The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure

Bryan Lester Dupler

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
THE UNCOMMON LAW: INSANITY, EXECUTIONS, AND OKLAHOMA CRIMINAL PROCEDURE

BRYAN LESTER DUPLER*

Furiosus Furore Solum Punitur
The Madman is Punished By Madness Alone.
— Latin Maxim

I. Introduction

In Ford v. Wainwright,1 the United States Supreme Court held that carrying out a death sentence upon a convicted prisoner who had gone insane while awaiting execution violates the Eighth Amendment prohibition against "cruel and unusual punishments."2 This conclusion was anything but news; most states had outlawed the execution of the insane in the two previous centuries, and no state openly claimed the right to execute capital prisoners who had gone insane. Having reached such a pat constitutional conclusion, the Court splintered on more troublesome questions. The Court failed to agree on a definition of "insanity" for Eighth Amendment purposes and largely left to the several states the issue of what procedures are necessary to adequately protect insane prisoners from such illegal...
executions. Ford certainly stands as an injunction to the states commanding what they cannot do, but it says precious little about how not to do it.

This article examines several issues that the Ford Court did not, from the standpoint of current Oklahoma law: What is the procedure that the State must follow in cases involving a condemned inmate who has allegedly gone insane awaiting execution? What is the legal definition of insanity in relation to a prisoner awaiting execution, i.e., what is the legal definition of "insanity to be executed"? Who has the burden to initially prove a condemned prisoner's insanity? Who has the burden of proof upon an allegation that sanity has been restored? What quantum of proof can be legally required? After a finding of insanity, can the State forcibly medicate an insane inmate to restore his sanity for execution? The answers to these questions require an analytical odyssey through the ancient common law of England; the obscure statutes and decisions of the State of Oklahoma; and several decisions of the U.S. Supreme Court, some contemporary and some long forgotten.

Questions surrounding the legal conception of insanity to be executed have received less than adequate attention in Oklahoma jurisprudence and scholarship. The dearth of legal analysis is understandable given the rarity of such cases reaching the courts. Since statehood, a formal judicial inquiry into the sanity of a condemned prisoner has been initiated only on three occasions: once in 1945, again in 1946, and most recently in 1994.

This uncommon area of law came to my attention when, in March 2001, the Oklahoma Supreme Court directed the Oklahoma Indigent Defense System to provide counsel for Sammy Van Woudenberg in district court proceedings to determine whether he had been restored to sanity. Sammy Van Woudenberg had been convicted of capital murder in Muskogee County for his participation in a 1983 jailhouse murder. The Oklahoma Court of Criminal Appeals later affirmed the conviction and sentence, and the federal courts subsequently denied habeas corpus relief. His social history included early diagnoses of mental retardation,

4. "Insanity to be executed" and "sanity to be executed" are phrases used throughout the article to refer to the determination of whether a convicted person awaiting execution is insane so that execution of that person would violate the Eighth Amendment.
8. In Van Woudenberg v. Taylor, No. 95,807 (Okla. Mar. 15, 2001), the Oklahoma Supreme Court held that the Indigent Defense System is charged by statute with providing representation to capital prisoners in proceedings to determine sanity to be executed.
inhalant abuse, sexual abuse, and a form of psychosis later determined to be schizophrenia of an undifferentiated type.10 After several years on Oklahoma's death row, in 1994, Van Wouden-berg was declared insane and therefore ineligible to be executed.11 He spent most of the next six years in the Special Care Unit (SCU) of the Oklahoma State Penitentiary, where he received psychiatric treatment and antipsychotic medications. Sammy Van Wouden-berg's mental illness was longstanding and chronic. Neither his time on death row nor the psychiatric treatment he received in prison did much to improve it.

In the fall of 2000, the superintendent of the Special Care Unit apparently informed the warden that Van Wouden-berg had completed the course of his treatment and should be returned to death row.12 The warden and the SCU superintendent jointly wrote a letter to Governor Frank Keating alleging that Van Wouden-berg had regained his reason and asking the Governor to set a date for execution.13 Because the law was unclear regarding who had the legal authority to set an execution date, the Oklahoma Attorney General also filed a request for an execution date with the Oklahoma Court of Criminal Appeals.14 Van Wouden-berg's court-appointed federal habeas counsel then petitioned the Oklahoma Court of Criminal Appeals for a stay of execution and sought to contest the allegation of restored sanity in the Pittsburg County District Court.15 After the Oklahoma Supreme Court resolved a legal uncertainty concerning which state agency bore the responsibility to provide legal representation, the Capital Post-Conviction Division of the Oklahoma Indigent Defense System was eventually assigned to the case.16

The Honorable Steven Taylor conducted proceedings in the Pittsburg County District Court to try the question of present sanity.17 Most of the research in this

---

by McGregor v. Gibson, 248 F.3d 946 (10th Cir. 2001) (holding that the correct standard in a procedural competency claim is whether a petitioner can "establish that a reasonable judge should have a bona fide doubt as to his competence at the time of trial," not whether the trial judge "ignored facts" which should have raised a bona fide doubt, as stated in Foor). The United States Supreme Court again denied certiorari on January 21, 2000. Van Wouden-berg v. Gibson, 531 U.S. 1161 (2001).

10. Foor, 211 F.3d at 566.
11. Id. at 568.
14. In general, execution dates in capital cases are set by order of the Oklahoma Court of Criminal Appeals. 22 OKLA. STAT. § 1001.1 (Supp. 1995). In the case of a prisoner who has been adjudicated insane, the Oklahoma Statutes provide that "[w]hen the defendant recovers his reason the superintendent of [the mental health care facility] must certify that fact to the Governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment." 22 OKLA. STAT. § 1008 (1991).
article was initially presented to the Pittsburg County District Court and the Oklahoma Court of Criminal Appeals on Mr. Van Woudenberg's behalf. This most recent phase of the case eventually ended in July 2001, without a contested trial, when the parties stipulated that Van Woudenberg remains in a state of insanity. However, in the proceedings leading up to the sanity trial, Oklahoma courts addressed some key issues that will have continuing significance in future cases. In this article, I submit the relevant legal analysis and a discussion of the state court proceedings to posterity in the hopes that judges and advocates in future cases might benefit from our search for answers to the important questions we encountered in this uncommon law.

II. Ford v. Wainwright: Ground Rules in Search of Ground?

Any discussion of constitutional criminal procedure and sanity (or in more modern parlance, competency) to be executed must begin with the Supreme Court's 1986 opinion in Ford v. Wainwright. Alvin Ford was convicted of murder and sentenced to death in Florida. Although there was no suggestion of mental incompetency at trial or sentencing, Ford subsequently showed signs of mental illness. He became obsessed with the activities of the Ku Klux Klan, writing letters to various people about his "Klan work" and claiming that he was the victim of a vast conspiracy designed to force him to commit suicide.

Ford also expressed delusions that the prison guards were killing people and hiding their bodies in the concrete bunks of his prison cell, that his female relatives were being sexually tortured in other parts of the prison, and that other members of his family were being held hostage. Ford's delusions developed to include a full-blown hostage crisis in which the perpetrators had taken hold of "senators, Senator Kennedy, and many other leaders." Ford wrote a letter to the Florida Attorney General claiming that he had ended the crisis and fired several prison officials. He eventually referred to himself as "Pope John Paul III" and claimed to have appointed nine new justices to the Florida Supreme Court. His condition finally deteriorated to a point where his sole communication with his attorneys consisted of an incoherent code in which he repeatedly used the word "one." Ford told his attorneys: "Hands one, face one. Mafia one. God one, father one, Pope one. Pope One. Leader One."

After two psychiatrists examined Ford at defense counsel's request, both told defense counsel that Ford was mentally incompetent. Ford's counsel then invoked the Florida statutory procedure for a determination of competency to be executed. The Governor appointed three psychiatrists to examine Ford. These examiners jointly interviewed Ford for a total of thirty minutes in the presence of no less than

18. Id. at 4.
20. Id. at 402.
21. Id.
22. Id.
23. Id. at 403.
eight other people, including Ford's counsel, the State's attorneys, and Florida correctional officials.

The psychiatrists filed separate reports with the Governor, to whom the ultimate decision on competency was delegated under Florida law. They variously described Ford as having "psychosis with paranoia," being "psychotic," and having a "severe adaptational disorder." However, all three of the examiners believed that Ford was competent to be executed. The Governor refused defense counsel's attempt to provide additional documentation supporting Ford's incompetency. Subsequently, without explanation of his findings, the Governor signed Ford's death warrant.  

Ford's attorneys unsuccessfully sought a de novo hearing on Ford's competency in Florida state courts. A habeas petition filed on Ford's behalf in federal district court requested an evidentiary hearing to determine the question of Ford's present sanity, but the district court denied the petition without a hearing. The court of appeals addressed the claim of incompetency on the merits and subsequently affirmed the district court's denial of the writ. The United States Supreme Court granted certiorari to determine "whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on petitioner's claim." 

Relying heavily on English common law precedents, five Justices of the Supreme Court held that the Eighth Amendment's prohibition against "cruel and unusual punishments" applied to the states through the Fourteenth Amendment's Due Process Clause and banned the states' use of capital punishment against prisoners who have gone insane. Reasoning that no state allowed execution of the insane and that the "humane limitation upon the State's ability to execute its sentences has as firm a hold . . . as it had centuries ago in England," the Court found no value in executing a person who cannot understand his punishment. Ultimately, the Court held:

Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

24. Id. at 404.
25. Id.
27. Ford, 477 U.S. at 404.
28. Id. at 404-05.
29. Id. at 405.
30. Id. at 409-10.
31. Id. at 409.
32. Id. at 409-10.
After recognizing the existence of a substantive Eighth Amendment protection against being executed while insane, a plurality of the Court went on to hold that a state must provide some form of adversarial, judicial forum in which the question of insanity can be determined.\textsuperscript{33} Necessarily, the plurality condemned Florida's wholly executive, ex parte sanity procedure as inadequate to protect a fundamental constitutional right, explaining that "any procedure that precludes the prisoner . . . from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate."\textsuperscript{34} To the Court, the most striking procedural defect in Florida's statutory scheme was the statute's "placement of the [execution] decision wholly within the executive branch."\textsuperscript{35} Because the Governor's subordinates oversaw the entire prosecution from arrest to sentencing, the Court reasoned that the Governor lacked the neutrality "necessary for reliability in the factfinding proceeding."\textsuperscript{36}

The Supreme Court concluded "that the State's procedures for determining sanity [were] inadequate to preclude federal redetermination of the constitutional issue,"\textsuperscript{37} reversed the judgment of the court of appeals, and remanded the case to the district court for an evidentiary hearing on Ford's claim of insanity.

Justice Powell, in his opinion concurring in part and concurring in the judgment, agreed that the execution of insane prisoners violates the Eighth Amendment proscription against "cruel and unusual punishments."\textsuperscript{38} His opinion also offered a legal definition of insanity to be executed, something entirely omitted by the other Justices.\textsuperscript{39} This definition is discussed in Part VII of this article. Finally, Justice Powell's opinion disagreed with the plurality's position that an adversarial judicial hearing on the question of sanity was the only way to adequately protect the Eighth Amendment right not to be executed while insane.\textsuperscript{40} Justice Powell stated that he would require much less than a formal trial. He would only require that an impartial board hear the prisoner's evidence and would grant the states "substantial leeway to determine what process best balances the various interests at stake."\textsuperscript{41}

\textsuperscript{33} \textit{Id.} at 418.
\textsuperscript{34} \textit{Id.} at 414. Explaining the procedure afforded the prisoner in this case, the Court stated: Petitioner received the statutory process. The Governor selected three psychiatrists, who together interviewed Ford for a total of 30 minutes, in the presence of eight other people, including Ford's counsel, the State's attorneys, and correctional officials. The Governor's order specifically directed that the attorneys should not participate in the examination in any adversarial manner. This order was consistent with the present Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane."
\textit{Id.} at 412-13 (quoting Goode v. Wainwright, 448 So. 2d 999, 1001 (Fla. 1984)).
\textsuperscript{35} \textit{Id.} at 416.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 418 (Powell, J., concurring).
\textsuperscript{39} \textit{Id.} at 422 (Powell, J., concurring).
\textsuperscript{40} \textit{Id.} at 426 (Powell, J., concurring).
\textsuperscript{41} \textit{Id.} at 427 (Powell, J., concurring). Justice Powell went on state, "As long as basic fairness is
Justices O'Connor and White also concurred in the Court's judgment to remand the case for further proceedings but used a very different rationale. Justice O'Connor's opinion, joined by Justice White, dissented from the Court's conclusion that a substantive prohibition against executing the insane can be found in the Eighth Amendment. However, because Justice O'Connor found that the Florida statutes created a protected "liberty interest," she agreed with the plurality that allegedly insane prisoners are entitled to procedural due process before a state can execute a prisoner who has raised the issue of sanity.

Because . . . the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's competency to be executed.

Dissenting, Justice Rehnquist and Chief Justice Burger denied that the Eighth Amendment included a substantive prohibition against executing the insane. They disputed the majority's historico-legal analysis of the common law prohibition, characterizing the prisoner's sanity to undergo execution as a question generally committed to the discretion of the executive branch rather than a matter of law. The dissenters saw no difference between the question presented by Ford and the claim previously rejected in the 1950 case of Solesbee v. Balkcom.

The dissenters quoted from Solesbee:

"Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the

---

42. Id. (O'Connor, J., concurring in part and dissenting in part).
43. Id.
44. Id. at 427-28 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor went on to state:

In my view, however, the only federal question presented in cases such as this is whether the State's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation. Once satisfied that the procedures were adequate, a federal court has no authority to second-guess a State's substantive competency determination.

45. Id. at 431 (Rehnquist, J., dissenting).
46. Id.
47. Id. at 432 (Rehnquist, J., dissenting) (citing Solesbee v. Balkcom, 339 U.S. 9 (1950)).
power to pardon. Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. 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."

Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity. The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate to protect the newly created but common-law based right. 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. I therefore dissent.44

Ford established two important constitutional principles: (1) execution of an insane prisoner is "cruel and unusual" punishment that directly violates the language of the Eighth Amendment; and (2) nonadversarial, state administrative procedures for determining the prisoner's sanity are inadequate to protect such a fundamental constitutional right.45 If the dissenters in Ford were correct, the Court's announcement of a ban on executions, which no State had sought to carry out, was a needless exercise in constitutional lawmakers. But the correctness of their view is doubtful for several reasons. The dissenters' characterization of sanity-determination procedures as traditionally executive fails to adequately explain the existence of common law decisions and commentaries that unsurprisingly regarded a plea of insanity to be executed as a judicial matter that, in cases of doubt, must be tried by a jury. Another section of this article will discuss another weakness of the Ford dissent — its reliance on Solesbee v. Balkcom. A careful examination of Supreme Court decisions in this area shows that Solesbee itself was an extreme aberration from the course of established law and was based on a serious misreading of the common law decisions; consequently, the dissenting Justices' faith in Solesbee as correct authority was misplaced.

In sum, Ford v. Wainwright authorized federal habeas corpus review of substantive claims of insanity as a matter of personal right under the Eighth Amendment. Ford also put the states on notice that the failure to adopt adequate procedures to protect this substantive constitutional right would result in relitigation of the factual question of insanity de novo in a federal evidentiary hearing.46 Rather than a needless injunction prohibiting a discarded practice, Ford is an important decision because it uniformly extends substantive and procedural

48. Id. at 432, 435 (Rehnquist, J., dissenting) (quoting Solesbee, 339 U.S. at 11-12).
49. Id. at 410.
50. Id. at 418.
protections to all capital prisoners who are, or may be, insane. If the dissenters' view had prevailed, federal court review of individual claims of insanity would be nonexistent. And according to the procedural due process view endorsed by concurring Justices O'Connor and White, federal court review of state sanity determinations would be limited to a very narrow requirement that the states observe fundamental fairness under the Fourteenth Amendment. A state's governor, although an elected, partisan official and technically its chief prosecutor, could make the sanity determination, so long as he agreed beforehand to consider the written submissions of the condemned prisoner. It is not overly pessimistic to think this type of process might uphold the "prohibition" against executing the insane by virtually ensuring that no prisoner could ever meet the decision maker's test for insanity.

Moreover, Justice O'Connor's opinion makes it abundantly clear that the availability of a procedural due process review in federal court would initially turn on whether the individual state had created a "liberty interest" in avoiding execution while insane. States seeking to avoid federal court intervention in their capital punishment schemes would be free to repeal longstanding statutory or constitutional prohibitions against such executions for the purpose of negating the preexisting "liberty interest" and thus prospectively limiting a prisoner's federal rights to a procedural due process review.

Compared to the judicial review mechanism sanctioned in Ford — which consisted of recognizing a substantive right and giving the states procedural incentives to adequately protect it — the course offered by Justice O'Connor might very well have rewarded the states' traditional reluctance to execute the insane with a perverse incentive to abandon it. It may seem doubtful that a great many states would consider such a break with historical legal and moral principles. But some death penalty states, grown weary of federal court involvement in capital cases, might predictably opt to curtail the availability of federal habeas review wherever they could. The end result would be a death penalty patchwork quilt in which some capital prisoners received judicial review of their substantive claims of insanity (in state court), others received a procedural due process review only (in federal court), and some received no judicial review at all. In this light, Ford's holding is justified by the need to uniformly guard against the episodic infliction of a punishment that has been so universally condemned.

51. Id. at 430 (O'Connor, J., concurring in part and dissenting in part).
52. The Oklahoma statutory procedure concerning alleged restoration of sanity, title 22, section 1008 of the Oklahoma Statutes, which is discussed in the following section, allows a wholly executive and nonadversarial procedure even more truncated than the procedure condemned in Ford. Without an opportunity for the prisoner to contest the certification of sanity or submit contrary evidence, such a procedure would clearly violate Ford. But as this article demonstrates, the Oklahoma Court of Criminal Appeals does not follow the literal language of the statute when, after the initial finding of insanity, the question of a prisoner's restoration of sanity arises.
III. The Framework for "A Hazardous Guess": Oklahoma's Sanity-Determination Statutes and Their Origin in the Common Law

"In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."53 Moreover,

[that it offends our historic heritage to kill a man who has become insane while awaiting sentence cannot be gainsaid. This limitation on the power of the State to take life has been part of our law for centuries, recognized during periods of English history when feelings were more barbarous and men recoiled less from brutal action than we like to think is true of our time.54

In 1911, the Oklahoma Legislature enacted a statutory framework for dealing with cases of capital prisoners who had gone insane while awaiting execution. The statutes governing sanity to be executed have not been amended since 1913. Enacted as sections 1005-1008 of title 22 of the Oklahoma Statutes, the law provides as follows:

§ 1005. Prisoner becoming insane—Question for jury trial

If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

§ 1006. Attendance by district attorney—Witnesses for inquisition

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

53. Solesbee v. Balkcom, 333 U.S. 9, 14 (Frankfurter, J., dissenting); see also Harvey Bluestone & Carl L. McGahee, Reaction to Extreme Stress: Impending Death by Execution, 129 AM. J. PSYCHIATRY 393 (1962); Ptolemy H. Taylor, Comment, Execution of the "Artificially Competent": Cruel and Unusual? 66 TUL. L. REV. 1045, 1049 (1992) ("One of the least common and possibly the most stressful of all human experiences is the anticipation of death at a specific moment and in a known manner.") (quoting Johnnie L. Gallemore & James H. Panton, Inmate Responses to Lengthy Death Row Confinement, 129 AM. J. PSYCHIATRY 167, 167 (1972)).

54. Solesbee, 333 U.S. at 16.
§ 1007. Verdict—Order of the court
The verdict of the jury must be entered upon the minutes and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane the order must direct that he be taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored.

1008. Execution of judgment—Proceedings when defendant found insane—Recovery of reason
If it is found that the defendant is sane the warden must proceed to execute the judgment as certified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order. When the defendant recovers his reason the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment.55

Oklahoma's statutory procedure for determining a capital prisoner's sanity to be executed undoubtedly arises from that solemn rule of the English common law, which is often quoted from the writings of the great jurist William Blackstone:

[I]f a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he 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 peradventure, 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.56

Centuries before Blackstone penned those memorable lines, English judges had recognized that execution of a prisoner who had gone mad was against common decency and common law. The doctrine was a matter of rote and respectful recitation by the middle of the eighteenth century, when England produced some of its most eloquent chroniclers and commentators on the rules and decisions of the common law.57

56. 4 WILLIAM BLACKSTONE, COMMENTARIES *24-*25.
57. Writing in 1736, Sir Matthew Hale stated this unquestioned principle of the common law:
If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy,
While these authorities seemed to focus on the prisoner’s sanity solely as a function of his ability to plead some matter against the judgment, the early writers also found justification for the rule in basic humanitarian principles. Even the King’s lawyers, in those monarchical times, stated this rule with eloquence. Sir John Hawles, Solicitor-General to the Courts of King William III, stated that "it is inconsistent with humanity to make Examples of them; it is inconsistent with Religion, as being against Christian charity, to send a great Offender quick, as it is stiled, into another World, when he is not of a capacity to fit himself for it."

When discussing King Henry VIII’s tyrannical attempts to abrogate the rule against such executions in cases of high treason, Lord Coke perceived that the common law rule was supported by its morality as well as its practical justifications: "[B]ut so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." Blackstone himself also offered an essentially humanitarian justification for the common law prohibition in the penetrating maxim: *furiosus furore solum punitur* ("a madman is punished by his madness alone").

Collectively, these writings on the ancient principles of the common law of England are the legal precursors to the insanity defense, incompetency to stand

but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment . . . And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.

MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (photo. reprint 1989) (1736). William Hawkins, in an earlier treatise also entitled *Pleas of the Crown*, gave this statement of the rule and its reasons: "And it seems agreed at this Day, That if one who has committed a capital Offence, become *Non Compos* before Conviction, he shall not be arraigned; and if after Conviction, that he shall not be executed . . . ." WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 2 (1716). John Hawles, writing in 1689 on the trial of Charles Bateman, stated:

For nothing is more certain in Law, than that a Person who falls Mad after a Crime supposed to be committed, shall not be tried for it; and if he fall Mad after Judgment, he shall not be executed, though I do not think the reason given for the Law in that point will maintain it, which is that the end of Punishment is the striking a Terror into others, but the Execution of a Mad-man had not that effect; which is not true, for the Terror to the living is equal, whether the Person be Mad or in his Senses . . . but the true reason of the Law, I think to be this, a Person of *non sane Memoria*, and a Lunatick during his Lunacy, is by an Act of God (for so it is called, though the means may be humane, be it violent, as hard imprisonment, Terror of death, or natural, as sickness) disabled to make his just defence, there may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the Persons, who shall take upon them his Defence . . . .


60. 4 BLACKSTONE, supra note 56, at *24.
trial, and competency (or in Oklahoma's statutes, "sanity") to be executed. And all of these concepts impel those who interpret and apply the law to make profound judgments about their fellow human beings: Is this person mentally fit to be put on trial? Is this person fit to be held judicially responsible for crime and even executed as punishment?

Dissenting in Solesbee v. Balkcom, Justice Felix Frankfurter noted the daunting uncertainty inherent in the judicial determination of sanity to be executed. He noted that the execution of an insane person requires an "ascertaining of what is called a fact, but which in the present state of the mental sciences is at best a hazardous guess however conscientious."

Writing for the Supreme Court thirty-six years later in Ford v. Wainwright, Justice Marshall quoted Frankfurter and reaffirmed the difficulty of ascertaining present sanity to be executed:

Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertaining of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations."

Assuming that the rule prohibiting execution of the insane is, at this point, an indisputable point of substantive constitutional law, this article turns to the issues surrounding the first controversial matter of procedure: To whom must the question of sanity to be executed be tried: a judge or a jury?

IV. Statutory and Constitutional Rights to Trial by Jury to Determine Sanity to Be Executed

A. Standing to Commence a Judicial Inquiry into Present Sanity and the Right to an "Initial" Jury Trial

According to title 22, section 1005 of the Oklahoma Statutes, the Oklahoma Legislature vested the exclusive authority in the warden of the Oklahoma State

61. 333 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).
62. Id. at 23 (Frankfurter, J., dissenting) (emphasis added).
Penitentiary to commence a judicial inquiry into a condemned prisoner's present sanity. The statute provides that if, after delivery to the warden, there is "reason to believe" that the prisoner has gone insane,

the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into.

The 1913 Oklahoma statute, which vests in the warden this exclusive power to commence a judicial inquiry into the prisoner's sanity, is of doubtful constitutionality after Ford v. Wainwright. Ford recognized Eighth and Fourteenth Amendment rights to petition the court for a judicial determination of present sanity; these rights are personal to the prisoner and may be invoked by the prisoner himself or perhaps by third parties acting on his behalf. The American Bar Association's Criminal Justice Mental Health Standards, adopted in 1987 in response to Ford, also endorsed this broader view of standing to commence a judicial inquiry of the condemned prisoner's sanity. Standard 7-5.7 provides in part:

(a) Whenever a correctional official, other state official, the prosecution, or counsel for the convict have reason to believe that a convict who has been sentenced to death may be currently incompetent, such person should petition the court for an order requiring an evaluation of the convict's current mental condition. If the court concludes that the information in the petition indicates reasonable cause to believe that the convict may be incompetent, it should order an evaluation.

(b) Any interested person who has reason to believe that the convict may be currently incompetent may petition the court for an order requiring an evaluation of the convicts current mental condition. If the court concludes that the information in the petition indicates reasonable cause to believe that the convict may be incompetent, it should order an evaluation, and, if the convict is not represented by counsel, appoint counsel for the convict.

---

65. Id.
66. This interpretation would be similar to the approach taken in more recent legislative enactments on the related subject of competency to stand trial. Title 22, section 1175.2(a) of the Oklahoma Statutes permits the judge, prosecutor, or defense attorney to petition the court for a determination of whether the defendant is competent to stand trial.
67. ABA Criminal Justice Mental Health Standards, Standard 7-5.7 (1987).
68. Id.
Because of the modern recognition of these broader notions of standing to request a sanity determination, a district court faced with a prisoner-initiated or third-party petition for a sanity determination is probably duty bound to consider whether the petition states facts giving the court a "reason to believe" that the prisoner is presently insane. Upon the filing of a petition seeking a sanity determination, the district court "must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry." 69 Regardless of whether the inquiry is commenced by the warden, the prisoner, defense counsel, or interested third parties, section 1005 undoubtedly requires that the initial judicial determination of present sanity be conducted as a jury trial.

B. The Complicated Question: A "Restoration of Sanity" Trial?

If the initial sanity trial conducted pursuant to section 1005 results in a verdict that the prisoner is presently insane, section 1007 requires that the prisoner be committed to the state mental hospital until his sanity is restored. 70 The authority to determine when the prisoner has regained his sanity is, in the first instance, vested exclusively in the superintendent of the state mental hospital, or more likely the superintendent of the Special Care Unit at the Oklahoma State Penitentiary. 71 Section 1008 provides that "[w]hen the defendant recovers his reason the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment." 72

If the procedure prescribed in section 1008 were the literal statement of the law, this article — like the life of a prisoner certified sane by the superintendent — would be short indeed. But the wholly executive, ex parte procedure set out in section 1008 clearly violates Ford v. Wainwright. It denies the capital prisoner any right to contest his present sanity in a full and fair judicial proceeding. This raises

---

70. Id. § 1007. In the only recent Oklahoma case, the literal language of the statute was not followed. After Sammy Van Woudenberg was found insane by the jury in 1994, he was transferred to the Special Care Unit inside the Oklahoma State Penitentiary, where he underwent psychiatric treatment and observation. This was done by the agreement of the parties and with the consent of the court; therefore, the question of whether state law requires that the prisoner actually be removed from the penitentiary to a state mental hospital has never been litigated in the appellate courts. Since the enactment of section 1005 in 1911, the availability of psychiatric care has changed considerably. In 1989, the Oklahoma Legislature directed the Department of Corrections to "develop and implement a special treatment program at the Joseph Harp Correctional Center for inmates with severe psychiatric problems, including inmates convicted of sex-related offenses and inmates that have prior convictions for sex-related offenses." 57 OKLA. STAT. § 509.4 (1991). In 1990, the Oklahoma Legislature further authorized the creation of the Special Care Unit at the Oklahoma State Penitentiary "for the care and treatment of inmates, classified as maximum security, who are or become in need of acute psychiatric care." Id. § 400. The modern availability of professional psychiatric care within the prison system arguably indicates that the earlier statute requiring transfer of insane prisoners to a state mental hospital has been repealed by implication.
72. Id.
the following question: If section 1008 does not set forth a constitutionally adequate procedure to be followed where the prisoner has allegedly regained his sanity, what procedure must be followed?

*Ford v. Wainwright* demands that states afford some reliable, judicial procedure for the determination of present sanity to be executed, but it says little about the type of procedures necessary to protect the prisoner's right not to be executed while insane. While the Supreme Court found the executive, ex parte inquiry used by Florida to be inadequate, it left the states to decide how to best implement an enforcement mechanism for the newly recognized constitutional right. In Oklahoma, the answer to this question of proper procedure is found in three distinct sources of law, including the Oklahoma Statutes, the Oklahoma Constitution, and the common law of England. Collectively, these authorities provide that, in cases of difficulty or doubt, the prisoner who has allegedly regained his reason may demand that the question of present sanity be decided in a trial by jury.

1. The State Constitutionalization of Common Law Trials by Jury

The framers of Oklahoma's Progressive-Era Constitution guaranteed a fundamental right to trial by jury. The language declaring this right as "inviolate" has persisted through numerous revisions and is contained in article 2, section 19 of the Oklahoma Constitution. What is this "inviolate" right and when may its protections be invoked? A wealth of authority holds that, in adopting this constitutional provision, the people vouchsafed the right to jury trial in all cases where it existed at the common law, except as specifically modified by the constitutional text itself.

For example, in *Keeter v. State,* the Oklahoma Supreme Court specifically held that the right to jury trial is guaranteed according to the common law:

The right to trial by jury, declared inviolate by section 19, art. 2, of the Constitution of Oklahoma, except as modified by the Constitution itself, has reference to the right as it existed in the territories at the time of the adoption of the Constitution, and the right to a jury trial therein referred to was not predicated upon the statutes existing in the

---

73. Compare Okla. Const. art. II, § 19 (amended 1991), with Okla. Const. art. II, § 19. In full, the current provision provides:

The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars ($1,500.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Thousand Five Hundred Dollars ($1,500.00). Provided, however, that the Legislature may provide for jury trial in cases involving lesser amounts. Juries for the trial of civil cases, involving more than Ten Thousand Dollars ($10,000.00), and felony criminal cases shall consist of twelve (12) persons. All other juries shall consist of six (6) persons. However, in all cases the parties may agree on a lesser number of jurors than provided herein.


74. 1921 Ok 197, 198 P. 866.
territories at that time, but the right as guaranteed under the federal
Constitution and according to the course of the common law.75

Similarly, in Pine v. State Industrial Commission,76 the Oklahoma Supreme Court
interpreted article 2, section 19 as follows: "[This] provision in our Bill of Rights
is uniformly interpreted to provide for the retention of right of trial by jury only
where the right of jury trial existed at common law."77 This preservation of
common law trials by jury was the usual practice of American states when they
adopted constitutional provisions. In Keeter, the Oklahoma Supreme Court noted
this fact in a reference to the authoritative work of Judge Cooley, who stated that
"[t]he [states'] constitutional provisions do not extend the right to a jury trial;
they only secure it in the cases in which it was a matter of right before. But in
doing this, they preserve the historical jury of twelve men with all its incidents,
unless a contrary purpose clearly appears."78 Thus, under the Oklahoma
Constitution and other state constitutions, the right to jury trial incorporates
the mandates of the common law.

2. Common Law Usage of Trial by Jury to Determine Sanity

With these principles in view, the determinative question becomes whether the
common law recognized the right to a jury trial to determine a prisoner's sanity to
be executed. Authoritative statements on this point abound. William Blackstone
clearly set forth the common law rule, stating:

[I]n the bloody reign of Henry the Eighth, a statute was made which
enacted, that if a person, being compos mentis (of sane mind), should
commit high treason, and after fall into madness, he might be tried in
his absence, and should suffer death, as if he were of perfect memory.
But this savage and inhuman law was repealed . . . . For, as observed
by Sir Edward Coke, "the execution of the offender is for example, ut
poena ad paucos metus ad omnes perveniat (that few may suffer, but
all may dread punishment): but so it is not when a madman is
executed; but should be a miserable spectacle, both against law, and of
extreme inhumanity and cruelty, and can be no example to others."
But if there be any doubt whether the party be compos or not, this
shall be tried by a jury.79

Following the common law, the earliest American decisions are in accord with
this fundamental principle. In the 1826 case of Bonds v. State,80 a prisoner was

75. Id. ¶ ___, 198 P. at 866.
76. 1924 OK 876, 229 P. 784, withdrawn on other grounds, 1925 OK 287, 235 P. 617.
77. Id. ¶ ___, 229 P. at 788.
78. Keeter, 1921 OK 197, ¶ ___, 198 P. at 868 (quoting THOMAS M. COOLEY, CONSTITUTIONAL
    LIMITATIONS 589-90 (7th ed. 1903)).
79. 4 BLACKSTONE, supra note 56, at *24-*25 (quoting EDWARD COKE, THE THIRD PART OF THE
    INSTITUTES OF THE LAWS OF ENGLAND 6 (1644)).
80. 8 Tenn. 142, 1 Mart. & Yer. 137 (Tenn. 1827).
convicted of murder and sentenced to death. Through his counsel, the prisoner pled his insanity as grounds to bar the execution. The trial judge examined the prisoner, found that no doubt was raised as to his sanity, found that no fact was proven to support the plea, overruled the plea, and refused to order the jury. On appeal, the Supreme Court of Tennessee upheld the trial court's ruling. However, the court made clear that in cases raising any doubt as to the prisoner's sanity, the court should impanel a jury to try the issue.\(^{81}\)

Justice Whyte, delivering the opinion of the Tennessee Supreme Court, reasoned that the jury trial was the mode of procedure prescribed at the common law and cited the following from Hawkins' *Pleas of the Crown*:

> Every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by inspection of the Court, by evidence given to the jury, who are charged to try the indictment or, by being collateral issue, the fact may be pleaded and replied to one term, and a venire awarded, returnable instanter in the nature of an inquest of office; and this method, in cases of importance, doubt, or difficulty, the Court will in prudence and discretion adopt.\(^{82}\)

The Supreme Court of Tennessee found no error in the trial court's denial of the motion for a jury trial of the issue, reasoning that the statement of counsel, without the pleading of facts to support the claimed insanity, did not warrant the impaneling of a jury to try the issue.\(^ {83}\) Standing alone, counsel's plea created no triable issue of fact and the jury was therefore properly denied.

In another early American case, *Commonwealth v. Buccieri*,\(^{84}\) the Supreme Court of Pennsylvania characterized the plea of insanity to be executed as "an appeal to the humanity of the court to postpone punishment until a recovery takes place, or as a merciful dispensation. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."\(^ {85}\) Thus, the court found that a jury trial was the proper forum for deciding the issue of

\(^{81}\) Specifically, the court held:

If a prisoner who has been tried and found guilty of murder allege by his counsel (as a reason why sentence of death should not be pronounced upon him) that he at that time is a lunatic, and the judge, upon his own inspection, is satisfied the plea is false, he may pronounce the sentence of the law without having a jury empanelled to ascertain the fact. But if the court have any doubt, or if be a case of difficulty, they ought to award a venire, returnable instanter, to have the fact ascertained.

\(^{82}\) *Id.* at 142, 1 Mart. & Yer. at 137.

\(^{83}\) *Id.* at 144, 1 Mart. & Yer. at 139 (citation omitted) (quoting *Hawkins*, supra note 57, at 3).

\(^{84}\) *Id.* at 144-45, 1 Mart. & Yer. at 139.

\(^{85}\) *Id.* at 228 (Pa. 1893).

*Id.* at 235 (quoting Laros v. *Commonwealth*, 84 Pa. 200, 211 (1877)). *Buccieri* was cited by the Oklahoma Court of Criminal Appeals in *Denton v. State*, 1935 OK CR 235, 53 P.2d 1136, 1140, for a proposition demonstrated later in this section: If a trial judge has a measure of "discretion" to deny a jury trial of the question of insanity — as some cases have mentioned and modern (post-*Ford*) cases invariably claim — that discretion is limited to those cases where the prisoner's plea fails to raise a legitimate factual doubt of present insanity.
sanity to be executed. However, the court affirmed the trial court's denial of a jury to try the issue of the condemned prisoner's present sanity because nothing had been pled to properly raise a doubt.86

In State v. Vann,87 a capital prisoner was brought before the court for judgment. By his counsel, the prisoner entered the plea of present insanity and filed affidavits in support of the plea.88 The trial court held that he was entitled to a jury to try the sanity issue and passed the case to the next term for trial.89 The State brought an appeal.90 The Supreme Court of North Carolina affirmed the trial court's ruling, stating that "judgment must be suspended, if the prisoner has become insane . . . until he recovers his reason, and that an issue to be submitted to the jury is the proper mode of ascertaining the truth of his allegation."91 The court further observed that the "same rule is laid down by the elementary writers and may be found in adjudged cases."92

The Supreme Court of Colorado, in Bulger v. People,93 followed the same rule. In that case, the prisoner had pled insanity against his execution, and a jury had found him sane. The court held that the prisoner could not appeal the jury's sanity determination and noted that the trial court had followed the proper procedure by trying the matter to a jury:

It will be observed that both the common law and the statute are specific that, when a person becomes insane after conviction of a capital offense, he shall not be executed until his recovery from the lunacy, and under the statute, when the fact of insanity exists, a jury shall be empaneled to try the question.94

These cases clearly establish that, at common law, the determination of sanity to be executed was a question for the jury.

3. State Constitutional Preservation of Trial by Jury on the Related Questions of Competency to Stand Trial or Be Sentenced

These early cases also establish that, like most rights, the common law right to a jury trial on the issue of sanity to be executed was not absolute; rather, it was

86. In so holding, the court stated:
We must assume that, in overruling this plea, the just and humane judge of the oyer and terminer found nothing to raise a doubt in his mind as to the sanity of the prisoner when he was called for sentence. If there was nothing to raise such a doubt, it was his imperative duty to disregard a plea which could only serve to delay the judgment which justice and the law demanded should follow the crime with due promptness.

Buccieri, 26 A. at 235-36.
87. 84 N.C. 722 (1881).
88. Id. at 722.
89. Id.
90. Id.
91. Id. at 723 (citing HALE, supra note 57, at 34; 4 BLACKSTONE, supra note 56, at *25).
92. Id. at 724.
93. 156 P. 800 (Colo. 1916).
94. Id. at 802.
sensibly premised upon a judicial finding that the facts created reason to believe that the defendant was then insane. This requirement is no different than the threshold showing generally required to trigger the right to jury trial on the issue of competency to stand trial under various state constitutions and statutes. The following cases show that the right to jury trial on the issue of sanity in the contexts of (1) competency to stand trial and (2) competency to be sentenced was preserved with state constitutional language almost identical to that found in article 2, section 19 of the Oklahoma Constitution.

In *Ex parte LaFlore*, the Alabama Supreme Court held that the common law recognized the right to trial by jury to determine a person's sanity (competency) at the time of trial. LaFlore was charged with theft and entered alternative pleas of not guilty and not guilty by reason of insanity. She later requested a hearing to determine her mental competency to stand trial. A licensed psychiatrist and a licensed psychologist both testified that petitioner was unable to cooperate with counsel and assist in the preparation of her defense.

The trial judge initially found the petitioner competent to stand trial. Upon reconsideration, the judge ordered an independent examination of the petitioner and scheduled a jury trial to resolve the issue. The State obtained from the Alabama Court of Criminal Appeals a writ of mandamus against the district court to prohibit the jury trial proceeding. The Supreme Court of Alabama reversed, finding that the right to a jury trial was preserved by the Alabama Constitution. The Court reasoned:

Article I, § 11, Ala. Const. 1901, provides "that the right of trial by jury shall remain inviolate." These right-to-jury-trial provisions have been in all of Alabama's Constitutions, beginning with the constitution of 1819 and including those of 1861, 1865, 1868, and 1875.

Section 11 has been interpreted to provide for the right of jury trial in those classes of cases in which that right existed at common law ....

In *Edgerson v. State*, the Court of Criminal Appeals recognized that accused persons were entitled to a jury trial at common law on the issue of competency to stand trial.

After quoting from Blackstone, the Alabama Supreme Court went on to state that the determination of competence to stand trial was, at common law, a jury question. In addition to citing Blackstone, the court relied upon an act passed by Parliament declaring the issue to be one for the jury. Ultimately, the court held:

95. 445 So. 2d 932 (Ala. 1983).
96. Id. at 933.
97. Id.
98. Id.
99. Id. at 935.
100. Id. at 934 (citation omitted).
101. Id. at 934-35.
102. Id. The court explained the application of this statute in relation to an earlier case:
Thus, both by the common law in Blackstone's time and through the later Act of Parliament, the question of whether an accused was competent to stand trial was for the jury. This right is preserved to the citizens of Alabama by § 11 of the Constitution of 1901.  

We therefore conclude that the petitioner is constitutionally entitled to a jury trial on the issue of her mental competency to stand trial. The statutes in Article 2, Chapter 16, Title 15, Code 1975, should be considered modified to the extent that they are in conflict with the constitutional right to trial by jury.  

The right to a jury trial at common law, which arose in any case of doubt or difficulty as to the question of sanity, is not only guaranteed by article 2, section 19 of the Oklahoma Constitution, it has also become part of the fabric of Oklahoma's statutory law. A comparison of statutes on the related subjects of alleged restoration of competency to stand trial and alleged restoration of sanity at the time of sentencing makes this guarantee even more certain.  
The Oklahoma Statutes require that if the trial court makes an initial finding of doubt as to the accused's competency to stand trial, the issue must be tried by a jury if demanded by the accused. Cases from the territorial period and early Oklahoma statehood cast no doubt on this basic guarantee. In _Maas v. Phillips_, the Supreme Court of the Oklahoma Territory held that "[i]f the court entertains an honest doubt as to the sanity of a defendant when his case is called for trial . . . it must defer the trial or sentence until after the question of the defendant's sanity has been passed upon by a jury."  

That statute was relied on in _Rex v. Little_. Little was indicted for assault with intent to murder, but the jury found him insane both at the time of the commission of the offense and at the time of trial. The trial judge ordered him kept in custody under the section of the Criminal Lunacy Act pertaining to insanity at the time of trial, the section pertaining to insanity at the time of commission of the offense not being applicable to the case. This action was found to be correct.  
In the report of _Rex v. Little_, supra, there appears the following summary of the statute:  
"By 39 & 40 Geo. III c. 94 s. 1, it is enacted, That in case any person charged with treason, murder, or felony, proving to be insane at the time of the commission of such offence, be acquitted, the jury are to declare whether he was acquitted by them on account of insanity; and if they so find the Court shall order him to be kept in custody till his Majesty's pleasure be known, & c. By s. 2 it is enacted, That if, upon the trial of any person indicted for any offence, such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the Court before whom any person shall be brought to trial, as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure be known."  

_id._ at 935 (citations omitted).  
103. _Id._ at 935.  
104. 22 OKLA. STAT. §§ 1175.3(B), 1175.4(B) (Supp. 2000).  
105. 1900 OK 68, 61 P. 1057.  
106. _Id._ § 4, 61 P. at 1058.
Similarly, in *Marshall v. Territory*, 107 the Oklahoma Court of Criminal Appeals held the failure to impanel a jury, in the face of credible evidence to raise a doubt of competency to stand trial, was reversible error. Significantly, the court emphasized that under Oklahoma's statute, the court did not have the discretion to decide whether or not to call a jury. 108 As stated by the court, "The only contingency is, Does a doubt arise? This means, has information come to the court through a proper channel . . . that the defendant is insane, or if from personal inspection or observation of the court . . . then the law requires that a jury should be impaneled." 109

Since this article is concerned in part with procedure in cases of alleged restoration of sanity to be executed, the statutes governing the similar situation of restoration of competency to stand trial, or the even more closely related issue of restoration of sanity to be sentenced, are illuminating. In cases of alleged restoration of competency to stand trial, the controlling statute requires that "[i]f the agency or institution reports that the person appears to have achieved competency or is no longer incompetent . . . the court shall hold another competency hearing to determine if the person has achieved competency." 110 The reference to another competency hearing contemplates the same type of post-examination competency hearing which is initially provided, which includes the right to trial by jury if demanded.

The statutes relating to insanity at the time of sentencing have the same effect. In cases where an allegation of present insanity is made prior to the court's pronouncement of judgment, "if a doubt arise[s] as to the sanity of the defendant, the court must order a jury to be impaneled from the jurors summoned and returned for the term . . . to inquire into the fact." 111 The statute further provides that "[i]f the jury finds the defendant presently insane, the trial or judgment must be suspended until he becomes sane." 112

From the general language defining the defendant's right to raise the issue whenever he might appear for pronouncement of judgment, it logically follows that if a legitimate "doubt" as to sanity is shown, the trial court has no discretion but to impanel the jury to determine the fact. This reading in no way allows the feigning defendant to repeatedly escape justice, as some argue. If the defendant is adjudged by the jury to be competent to stand trial (or sane to be sentenced, as the case may be), the criminal proceedings continue and judgment is pronounced. Conversely, if he is again adjudged insane, judgment would naturally be suspended and a new commitment order entered.

Now contrast these authorities with the literal language of title 22, section 1008 of the Oklahoma Statutes, governing sanity to be executed. This statute allows the Governor to issue a death warrant (and the warden to execute it) based solely on

107. 1909 OK CR 43, 101 P. 139.
108. Id. ¶ ____, 101 P. at 143.
109. Id.
110. 22 OKLA. STAT. § 1175.6(A)(3) (Supp. 2000).
111. Id. § 1162.
112. Id. § 1167.
the mental-hospital superintendent's unsworn allegation that the prisoner has regained his sanity and is therefore fit for execution.113 As already mentioned, Ford v. Wainwright plainly held that a prisoner has an Eighth Amendment procedural right to contest this allegation in some judicial forum prior to his execution. A literal reading of the language in section 1008 would render the statute unconstitutional under Ford.

Ford does guarantee a judicial hearing, but this only settles half the question of how to follow the procedure for restoration of sanity under section 1008. Because article 2, section 19 of Oklahoma's Constitution preserved the "inviolate" right to jury trial as it existed at common law (with exceptions already noted), the prisoner has a further right under the state's fundamental law to demand that the question of his alleged restoration of sanity be tried before a jury. The proper interpretation of the statutory procedure set forth at sections 1005-1008 is one that preserves and gives effect to this constitutional right rather than one that judicially construes it into oblivion. As the Oklahoma Supreme Court stated in Gilbert Central Corp. v. State,114 "Where there are two possible interpretations in the construction of a statute, one of which would render the statute unconstitutional, the Court should adopt the construction which upholds the statute, unless the repugnancy to the constitution is shown beyond a reasonable doubt."115

The common law required that if the question of a condemned prisoner's sanity presented a case of doubt or difficulty, the prisoner had a right to submit the question to a jury. From this, it appears that a condemned prisoner might be required to show, at most, a doubt as to whether he has regained sanity before he is entitled to a jury trial.

C. The Last, Unpublished Word: Van Woudenberg v. District Court

After the warden and the SCU superintendent alleged that Sammy Van Woudenberg had regained his sanity, the trial court held an initial hearing. The trial court found that, under Ford v. Wainwright, Van Woudenberg had the right to appointed counsel and the right to contest the warden's allegation of regained sanity in a non-jury trial.116 In a related ruling denying the State's request for an execution date, the Oklahoma Court of Criminal Appeals also prescribed a non-jury trial of the issue. The court held that Van Woudenberg must affirmatively request the hearing within a specified time in order to contest the allegation.117 In the absence of such a request, the court would lift a stay of execution and the Governor would be allowed to set an execution date.118 The court further held that if Van Woudenberg's counsel filed a request for hearing, the trial court must conduct the hearing

113. Id. § 1008.
114. 1986 OK 6, 716 P.2d 654.
115. Id. § 7, 716 P.2d at 658.
118. Id. at 8.
within a specified time and enter findings of fact and conclusions of law.119 The Oklahoma Court of Criminal Appeals would then review the findings of the trial court; if it determined the prisoner was sane, it would set the execution date.120

The Oklahoma Court of Criminal Appeals entered these preliminary orders before we121 had the opportunity to fully research the issue of whether Van Woudenberg had the right to a jury trial. In a later pretrial motion hearing, we attempted to invoke this right as it existed at common law.122 By attaching to our demand for trial the affidavit of a competent psychiatrist stating his opinion (based on a recent evaluation) that Sammy Van Woudenberg was presently insane,123 we satisfied the common law requirement of supporting the plea of insanity with an affidavit from a credible source. We thereby created a doubt of present sanity as a matter of law and were entitled to a jury trial on the issue.124

On the strength of the foregoing authorities, we requested that the Pittsburg County District Court submit the question of restoration of sanity (which, like the initial question, is a question of present sanity) to a jury.125 The trial court denied our motion. We then appealed that ruling on a petition for extraordinary writ of prohibition or writ of mandamus, which the Oklahoma Court of Criminal Appeals denied in an unpublished order.126 While the order is not binding precedent in Oklahoma, it is relevant for the purposes of this article.

In its analysis of Van Woudenberg's request for a jury trial, the Oklahoma Court of Criminal Appeals mischaracterized the question as one arising purely by the force of common law. Proceeding from this faulty premise, the court reasoned that the statutory procedure abrogated the common law right to jury trial. The court stated that "the issue of a capital defendant's competency to be executed is not a matter of common law, but has been codified in 22 O.S. 1991, § 1005 et seq."127 The court then noted that, in 1999, officials at the penitentiary found that Van Woudenberg had been restored to competency.128 Under these circumstances, according to the court, the following procedural provisions of title 22, section 1008 of the Oklahoma Statutes govern: "When the defendant recovers his reason the

119. Id. at 7.
120. Id.
121. "We," throughout the remainder of the article, refers to Van Woudenberg's appellate counsel.
124. Cf. Barr v. State, 359 So. 2d 334 (Miss. 1978) (holding that an affidavit of a competent expert expressing an opinion that a prisoner is insane is sufficient to raise doubt and require a jury trial of the issue); Berwick v. State, 1951 OK CR ———, 229 P.2d 604 (holding that positive affidavits alleging present insanity are sufficient to raise doubt and require the impaneling of a jury).
127. Id. at 5.
128. Id. at 6.
superintendent of such hospital must certify that fact to the Governor, who must 
thereupon issue to the warden his warrant, appointing a day for the execution of 
the judgment." The court found that prison officials properly followed the 
statutory mandates and that the district court properly ruled that Van Woudenberg 
was merely "entitled to a non-jury hearing on the issue of his competency to be 
executed." The court reasoned that, based on the statutory provisions, Oklahoma 
does not require "a second jury trial after the defendant has recovered his 
reason."130

We argued that interpreting the statutes in this manner violated the prisoner's 
state constitutional right to a jury trial. On this issue, the court ruled that because 
the issue of competency to be executed arises after the trial, the relevant state 
constitutional rights to a jury trial did not attach:

This Court has held that in criminal cases, the right to a jury trial set 
forth in Article 2, § 19 of the Oklahoma Constitution "relates only to 
the determination of guilt." Exceptions to this rule are specifically set 
forth in the state statutes. These exceptions are limited and include 22 
O.S. 1991, § 1175.1 et. seq., Determination of Competency, which 
addresses the determination of a defendant's competency to participate 
in the criminal proceedings against him from the time of arrest through 
trial. The right to a jury trial on the issue of competency to stand trial 
is specifically set forth in 22 O.S. 1991 §§ 1175.2(B)(2) and 1175.4 
The issue in the present case, competency to be executed, is distin-
guishable as it arises post-trial, therefore the provisions of § 1175.1 et. 
seq. are not applicable.131

If only the issue were as simple as the court portrayed it. The argument for a 
right to jury trial would indeed be difficult to sustain if it were weakly premised 
on the claim that a court is bound to choose between the requirements of the 
common law and the plain language of the statute. In such cases, as the court 
deftly pointed out, the statute itself controls. But to reach its result here, the court 
made a further stretch (citing nothing but its own recent case law) to dispense with 
the claim that article 2, section 19 of the Oklahoma Constitution also requires a 
jury trial to settle the question of present sanity.132 The court did so with the 
retort "that in criminal cases, the right to a jury trial set forth in Article 2, § 19 of 
the Oklahoma Constitution 'relates only to the determination of guilt.'"133 The 
court cited Romano v. State134 for this dubious proposition. In Romano, however, 
the court rejected a very different claim. It rejected the claim that the right to jury

129. Id.
130. Id. at 7.
131. Id. at 7 (citations omitted).
132. See id. at 5.
133. Id. at 7.
134. 1995 OK CR 74, 909 P.2d 92.
trial found in article 2, section 19 was violated by requiring a jury to express its finding of aggravating circumstances in a capital case on a verdict form.\textsuperscript{135}

Based on this unusual case, the court in \textit{Van Woudenberg} reasoned that a jury trial is only constitutionally required in criminal cases for the "determination of guilt."\textsuperscript{136} Because the criminal proceeding at issue was for the determination of something other than guilt, the court reasoned that there was no constitutional right to jury trial in this case.\textsuperscript{137} The court's line of reasoning is flawed on a number of levels. The court failed to explain how its sweeping claim about the limited scope of article 2, section 19 can be squared with the long-established doctrine that article 2, section 19 extended constitutional protection for the jury trial right \textit{as it existed at common law}, with the \textit{sole exception} being those express limitations found in the text of the constitutional provision itself. The court simply disregarded the wealth of authority interpreting article 2, section 19 of the Oklahoma Constitution, and identical provisions in other state constitutions, as preserving the right to jury trial as it existed at common law.\textsuperscript{138} Instead, the court cast the argument aside with the inapposite citation to its own statement in \textit{Romano}, a recent case raising a completely different claim.

The jury trial on the question of sanity to be executed was undeniably a right (limited by the "doubt" threshold, of course) at common law. Whether it was an "initial" inquiry into present sanity or an inquiry made upon a claim of "restoration" of sanity is of no consequence at all, except to those who are bothered by its inexpediency. The question to be determined was present sanity to be executed. Upon a showing of doubt, this matter clearly must be tried by jury if the prisoner demands it. A legislative enactment purporting to alter the constitutionally prescribed mode of procedure, such as section 1008, simply abridges the constitutional rights guaranteed by article 2, section 19 of the Oklahoma Constitution. The court could have applied the statute to avoid its constitutional infirmity by simply acknowledging that if any dispute arose as to the alleged restoration of sanity, upon a proper showing of doubt, the matter must be tried to a jury according to the traditional reading of article 2, section 19. Instead, the court dispensed with this traditional reading of the constitutional text without even raising a serious argument against it.

\textbf{V. A Cruel and Unusual Twist: How Ford v. Wainwright Dishonored One Common Law Tradition While It Constitutionalized Another}

The common law authorities clearly prove that the capital prisoner's right to a trial by jury to determine present sanity to be executed was an established feature of "due process of law" at the time of the adoption of the Fifth, Eighth, and Fourteenth Amendments. But in a series of poorly decided Supreme Court cases,

\begin{flushright}
\textsuperscript{135} Id. ¶ 105, 909 P.2d at 125.
\textsuperscript{136} \textit{Van Woudenberg}, No. PR-2001-636, at 7 (order denying petition for writ of prohibition and/or mandamus).
\textsuperscript{137} Id.
\textsuperscript{138} See supra Part IV.B.1; see also Keeter v. State, 1921 OK 197, 198 P. 866.
\end{flushright}
the Court entrusted the availability of this ancient right to the uncharitable fortune of judicial "discretion" (a nether realm from which few fundamental rights are ever heard again). The right became so little recognized by the late twentieth century that it was virtually dispensed with altogether by the Supreme Court's opinion in *Ford v. Wainwright.* An examination of these Supreme Court cases reveals how the right was ignored and why the decisions diminishing the right are not accurate representations of the common law or the meaning of "due process" of law. Because all important constitutional questions always remain open, I submit the following discussion of those decisions to trace the unfortunate path by which an important right was brought to the ignominious ebb where it can be found today.

A. The Ignoble Error: Nobles v. Georgia and Corruption of the Common Law

In *Nobles v. Georgia,* the Supreme Court held, for the first time, that a state trial court's refusal to impanel a jury to try a capital prisoner's sanity was not a denial of due process of law under the Fourteenth Amendment. While *Nobles* has since been cited as rejecting any right to trial by jury, neither the holding itself nor the cases relied upon support this broad reading. Instead, *Nobles* and the authorities it cited are very limited and can be properly read only to recognize an obvious rule: that an unsupported plea of insanity, which fails to raise any doubt at the time it is entered, does not trigger an absolute right to a trial by jury either at common law or under the Fourteenth Amendment's Due Process Clause.

Elizabeth Nobles was found guilty of murder and sentenced to death. The trial court apparently suspended the sentence for a period of time, and the case later returned to the court for the pronouncement of the sentence. On the date of the appearance for resentencing, a petition was presented to the trial court praying that the sentence not be pronounced and alleging that Nobles "is now insane." It was further alleged on Nobles' behalf that her execution while insane would violate the due process of law guaranteed by the Fourteenth Amendment. An additional plea was entered asserting that due process of law required the impaneling of a jury to try the question.

139. 477 U.S. 399 (1986).
140. 168 U.S. 398 (1897).
141. *Id.* at 409.
142. *Id.* at 399.
143. *Id.*
144. *Id.*
145. The plea read:

Petitioner says that it is essential to due process of law within the meaning of the above requirement that a jury be empanelled on the issue now tendered by this petition, and that trial take place before a judge of the Superior Court of the State of Georgia, according to the due and regular form of proceedings in our courts. Whenever an issue of fact is made in a Superior Court in the State of Georgia the trial of the questions thereby raised is a function of the Superior Court of the county having jurisdiction, and that the trial of the question raised by this petition is a function of the Superior Court of Twiggs County, in which said court the said Mrs. Nobles was convicted of murder.
The trial court denied the petition, and the Supreme Court of Georgia affirmed. The case came to the United States Supreme Court on writ of error. The Supreme Court stated the relevant issue as follows:

[T]he only question which we are called upon to determine is whether, after a regular conviction and sentence, a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and quasi judicial process is created for the purpose of investigating the suggestion.

Stating the question in this way, the Supreme Court quickly assumed "its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment." The Court reasoned that if a suggestion of insanity after sentencing created an absolute right to a jury trial of the issue, the convict would have the power to make "suggestion after suggestion of insanity, to be followed by trial upon trial."

The Court then went on to consider Blackstone and other common law authorities, referenced throughout this article, asserting that the common law imposed an imperative duty to try the insanity of a convict by judge and jury. Considering these authorities, the Court agreed that an insane person could not suffer punishment at common law. However, the Court distinguished the question of what method should determine the existence of sanity after a conviction and sentence have been imposed.

The Supreme Court concluded that a jury was not required to try the issue upon a mere suggestion of insanity, where no factual showing was offered in support of the plea:

---

*Id.* at 400.
146. *Id.* at 401.
147. *Id.* at 405.
148. *Id.*
149. *Id.* at 405-06.
150. *Id.* at 406. The text specifically referenced by the Court reads as follows:

Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, 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.

*Id.* (quoting 4 BLACKSTONE, *supra* note 56, at *24-*25)
151. *Id.*
152. *Id.*
In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best.\(^{153}\)

For this proposition, the Supreme Court cited two cases discussed at length earlier in this article. They are mentioned again here to demonstrate that the Nobles case was subsequently read in a way that was inconsistent with its actual holding. The Supreme Court first cited Laros v. Commonwealth, in which a suggestion of insanity was made after the verdict.\(^{154}\) The Court quoted portions of Laros that reasoned that "'no right of trial by jury [was] involved in the question.'\(^{155}\) Because a jury had found a verdict against the plea of insanity when used as a defense to conviction, the Laros court reasoned that "'subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place . . . ."\(^{156}\) The Supreme Court further cited Laros's reasoning that a rule allowing repeated pleas of insanity would be "'inconsistent with the due administration of justice.'\(^{157}\)

The Supreme Court also relied on Bonds v. State, in which a convicted prisoner claiming lunacy requested a jury to try the issue of his sanity.\(^{158}\) In Bonds, the court "denied him the privilege of a jury to try the question of his sanity or insanity, and passed upon the accused the sentence of death."\(^{159}\) Denying this privilege, the court reasoned that a jury trial is not an absolute right and that "'inspection by the court is one of the legal modes of trying the fact of insanity [and nothing showed] that the discretion of the court, in adopting the mode pursued, was erroneously exercised.'\(^{160}\)

The Supreme Court concluded its discussion with a narrow holding that Nobles' unsupported plea of insanity did not give rise to any absolute right at common law to have the question of present sanity submitted to the jury.\(^{161}\) Specifically, the Court reasoned:

It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be

\[^{153}\text{Id. at 407.}\]
\[^{154}\text{Id. (citing Laros v. Commonwealth, 84 Pa. 200, 210 (1877)).}\]
\[^{155}\text{Id. at 407 (quoting Laros, 84 Pa. at 210).}\]
\[^{156}\text{Id. (quoting Laros, 84 Pa. at 210).}\]
\[^{157}\text{Id. at 407-08 (quoting Laros, 84 Pa. at 210).}\]
\[^{158}\text{Id. at 408 (citing Bonds v. State, 8 Tenn. 142, 1 Mart. & Yer. 137 (Tenn. 1827)).}\]
\[^{159}\text{Id. (citing Bonds, 8 Tenn. at 143-44, 1 Mart. & Yer. at 138).}\]
\[^{160}\text{Id. at 409 (quoting Bonds, 8 Tenn. at 144, 1 Mart. & Yer. at 139).}\]
\[^{161}\text{Id.}\]
determined was purely a matter of legislative regulation. It was, therefore a subject within the control of the State of Georgia. Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the Fourteenth Amendment, a State is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best. 162

B. The Limits of Common Law Discretion

A careful examination of both Laros and Bonds, the cases cited in Nobles, does not establish that the common law right to trial by jury was nonexistent. Instead, these two cases establish that the right was not absolute. In fact, both cases recognized that judicial discretion to deny a jury on the issue of sanity had well-established limits. 163 Because the cases were fact specific to the plea that was entered and the manner in which it was put in, both cases held only that the denial of the jury trial was not error on the record presented. 164

In Laros, the court noted that the plea was put in by the prisoner at the conclusion of his trial, at which his defense was insanity. 165 It appears from the opinion that this was in the same term of court, as little as a few days after the date of conviction. 166 Moreover, the opinion indicates that nothing was presented in the way of new or different factual information that had not already been presented to the trial jury. 167 The trial court interrogated the prisoner to its satisfaction and clearly found that no doubt had been raised by the plea. 168 These were the circumstances in which the jury was properly denied. But the Supreme Court of Pennsylvania recognized that "[i]f a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury." 169

Bonds v. State contains a very similar statement, which also spells out the limits upon common law judges' discretion in denying a jury trial in this type of case. In denying the jury trial in this instance, the Bonds court stated:

But the Court, upon inspection of the prisoner, and upon consideration of the case, because nothing was shown to render it probable that

162.  Id.
163.  Laros v. Commonwealth, 84 Pa. 200, 211 (1877); Bonds, 8 Tenn. at 144, 1 Mart. & Yer. at 138.
164.  Laros, 84 Pa. at 211; Bonds, 8 Tenn. at 144-45, 1 Mart. & Yer. at 139.
165.  Laros, 84 Pa. at 201.
166.  Id. at 204-05.
167.  Id. at 205.
168.  Id.
169.  Id. at 211 (emphasis added).
defendant was a lunatic, or to make that matter doubtful, refused to allow the prisoner his plea aforesaid, and denied him the privilege of a jury at this time, to the question of his sanity or insanity, and proceeded to pronounce the sentence of death accordingly. 170

Thus, in Bonds, the plea failed to raise a factual doubt, and it is therefore understandable that the Supreme Court of Tennessee found no error in the trial court's ruling. The Tennessee Supreme Court quoted approvingly from William Hawkins' Pleas of the Crown and recognized the judge's duty to impanel a jury "in cases of importance, doubt, or difficulty." 171 And one should also recall the case of Commonwealth v. Buccieri, in which the Supreme Court of Pennsylvania eloquently echoed this same limitation on the tyranny of discretion: "If there was nothing to raise such a doubt, it was his imperative duty to disregard a plea which could only serve to delay the judgment which justice and the law demanded should follow the crime with due promptness." 172

Rather than disparage the right to jury trial, as many others would later do in their names, the judges deciding Laros, Bonds, and Buccieri knew the limits of common law discretion and assumed that future judges would observe these limitations. 173 Even in the 1935 case of Denton v. State, 174 the Oklahoma Court of Criminal Appeals found error in the trial court's denial of a jury to try the defendant's present sanity to be sentenced and held judicial discretion in check by following the common law:

When the motion is made and supported by such a showing, then a legal doubt of defendant's sanity arises, and it is the duty of the trial court to impanel a jury and to try the issue. While a trial judge may personally have no doubt of defendant's sanity, yet if the motion and showing in support thereof is substantially as outlined, it is sufficient legally to raise a doubt. In such a case, a refusal to submit the issue to the jury is an abuse of discretion . . . . While the trial court has a discretion, it is not arbitrary or absolute. 175

But in later cases, when appellate judges faced a choice between the expense of error and the expanse of discretion, discretion proved the more tempting option.

C. Discretion Defeats Itself — The First Time As Tragedy, the Second Time As Farce

In Nobles, the Supreme Court issued a narrow decision and applied its reasoning to the precise question presented. Unfortunately, the discussion of the

171. Id. at 144, 1 Mart. & Yer. at 139 (quoting HAWKINS, supra note 57, at 3).
173. Id.
175. Id. ___, 53 P.2d at 1140 (emphasis added).
question in that case condemned it to a half century of judicial inattention and indifference. In fact, by the time the Supreme Court decided Solesbee v. Balkcom,\textsuperscript{176} the Court was prepared to uphold a legislative enactment that removed the legal question of sanity to be executed from the judicial forum altogether. The Supreme Court willingly accepted this legislative ouster by painting a truly aberrant portrait of the practice at common law, likening the post-conviction sanity determination to the power of the executive clemency.\textsuperscript{177}

Another thirty-six years would pass before the Supreme Court reclaimed the legal question of present sanity as a proper subject of judicial review in Ford v. Wainwright.\textsuperscript{178} The Court held that the Eighth Amendment incorporated the common law rule prohibiting execution of the insane and that some judicial means of enforcing this right must be recognized. But in the careless hands of these latter-day jurists, the common law's limited discretion to deny a jury trial of this issue was supplanted by the assertion that no such right could be found at common law. The Supreme Court then essentially loosened a procedural free-for-all of federalism. The individual states would be allowed to devise their own judicial procedures, observing certain (very) minimal constitutional requirements of basic fairness, all to be enforced by the benevolent authors of Ford and their successors.

The Ford Court made no mention of the ancient rule of limited judicial discretion to deny a jury trial of the issue, which was implicitly recognized in Nobles v. Georgia\textsuperscript{179} and the cases it cited. In an analysis remarkably lacking in scholarship, the Court ignored the common law procedural right of trial by jury and struggled to articulate a suitable vehicle for judicial enforcement of the substantive right it had just enshrined in the Eighth Amendment. The Court's analysis of the procedural question includes the somewhat gratuitous observation that "[w]e do not here 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

\begin{itemize}
\item \textsuperscript{176} 339 U.S. 9 (1950).
\item \textsuperscript{177} Specifically, the court reasoned:
Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon. Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. 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.
We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. 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.
\item \textsuperscript{178} 477 U.S. 399 (1986).
\item \textsuperscript{179} 168 U.S. 398, 407 (1897).
\end{itemize}
appropriate ways to enforce the constitutional restriction upon its execution of sentences."

Without any mention of the mode of procedure that prevailed for centuries at common law, Justice Powell wrote in a concurring opinion that he believed "a constitutionally acceptable procedure may be far less formal than a trial." Justice Powell emphasized the states' judicial leeway in determining the proper procedure, explaining that states need only "provide an impartial officer or board that can receive evidence and argument." Indeed, why should a Supreme Court Justice trouble with an investigation of centuries of jurisprudence when a strongly held "view" of the most expedient method will suffice? Justice Powell and the rest of the Court seemed oblivious to the fact that the common law provided an exceptionally plain answer to the question of what procedure should be followed. The common law rule was simple: in cases of difficulty or doubt, the question of sanity to be executed shall be tried by jury. Tarnished by judicial indifference, trod upon by generations of careless lawgivers and opinion writers, the right to jury trial remains an undeniable part of the procedure at common law.

D. Original Intent: Jury Trial As the "Due Process of Law"

The framers of the U.S. Constitution would have studied the statements of Blackstone, Hale, Hawkins, and Coke, which are cited repeatedly in this article. The authors and advocates of the amendments to the Constitution intended to preserve the best elements of our common law heritage in the Fifth Amendment's guarantee of "due process of law." That same simple phrase was later extended to restrain the policies of the states after the Civil War. In fact, in Foster v. Marshall, the Oklahoma Supreme Court noted that "[t]he very close relationship between due process and the procedure at common law was stressed in opinion after opinion. This was but natural in view of the background of the early state courts, and the fact that the colonial courts had consistently proceeded according to it." Concerning the constitutional provisions prohibiting legislative suspension of the writ of habeas corpus, Justice Tarsney, in the early Oklahoma case of In re Patzwald, stated:

That provision of the constitution is a guaranty that the right of the writ of habeas corpus should remain as it existed at the common law, and should not be curtailed by legislative enactment, or by subtle and metaphysical judicial interpretation, and legislatures can no more

181. Id. at 427 (Powell, J., concurring).
182. Id.
183. 1930 OK 73, 284 P. 882.
184. Id. ¶ 16, 284 P. at 884 (quoting Rodney L. Mott, Due Process of Law 208 (1926)).
185. 1897 OK 74, 50 P. 139.
prevent its application to cases where it would have been applicable at common law than they can abrogate the right of trial by jury. 186

Mere legislation is not the measure of "due process." While not every form of modern procedure can (or should) be traced to an analogous inquiry at the common law, those forms that were well established at common law were clearly the law of the land. Thus, these common law procedures were included by and through the Fifth and Fourteenth Amendments in the phrase "due process of law."

Justice Curtis made this point in his opinion for the U.S. Supreme Court in Den ex dem. Murray v. Hoboken Land & Improvement Co., 187 a case discussing whether a warrant issued in conformity with a congressional act constituted "due process of law." Justice Curtis reasoned that Congress was not "free to make any process 'due process of law,' by its mere will." 188 Instead, he suggested the Court must examine only the Constitution itself and the common law of England to ascertain whether the process was due process of law. 189

In the uncommon cases raising the question of a prisoner's sanity to be executed, American judges have obscured, ignored, and finally discarded the ancient common law right to trial by jury. Successive generations of jurists first failed to consider the common law authorities with adequate care, and then failed to consider them at all. The rarity of such cases, the swiftness of judgment and sentence in earlier times, the frequent denial of counsel to the condemned prisoner, and a host of other factors may have contributed to the misunderstanding of these authorities over the years. But "due process of law" in sanity proceedings undoubtedly includes a right to trial by jury in cases of difficulty or doubt.

To suggest this today, of course, may invite a puzzled look or worse from the intended audience. The procedural dictum of Ford — heedless legal contrivance that it is — reigns supreme. But if advocates in future cases confront the courts with these authorities and claim for their clients a right guaranteed by the Constitution and its great progenitor, the English common law, this discussion might dimly light the way.

186. Id. ¶ 12, 50 P. at 142.
187. 59 U.S. 272 (1855).
188. Id. at 276.
189. Id. at 277. The Court held:

It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Id. at 276-77.
VI. Appointment of Counsel and Forensic Assistance in Sanity Proceedings

A. The Prisoner's Access to Counsel and Forensic Assistance

Under the Eighth Amendment, as interpreted by the Supreme Court in Ford, capital prisoners subject to sanity-determination proceedings are entitled to representation by counsel. Oklahoma law requires that indigent death row prisoners in such proceedings be appointed counsel pursuant to the Oklahoma Indigent Defense Act, which authorizes the Executive Director of the Oklahoma Indigent Defense System (OIDS) to assign counsel to represent the prisoner. In the Van Woudenberg case, the Executive Director assigned the case to the OIDS Capital Post-Conviction Division.

The landmark case of Ake v. Oklahoma established that, under the Fourteenth Amendment's Due Process Clause, the indigent accused in a criminal trial is entitled to expert psychiatric assistance at public expense if his sanity is likely to be a "significant factor" in his defense at trial. Subsequent cases suggest that Ake's holding extends to include any form of expert or investigative assistance necessary to an adequate defense. Ake initially allowed state trial judges to decide the question of whether such assistance would be provided upon a proper motion by defense counsel. However, legislative amendments have largely supplanted that practice by requiring Oklahoma's public-defense agencies to administer the funds and make their own determinations of when expert or investigative assistance will be used in a particular case.

191. Id. § 1355.4; see also Van Woudenberg v. Taylor, No. 95,807 (Okla. Mar. 15, 2001) (order assigning the Oklahoma Indigent Defense System to represent Van Woudenberg).
194. Id. at 83.
195. See Tibbs v. State, 1991 OK CR 115, 819 P.2d 1372 (extending Ake to include experts necessary for an adequate defense upon proper showing).
196. See Rogers v. State, 1995 OK CR 8, 890 P.2d 959 (finding that defense's request for expert assistance was properly directed to trial court).
197. See Fitzgerald v. State, 1998 OK CR 68, 972 P.2d 1157; see also 22 Okla. Stat. § 1355.4(D) (Supp. 1999) (giving the Executive Director of the Oklahoma Indigent Defense System the authority to provide expert, investigative, or other necessary services to indigent criminal defendants and attorneys appointed pursuant to the Act). The public defenders of Oklahoma and Tulsa counties are granted similar authority by title 19, section 138.8 of the Oklahoma Statutes. Funding for this type of assistance is provided to each agency through legislative appropriations or use of the county court fund. Although the Oklahoma Court of Criminal Appeals has held that such requests are to be submitted to the trial judge, Judge Lumpkin gave this explanation of the current procedure in his opinion concurring in the result in Fitzgerald:

Under the current statutory framework, a judge is not to be involved in authorizing or compensating expert witnesses within the context of the facts presented in this case. That budget is to be established by the governing board of the Court fund for the Public Defender's office. Granted, that Court fund board would consist of a District Judge, Associate District Judge and District Court Clerk of the County as set out in 20 O.S. 1991, § 1302. But by its repeal of Section 464 of Title 22, the Legislature has changed
The determination of a capital prisoner's sanity to be executed is a "hazardous guess" in which the use of psychological and psychiatric experts is essential to a full and fair determination of the question. For this reason, the indigent capital prisoner is entitled to assistance of one or more psychological and/or psychiatric experts to conduct mental status evaluations, consult with counsel, and provide relevant testimony on the question of sanity.

Sanity is ultimately a legal determination rather than a medical one. But the cognitive factors defining legal insanity in Bingham v. State require a complete understanding of the prisoner's present mental functioning, including how that functioning may be impaired by recognized forms of mental disease or disorder. Comprehensive mental-health observation and examination of the prisoner by competent mental-health professionals is an indispensable feature of a full and fair sanity-determination procedure. Oklahoma law clearly answers the question of whether the prisoner is entitled to this type of assistance. Even if the indigent prisoner is represented by retained counsel rather than the public defender, he is certainly entitled to such assistance if counsel can demonstrate the prisoner's inability to pay.

B. The State's Right to Evaluate the Prisoner

Because the prisoner's sanity is at issue in such a proceeding, the State probably has a corresponding right to retain psychological or psychiatric experts and to have those experts evaluate the prisoner's mental condition. A prisoner probably

the procedure. Because of this change in procedure established by the Legislature, the analysis set forth in Fitzgerald, relating to the trial judge, is no longer applicable within the State of Oklahoma. The only time the District Court should become involved in the issue of funding, as it relates to the Public Defender, is if the Public Defender believes insufficient funds have been provided to fulfill his or her statutory and constitutional role. An action could be filed in the District Court to mandamus the providing of those funds. However, other than the sufficiency of the overall budget, the individual decisions relating to the expenditure of those funds is the same for the Public Defender in Oklahoma and Tulsa counties as it is for the Executive Director of O.I.D.S.

Fitzgerald, 1998 OK CR 68, ¶ 7, 972 P.2d at 1177 (Lumpkin, J., concurring). The majority in Fitzgerald declared that it was not concerned with the technicalities of who pays and what procedures for payment are followed, but with the clear intention that all defendants are entitled to necessary expert assistance when that constitutes a basic defense tool. By extending Ake, we have ensured that the Legislature's intent is preserved, and indigent defendants in all counties of Oklahoma have access to the basic tools necessary for an adequate defense.

Id. ¶ 16, 972 P.2d at 1165.


199. 1946 OK CR , , 169 P.2d 311, 314. The Bingham test and other prevailing tests for insanity to be executed are discussed infra Part VII.

200. Id.

201. See Spain v. Dist. Court, 1994 OK CR 36, ¶ 11, 882 P.2d 79, 81 (holding that an indigent defendant represented by retained counsel is entitled to a transcript at public expense based on a showing that the defendant is personally unable to pay the costs of the transcript).

does not have the right to refuse such an examination, though he can obviously limit the evaluation by refusing to answer questions or perform other tasks requested by the State's examiner.

The State's right to a psychological examination is limited, however, by the scope of the inquiry before the court. In \textit{Estelle v. Smith},\textsuperscript{203} the U.S. Supreme Court recognized that a criminal defendant's privilege against self-incrimination and right to counsel attach to psychological examinations conducted in connection with criminal proceedings.\textsuperscript{204} This protection logically extends to examinations for sanity to be executed. \textit{Estelle} essentially requires that the prisoner be given a \textit{Miranda} warning concerning the nature and scope of the mental examination, that his counsel be notified that the examination will be conducted, and that the prisoner be afforded the right to consult with counsel concerning whether to submit to the examination.\textsuperscript{205}

Despite the fact of his conviction, the prisoner may also refuse to answer questions concerning his involvement in the crime itself. In \textit{Traywicks v. State},\textsuperscript{206} the Oklahoma Court of Criminal Appeals observed the following about the limitations imposed by \textit{Estelle}:

\begin{quote}
[W]hile the defendant may be compelled to answer questions about his mental health, a constitutional violation may occur if the defendant is compelled to reveal details of the crime itself to the State's mental health expert. This distinction makes sense. The State needs the mental health evidence to rebut the insanity defense, and it seems logical that raising that defense waives the defendant's right to silence as to those mental health issues. However, evidence of the crime itself is a distinct and different question from the issue of mental illness. Accordingly, the defendant retains the right to assert his Fifth Amendment privilege as to the details of the crime. Of course, the defendant could waive his privilege to remain silent as to the details of the crime, but that waiver would have to be done knowingly and voluntarily after the administration of \textit{Miranda} warnings.\textsuperscript{207}
\end{quote}

Neither \textit{Estelle} nor \textit{Traywicks} have been explicitly extended to proceedings for determining sanity to be executed, but there is little reason to believe that the

\textsuperscript{203} 451 U.S. 454 (1981).
\textsuperscript{204} \textit{Id.} at 468, 471.
\textsuperscript{205} \textit{Id.} at 470-71.
\textsuperscript{206} 1996 OK CR 54, 927 P.2d 1062.
\textsuperscript{207} \textit{Id.} \textsection 12, 972 P.2d at 1065.
Oklahoma Court of Criminal Appeals or the U.S. Supreme Court would adopt a radically different approach in such cases. However, the finality of the prisoner's conviction in cases involving sanity to be executed might diminish the pretrial and trial-level constitutional protections recognized in Estelle and Traywicks. Although the danger of false or spurious insanity claims is frequently overstated, the State's interest in avoiding the frustration of its sentencing scheme by a prisoner's feigned insanity probably justifies the State's right to have its own experts conduct mental evaluations of the capital prisoner who is allegedly insane.

VII. It's Naught M'Naghten: Prevailing Legal Tests for Insanity to Be Executed

While the Supreme Court prohibited executions of the insane in Ford v. Wainwright, the case itself failed to articulate any constitutional test for insanity. Insanity to be executed is not a test of criminal responsibility but rather a question of the prisoner's present mental state in relation to a capital sentence. Therefore, the familiar test for insanity in M'Naghten's Case has nothing to do with insanity to be executed. In his concurring opinion in Ford, Justice Powell attempted to correct this omission with his own test. To do so, Justice Powell surveyed various definitions used at the common law and in state statutes and then formulated a test

208. Despite the lack of empirical support, judges deciding legal questions related to sanity frequently appeal to what they perceive as the significant dangers presented by feigned or spurious claims of insanity. In fact, the insanity defense is rarely used at all, and when it is, the data suggest that severe mental illness is almost always present.

Perhaps the oldest of the insanity defense myths is that criminal defendants who plead insanity are usually faking, a myth that has bedeviled American jurisprudence since the mid-nineteenth century. Of the 141 individuals found NGRI [not guilty by reason of insanity] in one jurisdiction over an eight year period, there was no dispute that 115 were schizophrenic . . . and in only three cases was the diagnostian unwilling or unable to specify the nature of the patient's mental illness.


Professor Perlin attributes such fear of faking to the existence of "sanism," which he defines as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry." Id. at 1418. Sanism may affect judicial attitudes in cases involving questions of insanity. Professor Perlin writes, Sanist attitudes often lead to pretextual decisions. Fact-finders accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest, frequently meretricious, decisionmaking . . . . Judges often select certain preferred [sic] data that adhere to their pre-existing social and political attitudes, and use heuristic reasoning . . . to rationalize otherwise baseless judicial decisions.

Id. at 1419. The possibility that decision makers in these cases may hold sanist attitudes should be taken into account when formulating a strategy for the presentation of evidence. Where possible, defense counsel should retain more than one expert and require separate evaluations of the defendant's mental condition. In a following section, this article explains how we, Van Woudenberg's attorneys, followed this approach and used separate evaluations in preparing for the sanity trial in the Van Woudenberg case.

209. Oklahoma has long followed the definition of insanity articulated by the House of Lords in M'Naghten's Case, 8 Eng. Rep. 718 (1843), as the test for criminal responsibility. See Pugh v. State, 1989 OK CR 70, 781 P.2d 843.
of his own. The resulting combination of judicial hubris and oversimplification is properly considered the "sound bite" test for insanity: "[T]he 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."\(^{210}\)

By focusing solely on the prisoner's awareness of the punishment and the reasons for it, Justice Powell espoused a cognitive test that rests the determination of insanity solely on the prisoner's mental awareness of the sentence. Justice Powell's definition omitted any functional element of insanity as it was defined at the common law, which required the court to determine whether the prisoner had sufficient present understanding and intelligence to assist in his defense or articulate any reason why his punishment would be unjust or unlawful.\(^{211}\) Justice Powell found that the common law justifications for this functional inquiry were out of step with the elaborate systems of judicial review required by modern capital punishment law.\(^{212}\) He reasoned that "modern practice provides far more extensive review of convictions and sentences than did the common law," such as direct appeal and collateral review.\(^{213}\) Based on these modern practices and guarantees of effective assistance of counsel, he reasoned that "[i]t is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free."\(^{214}\) Justice Powell further reasoned that the modern law's requirement that a defendant be competent to stand trial ensured that the defendant would be able to assist in his defense.\(^{215}\)

The absence of the functional inquiry required by the common law is a serious flaw in Justice Powell's formulation of a test for insanity to be executed. Judicial scrutiny of capital convictions and sentences is indeed more rigorous than it was at the common law, but the prisoner's need to meaningfully participate in the judicial and executive processes that may lead to his execution is entitled to more careful consideration than that given by Justice Powell. The Supreme Court has emphasized the significance of executive clemency in modern capital-sentencing schemes, stating that "[e]xecutive clemency has provided the 'fail-safe' in our criminal justice system."\(^{216}\) The Supreme Court has acknowledged that questions


\(^{211}\) Common law writers such as Hale and Blackstone spoke of insanity in terms of a functional inability on the part of the prisoner to allege something that might render his punishment unlawful or unjust. See 4 BLACKSTONE, supra note 56, at *24-*25 ("[I]f, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, 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."); HALE, supra note 57, at 35 ("[I]f after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory he might allege somewhat in stay of judgment or execution."). Because either "idiocy" or "lunacy" might render a person "insane" under this test, the concept of insanity at common law was broad enough to include both mental illness such as schizophrenia and mental defect such as mental retardation, organic brain damage, or other forms of dementia.

\(^{212}\) Ford, 477 U.S. at 420 (Powell, J., concurring).

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) Id. at 420-21 (Powell, J., concurring).

of innocence and the larger questions of the justness of a particular capital sentence have historically been, and will continue to be, presented to chief executives and clemency boards in the states:

It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made.217

The Supreme Court's acknowledgment of the fallibility of the American system of capital punishment suggests that Justice Powell's confident assertions about the reliability of judicial review are naive and irresponsible. Dispensing with any inquiry into the condemned prisoner's ability to assist in his own defense or to articulate a reason why he should not be executed is inconsistent with the Supreme Court's own statements about the critical role played by executive clemency in the overall fairness of a capital-punishment scheme.

When all legal appeals have failed and the sentence of death is beyond collateral attack, the prisoner's functional ability to participate in clemency proceedings — by proclaiming his innocence, expressing his heartfelt remorse, or pleading for his life by arguing his lesser culpability in the capital crime — might mean the difference between living and dying. Justice Powell's disregard of this functional capacity as a necessary part of the sanity inquiry is unsound in theory and unjustified in practice. If clemency is indeed the "fail-safe" of capital justice, then a test for sanity to be executed that ignores the prisoner's functional inability to participate in that process encourages the infliction of cruel and unusual punishment.

Largely in response to Ford, in 1987, the American Bar Association included the following test for insanity to be executed (also known as incompetence to be executed) in the ABA Criminal Justice Mental Health Standards:

A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict

---

217. Id. (citing Edwin Borchard, Convicting the Innocent (1932); Michael L. Radelet et al., In Spite of Innocence 282-356 (1992)).
lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court. 218

The language of the ABA standard is largely adopted from Justice Frankfurter's dissenting opinion in Solesbee v. Balkcom. 219 Unlike Justice Powell's definition, the ABA definition expressly contemplates incompetence resulting from either mental illness or mental retardation. 220 Competence according to this standard also requires an assessment of the prisoner's awareness of both prior and pending proceedings. Thus the standard seems to appreciate the prisoner's need to understand what he was tried for and why he is being punished. Since the test requires a further assessment of the prisoner's understanding of the "nature of the punishment," 221 a prisoner is incompetent if his mental defect or disease prevents an understanding of the finality of punishment as an end to natural life. Under this standard, prisoners who are aware of their trial, conviction, and sentence, but who suffer from delusions or lack of understanding about the reality of death itself should not be executed.

Justice Powell's test arguably incorporates these cognitive inquiries somewhere within the vague parameters of prisoners being "unaware of the punishment they are about to suffer and why they are to suffer it." 222 However, the ABA standard is far more exacting than Powell's definition in its fidelity to the functional element of sanity required at the common law. The prisoner's execution must be stayed if the prisoner lacks sufficient capacity to recognize or understand any fact that would make the punishment either unjust or unlawful, or lacks the ability to communicate such information to counsel or the court. 223

If a prisoner's understanding of the reason he was sentenced to death is wholly delusional or nonexistent, he obviously cannot rationally communicate important matters that might call the justness of the sentence into question. Such matters include expressions of remorse, his relatively limited participation in the offense, mitigating evidence in his own background, or other information that mitigates, exculpates, or justifies the extension of mercy by the chief executive. The ABA Commentary to Standard 7-5.6 contrasts its formulation of incompetence to the definition adopted by Justice Powell:

The Standard reflects a different viewpoint. This parallels the Standards' two-pronged test for incompetence to stand trial, addressing both ability to understand the proceedings and ability to assist counsel. The possibility that a defendant could be executed because of inability to

218. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-5.6(b) (1987).
219. Id. cmt. (citing Solesbee v. Balkcom, 339 U.S. 9, 20 n.3 (1950) (Frankfurter, J., dissenting)).
220. Id. Standard 7-5.6.
221. Id.
223. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-5.6(b) (1987).
communicate information that could be relevant to the decision whether to carry out the death sentence is equally unacceptable as executing someone who could not understand the penalty. (It need not, of course, be information that would "set him free" to be relevant.)

Perhaps surprisingly, Oklahoma's legal test for insanity to be executed reflects a humane concern that the capital prisoner possess two traits: (1) a cognitive understanding of the nature of the proceedings against him and the true nature of the punishment; and (2) a present functional ability to rationally participate in the proceedings affecting his fate. The governing test in Oklahoma for insanity to be executed is found in Bingham v. State:

The test of the question as to whether one about to be executed is sane or insane is whether or not such person, at the time of the examination, from the defects of his faculties, 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 which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court. If he has, then he is sane; otherwise he is insane, and should not be executed.

The Bingham test mirrors the requirements of the ABA standard in important ways, emphasizing that the prisoner's insanity might arise from any one or a combination of "defects of his faculties," including mental illness, mental retardation, or other organic dysfunction of the brain. The test requires certain cognitive abilities, i.e., "sufficient intelligence to understand" the charge for which he was tried and the reason he is being punished. Its reference to the prisoner's understanding of the "impending fate which awaits him" further requires a rational appreciation for the finality of death. Bingham requires the court to suspend the execution in the absence of certain functional abilities, including the ability to know any fact affecting either the justness or legality of the sentence and the ability to convey that information to attorneys or the court. The fact need not necessarily amount to legal error, as Justice Powell would apparently have it; rather, any fact that mitigates the offense or warrants the extension of mercy to the offender is sufficient. Although any legal test can be subject to judicial manipulation and pretextuality, in theory, the Bingham test sets a higher legal standard and protects the integrity of otherwise lawful executions. In so doing,

224. Id. Standard 7-5.6 cmt. n.7 (citation omitted).
226. Id. 1 ___, 169 P.2d at 314-15.
227. Id. 1 ___, 169 P.2d at 314.
228. Id.
229. Id.
230. Id. 1 ___, 169 P.2d at 314-15.
Bingham remains faithful to what Blackstone called "the humanity of English law," which is the lifeblood of the constitutional prohibition against executions of the insane.\footnote{4 BLACKSTONE, supra note 56, at *24.}

VIII. When Is Voluntary Not Voluntary? Antipsychotic Medication and Sanity to Be Executed

The State's ability to medicate a capital prisoner who has been adjudicated insane raises fundamental philosophical and constitutional questions. Satisfactory solutions to the virtually intractable dilemmas caused by the State's medication of insane, death-sentenced prisoners are beyond the scope of this article. However, it is necessary to discuss the constitutional authorities that may limit the State's authority to dispense medication to an insane prisoner in order to restore his sanity for execution.

For purposes of this discussion, I will assume that the prisoner has already been adjudicated insane and that his insanity is the probable result of a treatable mental illness. The competence of prisoners with a permanently disabling mental condition, such as mental retardation or brain damage from a stroke or organic syndrome, probably cannot be restored with medication. The more difficult cases, which this section of the article discusses, are those of prisoners suffering from a psychotic thought disorder such as schizophrenia, which sometimes can be treated with antipsychotic drugs.

Formulating legal objections to the State's medication of an insane capital prisoner will often require the lawyer to confront a factually ambiguous situation. Generally, if a prisoner has an illness, the Eighth Amendment (and most state constitutions) require prison authorities to provide an appropriate diagnosis and treatment of his condition.\footnote{232 See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that the Eighth Amendment protects prisoners from state officials' deliberate indifference to a serious medical need).} This general rule becomes extremely complicated in application to an insane capital prisoner. While the prison official is bound by law to provide medical treatment to the prisoner, the legal consequence of successful treatment of the prisoner's mental illness may be his eventual execution.

The legal situation is further complicated by the issue of whether the prisoner's treatment with antipsychotic medications by prison physicians is "voluntary" or "involuntary" as a matter of constitutional law. Even when prison officials do not use physical force to medicate the inmate, his compliant ingestion of prescribed medication may not be based on "informed consent." The prior adjudication of the prisoner's insanity stands as positive proof that the prisoner cannot fully comprehend his legal situation, and the medication itself may further blunt the prisoner's ability to choose his course of treatment with due consideration of the legal consequences. This adds to the difficulty of deciding whether a prisoner's ingestion of prescribed medication is voluntary or involuntary in a constitutional sense.
Despite its potential factual ambiguity, the voluntary or involuntary nature of the State's medication of the insane prisoner has constitutional significance in two different contexts. First, it is significant to the question of whether the insane prisoner has a constitutional right to object to unwanted medication when he is required to appear and participate in judicial proceedings to determine whether his sanity has been restored. Second, it is significant to the substantive question of whether the U.S. Constitution prohibits the unwanted medication of a capital prisoner where the purpose (or collateral but probable effect) of such medication is to bring about a restoration of sanity and thus eventual execution. I will address these two questions in turn, providing an overview of the relevant Supreme Court cases that will almost certainly inform future litigation in this area.

A. The Right to Refuse Antipsychotic Medication During Sanity-Determination Proceedings

In *Riggins v. Nevada*,233 the Supreme Court held that the State's administration of the antipsychotic medication Mellaril to the petitioner throughout his trial, over his objection, violated the Fourteenth Amendment.234 Riggins had been charged with robbery and capital murder. In jail, he told a physician that he was hearing voices in his head and having trouble sleeping. The doctor prescribed a regimen of the antipsychotic drug Mellaril, gradually increasing the dosage to 800 milligrams daily. Although defense counsel raised the question of Riggins' competency, the court found Riggins competent and ordered him to stand trial for murder.235

Before trial, defense counsel filed a motion to suspend the administration of Mellaril to Riggins during the trial, arguing that continued administration of the drug against Riggins' wishes infringed his rights under the Fourteenth Amendment and Nevada's constitution.236 In support of this argument, defense counsel pointed out that the serious side effects of antipsychotic drugs were unwanted, and that the drug would affect Riggins' demeanor and mental state during the trial.237 Because defense counsel intended to offer insanity as a defense to the murder charge, he also argued that the Fourteenth Amendment guaranteed Riggins the right to show jurors his "true mental state."238

At the hearing on Riggins' motion, psychiatrists had different opinions regarding the precise effect of suspending Riggins' medication. The treating physician testified that Riggins would be competent to stand trial without medication and that jurors would probably notice the effects of Mellaril on his demeanor. Another physician testified that the medication would calm Riggins, but that high doses could cause drowsiness. Yet another physician testified that he could not predict

---

234. *Id.* at 138.
235. *Id.* at 130.
236. *Id.*
237. *Id.*
238. *Id.*
Riggins' behavior if medication were suspended. The trial court also considered a report by another physician predicting that if the medication were suspended, Riggins would lapse into a manifest psychosis and become difficult to manage.239 The trial court denied Riggins' motion.240 At trial, Riggins pled insanity and testified in his own defense about the events resulting in the homicide.241 The jury convicted Riggins and sentenced him to death.242 On appeal to the Nevada Supreme Court, Riggins again argued that the unwanted administration of Mellaril throughout the trial denied his right to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor before the jury.243 Riggins argued that the Fourteenth Amendment includes a freedom from unwanted administration of such drugs, which can be overcome only by a showing that less restrictive alternatives will not adequately protect the State's legitimate interest in restoring him to competence and bringing him to trial.244 Thus, Riggins argued, the trial court's failure to consider the use of less restrictive alternatives to involuntary antipsychotic medication, such as sedatives or tranquilizers, violated this Fourteenth Amendment right.245

The Nevada Supreme Court affirmed the conviction and death sentence.246 On writ of certiorari, the Supreme Court reversed.247 The Supreme Court agreed with Riggins that continued use of antipsychotic medication over his objection was constitutional error and that prejudice resulting from such error would be presumed.248 The Court relied heavily on its 1990 opinion in Washington v. Harper,249 discussed fully later in this section, and held:

Under Harper, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial. Thus, once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug.250

While presuming "that administration of Mellaril was medically appropriate,"251 the Supreme Court held that continued administration of the drugs throughout

239. Id. at 131.
240. Id.
241. Id.
242. Id.
243. Id.
244. Id. at 131-32.
245. Id.
246. Id. at 132.
247. Id. at 138.
248. Id. at 137-38.
250. Riggins, 504 U.S. at 135 (citations omitted).
251. Id. at 133.
Riggins' trial was not justified by any state interest appearing from the record.\textsuperscript{252} The Court further reasoned that the drugs had significantly interfered with Riggins' liberty interest under the Fourteenth Amendment to be free from administration of medication against his will.\textsuperscript{253} The Court also presumed that such involuntary administration of antipsychotic drugs in a criminal trial resulted in prejudice to Riggins and denied him a fair trial.\textsuperscript{254}

The Supreme Court was careful to note that "the record in this case narrowly defines the issues before us."\textsuperscript{255} How, then, does Riggins potentially apply to the situation of a capital prisoner who objects to further medication during proceedings to determine whether he has been restored to sanity?

Because of the Supreme Court's conscious attempt to limit the holding in Riggins, it may initially appear that the case provides little support for the argument that capital prisoners have a similar constitutional right to refuse unwanted antipsychotic medication during proceedings to determine present sanity to be executed. However, the Supreme Court's holding in Riggins was an extension of the rule established in Washington \textit{v. Harper}, which involved prisoners. Therefore, applying the liberty interest recognized in Riggins to proceedings involving convicted prisoners involves no quantum leap from constitutional criminal-trial procedure into the realm of prisoners' rights. On the contrary, the Supreme Court's prior recognition of the freedom from unwanted medication belonging to convicted prisoners in Harper \textit{dictated the result} for the situation involving pretrial detainees in Riggins.

\textsuperscript{252} ld. at 137-38.
\textsuperscript{253} ld.
\textsuperscript{254} ld. The Court held:

\begin{quote}
Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. Like the consequences of compelling a defendant to wear prison clothing, or of binding and gagging an accused during trial, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril.

\ldots [A]llowing Riggins to present expert testimony about the effect of Mellaril on his demeanor did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril. Even if (as the dissent argues) the Nevada Supreme Court was right that expert testimony allowed jurors to assess Riggins' demeanor fairly, an unacceptable risk of prejudice remained.

\ldots [T]rial prejudice can sometimes be justified by an essential state interest. Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.
\end{quote}

\textit{ld.} (citations omitted).

\textsuperscript{255} ld. at 133.
Riggins and Harper therefore suggest that capital prisoners could legitimately object to receiving further medication while subject to judicial proceedings to determine their sanity to be executed. Part of Riggins' claim was that the Fourteenth Amendment protected his right to show the jury his "true mental state."256 And in Ford v. Wainwright, when the Supreme Court discussed the kind of procedural reliability it would henceforth demand in state sanity determinations, it cautioned that "[i]t is all the more important that the adversary presentation of relevant information be as unrestricted as possible" and 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."257

Medication of the prisoner with antipsychotic drugs that (1) prevent the unrestricted presentation of relevant evidence of insanity (including testimony by, or proper evaluation of, the prisoner), or (2) bar the finder of fact (jury or judge) from considering relevant evidence would render the state's sanity-determination procedure "inadequate" under Ford. Therefore, absent an overriding justification shown by the State, the administration of antipsychotic medications over the prisoner's objection would violate both the Eighth and Fourteenth Amendments. Such an overriding justification would require the State to prove more than the appropriateness of the medication to the prisoner's illness. A strong showing that the prisoner is uncontrollable or predictably violent while in an unmedicated state might be adequate to justify continued forced medication. In most cases, this will be a difficult standard for the State to meet. If the prisoner objects, the court should ordinarily suspend the medication throughout the course of sanity-determination proceedings.

B. Treating to Kill: Forcing Antipsychotic Drugs on the Insane Prisoner

Beyond the procedural confines of sanity-determination proceedings lies the more substantive question: Can the State medicate a prisoner with antipsychotic (or other) drugs when the purpose (or collateral but probable effect) of such medication is restoration of the prisoner's sanity to be executed? Is it the State's intent, or just the probable (but perhaps unintended) consequence of medication, that is relevant to the constitutional question? Perhaps no issue of recent times evokes more fundamental tension in the proper relationship between the government and the individual. Forced medication carries with it connotations of invasive mind control by the State. When the objectives of the treatment include preparing the patient for capital punishment, the conflict between the State's duty to relieve the prisoner's suffering and the State's (often equally zealous) endeavor to hasten his destruction is one of the most unsettling paradoxes at the intersection of law and medical science.258

256. Id. at 130.
258. See, e.g., Bruce A. Arrigo & Jeffery J. Tasca, Right to Refuse Treatment, Competency to Be Executed, and Therapeutic Jurisprudence: Toward a Systematic Analysis, 23 LAW AND PSYCHOL. REV. 1, 44-46 (1999). The authors identify at least four "anti-therapeutic" effects of a state policy allowing forced medication of the condemned. First, the "use of therapists as an adjunct to the administration of capital punishment bastardizes their role as healers." Id. Second,
Beyond these observations, this discussion is limited to the few published cases that have directly addressed the forced medication of prisoners facing capital punishment. Two state supreme courts — Louisiana and South Carolina — have rejected forced medication on constitutional grounds. A third — the Supreme Court of Arkansas — seems to have embraced the practice of forced medication based on a determination of the State's intent in giving the medication.

In *State v. Perry*, the Louisiana trial court adjudicated the prisoner insane to be executed but found that sanity could be restored through the administration of antipsychotic medication. The trial court committed the prisoner and ordered drug treatment, even against the prisoner's will if necessary. The Louisiana Supreme Court reversed, specifically holding that, under its state constitutional right to privacy and the prohibition against cruel and unusual punishments, the State could not medicate an incompetent defendant in order to carry out his death sentence. The court found that forced medication is just a way around the constitutional prohibition against executing the insane:

For centuries no jurisdiction has approved the execution of the insane. The state's attempt to circumvent this well-settled prohibition by forcibly medicating an insane prisoner with antipsychotic drugs violates his rights under our state constitution. First, it violates his right to privacy or personhood. Such involuntary medication requires the unjustified invasion of his brain and body with discomforting, potentially dangerous and painful drugs, the seizure of control of his mind and thoughts, and the usurpation of his right to make decisions regarding his health or medical treatment. Furthermore, implementation of the state's plan to medicate forcibly and execute the insane prisoner would constitute cruel, excessive and unusual punishment.

---

259. 610 So. 2d 746 (La. 1992).
260. *Id.* at 747.
261. *Id.*
262. *Id.*
263. *Id.* (citation omitted). The court went on to state:

This particular application of the death penalty fails to measurably contribute to the social goals of capital punishment. Carrying out this punitive scheme would add severity and indignity to the prisoner's punishment beyond that required for the mere extinguishment of life. This type of punitive treatment system is not accepted anywhere in contemporary society and is apt to be administered erroneously, arbitrarily or capriciously.
The Perry decision rested largely on the Louisiana Supreme Court's conclusion that the State's involuntary treatment of Perry was solely intended to render him competent for execution. This raises the factual problem of whether medication with an ambiguous purpose or effect is constitutionally permissible. Can the State argue that its primary duty is to treat the prisoner's mental illness, regardless of the possible consequence of restored competency, and thereby avoid a constitutional rule that prohibits medication solely to restore competency? Although Washington v. Harper seems to allow forced medication when it is "medically appropriate" and accomplishes an important state interest,264 the Perry court found that treatment of incompetent capital prisoners who would be executed if competency is restored is not medical "treatment" at all. Instead, the court found this type of treatment "antithetical to the basic principles of the healing arts."265 According to this view, as long as the State actively pursues the prisoner's execution, the provision of psychiatric treatment does not benefit the prisoner but rather serves the State's interest in enforcing its death-penalty law. Treatment of a prisoner under sentence of death is then properly characterized as aiding the executioner, not the inmate, and is therefore unconstitutional.

The South Carolina Supreme Court followed the reasoning of Perry in Singleton v. State.266 The death-sentenced prisoner in Singleton was found incompetent by the judge in a post-conviction hearing.267 The trial court then modified the death sentence to life imprisonment and the State appealed.268 Among others, the South Carolina Supreme Court decided the issue of whether the State could forcibly medicate the prisoner to restore his competency. Relying heavily on the right to privacy guaranteed by the state constitution269 and the due process analysis in Washington v. Harper, the South Carolina Supreme Court also prohibited forced medication of the prisoner solely to facilitate his execution.270

The court in Singleton assumed that the State had a substantial interest in medicating the symptoms of a violent, mentally ill prisoner. But it rejected the

___

265. Perry, 610 So. 2d at 751.
266. 437 S.E.2d 53 (S.C. 1993).
267. Id. at 55.
268. Id.
269. The South Carolina Constitution provides in part, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. CONST. art. 1, § 10.
270. Singleton, 437 S.E.2d at 61. In so holding, the court reasoned:

We hold that the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution. An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions. Federal due process and our own South Carolina Constitution require that an inmate can only receive forced medication where the inmate is dangerous to himself or to others, and then only when it is in the inmate's best medical interest.
argument that medicating the prisoner to facilitate his execution could ever meet Harper's requirement that forced medication be in the prisoner's "medical interest."271 Like the Louisiana Supreme Court, the South Carolina Supreme Court essentially rejected the notion of the State's use of drugs as "treatment" in the medical sense.272 The court reasoned that both the Hippocratic Oath273 and the established ethical principles of the medical profession recognize the essential difference between the use of drugs to effect death and the use of drugs as a form of medical treatment.

The American Medical Society and the American Psychiatric Associations have adopted positions in their respective ethical codes opposing participation by medical professionals in the legally-authorized execution of a prisoner. Their reasoning is the causal relationship between administering a drug which allows the inmate to be executed, and the execution itself. They opine that the administration of the drug is responsible for the inmate's ultimate death.274

The South Carolina Supreme Court stated a final reason for its conclusion that forced medication would not be in Singleton's medical interest.275 The evidence presented in the trial court established that Singleton suffered from both schizophrenia and organic brain damage. Singleton's brain damage made it unlikely that forced medication would render him competent to be executed and the organic brain damage made him more vulnerable to the painful side effects of antipsychotic medications.276 These additional facts further convinced the court that forced administration of antipsychotic drugs was not in Singleton's medical interest.277 Therefore, the State failed to satisfy both the due process requirements of Washington v. Harper and the privacy interests protected by the South Carolina Constitution.278

Not unlike Perry, Singleton dealt with the direct question of forced medication intended solely to facilitate the prisoner's execution. Thus, both cases imply the possibility of a different result where the forced administration of medication has the

271. Id. at 60-61.
272. Id. at 61.
273. As quoted by the South Carolina Supreme Court, the Hippocratic Oath provides:
I Swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following Oath: . . . I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death . . . . I will preserve the purity of my life and my art . . . . In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill doing . . . .
Id. (quoting State v. Perry, 610 So. 2d 746, 752 (La. 1992)).
274. Id. (citing AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 1(4) (1985); Donald H. Wallace, Incompetency for Execution, 8 J. LEGAL MED. 265 (1987)).
275. Id.
276. Id.
277. Id.
278. Id.
incidental effect of rendering the prisoner competent for execution. Predictably, the distinction has not gone unnoticed. Because the State may easily deny that it intends to render the prisoner competent, government attorneys eventually recast the issue as one of unintended consequences rather than a lethal experiment in modern chemistry. A court would eventually find itself in agreement with this unctuous premise. It happened in Arkansas in the case of Singleton v. Norris.279

In Singleton v. Norris, the capital prisoner had been treated with antipsychotic medications for years in prison. In 1997, he voluntarily ceased taking his medications and lapsed into psychosis. On the recommendation of his psychiatrist, a Medication Review Panel authorized the forced administration of antipsychotic drugs. While under this forced regimen, the prisoner lost his last appeals and an execution date was set. He petitioned the trial court for declaratory relief prohibiting his execution while his competency was maintained through the involuntary administration of drugs.280 The trial court denied relief and he appealed.281

Before the Arkansas Supreme Court, the parties stipulated that the prisoner was presently competent to be executed, but the prisoner argued that his execution would be unconstitutional as it was procured through the forced administration of antipsychotic drugs.282 The State responded that it had a duty to medicate the prisoner so long as he remained a danger to himself or others, and the fact that he became competent under such medication was merely an unintended effect.283 The State thus denied that it was medicating the prisoner solely to facilitate his execution. The Arkansas Supreme Court agreed.

The court held that forced medication of the prisoner was appropriate due to the State's "due process obligation to provide appropriate medical care to persons in its custody."284 It reasoned that, under Washington v. Harper, forced medication was "for appellant's own good and for the security of the institution in which he is incarcerated; it remains appropriate as long as appellant is alive and is either a potential danger to himself or others."285 In what may be an example of Michael Perlin's theory of pretextuality, the court ignored the lethal effect of the forced medication so long as the State portrayed its action as one for the benefit of the prisoner: "Here, the State contends that the medication is necessary for appellant's own good and for the safety of others. The intent of the State was not to medicate him in order to make him competent to be executed."286

The Court expressed particular concern that "appellant has not contested the appropriateness of the involuntary administration of medication under Washington v.

279. 992 S.W.2d 768 (Ark. 1999). The capital prisoner in Arkansas is no apparent relation to the more fortunate prisoner in Singleton v. State.
280. Id. at 768.
281. Id. at 769.
282. Id.
283. Id. at 770.
284. Id. at 769.
285. Id.
286. Id. at 770.
Harper. In fact, that same sentence, verbatim, appears twice in the short opinion:

As appellant has neither contested Washington v. Harper nor taken an appeal from same, we hold that the State had a burden to medicate appellant under Harper, that said burden continues, and that the State has met and is meeting its burden. We further hold that because appellant never requested a Ford hearing while off the medication, Washington v. Harper is controlling, and the collateral effect of the involuntary medication rendering him competent to understand the nature and reason for his execution is therefore no violation of any due process law.

Of course, the Arkansas Supreme Court doth protest too much that the prisoner never "contested the appropriateness" of his medication. The opinion itself gives this away:

[The prisoner] assert[ed] that to the extent the involuntary administration of medication might have been appropriate when it was originally ordered in August of 1997, following a Harper evaluation conducted by the Medication Review Panel, such administration ceased to be valid as a medical necessity for appellant's own good when his stay of execution was dissolved and an execution date was proclaimed.

Contrary to the Arkansas Supreme Court's dismissive portrayal, Singleton's argument was more than a flailing attempt to bring his case within Harper's limitations on forced medication; it went to the very heart of the matter. "Medical appropriateness" was the point at which the courts in Perry and Singleton drew the constitutional line. Forced medication may be "medically appropriate" where the prisoner is mentally ill and a danger to himself or others, but when it brings about the prisoner's execution, it cannot be described sensibly as state action that is in the prisoner's medical interest. Under Perry and Singleton v. State, the only apparent way to avoid this constitutional conflict is to vacate the death sentence and impose a noncapital sentence before allowing any forced medication of the prisoner.

After the Arkansas Supreme Court rejected Singleton's challenge to forced medication, Singleton filed a petition for a writ of habeas corpus in federal district court. Singleton argued that his execution would violate Ford v. Wainwright, not because he was presently incompetent, but rather because his competency was achieved by involuntary medication. The district court reached the same conclusion as the Arkansas Supreme Court, reasoning that "current law only prohibits medicating an incompetent death row inmate when the sole purpose is to

287. Id.
288. Id.
289. Id. at 769.
make him competent so that the State can execute him."291 The district court concluded that there was "no evidence . . . that the actions and decisions of the medical personnel involved were in any degree motivated by the desire, purpose or intent to make Mr. Singleton competent so that he could be executed."292 Based on these findings, the district court denied Singleton's habeas petition and his request for a stay of execution.

Singleton's fortunes briefly turned when he appealed the district court's ruling to the court of appeals and renewed his request for a stay of execution. A three-judge panel of the Eighth Circuit Court of Appeals reversed the order of the district court and granted a "permanent" stay of execution, which effectively modified Singleton's sentence to life imprisonment. After discussing both Ford and Harper, the court of appeals reasoned that "neither case answers the question of whether a state can involuntarily medicate an otherwise incompetent prisoner to protect him from harming himself or others and then execute the prisoner if the medication renders him Ford competent."293

Questioning whether the constitutional analysis in Harper could be applied in cases of forcible medication of death row prisoners who were facing execution, the court of appeals believed that if the State's intent controlled the question of constitutionality in such cases, then "the State can be expected to claim that it is medicating the inmate to protect him from harming himself and others, and the prisoner will almost certainly argue the State's proffered reasons are a pretext for rendering him competent to be executed."294

The court of appeals ultimately decided that the State's intent in medicating the inmate was not dispositive. Instead, relying on the "unique" facts, primarily the inmate's longstanding mental illness and his frequent psychotic episodes even while medicated, the court concluded that

there is no way of knowing how long he will remain competent once the medication is discontinued or how long it will take him to regain Ford competency once he begins taking medication.

... Singleton does not have the understanding necessary to permit the State to execute him. It is therefore time to bring this case to an end and grant a permanent stay of execution. To do otherwise in the circumstances of this case would, in the words of Justice Marshall, subject Singleton to "the barbarity of exacting mindless vengeance."295

However, the court greatly exaggerated the permanence of Singleton's stay of execution. Within two months of the panel opinion granting the stay, the court of appeals granted rehearing en banc and vacated the opinion of the three-judge panel.

291. Id. at 864 (quoting transcript of 2/16/00 District Court Hearing, at 94-95).
292. Id.
293. Id. at 869.
294. Id.
295. Id. at 871 (quoting Ford v. Wainwright, 477 U.S. at 399, 410 (1986)).
in an unpublished order. The en banc court recently heard oral arguments in the case, but has yet to issue an order affirming the judgment of the district court. Singleton v. Norris reveals important shortcomings of Washington v. Harper as it applies to the question of forced medication in capital cases. The inmate in Harper was not exposed to the death penalty as a result (unintended or otherwise) of the forced medication sanctioned in that opinion. The extremely delicate balance struck in that case recognized that the invasion of the inmate's bodily integrity was not so extreme, in light of the need to maintain the prisoner's long-term health and institutional safety, that it violated substantive due process.

As a matter of candor and common sense, the long-term health (or "medical interest") of the insane capital prisoner is not the concern of the State that seeks to forcibly medicate him. This fact alone skews the Harper analysis to an unworkable degree. Applying the Harper analysis to capital prisoners facing forced medication and possibly execution invites prosecutors and courts to engage in disingenuous assessments of governmental intent and pretextual appraisals of "medical interest." Harper's due process protection against involuntary medication is dubious indeed if the State's performance of its "due process obligation" to provide medical care becomes a license to "unintentionally" medicate its prisoner right into the execution chamber.

These concerns bring the article back to the case of Sammy Van Woudenberg. A psychologist who evaluated Van Woudenberg in 1994 poignantly described him as a person who "was born into a world of poverty and pain and it never ended." A life of emotional deprivation, family dislocation, poverty, abuse, drugs, and prison took a heavy toll. Since his early childhood, Van Woudenberg had been diagnosed with mental retardation and organic brain syndrome. Later diagnoses revealed a psychotic thought disorder, later termed schizophrenia of an undifferentiated type.

After a jury declared Van Woudenberg insane in 1994, he was housed in the psychiatric unit at the Oklahoma State Penitentiary and treated with various antipsychotic medications. Prison doctors continued to prescribe this medication for his schizophrenia after he was moved back to death row in late 2000. Van Woudenberg was offered the medication on a daily basis and sometimes refused his dosage. However, the State did not use physical force to compel him to ingest it. According to a psychiatrist and two psychologists retained by the defense, Van Woudenberg continued to be psychotic after his return to death row. This gave us reason to believe Van Woudenberg could not actually understand the possible legal consequences of taking the medication offered by the prison. In this sense, his ingestion of the drugs was neither voluntary nor based on informed consent.

296. Telephone Interview with Jeffrey Rosenzweig, counsel for Charles Laverne Singleton (Apr. 11, 2002).
During a pretrial hearing in the sanity-determination proceeding, we filed a motion requesting that the district court suspend the administration of antipsychotic medications throughout the remainder of the sanity proceedings. In support of this motion, we cited the due process holdings of Riggins v. Nevada and Washington v. Harper; the Eighth Amendment principles of Ford v. Wainwright; and the state constitutional ruling in State v. Perry.\(^{299}\)

The motion assumed that the treatment of schizophrenia with antipsychotic drugs is medically appropriate in general, but that the administration of drugs in this case interfered with Van Woudenberg’s due process right, recognized in Riggins, to participate in the proceedings and voluntarily appear before the factfinder in an unmedicated state.\(^{300}\) We argued that the prison’s medication of Van Woudenberg was involuntary under Harper and Riggins because Van Woudenberg did not personally want the medications and because he was unable to comprehend the legal ramifications of ingesting them.\(^{301}\) We also voiced the concern that prison staff might use subtler forms of psychological pressure to overcome Van Woudenberg’s resistance and convince him to take the medication against his wishes.\(^{302}\) Finally, we argued that the State could not demonstrate that its use of medication was necessary to protect any legitimate institutional interest in safety that could not be accomplished by less intrusive means, such as solitary confinement, if Van Woudenberg became uncontrollably aggressive.\(^{303}\) We argued that, under these circumstances, the involuntary administration of antipsychotic drugs violated Van Woudenberg’s state and federal constitutional rights to due process and the prohibition against cruel and unusual punishments.\(^{304}\)

The district court denied the motion, and we appealed to the Oklahoma Court of Criminal Appeals by a petition for extraordinary relief.\(^{305}\) The court of criminal appeals denied relief, finding that the State’s use of prescribed antipsychotic medication complied with the relevant statute\(^{306}\) and did not violate due process.\(^{307}\) The court relied primarily on documents filed by the State that

\[\text{\footnotesize 300. Id. at 2.} \]
\[\text{\footnotesize 301. Id. at 5.} \]
\[\text{\footnotesize 302. Id.} \]
\[\text{\footnotesize 303. Id.; see also Transcript of Hearing on Motion at 18-39, In Re Van Woudenberg (No. C-94-585).} \]
\[\text{\footnotesize 304. Motion to Suspend Administration of Anti-Psychotic Medications at 5, In Re Van Woudenberg, No. C-94-585.} \]
\[\text{\footnotesize 306. The statute in question, title 43A, section 5-204(B) of the Oklahoma Statutes, provides:} \]
\[\text{\footnotesize Treatment and medication may be administered to a nonconsenting individual upon the written order of a physician who has personally examined the patient and who finds such medication or treatment is necessary to protect the patient, the facility or others from serious bodily harm, and who so notes in the individual’s medication record, with an explanation of the facts leading up to the decision to administer treatment and medication including psychotropic medication.} \]
\[\text{\footnotesize 43A OKLA. STAT. § 5-204(B) (Supp. 2000).} \]
indicated that "[p]etitioner has been diagnosed with [a] chronic psychiatric condition and that psychotropic medications have been prescribed for Petitioner to control signs and symptoms of that condition." The State also provided a letter from its consulting neuropsychologist indicating "an ongoing concern of harm toward self or others displayed by the actions of Mr. Van Woudenberg." The court concluded that "the medical staff at the State Penitentiary have determined that treatment is in Petitioner's best interest and that he is being treated accordingly."310

The court rejected our arguments, which were based on Riggins v. Nevada and Washington v. Harper, that the involuntary medication of Van Woudenberg at a time when his sanity was about to be judicially determined violated due process.311 The court specifically held that "[p]etitioner's reliance on Riggins is misplaced as it addresses concerns raised when the defendant is tried before a jury.

... The issue in the present case is strictly a post-trial issue."312 The court found Harper "more instructive in the present case."313 Avoiding any discussion of whether Harper's "medical interest" analysis should apply differently in the case of a condemned prisoner, the court went on to find that the trial court's holding "that the decision whether to medicate Petitioner was best left to the medical professionals at the State Penitentiary was properly based in the law."314

The Oklahoma Court of Criminal Appeals' ruling on the forced medication issue in Van Woudenberg unfortunately applied a generic test of "medical interest," which creates the very paradox that concerned the Louisiana Supreme Court in State v. Perry and the South Carolina Supreme Court in Singleton v. State. If the State is actively pursuing the execution of a prisoner already found insane and involuntary medication is probably the only means of making the prisoner competent, how can the State credibly claim that its employees are medicating the inmate for his own good? Only the narrowest conception of the prisoner's medical interest would justify the State's use of medication in such a case: the treatment that allegedly helps him today will lead to his execution in the near future. Rather than acknowledging how elusive the concept of "medical interest" can be in such cases, the court simply adopted a narrow conception of "medical interest" and vested the prison's medical staff with an unreviewable discretion to administer drugs that might seal the prisoner's fate.

Although Van Woudenberg was only refusing his medications intermittently and was compliant at other times, the court's opinion did not dwell on this problematic fact in our claim that the medication was "involuntary" under Washington v. Harper. This was probably due to the emerging recognition that neither Riggins

(order denying petition for writ of prohibition and/or mandamus).

308. Id. at 13.
309. Id. at 14.
310. Id.
311. Id. at 15.
312. Id.
313. Id.
314. Id. at 17.
nor Harper can be limited to situations where medication of the prisoner is accomplished through the application of physical force. The Harper/Riggins concept of "involuntary" medication reaches a variety of situations where the medication is taken without sufficient understanding of its legal ramifications. In this sense, the involuntary concept is a variant of the legal construct of "informed consent." The Oklahoma Court of Criminal Appeals may have noticed a footnote in Van Woudenberg's petition for extraordinary relief. The footnote cited the statement of the Tenth Circuit Court of Appeals in an unpublished decision, Quintero v. Encarnacion. In Quintero, a civil rights suit partly based on Harper and Riggins, the Tenth Circuit stated:

> Even if [the patient] did not object explicitly to taking the psychotropic medications, it does not necessarily follow that she took them voluntarily. If she did not know anything about them, or if the effects of the medications were to blunt her ability to refuse them, her acquiescence cannot be characterized as the voluntary ingestion of psychotropic medications.  

This section of the article initially posed the question, "When is voluntary not voluntary?" Van Woudenberg suggests that when a prisoner has been previously adjudicated insane, his ingestion of medication offered by prison officials may be involuntary even though the treatment is accomplished without the use of physical force. Without saying so, the Oklahoma Court of Criminal Appeals may have realized that a prisoner's peaceful compliance with a regimen of medication is not the equivalent of voluntariness or informed consent.

But Van Woudenberg also suggests that the involuntary character of the medication does not end the inquiry. The court basically adopted the misguided approach of the Arkansas Supreme Court in Singleton v. Norris and refused to look deeper into the forced medication paradox as it relates to condemned prisoners. After Van Woudenberg, it seems likely that when a challenge to forced medication arises, the State will immediately invoke its "duty" to medicate the mentally ill condemned prisoner. And the Oklahoma Court of Criminal Appeals will obligingly find that the discharge of that duty satisfies the due process rule of Washington v. Harper. Like the Arkansas Supreme Court in Singleton v. Norris, the Oklahoma Court of Criminal Appeals may choose to ignore the fact that the State's discharge of that "duty" will conveniently facilitate its less charitable goal of executing the prisoner.

The Oklahoma Court of Criminal Appeals should have prohibited the State's use of involuntary medication on insane prisoners until the State permanently removed the corresponding threat of eventual execution by commutation of the capital sentence. With such a pro-death penalty court, this was too much to hope for. Absent such a constitutional ruling, the subject of forcibly medicating the insane

capital prisoner to facilitate his execution should be addressed with a statute providing for either judicial modification or executive commutation of death sentences prior to the use of forced medication to treat a death row inmate's mental illness. Removal of the capital sentence is the only solution that is consistent with civilized standards. As it stands now, in the cases of insane capital prisoners, the path to Oklahoma's execution chamber is paved with the State's good intentions.

IX. Taming the Beasts of Burden: Who Should Prove Insanity and When?

Neither the Oklahoma Statutes nor the U.S. Supreme Court's opinion in Ford gives a clear statement of which party bears the burden of proof in proceedings to determine sanity to be executed. The plurality opinion in Ford passed over this important issue with the observation that "[i]t 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." 317 To illustrate its point, the Supreme Court cited Pate v. Robinson, which held that a hearing on competency to stand trial is required only when the defendant has raised a "sufficient doubt" that his competency is in question. 318

Once a prisoner has made the initial showing of "doubt" and the trial court has made the decision that a sanity hearing will be held, which party bears the burden of proof on the ultimate question of present sanity, and by what standard of proof shall the court decide who prevails? Once a prisoner has been adjudicated insane and the State alleges that sanity has been restored, who has the burden of proof to show a restoration of sanity?

Despite the lack of specific statutory or constitutional direction, the answers to these questions are fairly straightforward. Through a combination of general legal principles, constitutional decisions on competency in other contexts, and the few decisions that have addressed the issue, the trial and appellate courts can allocate the burden of proof and adopt a standard of proof that will likely comply with constitutional guarantees. This section will discuss these lines of authority and provide a procedural framework for the fair adjudication of claims of insanity to be executed.

A. Constitutional Considerations

Old cases frequently say that "sanity being the normal and usual condition of mankind, the law presumes that every person is sane." 319 The Supreme Court has recognized that a similar presumption applies to questions of mental competency to stand trial. In Medina v. California, 320 the Court held that a California statute requiring a defendant to prove his incompetence to stand trial by a preponderance

318. Id.
of the evidence did not violate the Fourteenth Amendment's guarantee of due process of law. 321 Medina effectively permits state courts to presume a defendant is competent until he demonstrates incompetency by the greater weight of the evidence.

While competency to stand trial and competency to be executed are very different factual inquiries, the State's decision to place the burden of proof on a capital prisoner to prove his insanity by a preponderance of the evidence would likely be constitutional after Medina. The Supreme Court would likely regard such a measure as "a necessary means to control the number of nonmeritorious or repetitive claims of insanity" that concerned the Court in Ford. 322 This seems particularly true when one considers that the capital prisoner is regarded as duly convicted and lawfully sentenced to death. The state of insanity is simply a bar to execution of an otherwise valid judgment. Justice Powell probably echoed the sentiments of a great many jurists in his concurring opinion in Ford when he said the following about claims of insanity to be executed:

First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not whether, but when, his execution may take place. 323

Although the State's interest in executing the validly convicted capital prisoner commands substantial weight in the matter of allocating the burden of proof in sanity hearings, the U.S. Constitution does restrict the State's ability to impose an unusually high standard of proof on the capital prisoner in such proceedings. In Cooper v. Oklahoma, 324 the U.S. Supreme Court held that an Oklahoma statute requiring an allegedly incompetent criminal defendant to prove his incompetence to stand trial by "clear and convincing evidence" violated the Fourteenth Amendment's guarantee of due process of law. 325 Because proceedings to determine competence to stand trial are the closest analogue of a proceeding to determine sanity to be executed, the due process analysis in Cooper is highly relevant.

In Cooper, the Supreme Court concluded that the "clear and convincing" burden of proof created fundamental unfairness in cases where the defendant's interests were significant and the harm to the State, from an erroneous determination of the issue, was minimal. 326

321. Id. at 448.
322. Ford, 477 U.S. at 417.
323. Id. at 425 (Powell, J., concurring).
325. Id. at 369.
326. Id. at 364-65.
Contemporary and historical procedures are fully consistent with our evaluation of the risks inherent in Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence.

The "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." For that reason, we have held that due process places a heightened burden of proof on the State in civil proceedings in which the "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'"

Far from "jealously guard[ing]," an incompetent criminal defendant's fundamental right not to stand trial, Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent.327

Under the analysis of Cooper, a statute requiring the capital prisoner to prove insanity by clear and convincing evidence would almost certainly violate the Fourteenth Amendment and would be inadequate to protect the Eighth Amendment rights recognized in Ford. Although Cooper involved competence to stand trial, the observations of the Supreme Court hold equally true in a sanity determination. The observation made by the Supreme Court in Cooper applies to all cases: "The 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'"328 Even more so than the prisoner who is incompetent to stand trial, "the consequences of an erroneous determination of competence [to be executed] are dire," and, in such cases, almost immediate.329 An erroneous finding of sanity exposes the prisoner to the prospect of imminent execution. Like the burden of proof condemned in Cooper, a rule requiring a prisoner to demonstrate his insanity under such a rigorous standard of proof has an almost inevitable consequence: the clear and convincing standard of proof will lead to executions of prisoners who can prove that they are, more likely than not, insane. Considering the ancient common law prohibition against executing the insane, the clear and convincing standard of proof would threaten a "fundamental component of our criminal justice system" and would offend a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."330

328. Id. at 362 (quoting Cruzan, 497 U.S. at 283).
329. Id. at 364.
B. Burden and Standard of Proof in Other Jurisdictions

The few modern cases that have addressed the allocation of the burden of proof and the proper standard of proof in determining sanity to be executed appear to incorporate the constitutional principles outlined above. In each of these cases, the state courts have recognized the general presumption of sanity and held that the prisoner has the initial burden of proof to show insanity by a preponderance in order to stay the execution. However, a prisoner adjudicated insane is entitled to the presumption that his insanity continues. Therefore, the State must prove that sanity has been restored by a preponderance of the evidence.

In Van Tran v. State, the Tennessee Supreme Court faced a petition alleging that a capital prisoner was presently insane and should not be executed. Because the state legislature had failed to enact any procedure for determining sanity to be executed, the court exercised its supervisory authority and promulgated procedures to be followed in compliance with Ford v. Wainwright. Consistent with many states, Tennessee adopted an initial presumption of competency that the prisoner must overcome by the greater weight of the evidence. The Tennessee Supreme Court also addressed the question of which party should bear the burden of proof after a prior adjudication of insanity. The court held that in cases where the prisoner was previously found incompetent, the State would subsequently bear an equivalent burden to demonstrate a restoration to sanity.

In declaring this allocation of the burden of proof, the Tennessee Supreme Court followed the holding of the South Carolina Supreme Court in Singleton v. State, which stated the rule as follows:

Once the defendant is found incompetent and the stay of execution is affirmed by this Court, the burden necessarily shifts to the State to move for a hearing upon the defendant’s return to competency. At this subsequent hearing, the State must show by a preponderance of the evidence that the defendant is competent to be executed. If the State

331. 6 S.W.3d 257 (Tenn. 1999).
332. Id. at 260-61.
333. Id. at 268. The court stated, "At the outset we note that at the hearing the prisoner is presumed to be competent to be executed . . . To prevail, the prisoner must overcome the presumption of competency by a preponderance of the evidence." Id. at 270-71 (citation omitted) (citing Ford v. Wainwright, 477 U.S. 399, 426 (1986) (Powell, J., concurring)).
334. Id. at 272-73. In so holding, the court reasoned:
Until and unless a statutory review procedure is adopted, the order staying execution will direct the parties to file in this Court every six months a status report which summarizes the prisoner's mental condition. When and if these submissions indicate that the prisoner has regained competency, this Court will remand the case to the trial court for a hearing to determine whether the prisoner has regained competency so that an execution date may be scheduled. At the hearing, the State will bear the burden of proving competency by a preponderance of the evidence.

Id. (citations omitted).
establishes competency, then the . . . court may lift the previous stay of execution subject to the review of this Court.\textsuperscript{336}

The same rule is found in \textit{State v. Perry},\textsuperscript{337} a case already discussed in the section of this article that addresses the forced-medication issue. After the prisoner was adjudicated insane to be executed by the state trial court, the Louisiana Supreme Court affirmed the trial court's ruling in this respect, stating that "in order to modify this stay order the State must demonstrate to this Court that Perry has achieved or regained his sanity and competence for execution."\textsuperscript{338}

Trial courts conducting proceedings to determine sanity to be executed in Oklahoma can follow these rulings with substantial confidence. The constitutional cases certainly permit the State to require that the prisoner alleging insanity in bar of execution should prove his insanity by the greater weight of the evidence. The cases recognize a legitimate interest in the State's execution of the judgment, which might be frustrated by spurious and repetitive claims of insanity. However, the adoption of any higher standard of proof, such as "clear and convincing" evidence, inappropriately allocates too much risk of factfinding error to the prisoner. It also probably violates state and federal constitutional due process guarantees and the full and fair hearing guaranteed in sanity cases under \textit{Ford v. Wainwright}.

In cases where the prisoner has already been adjudicated insane, the trial court must shift the presumption in the prisoner's favor and require the State to demonstrate that sanity has been restored. Oklahoma's courts have recognized in several contexts that a prior judicial finding of insanity gives rise to a presumption of continued insanity, and shifts the burden of proof to the party alleging that the person in question has regained sanity. In \textit{Keenan v. Scott},\textsuperscript{339} an action to set aside certain deeds based on the grantor's mental incapacity, the Oklahoma Supreme Court held:

\begin{quote}
In all civil actions it is generally held that the burden of proof of insanity rests upon him who alleges insanity, or seeks to avoid an act on account of it, and it devolves upon him to establish the fact of insanity by a preponderance of the evidence. If, however, a previous state of insanity is proved, the burden of proof is then usually considered to shift to him who asserts that the act was done while the person was sane . . . .\textsuperscript{340}
\end{quote}

The Oklahoma Court of Criminal Appeals followed the same rule in \textit{Adams v. State},\textsuperscript{341} a homicide prosecution in which the defense was insanity at the time of the offense. There, the court found the presumption was proper in cases where the proof showed mental disease of a chronic nature.\textsuperscript{342}

\textsuperscript{336} \textit{Id.} at 60.

\textsuperscript{337} 610 So. 2d 746 (La. 1992).

\textsuperscript{338} \textit{Id.} at 771.

\textsuperscript{339} 1924 OK 470, 225 P. 906.

\textsuperscript{340} \textit{Id.} \textit{at} 771, 225 P. 906.

\textsuperscript{341} 1930 OK CR 292, 292 P. 385.

\textsuperscript{342} \textit{Id.} \textit{at} 292, 292 P. 388. Quoting from \textit{Corpus Juris}, the court stated, "General insanity
In the Van Woudenberg case, the district court effectively applied this presumption and required the State to bear the burden of proving the allegation of restored sanity by a preponderance of the evidence. Van Woudenberg had proven his insanity to the satisfaction of a jury in 1994, under the more rigorous clear and convincing evidence standard used by the trial court at that time. In the 2001 proceedings, the district court avoided this "clear and convincing" standard altogether, and its ruling was unchallenged by the parties.

The presumption of insanity that arises from a prior adjudication of insanity is a fundamentally fair allocation of the risk of error in litigation of a fact question that is easily alleged but usually difficult to establish in court. The party alleging insanity may be justly required to adduce persuasive evidence of the claim. But having brought forward the evidence to establish the condition in a previous judicial proceeding, he is entitled to the benefit of doubt when the State seeks to overturn that finding and proceed with an execution.

X. Conclusion

This article attempts to provide a comprehensive discussion of common law, statutory, and constitutional rules in the uncommon law of sanity to be executed. The rules and procedures discussed here are important because they helped to save the life of a truly insane prisoner and thus prevented a grave miscarriage of justice. When properly understood by advocates and conscientiously followed by judges, these same rules should continue to prevent the cruelty and injustice of such executions in the future.

Through the Indigent Defense Act, Sammy Van Woudenberg was provided counsel to represent him and funds to retain three experts to conduct separate mental-health evaluations. Due to the complexity of mental illness and the natural skepticism toward claims of insanity (or the possibility of "sanism" as described by Michael Perlin), the process of selecting experts and developing forensic evidence became a major focus of our efforts. By retaining three independent experts, we borrowed from an old statutory concept in mental-health law and created a quasi-"sanity commission" of independent examiners who would conduct their evaluations and reach their conclusions independent of one another.

The experts chosen also reflected specific needs in the development of our case. In order to compare and contrast Van Woudenberg's present mental status with his condition in 1994, when the jury originally declared him insane, Van Woudenberg was re-evaluated by Dr. John R. Smith, a psychiatrist who testified for Van Woudenberg at the 1994 trial. Because the probative value of his testimony might be limited by his perceived professional bias and identification with the defense in a prior proceeding, we also retained a forensic psychologist from another state with no prior connection to the case. Because the State's case largely depended on

admitted or once proved to exist, is presumed to continue, and if a recovery or lucid interval is alleged to have occurred, the burden to prove such allegation is on the person making it." Id. at 388 (quoting 32 C.J. Insane Persons § 561, at 757).

343. See supra note 208.
testimony from correctional officials and prison medical personnel who believed that Van Woudenberg had been malingering his symptoms of psychosis, we chose Dr. Richard Rogers as our second forensic examiner. Dr. Rogers is a nationally recognized expert in the detection of malingering and the author of the Structured Interview of Reported Symptoms (SIRS), a widely validated standardized test for malingering of psychological symptoms. Our recent entry into the rapidly unfolding case and our lack of familiarity with Van Woudenberg's mental condition necessitated a third expert who was readily available and could give us competent, up-to-date forensic assessments of Van Woudenberg's condition on short notice. So we engaged a third forensic psychologist, Dr. Kathryn LaFortune (who is employed as a capital defense lawyer for another division of the Indigent Defense System), who provided us with periodic forensic assessments of Van Woudenberg's condition at any time without the prohibitive expense of repeated interviews by our other evaluators.

All three of the forensic examiners independently concluded that Sammy Van Woudenberg was insane. Their written reports were eventually admitted as evidence in the case and formed the basis for the district court's findings of fact. Had we not proceeded to develop our evidence in this way, we might have failed to convince a skeptical factfinder at trial or to raise a genuine concern among reviewing judges on appeal, regardless of the fact that Sammy Van Woudenberg was insane. The strength of the evidence produced in those three separate evaluations and the corroboration of those findings by two experts engaged by the State, Drs. Herman Jones and Randall Price, contributed to the resolution of the issue without a contested trial.

The district court, in a pretrial ruling, properly allocated the burden of proof to the State. When the forensic experts for both sides had completed their evaluations, it became clear that the State could not present persuasive evidence to support its earlier allegation that Van Woudenberg had regained his sanity. On July 10, 2001, the parties entered a stipulation that the available evidence demonstrated Van Woudenberg's insanity and that his execution would violate the state and federal constitutions. Even the warden, who had signed the letter to Governor Keating alleging that the prisoner had regained his reason, formally withdrew thelegation.

The district court entered findings of fact and conclusions of law to this effect. On this uncontested record, the Oklahoma Court of Criminal Appeals affirmed the district court on August 20, 2001. In its order, the Oklahoma Court of Criminal Appeals found Van Woudenberg presently insane and remanded him to the warden's custody for "proper placement and treatment."^344

The order made no mention of the lingering paradox of "treating" Van Woudenberg with antipsychotic medications to facilitate his eventual execution. Despite its silence, the problem of medicating to execute is the most disturbing legal conundrum to emerge from the case. It is a question that will haunt courts in future cases, especially if the State's effort to medicate an insane prisoner is pursued by more aggressive methods than those used on Sammy Van Woudenberg. Before that sad day comes, it is my hope that responsible legislative, judicial, and executive officers

will acknowledge and condemn by law the immoral practice of drugging insane prisoners and then executing them when they "recover their reason."

The kinds of severe mental or neurological disease that bring on the legal state of insanity are typically chronic and profoundly disabling. A death row inmate who has been found insane by a court or jury is unlikely to ever recover "reason" in the sense that civilized humans understand that term. Condemned by the false witness born of his own shattered senses, he is chained within the dilapidated prison of his mind. In many ways, he has departed this world already. Across the chasm of centuries, the ancients tell us the madman is to be punished by his madness alone. The palliatives of modern psychiatry have not overthrown that piercing maxim, and unless the treatment of the insane capital prisoner is coupled with a grant of clemency, the law has merely harnessed the power of science to subvert an eternal moral truth.