 have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* For a discussion of those statutes fitting the Court's latter description, *see infra* note 68.

who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still valid today.³⁸

The Court then addresses the issue of whether the District Court was bound by law to hold an evidentiary hearing to determine the question of Ford's sanity. The Majority cites *Townsend v. Sain*,³⁹ in which the Court held that, "[i]n a habeas corpus proceeding, 'a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.'"⁴⁰ The Court also discusses 28 U.S.C. section 2254, which was enacted shortly after the *Townsend* decision, and finds that even if the state court has rendered judgment, the federal court is obligated to hold an evidentiary hearing in a habeas corpus action if the state procedure was lacking in one of several areas.⁴¹ Justice Marshall further states that under the *Townsend* decision the adequacy of a state court procedure is determined by the circumstances and the interests at stake, and in a capital punishment case, the Court requires that "factfinding procedures aspire to a heightened standard of reliability."⁴²

The Majority found that the Florida statute governing the execution of inmates alleged to be incompetent⁴³ fails on three procedural grounds.

³⁸ *Ford v. Wainwright*, 752 F.2d 256 (8th Cir. 1985). The Eighth Circuit stated that although Ford's argument that an insane person could not be executed had merit, "no federal appellate court has so held." 752 F.2d at 527. The court affirmed the District Court's denial of Ford's petition because it was bound by *Sollesbee v. Balkcom*, 339 U.S. 9 (1950). For a discussion of *Sollesbee*, see *infra* note 33.

Judge Clark wrote a strong dissent saying that the two part analysis of the Eighth Amendment, whether the practice offends contemporary standards of decency and whether the practice comports with the dignity of man, clearly forbids the execution of an insane person. Clark also noted that: "It has been a part of the English common law since the medieval period that the presently incompetent should not be executed." 752 F.2d at 530.

³⁹ 372 U.S. 293 (1963). In *Townsend*, the defendant objected at his murder trial to the admission of his confession made under the influence of a "truth serum" and therefore coerced. The evidence was admitted and he was convicted. After several state appeals without any hearings on the issue, *Townsend* filed a federal habeas corpus petition. See, e.g., Note, *Mandatory Hearings in Federal Habeas Corpus Proceedings*, 11 *Lox. L. Rev.* 297 (1963); Note, *The 1963 Trilogy*, 42 *N.C.L. Rev.* (1964).

⁴⁰ *Ford v. Wainwright*, 106 S. Ct. 2595, 2603 (1986). See e.g., *Batey, Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 *U. Fla. L. Rev.* 252 (1984).

⁴¹ 28 U.S.C. § 2254 codifies procedures to be used in Federal habeas corpus actions. Since this statute is a minor part of the *Ford* decision, its discussion has been omitted.

⁴² *Ford*, 106 S. Ct. at 2603.

⁴³ *Id.* In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court held that there is no constitutional requirement that a jury's recommendation of life imprisonment in a capital case be final so as to preclude the trial judge from overriding the jury's recommendation and imposing the death sentence.

The first deficiency the Court cites is that the statute denies the condemned inmate the fundamental right to be heard, for the statute lacks any procedure for the prisoner to present evidence of his incompetency. The Court further stated:

[C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.⁴⁴

The second flaw the Court finds in the statute is that it does not provide for any opportunity for cross-examination or impeachment of the three state-appointed psychiatrists. The majority notes that the process of cross-examination is of vital importance and "would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases of each expert's testimony, . . . [and] any history of error or caprice of the examiner. . . ."⁴⁵ Thus, the Court rejected the statute for its total ignorance of any procedure that would facilitate the challenging of the state expert's methods or opinions.⁴⁶

The third, and as Justice Marshall notes, most "striking defect in the procedures under the Florida statute is the State's placement of the decision wholly within the executive branch."⁴⁷ Under the statute, the Governor appoints the experts who examine the inmate and he alone makes the ultimate decision of whether to carry out the sentence. A Governor who is charged with the execution of the laws of the state, and is the commander of the prosecutors cannot be said to have the neutrality that is necessary for reliability in the fact-finding proceeding.⁴⁸

The majority concludes by saying that they have, in this decision,

⁴⁴ *Ford*, 106 S. Ct. at 2604.

⁴⁵ *Id.* at 2605.

⁴⁶ *Id.* In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court stated:

Psychiatric testimony need not be based on personal examination of the defendant but may properly be given in response to hypothetical questions. Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its job.

463 U.S. at 902.

See also, Comment, *Barefoot v. Estelle: Psychiatric Predictions Used as Evidence in Determining Whether Death is an Appropriate Punishment*, 9 OKLA. L. REV. 197 (1984); Note, *Psychiatric Testimony and the Issue of Future Dangerousness*, 20 HOUS. L. REV. 1179 (1983). Comment, *Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials*, 73 CALIF. L. REV. 411 (1984).

⁴⁷ *Ford*, 106 S. Ct. at 2605 (1986).

⁴⁸ *Id.*

recognized a principle that has long resided in our law, and is no less abhorrent today than it was for centuries—to execute a person who does not comprehend the reasons for his punishment is wrong.⁴⁹

In reviewing the procedural aspect of the decision, Justice Marshall notes:

We do not here suggest that only a full trial on the issue of insanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity.⁵⁰

Justice Powell wrote a long concurring opinion on the issue of whether execution of an insane inmate violates the cruel and unusual punishment clause of the Eighth Amendment, and concurred in the judgment. Justice Powell pointed out that the Court's conclusion leaves two questions to be determined: "(1) the meaning of insanity in this context, and (2) the procedures States must follow in order to avoid the necessity of de novo review in federal courts under 28 U.S.C. section 2254(d)."⁵¹ The Court's opinion does not address the first of these questions, and Justice Powell disagrees with Justice Marshall concerning the resolution of the second.

Justice Powell then dispels the old argument that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf. He accomplishes this by pointing out the long appeals process to which defendants are entitled and that defendants have the right to effective assistance of counsel.⁵²

At common law, executions of the insane are simply cruel and unusual, thus justifying the extension of the Eighth Amendment's protection to the insane. Justice Powell's primary reason for concurring with Justice Marshall on the Eighth Amendment issue is that the major justification of capital punishment is retribution, and the force of the retribution relies upon the defendant's awareness of the penalty's existence and purpose.⁵³ If the defendant perceives the connection between his crime and his punishment, Powell says, the retributive goal of the criminal law is satisfied.⁵⁴ As a result of this belief, Powell would restrict the Eighth

⁴⁹ *Id.* at 2606.

⁵⁰ *Id.*

⁵¹ *Id.* at 2595, 2606.

⁵² *Id.* at 2608.

⁵³ *Id.* at 2609.

⁵⁴ *Id.*

Amendment's protection "only to those who are unaware of the punishment they are about to suffer and why they are to suffer it."⁵⁵

Justice Powell then addresses the due process issue of the Florida statute. The first point on which he differs with the majority is that the only question raised by this case is *when* the inmate is to be executed not *whether* he is to be executed.⁵⁶ This question is important, but not so as to require the heightened procedural requirements ordered by the majority.⁵⁷

Secondly, Powell says, the inmate in this case has already been convicted and sentenced, so he must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court.⁵⁸ Powell also notes that, "The state therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process."⁵⁹ Lastly, Powell states that cross-examination and other aspects of the adversarial process are not needed because the question of sanity is subjective.

Justice O'Connor and Justice White dissent by finding that the Eighth Amendment does not create a substantive right not to be executed while insane and concur with the majority opinion by concluding that the Florida statute did not provide for even minimal procedural protections.⁶⁰

Justice Rehnquist and Chief Justice Burger dissented, attacking the Court's decision by saying that it is based almost entirely on two observations; one, that there is "virtually no authority condoning the execution of the insane at English common law,"⁶¹ and "no state in the union permits the execution of the insane."⁶² The dissenters continue:

Armed with these facts, and shielded by the claim that it is simply "keeping faith with our common law heritage," the Court proceeds to cast aside settled precedent and to significantly alter both the common-law and the current practice of not executing the insane. It manages this feat by carefully ignoring the fact that the Florida scheme it finds unconstitutional, in which the

⁵⁵ *Id.*

⁵⁶ *Id.* at 2595, 2610. (Emphasis added.) In Justice Powell's footnote 5, *Id.*, he states: "It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the state is free to execute him."

⁵⁷ *Id.*

⁵⁸ *Id.* at 2611.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2611, 2612. Justices O'Connor and White note that: "[I]t is self evident 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."

⁶¹ *Id.* at 2595, 2613.

⁶² *Id.*

Governor is assigned the ultimate responsibility of deciding whether a condemned prisoner is insane, is fully consistent with the 'common-law heritage' and current practice on which the Court purports to rely.⁶³

Aside from perceiving *Sollesbee v. Balkcom*⁶⁴ to be binding precedent on the Court, the dissent also uses it to stand for the proposition that the postponement of an execution is not a trial for a crime, so there is no need for restrictive due process considerations. The dissenters also use the *Sollesbee* decision to dispel the argument that a determination of sanity cannot take place solely within the Executive branch.

In summary, the dissent concludes:

Since no state sanctions execution of the insane, the real battle being fought in this case is over what must accompany the inquiry into sanity. I find it unnecessary to 'constitutionalize' the already uniform view that the insane should not be executed, and inappropriate to 'selectively incorporate' the common law practice.⁶⁵

V. IMPLICATIONS OF THE DECISION

Through the end of 1983, actual execution has been the least common cause of death for those persons sentenced to die under the current generation of capital punishment statutes.⁶⁶ Furthermore, it is a fact that condemned prisoners more commonly die from natural causes, being killed by fellow inmates, or suicide, than die by lawful execution.⁶⁷

The *Ford* decision will immediately affect a states' ability to execute death row inmates. Several states have statutes dealing with the determination of competency to be executed; however, many of these statutes may not comport with *Ford's* due process requirement for sanity hearings.⁶⁸ Those states whose statutes need revision must change their

⁶³ *Id.*

⁶⁴ For a discussion of the *Sollesbee* decision see *supra* note 33.

⁶⁵ *Ford*, 106 S. Ct. at 2615. (Rehnquist, J., dissenting).

⁶⁶ NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *DEATH ROW, U.S.A.* 1, (Dec. 20, 1983), cited in Streib, *Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point In Pulling So Tight,"* 15 *RUTGERS L.J.* 443 (1984). Streib defines the current generation of capital punishment statutes as those statutes adopted following *Furman v. Georgia*, 408 U.S. 238 (1972). See *infra* note 71 for a discussion of the *Furman* case.

⁶⁷ See Streib, *supra* note 66. In Streib's footnotes 2 and 3 he states: "From 1973 until 1983, fifteen prisoners on death row died of natural causes or were killed" and "[f]rom 1973 until 1983, thirteen prisoners on death row committed suicide."

⁶⁸ In its second footnote the Court points out that "26 [states] explicitly requiring the

existing procedures and create a new method of finding an inmate fit to suffer death. The *Ford* Court stated that it would "leave to the State[s]

suspension of the execution of prisoner who meets the legal test for incompetence." 106 S. Ct. at 2602. The following is a summary of these states' statutory procedures for the determination of competency. The Ohio and Florida statutes are omitted because of their treatment elsewhere in this work. See *infra* note 131 and *supra* note 26, and their accompanying text, respectively. The statutes are grouped according to their constitutionality in light of the *Ford* decision.

Statutes that are unconstitutional: *Arkansas*, ARK. STAT. ANN. § 43-26-22 (1977). An inmate who is thought to be insane is confined to a state hospital for 30 days, after such time a written report is made to the Governor, who has the power to grant a stay of execution or proceed with the execution; *Georgia*, GA. CODE ANN. § 17-10-61 (1982). The Georgia statute is identical to the Florida statute overturned in *Ford*. See *supra* note 26; *Illinois*, ILL. REV. STAT. ch. 1005 § 2-5 (1982). If a death row inmate's sanity is questioned, a clinical psychologist shall be appointed and form an opinion of fitness in regard to the convict. No procedures are available for the defendant to present evidence or for judicial involvement; *Maryland*, MD. ANN. CODE Art 27 § 75(C). After a medical examination, a report concerning the inmate's prognosis is issued to the Governor, who has sole discretion to order the convict's removal into a state mental hospital.

Statutes whose constitutionality is now questionable: *New York*, N.Y. CORRECT. LAW § 655 (McKinney Supp. 1987). If a condemned prisoner "appears to be insane," the Governor may appoint three disinterested persons to examine him. The defendant may take part in the proceedings and then a report is submitted to the Governor, who makes the final decision on the convict's sanity; *South Dakota*, S.D. CODIFIED LAWS ANN. § 23A-27A-22 (1979). If a convict sentenced to death "appears to be mentally incompetent," the Governor appoints from three to five disinterested physicians. This commission makes an examination of the inmate, and then acts as the hearing judge where witnesses are produced. Afterward, the commission gives the Governor a report of their findings.

Statutes which are constitutional: *Colorado*, COLO. REV. STAT. § 16-8-111 (1978). When an inmate's competency is questioned, a hearing is set to determine the issue. At the hearing, the burden of submitting evidence and the burden of proof by a preponderance of the evidence are upon the party asserting the incompetency of the defendant; *Connecticut*, CONN. GEN. STAT. § 54-101 (1985). Upon an application to the court concerning the inmate's sanity, three physicians are appointed to examine the defendant and then a hearing is held with an opportunity for the defense to present evidence; *Kansas*, KAN. STAT. ANN. § 22-4006 (1981). If a convict "appears" insane, the district judge investigates and decides whether a commission ought to be named to examine the convict. If the judge finds the convict sane, he may proceed with the execution. If the judge finds grounds for the inmate's insanity, he may suspend the execution and appoint the superintendents of the four state mental hospitals, three of which must find the convict insane to postpone the execution; *Missouri*, MO. REV. STAT. § 552.050 (1987). If there is "reasonable cause to believe" that a condemned inmate is incompetent, he is transferred to a mental hospital for a 90 day confinement and if no noticeable improvement is made, he may be given a one year confinement at the hospital; *Nebraska*, NEB. REV. STAT. § 29-2537 (1979). This statute is almost an exact reproduction of KAN. STAT. ANN. Sec. 22-4006 above; *Nevada*, NEV. REV. STAT. 176. 425 - 176/435 (1977). If the warden has "good reason to believe" that an inmate is insane, and a physician concurs in his judgment, a hearing is held. Two psychiatrists are appointed and one is assigned to the defendant to help prepare his case. At the hearing the defendant is permitted to present evidence and cross-examine witnesses; *New Jersey*, N.J. STAT. ANN. § 30:4-82 (West 1981). If a condemned inmate appears to be insane he is given a full hearing on the issue. This hearing will be "like an action for commitment" [in probate court]; *New Mexico*, N.M. STAT. ANN. § 31-14-4 (1984). Once there is "good reason to believe" that an inmate is insane, a hearing is had and the district attorney must produce witnesses to prove

the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."⁶⁹

The time state legislatures need to write and enact constitutional procedures for the determination of sanity to suffer execution may be substantial. Ohio, for example, needed nine years to create a constitutional death penalty statute. Ohio's experience in enacting the proper legislation can serve as a useful lesson in what may arise from the *Ford* decision.

In *Furman v. Georgia*⁷⁰ the Court held that the imposition and carrying out of the death penalty, in cases in which persons convicted of capital offenses could be sentenced to death at the discretion of the judge or jury, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁷¹ Many observers saw *Furman* as restricting a state's ability to exercise capital punishment.⁷²

"The Ohio legislature, which had been in the process of revising Ohio's death penalty law at the time *Furman* was decided, adopted a new death

his sanity; *Montana*, MONT. CODE ANN. § 46-14-202 (1984). When a condemned inmate's sanity is questioned, a psychiatrist is appointed to examine him, and if there is good reason to believe he is insane, a hearing is held; *North Carolina*, N.C. GEN. STAT. § 15A-1002 (1983). If the sanity of a condemned convict is questioned, the court appoints one or more impartial medical experts to examine him, and then report to the court. If a finding of insanity is made, a hearing on the issue is held; *Utah*, UTAH CODE ANN. § 77-19-13 - 77-19-15 (1982). If there is "good reason to believe that the defendant is insane," the court appoints two doctors to examine him, who submit a report of their findings to the court. Afterward, a hearing is held and if the defendant is found insane, he cannot apply for a reinstatement of sanity hearing until six months later.

States with statutes whose constitutionality is unquestionable because they employ a full jury trial to determine a convict's competency: *Alabama*, ALA. CODE § 15-16-27 (1982), *Arizona*, ARIZ. REV. STAT. ANN. § 13-4021 (1978), *California*, CAL. PENAL CODE ANN. § 3701 (West 1982), *Kentucky*, KY. REV. STAT. § 431-238(1) (1985), *Mississippi*, MISS. CODE ANN. § 99-19-57 (Supp 1985), *Oklahoma*, OKLA. STAT. tit. 22, § 1005 (1986), and *Wyoming*, WYO. STAT. § 7-31-901 (Supp. 1985).

⁶⁹ *Ford*, 106 S. Ct. at 2606.

⁷⁰ 408 U.S. 238 (1972).

⁷¹ This holding comes from a short Per Curiam opinion, 408 U.S. at 239. Aside from this Per Curiam opinion, each Justice wrote separately, with Justices Douglas, Brennan, Stewart, White and Marshall in the majority and Chief Justice Burger, along with Justices Blackmun, Powell and Rehnquist dissenting.

From the opinions of the majority, a common theme of the randomness (Stewart), selectiveness (Douglas), and infrequency (White) of the administration of the death penalty arose. For these reasons the majority held that the way the death penalty was being implemented violated the cruel and unusual punishment clause of the Eighth Amendment.

⁷² See, e.g., Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L. J. 651 (1974); Note, *The Furman Case: What Life is Left in the Death Penalty?*, 22 CATH. U. L. REV. 651 (1973); Comment, *Furman v. Georgia: A Post-mortem on the Death Penalty*, 18 VILL. L. REV. 678 (1973).

penalty statute in 1972."⁷³ This new statute was thought to be in accordance with the Supreme Court's construction of the requirements needed to constitutionally execute a death row inmate.⁷⁴ This statute remained in place after the *Gregg v. Georgia*⁷⁵ attack upon the death penalty. Apparently this belief was not valid, for in *Lockett v. Ohio*⁷⁶ the Court struck down the 1972 statute because it "did not permit the type of individualized consideration of mitigating factors [the Court] now hold[s] to be required by the Eighth and Fourteenth Amendments in capital cases."⁷⁷

Unlike the *Lockett* Court, the *Ford* Court was not explicit in its command to the states regarding the procedures to be implemented to carry out the death penalty. Aside from the section of the opinion dealing with the Eighth Amendment, the *Ford* decision merely gave three reasons why the Florida statute was procedurally unconstitutional and stated: "We do not suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."⁷⁸

If the states whose statutory procedure of determining sanity for purposes of execution do not adequately change their laws, several years of litigation to determine the constitutionality of their new laws will limit the number of executions they will carry out.

Aside from the time that will be spent revising existing statutes dealing with competency for execution, a large amount of time will be spent litigating statutes to determine whether they violate the *Ford* standard. The *Ford* decision explicitly enumerates a basis for appeal—the process to determine the inmate's sanity lacks sufficient due process considerations. Undoubtedly, many appeals will arise on this issue,

⁷³ D. Benson, *Constitutionality of Ohio's New Death Penalty Statute*, 14 U. Tol. L. Rev. 77, 79 (1982).

⁷⁴ See *supra* note 73.

⁷⁵ 428 U.S. 153 (1976). In *Gregg*, the Court addressed the constitutionality of the death penalty itself, and held that the punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments.

The majority also stated:

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. . . . In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs.

428 U.S. 183.

See also, Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, 1976 S. Ct. Rev. 54.

⁷⁶ 438 U.S. 586 (1978).

⁷⁷ *Id.* at 606.

⁷⁸ *Ford v. Wainwright*, 106 S. Ct. 2595, 2606 (1986).

further extending the time from judgment to execution of a capital criminal.⁷⁹

VI. CHANGES THAT ARE NEEDED TO COMPLY WITH *FORD*

An important consideration in changing or evaluating existing competency for execution laws is the threshold requirement of receiving any hearing. If states create too strict a standard to establish a presumption of incompetency and thus the need for a hearing, prisoners' due process rights will be violated. However, if a state's threshold for a hearing to determine sanity is too easily met, countless delays will be created by every death row inmate pleading incompetency to forestall execution.

There are three areas of concern that must be addressed when creating or changing procedures for the determination of sanity for execution. The first area addressed is a threshold question as to what kind and degree of evidence is needed to create a right to a hearing on sanity, who will decide the threshold question and what methods will be used. If a prisoner is judged sane at the time of the crime and trial, Justice Powell states, in his concurring opinion: "The State may properly presume that [a] petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process."⁸⁰

The second area that must be developed is a test for sanity for execution. This test will be used at the hearing once the threshold question is met. Unlike the tests for sanity at the time of the crime and at trial, this test for sanity may be less stringent.⁸¹

The final area in need of development is the due process considerations needed in the hearing process to determine the sanity of an inmate awaiting execution. Although the Court in *Ford* points out that a full evidentiary trial is not necessary, it strikes down the Florida statute because it lacks the opportunity to be heard, a chance to cross-examine the experts on whose opinions the finding of sanity turns, and the opportunity for judicial involvement in the hearing process. A balance must be struck between the type of due process requirements of *Ford* and the minimum standards needed to remain constitutional.⁸²

⁷⁹ It is estimated that the average time from conviction to execution for those put to death is over twelve years. See, e.g., Silas, *The Death Penalty*, 71 A.B.A. J. 48 (1985).

⁸⁰ *Ford*, 106 S. Ct. at 2611.

⁸¹ See *supra* note 56.

⁸² Justice Powell, in his concurring opinion, 106 S. Ct. at 2611, comments: "We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be less formal than a trial." See also, *supra* note 70.

Once all three of these areas are discussed, the Ohio statutes concerning the inquiry of sanity of the convict and the proceedings established to determine sanity will be examined to determine what revisions need to be made to bring the statutes within *Ford's* guidelines.

A. Preliminary Determination of Sanity

If every inmate were entitled to a due process hearing on the question of his sanity before execution, each condemned prisoner would demand such a hearing and an endless cycle of litigation would result, further taxing judicial resources. Therefore, in the interest of judicial economy and in order to narrow the number of possible hearings needed, a threshold test of sufficient difficulty, yet reliability, must be devised.

Assuming accuracy is of the utmost concern, the immediate problem that arises in creating such a hurdle is what type of procedure can be used without itself becoming a full hearing. Ironically, the Florida statute struck down in *Ford* provides an example of the procedure that would best suit a preliminary finding of possible insanity. However, it is important to note that the use of the statute here is not the same as its role as the sole determinant of sanity of condemned prisoners in Florida.

Florida Statute section 922.07 provides for three psychiatrists to examine the convicted person and to report to the Governor in writing their diagnosis of his mental state.⁸³ The statute did not permit counsel for the convicted person to participate in the examination or present evidence to the Governor.⁸⁴

The proposed threshold hearing would also use a three psychiatrist panel to interview and examine the inmate. These doctors would also have to qualify as being disinterested so as to achieve absolute impartiality. A strong belief, either for or against the use of capital punishment, would disqualify a potential panel member. The appointing trial judge would conduct this short test before impanelling each member.

Unlike the Florida statute, the doctors would each be given an opportunity to examine the prisoner individually without the presence of the other experts. It may also be useful to have a time in which the psychiatrists may observe the inmate without his knowledge, for this procedure would assist in discovering any convicted persons with disorders "recently learned."⁸⁵

Once the experts were satisfied that they had sufficient time to examine the prisoner, they would make written findings to the judge of the convicting court. Depending on the outcome of the diagnosis, the inmate would either be given a hearing in which to prove his insanity, or he would be given a date for execution.

⁸³ See *supra* note 26 for the full text of the statute.

⁸⁴ *Ford*, 106 S. Ct. at 2604.

⁸⁵ See *supra* note 28.

Attorneys for the state and inmate would not participate in any of the examinations or findings by the doctors. The prisoner's counsel would initiate this preliminary determination procedure merely by petitioning the court which convicted the inmate, which would be unable to dismiss the application.

B. *Test for Sanity at Time of Execution*

Before discussing what a test of sanity for execution would consist of, it is necessary to examine other tests of legal sanity, which are employed at different times in the criminal process. Historically, competency at the time the crime is committed is considered the most important measurement of sanity, for if the accused was not sane at the time of his crime he may not have had the required mens rea to be held accountable for it.⁸⁶

A test to ascertain the accused's mental abilities at the time of trial has also been developed to ensure that the prisoner can participate in his own defense.⁸⁷ An understanding of the rationale and substance of these tests will assist in creating the new test of sanity to be executed.

A test known as the M'Naghten rule has been accepted in a majority of the jurisdictions of the United States.⁸⁸ One commentator states the test as follows:

Under M'Naghten, an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.⁸⁹

Some states that have adopted the M'Naghten rule have also incorporated the "irresistible impulse" test. This test "requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct."⁹⁰

⁸⁶ See, e.g., Platt and Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966); Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477 (1982).

⁸⁷ See *infra* note 92.

⁸⁸ Ohio adopted the M'Naghten rule in *State v. Brown*, 5 Ohio St. 3d 133, 449 N.E.2d 449 (1983). Congress adopted the rule for the Federal Courts in 18 U.S.C. § 20 (1984), but slightly changed the rule. 18 U.S.C. § 20 provides in relevant part that:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the facts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

⁸⁹ LAFAVE, *supra* note 7, at 310.

⁹⁰ *Id.* at 320. See, e.g., Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L.

If the defendant appears incompetent at the time of the criminal proceedings, the trial court judge will order him examined. If the accused is found to be insane, then he is committed to a mental hospital until he is mentally fit enough to stand trial.⁹¹ "The question of competency to stand trial is not concerned with the defendant's responsibility but rather with his ability to participate in the proceedings in a meaningful way."⁹²

The Supreme Court in *Dusky v. United States*⁹³ stated the common law test for competency as follows:

It is not enough for the . . . judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events;" rather, "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁹⁴

In proposing a new test for sanity, it is important to recall why the *Ford* Court deemed it cruel and inhuman under the Eighth Amendment to execute an insane person. Therefore, as each element of the test is presented an accompanying rationale under the *Ford* decision will follow. In this manner, the test for sanity will fulfill the legal definition of sanity as well as assure that the rationale and justification of the death penalty are met.

The first element in this test is: Whether the inmate comprehends the physical finality of death. This element can be fulfilled by simply asked the prisoner questions similar to "what happens when you die?", "what does death mean to you?," and "when does life end?" If these questions may appear to border on queries into one's religious beliefs, then they are properly framed, for the justification of this type of question is to give the inmate an opportunity to clear his conscience and make his peace with

REV. 443 (1925); Hoedemaker, "Irresistible Impulse" as a Defense in Criminal Law, 23 WASH. L. REV. 1 (1943).

⁹¹ LAFAYE, *supra* note 7, at 333. In *Jones v. United States*, 463 U.S. 354, 370 (1983), the Court held:

When a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

See, e.g., Margulies, *The Pandemonium between the Mad and the Bad: Procedures for the Commitment and Release of Insanity Acquittes after Jones v. United States*, 36 RUTGERS L. REV. 793 (1984).

⁹² LAFAYE, *supra* note 7, at 333. See, e.g., LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCE TO STAND TRIAL AND MENTAL ILLNESS (1974); ROESCH & GOLDING, COMPETENCY TO STAND TRIAL (1980); Silten & Tullis, *Mental Incompetency in Criminal Proceedings*, 28 HASTINGS L.J. 1053 (1977); Annot., 23 A.L.R.4th 493 (1983).

⁹³ 362 U.S. 402 (1960).

⁹⁴ 362 U.S. at 402.

his God. Justice Marshall, in *Ford*, cited one commentator as saying "that it is uncharitable to dispatch an offender 'into another world, when he is not of a capacity to fit himself for it.'"⁹⁵ If the prisoner understands death and what it means to him, then the second element of the test can be implemented.

The second element of the test is: Whether the inmate recognizes and understands the causal link between his act of murder and his penalty. This is perhaps the most crucial part of this new insanity test, for retribution is the main justification of capital punishment.⁹⁶

The *Ford* majority was cognizant of the importance of this justification and noted that, "the community's quest for 'retribution'—the need to offset a criminal act by a punishment of equivalent 'moral' quality—is not served by execution of an insane person, which has a 'lesser value' than that of the crime for which he is to be punished."⁹⁷

The third element of the test for sanity to stand execution is really a test in itself borrowed from probate law. In Ohio, the "*Niemes* test"⁹⁸ is the test used to determine if one is legally competent to make a will. This test is the only one needed to be passed to make a testamentary disposition, and can be fulfilled even if the person in question has physical defects⁹⁹ or sickness¹⁰⁰ that make him appear incompetent, cannot read or write,¹⁰¹ or fails to function socially.¹⁰²

The elements of the third prong of the new test for sanity are as follows: Whether the inmate knows and understands: (1) his property; (2) the nature of his acts; and (3) his family, or friends, including their names and is able to identify them. Although there are other elements to the original *Niemes* test,¹⁰³ the omitted parts deal exclusively with the disposition of property and the ability of the testator to know people who have claims against him, and as such would be irrelevant to the

⁹⁵ *Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986). Justice Marshall here cites Hawles, *supra* note 15.

⁹⁶ See *supra* note 75.

⁹⁷ *Ford*, 106 S. Ct. at 2601. See, e.g., Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980).

⁹⁸ This test was created in *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E.2d 503 (1917).

In *Niemes*, the Ohio Supreme Court held that the mental capacity to make a will requires the testator to understand the nature of the act he is performing, the general extent of property of which he is disposing, the relation which he holds to those who have claims upon him, and to appreciate his relation to members of his family.

It is important to note that this test has been used successfully in probate law for seventy years to determine legal competency. This shows that the test can be used in actual practice to determine one's competency.

⁹⁹ See *Brown v. Jacoby*, 55 Ohio App. 250, 9 N.E.2d 693 (1937).

¹⁰⁰ See *Fulkerson v. Fulkerson*, 12 O.L.A. 324, 35 O.L.R. 478 (1932).

¹⁰¹ See *Barlion v. Connor*, 9 Ohio App. 72, 31 O.C.A. 463 (1917).

¹⁰² See, *Kettelman v. Metzger*, 13 O.C.D. 61, 3 Cir. Ct. R. 224 (1901).

¹⁰³ See *supra* note 98 for the *Niemes* holding which created the test.

determination of a condemned prisoner's sanity. Even though a few parts of the *Niemes* test will not be used, it is still a valid manner to determine basic competency.

The first part of the third element in the new test for competency asks whether the inmate knows his property. In a will context this may encompass both real and personal property and would be strictly construed because of the basic presumption that a sane man knows his own property, no matter where it is situated. Although a death row inmate may not have vast amounts of wealth and land to remember and have knowledge of, this aspect of the test remains true, for no matter how little the amount of personal property an inmate may possess, he still would be expected to distinguish his own property from others. It may appear that this part of the test is too easily passed; however, if one were to apply this element of the test to Alvin Ford, he would be hard pressed to overcome it.¹⁰⁴

Whether the inmate knows the nature of his acts is the second element of the *Niemes* test as used here. This test can be simply applied by merely asking the inmate about his common day to day activities, limited as they may be. If a prisoner can't remember what he does during the day and other aspects of his personal life, there is no way one can term him sane.¹⁰⁵ When this part of the *Niemes* test is applied, the testator's ability to handle his personal business affairs is examined, as well as his personal relationships with others. The same form of inquiry can be used on an inmate, if applicable.

The third element of the *Niemes* test asks whether the condemned prisoner has the ability to recognize members of his family and identify them by name. The classic situation is when a sick person, because of drugs or impending death, cannot identify members of his own family. Persons under this disability are not permitted to draft a will and under this new test for sanity, they would not be executed.¹⁰⁶

If the *Niemes* test assures that one is legally competent to make a will, it would follow that this test, coupled with the other two elements, is sufficient to determine competency to stand execution. However, if the *Niemes* test is used alone, it would trivialize the test of competency for an inmate, and reduce the importance of his sanity to the same standard the law imposes on one wishing to give away his property after death. On the other hand, when the *Niemes* test for competency is coupled with the

¹⁰⁴ See *Ford v. Wainwright*, 106 S. Ct. 2595, 2598 (1986).

¹⁰⁵ This part of the test is not meant to be trivialized by asking the inmate questions like "what did you have for lunch yesterday?" Many sane persons can not readily answer that query. However, when applied to correspondence, conversations and other meaningful acts the test can be useful.

¹⁰⁶ This is not to suggest that every inmate tested needs to be suffering from the type of disability described here, for a variety of mental illnesses produce similar effects.

other elements, it assures that the prisoner is legally, and mentally ready to be put to death.

C. *Structure of the Hearing on the Issue of Insanity*

As previously noted,¹⁰⁷ the *Ford* Court leaves it up to the states to determine what type of hearing will be used to decide the issues of a condemned prisoner's sanity, yet the Court gives only limited guidance to the states,¹⁰⁸ and states that it does not suggest a "full trial on the issue of insanity."¹⁰⁹ Justice Powell went further than the Court and suggested that only the most minimum due process standards need to be employed when dealing with a convicted person.¹¹⁰

Given this background and judicial insight, one may think that the new type of hearing on sanity at the time of execution may resemble a lesson on how minimal due process standards can become without being unconstitutional. However, this assumption is far from true, for one must remember that a human life hangs in the balance of the proceedings. Therefore, in proposing a new procedure for the determination of sanity of a condemned inmate it is better to err on the side of reliability and thus place substantial due process considerations in the procedure.

Another reason why sufficient due process standards should be placed in the hearing is that if the statute creating the procedure is later tested constitutionally, the statute will have a margin for error that will make it almost unchallengeable.¹¹¹

The first part of the new hearing procedure is that counsel for the defense will be permitted to present any relevant evidence it has. The Florida statute¹¹² in *Ford* failed because it did "not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution."¹¹³ Since "the fundamental requisite of due process is the opportunity to be heard,"¹¹⁴ it would not be rationale to severely restrict whatever evidence counsel for the allegedly insane inmate can present, for there is no reason at this point in the proceedings to do so.

¹⁰⁷ *Ford*, 106 S. Ct. at 2606.

¹⁰⁸ *Id.* at 2604-05. In summary, the three reasons the Florida statute failed to pass due process standards were: 1) the failure to include the prisoner in the truth seeking process - no opportunity to be heard; 2) the denial of any opportunity to challenge or impeach the state-appointed psychiatrists - need to cross-examine; and 3) the State placed the determination of sanity wholly in the executive branch - since the Governor has a duty to enforce the laws, he would be a biased decision maker.

¹⁰⁹ *Id.* at 2606.

¹¹⁰ *Id.* at 2610.

¹¹¹ Since *Ford* states that a full hearing is not needed to satisfy due process, it would stand to reason that a full hearing more than satisfies due process.

¹¹² See *supra* note 26 for the full text of the Florida statute.

¹¹³ *Ford*, 106 S. Ct. at 2604.

¹¹⁴ *Grannis v. Oddean*, 234 U.S. 385 (1914).

Under the statute in *Ford*,¹¹⁵ the procedure for determining a prisoner's sanity was done almost summarily, with no hearings or argument, possibly because Florida did not wish to have full hearings on every claim of incompetence. This rationale, aside from being deemed unconstitutional in *Ford*, is not needed under the new statutory scheme being proposed,¹¹⁶ for a preliminary determination stage is employed to "weed out" frivolous or non-meritous claims.

A justification for permitting full presentment of all relevant evidence lies in the Supreme Court's holding in *Jurek v. Texas*.¹¹⁷ The Court in *Jurek* held that in a procedure or case that determines whether one will be put to death, the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine."¹¹⁸

The defense will also need to have the ability to present all of its relevant evidence because it has the burden, in this new statutory scheme, of rebutting a presumption of sanity. This presumption will be placed upon those inmates who did not raise the issue of sanity at the time of the crime or at trial, and/or those inmates who have no history of mental illness.¹¹⁹

Justice Powell supported a presumption of sanity in his concurring opinion of *Ford*. He stated:

[I]n order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out . . .¹²⁰

The defendant's right to cross-examine and impeach state appointed psychiatrists comprises the third part of the proposed hearing procedure.

¹¹⁵ See *supra* note 26 for the full text of the Florida statute.

¹¹⁶ See *supra* text p. 531 for a discussion of the proposed preliminary test.

¹¹⁷ 428 U.S. 262, 276 (1976). See e.g. Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1 (1976); Black, *Capital Punishment: The Inevitability of Caprice and Mistake*, 22 WILLAMETTE L. J. 261 (1974).

¹¹⁸ 428 U.S. at 276.

¹¹⁹ Although the majority of death row inmates never seek professional counseling for mental or emotional problems, are not committed to an institution, or raise the insanity issue at any point in the proceedings against them, this presumption will not prejudice those inmates who have developed their mental illness while waiting for execution, for this situation is well documented and accepted.

See, Ward, *supra* note 3, at 38-48; See, e.g., Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AMERICAN J. PSYCHIATRY 393 (1962); Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167 (1972); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REV. 141 (1979).

¹²⁰ *Ford v. Wainwright*, 106 S. Ct. 2595, 2611 (1986).

This right was lacking in the statute at issue in *Ford*,¹²¹ and is seen as fundamental to due process.¹²²

Without the right to effective assistance of counsel,¹²³ and a state-funded psychiatrist¹²⁴ to help prepare the inmate's claim of insanity, the hearing and its procedures would be meaningless. Since the Court has held both of these elements crucial to a fair hearing, it would be a major error to omit them. Although the Florida statute¹²⁵ overturned in *Ford* did not make provision for a state-funded psychiatrist, this is understandable for the statute became effective in 1985, and the right to a state-funded psychiatrist was not "created" until later that year.¹²⁶ The *Ford* Court ignored this deficiency in the statute, possibly because they did not deem it applicable to hearings on the question of sanity.¹²⁷

The final aspect of the decision to be made concerning the hearing on the issue of insanity is whether a judge or jury will make the ultimate determination of competency. Since the test for sanity developed earlier¹²⁸ will be used to measure the competency of the prisoner, it is imperative that a trained judge decide the issue.

A trial judge will readily understand the issues in the test, but a jury

¹²¹ See *supra* note 108.

¹²² If cross examinations are not used when determining the inmate's sanity, unchallenged testimony will be equivalent to non-participation by the defendant - an approach which was struck down in *Ford*.

¹²³ See *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court created a new test for effective assistance of counsel, which holds that a defendant claiming that he was not effectively represented must prove that (1) counsel's performance was deficient in the sense that counsel was not a responsible competent attorney; and (2) that the deficiencies in counsel's performance were prejudicial to the defense, in the sense that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

¹²⁴ *Ake v. Oklahoma*, 470 U.S. 68 (1985). The *Ake* Court held that there are two circumstances in which the defendant is entitled to a psychiatrist's assistance at state's expense: (1) when it is shown that a defendant's sanity is likely to be a significant factor in his defense; and (2) when, in a capital sentencing proceeding, the state tries to justify the death penalty by showing that the defendant will remain dangerous in the future.

In *Ake* the Court reasoned that: "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the juror's minds questions about the state's proof. . . ." 470 U.S. at 84.

Although in the proposed procedures no jury will be used, it is still important that the judge have two different points of view regarding the expert testimony. Even if the defense is given an opportunity to cross-examine the state's psychiatrists, it would be ineffective unless given its own expert to assist in the understanding of the opposing views.

See e.g., Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326 (1986).

¹²⁵ See *supra* note 26 for the full text of the statute.

¹²⁶ See *supra* note 124.

¹²⁷ See *supra* note 24.

¹²⁸ See *supra* text pp. 533-35 and accompanying notes 95-106.

may disregard the test to make the kind of "gut-level" determination that juries are used to making. For instance, if an inmate physically appears to be under a disability, a jury will naturally assume that "since he looks crazy—he must be crazy." Along with the intricacies of the proposed test for insanity comes the requirement that one "look" into the mind of the person and to disregard what the person "looks" like.¹²⁹

The finding of the county court judge after this hearing will not be appealable to a higher court.¹³⁰ If a finding of "not insane" were appealable, the type of endless adjudication this entire process seeks to avoid would be sanctioned.

One issue that remains is whether an inmate found "not insane" may subsequently file another, non-dismissable, petition with the same court again raising the issue of the prisoner's competency. The resolution of this question may determine if the proposed procedures can be successful. One possible solution would be to set the execution of a person found "not insane" shortly after he was judged as such. This solution would avoid the problem of subsequent non-meritorious petitions which would, even under the preliminary determination section of the procedures¹³¹ created to deal with this problem, waste valuable resources. However, this answer would be limited to those inmates who have exhausted their mandatory and collateral appeals.¹³²

Now that the theoretical justifications for the proposed test for sanity at the time of execution and changes in procedures for determining the issue have been presented, the current Ohio statutes, and construing case law, concerning these areas will be examined and finally the proposed statutes will be presented.

VII. ANALYSIS OF CURRENT OHIO STATUTES

Ohio Revised Code section 2949.28 provides:

If a convict sentenced to death appears to be insane, the warden or sheriff having custody of such convict shall give notice thereof to a judge of the court of common pleas of the county in which the prisoner is confined. Said judge shall inquire into such insanity at a time and place to be fixed by said judge, or impanel a jury for that purpose and shall give immediate notice thereof to the prosecuting attorney of the county in which the prisoner was

¹²⁹ See *supra* notes 98-101.

¹³⁰ The only appealable grounds would be constitutional, which this test meets.

¹³¹ See text p. 531 and accompanying notes 83-85 for a discussion of this aspect of the procedural process.

¹³² A considerable number of inmates fall into this category. See *supra* note 79.

convicted. Execution of the sentence shall be suspended pending completion of the inquiry.¹³³

The preliminary determination stage of the proposed proceedings is equivalent to this statute. On the face of this statute, an inmate can have his execution postponed, receive a hearing date, and have a jury impaneled for the purpose of inquiring into his sanity merely by physically "appearing insane." Although the statute does not state "physically appear insane," on its face, the only logical construction of the statute leads one to this conclusion, for one cannot appear insane without some sort of physical manifestation. The reverse may also be true, for it is possible that a person appearing normal and competent may actually be insane. The "test" under Ohio Revised Code section 2949.28 is really not test at all.

Any person whose life depends upon his ability to convince someone of his insanity would probably be very capable of doing so. It is understandable that the Ohio legislature meant to make it easy for an inmate on death row to have his sanity checked at the first sign of unfitness, yet the "test" places at the disposal of the inmate and his counsel the ability to put a halt to the time table of his execution. The statute permits the sentence to be suspended until the inquiry is completed, and then other statutes set the procedures to be followed.¹³⁴

Soon after the enactment of Ohio Revised Code sections 2949.28, 2949.29,¹³⁵ and 2949.30¹³⁶ an Ohio appellate court construed the term "insane" in these statutes. *In Re Keaton*¹³⁷ held:

The test of whether a convict awaiting execution is "insane" within the meaning of R.C. 2949.28, R.C. 2949.29, and R.C. 2949.30 is not whether he is "mentally ill," but whether he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court.¹³⁸

The *Keaton* test for insanity at the time of execution is based entirely on an inmate's "intelligence." This standard is inappropriate, for one's

¹³³ OHIO REV. CODE ANN. § 2949.28 (Page 1986).

¹³⁴ See *id.* §§ 2949.29, 2949.30 and *infra* note 144.

¹³⁵ See *supra* note 26 for the full text of the statute.

¹³⁶ See *infra* note 144 for the full text of the statute.

¹³⁷ 19 Ohio App. 2d 254, 250 N.E.2d 901 (1969), *vacated sub nom.* *Keaton v. Ohio*, 408 U.S. 936 (1972).

¹³⁸ Syllabus of the Court, ¶ 3, 19 Ohio App. 2d at 255.

intelligence has nothing to do with his competence.¹³⁹ The first part of the *Keaton* test aspires to establish the same level of certainty regarding why the prisoner is being put to death as the proposed test for sanity at the time of execution.¹⁴⁰ Another similarity between the two tests appears when the *Keaton* test asks whether the convict knows his impending fate—this is very similar to the proposed test, which inquires whether the inmate knows the meaning and finality of death.¹⁴¹

The main problem with the *Keaton* test is that it asks whether the convict has a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful. This analysis is incorrect, for at this stage in the proceedings, the only issue being raised is the inmate's competency, and if the inmate has the ability to tell his attorney that he is insane—is he really incompetent? This paradox is resolved by the proposed test for insanity by employing the *Niemes* test,¹⁴² which goes to the heart of the legal competency issue.

The final part of the *Keaton* test asks whether the inmate has to convey such information to his attorney. This aspect of the test also suffers from paradoxical reasoning. If an allegedly insane inmate can assist his attorney in proving that he is insane, his sanity really is not an issue. These defects in the *Keaton* test are cured under the proposed procedures by the use of a preliminary determination of insanity which excludes all counsel from participation.¹⁴³

Ohio Revised Code section 2949.29 provides:

In addition to the warden or sheriff, the judge of the court of common pleas, clerk of the court of common pleas, and the prosecuting attorney shall attend the inquiry commenced as provided in section 2949.28 of the Revised Code. Witnesses may be produced and examined before the judge or jury, and all findings shall be in writing signed by the judge or jury. If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless such time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution. If it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receive a warrant from the governor directing such execution as provided in section 2949.30 of the Revised Code. The finding, and the order of such judge,

¹³⁹ See *supra* note 101.

¹⁴⁰ See *supra* text pp. 532-34 and accompanying notes 87-97.

¹⁴¹ *Id.*

¹⁴² See *supra* note 20.

¹⁴³ See *supra* text pp. 534-35 and accompanying notes 98-103.

certified by him, shall be entered on the journal of the court by the clerk.

The Court in *Keaton*¹⁴⁴ also construed this statute and held:

Where a statutory procedure has been provided for suspending an execution upon notice by the warden to a judge of the Common Pleas Court of the county in which the prisoner is confined that such convict 'appears to be insane,' the 'inquiry' by the court 'into such sanity' is not an adversary proceeding, the convict is not a 'party' thereto, the determination of the question of present insanity is not subject to judicial review, and such convict has no right of appeal from a factual determination by the judge of the common pleas court that the convict is 'not insane.'¹⁴⁵

Ohio Revised Code section 2949.29 is clearly constitutional. After the *Ford* decision, any statute dealing with procedures to determine the sanity of a condemned convict must provide the inmate with an opportunity to be heard and to cross-examine witnesses against him, including state-appointed physicians.¹⁴⁶ Revised Code section 2949.29 provides for the production and examination of witnesses, which is the minimum that the *Ford* decision required of such a statute.¹⁴⁷

The Court in *Keaton* reads section 2949.29 as meaning that the "inquiry by the court into the convict's sanity is not an adversary proceeding, and the convict is not a party thereto," renders the statute open to constitutional attack. The Court in *Ford* meant to create a procedural scheme that would possess the best elements of an adversarial proceeding—cross-examination and an ability to argue on one's behalf—yet would not require a full trial on the question of insanity.¹⁴⁸ Therefore, although section 2949.29 is constitutional on its face, the construing case law interpretation of the statute is invalid.

¹⁴⁴ *Keaton* also discusses a related Ohio statute, OHIO REV. CODE ANN. § 2949.30, dealing with a convict's restoration of sanity. That section provides:

If a convict under sentence of death is found insane under section 2949.29 of the Revised Code, and if he is subsequently restored, the warden or sheriff having custody of such convict shall forthwith transmit a copy of the finding of restoration to the governor, who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time of his execution.

OHIO REV. CODE ANN. § 2949.30 (Page 1986).

¹⁴⁵ Syllabus of the Court, ¶ 2. In re *Keaton* 19 Ohio App. 2d 254, 255, 250 N.E. 2d 901, vacated *sub nom.* *Keaton v. Ohio*, 408 U.S. 936 (1972).

¹⁴⁶ *Ford v. Wainwright*, 106 S. Ct. 2595, 2605 (1986).

¹⁴⁷ See *supra* note 68 for other state statutes that may be deemed unconstitutional under *Ford*.

¹⁴⁸ See *Ford*, 106 S. Ct. at 2605.

VIII. CONCLUSION

Ford v. Wainwright makes it unconstitutional under the Eighth Amendment's cruel and unusual punishment clause to execute an insane prisoner. This rule has been the common law doctrine for hundreds of years in England and currently is the American rule as well.

Ford does not create an inordinate burden on the states to comply with when determining the competency of a condemned inmate. Compliance with *Ford's* due process requirements can be met simply by placing the factfinding process outside of the executive branch, and providing the allegedly insane inmate with an opportunity to be heard and conduct cross-examinations, yet several states' existing procedures are no longer valid in *Ford's* wake.¹⁴⁹

The most useful manner in which to summarize the changes this work proposes is to put them in statutory form, with the proposed sections italicized.

The new Ohio Revised Code section 2949.28 would provide:

(A) *If a warden or sheriff, having custody of a convict sentenced to death, has good reason to believe that such convict is insane, the warden or sheriff having custody of such convict shall give notice thereof to a judge of the court of common pleas of the county in which the prisoner was convicted.*

(B) *Said judge shall appoint three disinterested psychiatrists to inquire into the convicts insanity. After spending as much time examining the convict as they deem necessary, the panel shall submit in writing a report of their findings and prognosis to the judge of the convicting county court their findings.*

(C) *If the panel finds that the convict is competent to be executed, his execution date will be affirmed, but if the date of his execution has passed, a new date will be set.*

(D) *If the panel finds the convict is insane, the judge shall:*
1. *Notify the prosecuting attorney of the county in which the prisoner was convicted;* 2. *Set a date for a hearing, whose procedures are governed by R.C. 2949.29; and* 3. *Suspend execution of the sentence pending completion of the inquiry.*

The new Ohio Revised Code section 2949.29 would provide:

(A) *The judge of the court of common pleas for the county in which the prisoner was originally convicted shall be the sole factfinder and his decision shall not be reviewable.* In addition to the warden or sheriff, the clerk of the court of common pleas, and prosecuting

¹⁴⁹ See *supra* note 68.

attorney shall attend the inquiry commenced as provided for in section 2949.28 of the Revised Code.

(B) If indigent, the convict is entitled to have a psychiatrist appointed for him at the State's expense.

(C) Witnesses may be produced and examined before the judge and all relevant evidence may be presented.

(D) For purposes of this hearing, if the convict failed to raise the issue of insanity at any point previous to these proceedings and/or has no history of mental illness, he must overcome a rebuttable presumption of sanity.

(E) The only issue to be determined in this hearing is the test for sanity defined in R.C. 2949.29.5.

(F) If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless such time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution. If it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution as provided in section 2949.30 of the Revised Code.¹⁵⁰

The following statute does not presently exist. It is a codification of the proposed test for sanity. The new Ohio Revised Code section 2949.29.5 would provide:

For an inmate to be judged competent for execution it must be proven that he has the ability to:

(A) *Comprehend the physical finality of death;*

(B) *Understand the causal link between his criminal act and his impending punishment;*

(C) *Know, comprehend and recognize:*

(1) *his property;*

(2) *the nature of his acts;*

(3) *his family, or friends, as well as the ability to identify them by name.*

If these new statutes are enacted, Ohio will be in compliance with the decision of *Ford v. Wainwright*.

STEVEN J. HUFF

¹⁵⁰ See *supra* note 144 for the full text of OHIO REV. CODE ANN. § 2949.30 (Page 1986).