On the Execution of the Death Penalty

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Only a small fraction of the 3,700 inmates who sit on death rows nationwide will ever be executed. Far more death row inmates die of natural causes than by execution of their sentences. The number of people executed in the United States in any given year has yet to exceed the number killed by lightning. There are several ways executions are delayed or avoided. After the trial stage is completed, the court machinery continues to operate for some time. Appeals can be made at all levels of the state courts as well as in the federal courts. John Wayne Gacy, who confessed to killing 33 young males, filed 523 separate appeals, none of them based on a claim of innocence, and so delayed his execution by 14 years. When court procedures are finally exhausted, when review is no longer pending, the fate of the prisoner passes into the hands of the executive branch of the government. In many jurisdictions, the governor has to order the execution, and he often avoids the decision as long as possible. Reprieves are commonplace.

Then, too, the condemned prisoner must be competent to be executed. In 1986, in *Ford v. Wainwright*,[1] the U.S. Supreme Court ruled that the Constitution precludes a state from executing those who have temporarily or permanently become incompetent or insane. More recently, the Court ruled that the mentally retarded (whatever that means) are also exempt from execution (though their condition may be no different from when they were found criminally responsible).[2] Even before the decision in *Ford*, the rule on executing the insane was well established in most states, either by statute or common law, although the logic behind the rule is vague.

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In *Ford*,[1] the plurality of the Court did not set forth what standard was applicable in determining whether a person is incompetent to be executed. Justice Powell, the swing vote in the opinion, proposed a standard when he stated in a concurrence, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[1] He acknowledged that the states may have a different standard. Alvin Ford, the inmate involved in the case, died a natural death in 1991 while on death row.

The Supreme Court in 1950, in *Solesbee v. Balkcom*,[3] said that postponement of execution because of postconviction insanity bears a close affinity not to trial but to reprieves of sentences, which is an executive power, and "seldom, if ever, has this power of executive clemency been subjected to review by the courts." In *Solesbee* the Court found that Georgia had not violated due process in constituting its governor an "apt and special tribunal" for determining, in *ex parte* proceedings, the sanity of a condemned man at the time of execution. (In federal and military cases, Abraham Lincoln was apparently the first president to intercede in an execution on account of supervening insanity.)

Inquiries have been held entirely behind closed doors without any opportunity for submission of facts on behalf of the person whose sanity is to be determined. It was long recognized that due process does not require that a condemned man who asserts supervening insanity be given a full judicial proceeding to adjudicate his claim. In 1897, in *Nobles v. Georgia*[4] the Supreme Court said that if such proceedings were required "it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely

upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial."

In *Solesbee*, the Supreme Court, noting that the governor in deciding on execution had the aid of specifically trained physicians, went on to say:

> It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong. . . . We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved [Ref. 3, pp 12–13].

In this case, the condemned man lost out. If the governor decides in his favor, *a fortiori*, no one is interested or has standing to complain to the courts.

The power of the governor was often delegated to agencies such as pardon and parole boards. In 1958, in *Caritativo v. California*,[5] the Court, extending its decision in *Solesbee*, upheld a procedure whereby the initiation of proceedings to determine the sanity of a condemned man in his custody is made by the warden in his sole judgment. If the warden "has good reason to believe" that a condemned man has become insane, he must so advise the judge or district attorney of the judicial district where the convict was sentenced and an investigation may be ordered.

Justice Harlan in *Caritativo* said: "Surely it is not inappropriate for (the state) to lodge this grave responsibility in the hands of the warden, the official who beyond all others has had the most intimate relations with, and best opportunity to observe, the prisoner." But Justice Frankfurter, joined by Justices Brennan and Douglas, strongly dissented:

> Now it appears that [the determination of the sanity of a man condemned to death], upon which depends the fearful question of life or death, may. . .be made on the mere say-so of the warden of a state prison, according to such procedure as he chooses to pursue, and more particularly without any right on the part of a man awaiting death who claims that insanity has supervened to have his case put to the warden. There can hardly be a comparable situation under our constitutional scheme of things in which an interest so great, that an insane man not be executed, is given such flimsy procedural protection, and where one asserting a claim is denied the rudimentary right of having his side submitted to the one who sits in judgment [Ref. 5, pp 552–3].

In its 1986 decision in *Ford v. Wainwright*,[1] the aforementioned case, the Supreme Court found Florida's procedure, which relied on the governor's assessment of clinical reports, to be unconstitutional on three grounds: (1) it provided no opportunity for the condemned individual or his counsel to be heard; (2) it did not permit challenge of the state-employed mental health professionals' findings on the competency issue; and (3) it left the final decision as to competency to the executive rather than the judicial branch. Although thus ruling Florida's statute unconstitutional, the Court did not explicitly establish a right to counsel at competency proceedings, nor did it require that the condemned individual have a formal opportunity to cross-examine opposing experts or be provided funds for an independent expert. Justice Marshall, who wrote the Court's opinion, suggested that Florida might create a competency procedure similar to that used in the competency-to-stand-trial or civil-commitment contexts, but the majority did not agree on this point, with several members cautioning against requiring as a constitutional ruling a full-blown "sanity trial."

Subsequently, in a case involving Thomas Provenzano, the Florida Supreme Court declared that the state's failure to provide exculpatory information from a mental evaluation did not create reversible error, given the trial counsel's ability to obtain this information from other sources.[6] Seven years later in the case, the Florida Supreme Court found that the trial court had abused its discretion for (1) not continuing a hearing so Provenzano could present the testimony of a psychologist; (2) declaring that the psychologist was not an expert because she lacked a PhD; and (3) refusing to allow Provenzano to cross-examine a state expert. The trial court thereupon held proceedings at which the psychologist and other witnesses for both Provenzano and the state gave testimony, after which defense counsel stated on the record that everything he could offer on Provenzano's behalf had been presented. The trial court determined that Provenzano was competent for execution. The Florida Supreme Court affirmed. Despite his delusions that he was Jesus Christ, Provenzano understood the details of his trial and his conviction, that he was to be executed, and the reasons why. The Florida Supreme Court considered the case "troubling" given Provenzano's apparent mental health problems, even though his exaggeration of his symptoms and malingering made determining the exact nature of his condition difficult. However, the Florida Supreme Court, citing the U.S. Supreme Court's decision in *Ford*,[1] held that the Eighth Amendment requires only that defendants have an awareness of

what penalty they are being given and why they have received it.[7]

In sum and substance, the carrying out of the death penalty very much depends on the attitude of the warden toward the penalty and whether he will attest to the incompetency of the condemned person. By and large, wardens are opposed to the penalty, as are many psychiatrists. The warden can readily obtain a psychiatrist to attest to the condemned person's incompetency. As long as the death penalty is on the books, the psychiatrist by participating in the process can undercut the carrying out of the penalty, and given the vagueness of the test of competency, the psychiatrist with a clear conscience can attest to incompetency, even when the condemned person is on medication. Moreover, in this matter many believe, as the saying goes, one who calls a spade a spade is only fit to use one.

The attorney general may obtain a psychiatrist to attest to competency, but that rarely occurs. Under the governorship of Earl Long of Louisiana, no one condemned to death was put to death. He presumed that anyone on death row is or will become incompetent to be executed.

The ostensibly ill inmate is usually transferred to a forensic unit of a state mental hospital, where he lives out his days. One summer, as part of my training in the Tulane University Department of Psychiatry and Neurology, I was posted at the unit for the criminally insane of the East Louisiana State Hospital. Curiously, it was the only unit at the hospital that had a "welcome" sign—the security paled in comparison to that of a prison. The inmates played volleyball daily. Time and again I would hear the superintendent tell a condemned prisoner who had been transferred to the unit, "If you misbehave, you'll be sent back to fry." Paradoxically, the death penalty served as a deterrent to those already sentenced to death. Then, too, electroconvulsive therapy was used as a deterrent—to be sure, electricity has various uses.

In 1992, the Louisiana Supreme Court ruled it impermissible to medicate individuals forcibly to render them competent to be executed. Since then Maryland, South Carolina, and the U.S. Eighth Circuit Court of Appeals have called for the commutation of a death sentence to life imprisonment without parole when the individual is found incompetent to be executed.[8]

In years past, and today, the competency-to-stand-execution procedure, via the executive branch, in many cases has achieved the functional abolition of the death penalty. Though the United States has the death penalty and courts do in fact sentence criminals to death, more often than not, the sentence is not executed.

In sum and substance, it can be said that the United States has the death penalty (many states impose it), and at the same time it can be said that it does not have it (it is rarely carried out).

References

1. Ford v. Wainwright, 477 U.S. 399 (1986)
2. Atkins v. Virginia, 536 U.S. 304 (2002)
3. Solesbee v. Balkcom, 339 U.S. 9 (1950)
4. Nobles v. Georgia, 168 U.S. 398 (1897)
5. Caritativo v. California, 357 U.S. 549 (1958)
6. Provenzano v. State, 616 So. 2d 428 (Fla. 1993)
7. Provenzano v. State, 760 So. 2d 137 (Fla. 2000)
8. Singleton v. Norris, 267 F. 3d 859 (8th Cir. 2001)