ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5542

TITLE ALVIN BERNARD FORD, ETC., Petitioner V. LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE April 22, 1986

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ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

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ALVIN BERNARD FORD, ETC., :

Petitioner :

v. : No. 85-5542

LOUIE L. WAINWRIGHT, SECRETARY, :

FLORIDA DEPARTMENT OF CORRECTIONS :

- -x

Washington, D.C.

Tuesday, April 22, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

RICHARD H. BURR, III, ESQ., West Palm Beach, Fla.; on behalf of Petitioner.

JOY B. SHEARER, ESQ., West Palm Beach, Fla.; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Burr, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF

RICHARD H. BURR, III, ESQ.

ON BEHALF OF PETITIONER

MR. BURR: Mr. Chief Justice and may it please the Court:

The case of Alvin Ford is before you today on a record which raises grave questions about Mr. Ford's competence to be executed, notwithstanding the Governor's determination in Florida that Mr. Ford is competent.

The record shows a gradual, unrelenting deterioration of Mr. Ford's mental health from late December 1981 to the present. The record shows that by 1982 Mr. Ford was diagnosed as suffering from paranoid schizophrenia by a psychiatrist familiar with his medical history. Yet, this psychiatrist's recommendation for therapy and medication was ignored by prison staff.

The record further shows that by late 1983, when Mr. Ford's deterioration began to compromise his competence to be executed, he was examined by three psychiatrists appointed by the Governor of Florida and

by a fourth psychiatrist at the request of defense counsel.

Three of these psychiatrists agreed that Mr. Ford suffered from psychosis or paranoid schizophrenia. The record shows that, despite this substantial agreement on medical diagnosis, the Governor's psychiatrists disagreed with the defense psychiatrist concerning the legal consequences as to Mr. Ford's competency of his medical condition.

Finally, the record shows that in determining Mr. Ford's competence to be executed, the Florida Governor held no hearing of any kind to sort out which of the conflicting psychiatric opinions was more reliable. Indeed, the record shows that the Governor may not have even considered the opinion and reasoning of the defense psychiatrist who found that Mr. Ford was incompetent to be executed.

These deficiencies in the Governor's competency determination process created, we submit, a grave risk that the decision that Mr. Ford was competent was erreneous.

QUESTION: What you're going at is to tell us that the Florida statute which prescribes the method for dealing with this problem is invalid, is that it? Or is it the way in which they applied the statute? Which is

it?

MR. BURR: The statutory procedure, we submit, does not provide a sufficiently reliable process for the determination of competence.

QUESTION: You think it must be an adversary process?

MR. BURR: Yes, Your Honor, I do.

QUESTION: Well, what if all the psychiatrists had agreed?

MR. BURR: If all the psychiatrists had agreed that Mr. Ford was competent, I think there would be no issue. We would certainly agree --

QUESTION: Well, I thought you were saying that this procedure, this provision, is invalid on its face.

MR. BURR: Well, I think, Your Honor, there would have to be some threshold showing of incompetency, similar to a threshold showing of incompetency before trial, for example.

QUESTION: Well, let's assume there is a threshold showing, but then all the psychiatrists agree.

MR. BURR: Well, if there is a threshold showing of incompetency, then whatever procedure follows that results in all expert opinion being unanimous, then

the procedure would likely be at an end, because there'd be no issue to litigate.

QUESTION: So it's just a question of the application of this procedure in any particular case that you're --

MR. BURR: Well, I think --

QUESTION: That triggers any kind of constitutional problem?

MR. BURR: In a case where competency is seriously in question, this procedure we submit is inadequate.

QUESTION: Mr. Burr, this Court has never held that it's required that a defendant be found competent before he can be executed, has it?

MR. BURR: No, Your Honor.

QUESTION: You contend that it isn't just the Florida statute, though; that there's a requirement of the United States Constitution that says that one must be competent to be executed?

MR. BURR: That's right, we submit that there are two legs upon which this issue stands. One is certainly the state-created interest in being spared from execution when incompetent. The other is that as a matter of Eighth Amendment substantive law it is cruel and unusual to execute those who are incompetent at the

time of execution.

QUESTION: Is it cruel and unusual to imprison someone who is incompetent?

MR. BURR: I think the question would have to be resolved on the basis of the nature of the punishment.

QUESTION: So it could be in some circumstances cruel and unusual to imprison someone who is incompetent?

MR. BURR: It could be, depending on the nature of the incompetency and the nature of the sentence.

QUESTION: And he would then have a right to be released from prison, I take it, if he could show he were incompetent?

MR. BURR: Well, I think that the alternative would not be release from prison. The sentence would still be there to be served, but the person would probably be treated in some mental health facility. It could be a forensic mental health facility.

QUESTION: Why is it cruel and unusual to execute someone who is incompetent?

MR. BURR: Your Honor, I think the answer requires a blending both of historical analysis and of modern day analysis. Historically, from as far back as

we've been able to trace it, at least to the thirteenth century, the common law has flatly prohibited the execution of the incompetent.

QUESTION: But it never provided for any sort of a judicial hearing. Granted, there are statements in the commentaries, but they never suggest there was any court proceeding for a determination of competence.

MR. BURR: Well, that's certainly true. But as this Court's jurisprudence has developed in the last two or three decades, the question of procedure and right are two separate questions.

QUESTION: Well, not inexorably. Certainly Solesbee against Balkcom didn't treat it that way.

MR. BURR: Solesbee in my view treated the issue from the perspective of procedure. The Court asked, what is the way that this interest has been protected. The Court likened the protection of this interest to clemency, which was a wholly discretionary process in which various reasons for mercy could be submitted by a condemned person, and the Governor or other clemency authority said yes or no, depending wholly on that party's discretion.

So from that perspective, the Court did I believe begin with the question of how is this enforced and get to the question of it's not an enforceable right

protected by the due process clause.

QUESTION: Do you think it violates any constitutional provision for a state legislature to vest in the Governor authority to act on the sentence and to set it aside?

MR. BURR: No, not per se. Certainly Governors are deemed appropriate and highly appropriate decision makers as to clemency questions.

As to this question, which we submit is a rights question and not a discretionary mercy sort of question, the Governor may be an appropriate decision maker, depending in part on the source of the right. He would probably not be an appropriate decision maker ultimately for an Eighth Amendment right. But for the state-created right, the Governor, assuming he acts with impartiality and detachment, could be an appropriate decision maker.

There could be practical problems from a prejudgment perspective, because the Governor may in a clemency proceeding have already passed on a question of mental status.

QUESTION: You condition that on his acting impartially, as you just said. Who would review the Governor to decide whether he acted with impartiality?

MR. BURR: Well, if as a matter of due process

law some minimal due process requirements were required, whether a particular competency determination was made in accord with those requirements would, I believe, be an appropriate matter for federal review in habeas corpus.

QUESTION: But you said if it's required. In your view, are you telling us it is required?

MR. BURR: Your Honor, we submit that it is. Again, whether the source of the right is the Eighth Amendment or Florida's state-created right to be spared from execution when incompetent, we submit that the Constitution requires a reliable decision making process under either route.

QUESTION: What about a state law that said that the Governor shall appoint a commission of five reputable psychiatrists to decide as to whether he was sane enough to be executed?

MR. BURR: Again, I think if that were the only procedure, if those five psychiatrists were in the course of making that decision required to examine the person and then decide among themselves by whatever method they choose whether the person is competent or incompetent, I don't think that would stand up under constitutional scrutiny.

QUESTION: You mean you'd want to get in there

and decide what kind of hearing that the five psychiatrists held?

MR. BURR: Your Honor, again it depends on the role assigned. If those psychiatrists are the decision makers, then --

QUESTION: The five psychiatrists are made the decision makers.

MR. BURR: If they are the decision makers and there is a case where there is differing psychiatric opinion, not necessarily among those five --

QUESTION: Don't they have a right to a dissenting opinion, just the same as I have?

MR. BURR: I'm sorry?

QUESTION: Wouldn't one of those psychiatrists have a right to a dissenting opinion, just the same as I have a right to file?

MR. BURR: Certainly, certainly. But this Court has long recognized where psychiatrists do differ as to forensic mental health issues, the only reliable way for resolving that difference is through an adversarial process, where the competing views of psychiatrists are laid before a fact finder and the more reliable of those competing views can be decided by a neutral fact finder.

QUESTION: Well, what more do you have to cite

that says that five psychiatrists cannot be designated by the state as a "fact finding body"? Why can't a state say that that is a fact finding body for this purpose?

MR. BURR: Your Honor, I think the state could do that. But the risk of error, I submit, in a decision which has life or death consequences could not be satisfied by an ex parte process simply among those five psychiatrists.

In a case where there is a serious dispute as to competency, I submit that's the threshold. Certainly in a case where there was agreement as to incompetency or incompetency -- or competency --

QUESTION: You wouldn't need the commission. He'd plead guilty and plead that he was insane. I'm talking about where there is a dispute.

MR. BURR: Where there is a dispute --

QUESTION: Yes.

MR. BURR: Your Honor, I don't see how five commissioners among themselves can resolve that dispute without some input from --

QUESTION: Can five judges do it?

MR. BURR: Certainly, after having heard presentations from both sides of an issue.

QUESTION: The judges don't have to be

lawyers.

MR. BURR: No, that's correct.

QUESTION: So they could be psychiatrists.

MR. BURR: Absolutely.

QUESTION: So what are you arguing about?

MR. BURR: Your Honor, what we are arguing about is, in a case where there is a dispute about competency, the only fair and reliable way to resolve that dispute is through an adversarial process, at the end of which psychiatrists may well be the deciders. But the only way to have a disputed question of mental health and competency resolved, only reliable way, is through an adversarial presentation, to whomever the decision maker may be.

Simply entrusting those decision makers to themselves is not --

QUESTION: Did I say the procedure would not be adversarial? All I said the fact finders would be, that's all I said.

MR. BURR: I'm sorry. The fact finders could be psychiatrists. I'm sorry, I misunderstood the thrust of your question.

QUESTION: Mr. Burr, are you arguing for a full fledged adversarial hearing at a minimum, or can that be on paper? Can the documentation that you would

urge be considered be submitted on paper?

MR. BURR: Justice O'Connor, I think that a critical component would be an oral adversarial hearing, for this reason. Again, through a long line of decisions the Court has taken the opportunity to look at the way mental health issues are resolved, both in the criminal context and in the civil commitment type context.

And in each of those decisions, where the state takes involuntary action against a person who may be mentally ill, if mental illness is either a factual predicate for the state's action or a defense against the state's action, the Court has said that there has to be the adversarial crucible in which to make a reliable decision.

Now, that, as I understand the Court's decisions, requires a couple of critical components that can't be taken care of on paper: the right to present evidence and to have it understood through questioning by the fact finder; and the right to cross-examine adverse evidence, and again with the notion of assisting the fact finder to make the most reliable decision.

So I think it would have to be an oral adversarial hearing.

QUESTION: Mr. Burr, can I ask you what in

your view the test of incompetence is for this purpose?

MR. BURR: Again, I think the test would depend upon the source of the right.

QUESTION: Assume it's the Eighth Amendment.

MR. BURR: If the test is the Eighth Amendment, we have proposed a test that we believe follows the contours of the Eighth Amendment reasons for the right in the first place. Basically, there would be three components:

The first would be similar to the Florida test, whether the person understands the nature and effect of the death sentence and why it's being imposed. Secondly, whether the person has the capacity to appreciate the termination of his or her life, which is different from the first test. And the third part of the standard would be based on an access to courts concern, and that is whether the person has sufficient capacity to know any facts which might cause his conviction or sentence to be reversed and the ability to communicate it to counsel.

So we would submit that the Eighth Amendment interest would span -- Eighth Amendment test would span all three of those interests.

I'd like to talk briefly about four concerns which I think the need for a reliable procedure raises.

The first I have already addressed briefly, and that is the need for a threshold showing of incompetency before any plenary procedure, however it be defined, can be invoked.

We certainly concede that some threshold showing should be required. That kind of threshold has been required in other contexts, such as incompetency to stand trial, in which the threshold was articulated in Drope versus Missouri.

QUESTION: Mr. Burr, would you agree that the threshold ought to be directed at one or more of those three components of the test?

MR. BURR: Of the Drope components?

QUESTION: The three you gave me. It wouldn't be sufficient, for example, just to prove some form of mental illness which did not necessarily relate to one of these three components?

MR. BURR: I think that's true, but I think the showing as to the relationship with the component would certainly not have to be as strong as after a full proceeding. Taking trial competency as an example, in Drope the Court isolated three factors that were material to the threshold determination:

Evidence of irrational behavior, which I suppose might or might not be related to the Dusky test

of competency; the defendant's demeanor at trial or pretrial proceedings; and prior medical opinion as to competency to stand trial.

Now, the Court, as I read Drope and its progeny, certainly left latitude for one of these factors to be a sufficient threshold if it was strong enough. And I suppose if the person, again in a trial competency context, were so irrational that it was quite clear that that person had no capacity to understand the nature of the charges against him and to assist counsel, even though there was no explicit logical relationship, that would be enough to satisfy the threshold.

So I think if you had that kind of profound mental illness, that would be sufficient, just as it would in a trial competency context. But generally speaking, you would want to have that threshold relate to the test of competency. Otherwise, you may be going through a proceeding that at the end of which you find out was immaterial.

QUESTION: Why does the Eighth Amendment require the person appreciate the potential termination of his life?

MR. BURR: Justice Rehnquist, there's certainly no explicit requirement --

QUESTION: No, that's quite obvious.

MR. BURR: -- in the Eighth Amendment. I think again this whole Eighth Amendment question has to be addressed with a real feel for the historic prohibition, as well as the modern day analysis.

QUESTION: Well, the historic prohibition really comes cut to be making peace with your maker, doesn't it?

MR. BURR: Well, there were a number of rationales given.

QUESTION: Well, what other ones sufficed in your view?

MR. BURR: Historically, the thinking was that madness was punishment itself.

QUESTION: Well, do you think that's an adequate reason?

MR. BURR: Well, I think there's a common thread through all of the common law reasons which is certainly relevant today, and that is that the concern for a functioning human intellect in a person being punished was a great concern.

QUESTION: Well, but why doesn't that apply equally to anyone being sent to prison? The only thing that separates capital punishment from imprisonment is making peace with your God, really.

MR. BURR: To that extent, that's true.

QUESTION: And doesn't that involve entanglement under the First Amendment?

MR. BURR: I don't think so, because I think making peace with God is simply a form of expressing the capacity to appreciate the termination of life. Making peace with God was the language used back in the Middle Ages, and for some people that's certainly equally important today.

The capacity that we're talking about, though, is not a capacity for religion, but rather the capacity that all human beings have when they know that their death is imminent to come to terms with dying, rather than to be completely terrorized by death, to ameliorate that terror by an understanding of the life that person has lived and the death that's about to come.

QUESTION: Have you just discarded all the atheists?

MR. BURR: I don't think so, Justice Marshall, because I did say that it's the capacity to come to terms with death, not the capacity to make peace with God per se. Certainly people who are religious may express it in that way, but those who are not religious nonetheless have to face up to the terror of death itself.

QUESTION: This concept that you've been

discussing really antedates the Middle Ages and the medieval period, doesn't it?

MR. BURR: As best we can determine, yes, sir.

QUESTION: Have the psychiatrists come to terms with that, or do they accept the medieval concept?

MR. BURR: I don't quite understand your question.

QUESTION: Well, you're making -- you are urging that the psychiatrists make this decision. Do they have some psychiatric --

MR. BURR: Back in the Middle Ages?

QUESTION: No. Do they have a twentieth century latter part analysis and explanation for using this medieval concept that a man must really appreciate why he's being made to suffer?

MR. BURR: Well, I think, as I understand the medical literature and the research that has been done on death and dying, the medical profession understands now that there is an ameliorative psychiatrical process that seems to be common to being a human being, that people go through in different ways when their death is imminent.

I think there was an intuitive grasp of that

back in the Middle Ages, when people spoke about the need to make peace with God. But I think that has been secularly understood as a common and universal psychiatrical process in the twentieth century.

I'd like to talk briefly about not only the threshold that we submit must be met, but how the determination itself, again whether the right is from the Eighth Amendment or the state-created right, why the Constitution requires that there be a more reliable determination of competency than was present here. There are two reasons for this.

The first I submit is found in this Court's Eighth Amendment jurisprudence over the last decade and a half, since the Furman decision. Since Furman, the Court has clearly articulated on a number of occasions that, because the taking of a person's life by the state is qualitatively different in its severity and irrevocability than any other form of punishment, the decision to take life must be correspondingly more reliable.

And the Court has assured that there is this kind of greater reliability by requiring that the decision maker take into account all of the reasons proffered for not taking someone's life. Now, obviously there are some clear differences between the decision to

impose the death sentence at the outset and the decision to carry out a death sentence against a person who may be incompetent.

But there's a very fundamental commonality between those decisions as well, because in both instances what's at issue is whether or not life will be taken. And the irrevocability of that decision certainly informs the need for reliability as to the competency determination, just as much as it informs the need for a reliable sentencing decision at the outset. Likewise, the procedural assurance of reliability, that the decision maker take into account all of the countervailing reasons for taking life, should be applicable to the competency decision.

And it's quite clear that the Florida procedure does not allow that. The Florida procedure for determining competency does not require the decision maker to take into account the evidence indicating the person is incompetent if the source of that evidence falls outside of the three psychiatrists appointed by the Governor.

It's that need for reliability that the taking of life in this context requires that we find in the Eighth Amendment.

The second ground is simply from the due

process clause itself. For more than 100 years, this Court has repeatedly held that any party adversely affected, to be adversely affected by state action, has a right to be heard on the question of the appropriateness of the state's action.

That's not simply a matter of being fair, although it certainly is that. But it's also a matter of wanting state actions to be reliable, because we, for better than 100 years, for 200 years, have entrusted an adversarial process as getting us more reliable decisions.

It's that reliability which the Court has drawn on time and time again in the mental health forensic cases.

QUESTION: But the basic decision on the punishment has been dealt with in the sentencing hearing, has it not?

MR. BURR: Absolutely.

QUESTION: And that's an adversary proceeding.

MR. BURR: We concede that the question of the appropriateness of death as a punishment is settled and is settled in Mr. Ford's case. But at this point there is still a question as to whether that sentence is appropriately carried out at this moment. And if there

is a right from either source to be spared from execution when incompetent, then the question of whether life is to be taken now is a question that has to be reliable --

QUESTION: Should that be a final decision in this third stage, or could it be conditioned, that he could not be executed until he had recovered his capacity to grasp all the meaning of it?

MR. BURR: Historically and in most of the states that have this rule, the rule is the latter, that the execution is postponed until and if the person regains competency. So it would not be a question that affected the sentence in a jurisdictional sense. The sentence would still be there, but not to be carried out until competency is regained.

I'd like to take just one minute to address a final concern that I think this case raises, and that's the question of the need for finality. There's no question that in this Court's opinions and in the country now there is a great concern about finality in death cases.

This Court has always been careful, however, to balance the need for finality against the need for a reliable decision making when death is at issue. In the context of this issue, if there is a constitutionally

reliable decision making process at the outset finality will be possible to achieve. It can be done in this way.

If there's a reliable determination process upon a raising of a claim of incompetency, there will be reliable fact finding concerning the person's mental state, concerning the person's history, medical history and clinical background, and there will be a forward-looking decision made as to whether the person is now competent or may be incompetent in the future.

If future claims of incompetency were to be made, those claims would necessarily be new claims because they'd have to be made on the basis of changed circumstances. But the specter of endless litigation which the state has raised is really not a specter at all if there's a reliable process in the beginning, because --

QUESTION: Could I ask you, do you believe that the decision, by whomever it is made, should be subject to judicial review? Must it be?

MR. BURR: I sound like a broken record, but again I think it depends on the source of the right. If the source is the Eighth Amendment, then I think the habeas process would follow. But if it's a state-created right --

QUESTION: Then what?

MR. BURR: I think that's a tough question.

QUESTION: Well, I know. But you're saying -- you're asking us to say what's wrong with this --

MR. BURR: Certainly.

QUESTION: -- procedure, and so you should be able to say what you think the right procedure is.

MR. BURR: I will try to do that. But all I'm saying is that it's not easily answered.

QUESTION: Well, do it the hard way, then.

MR. BURR: This Court in non-capital cases, criminal cases, has never required appellate review. If there is appellate review, then it has to be fairly done.

QUESTION: Well, but we've at least required that there be a judge.

MR. BURR: Certainly. I thought the question was should there be appellate review.

QUESTION: No, I said just judicial review.

MR. BURR: I'm sorry, I'm sorry. I apologize. If the procedure --

QUESTION: What if the Governor went here had had an adversary hearing, you could call all the witnesses you wanted, make all the arguments you wanted, and then he decided the facts? Do you think the due

process clause would require a judicial decision?

MR. BURR: I think the due process clause would require a judicial review of that action. The reasons are this. In Pulley versus Harris, the Court held --

QUESTION: So the state might as well just quit wasting its time and provide for this hearing before a judge in the first place?

MR. BURR: Not necessarily, because I think any form of judicial review after a fair administrative proceeding can be limited. It can be limited to whether fact findings, for example, are fairly supported by the record, and need not be a plenary kind of review that there would be after a judicial proceeding.

But I do believe the underlying Eighth Amendment concern for reliability would call for some form of review, just as in the death sentencing context in Pulley the Court indicated the Eighth Amendment required some form of meaningful appellate review.

Thank you.

CHIEF JUSTICE BURGER: Ms. Shearer.

ORAL ARGUMENT OF

JOY B. SHEARER, ESQ.,

ON BEHALF OF RESPONDENT

MS. SHEARER: Mr. Chief Justice and may it

please the Court:

The Governor of Florida has determined that Alvin Ford is competent to be executed. The fact that this occurred does not give rise to an Eighth Amendment right, and the requirements of procedural due process were satisfied. At this point the state should be entitled to carry out its lawfully imposed sentence.

There is no question Alvin Ford was sane in 1974 when he committed the offense of first degree murder and when he was tried and convicted. In 1984, the Governor of Florida determined that he was sane to be executed. This was done through the procedure outlined in Florida Statute 92207.

Upon being informed by Ford's attorneys that they believed Ford was insane, the Governor appointed a commission of three psychiatrists. The commissioners were directed to examine Ford and to determine if he understood the nature of the death penalty and why it was to be imposed upon him.

The three commissioners personally examined Alvin Ford. They met with his attorneys and accepted materials prepared by the attorneys and submitted to them. They reviewed his prison records and they spoke to prison personnel having daily contact with Ford.

All three commissioners independently

concluded and reported to the Governor in writing that Ford did understand the penalty and why it was being imposed. By signing the death warrant, the Governor accepted their conclusions and made the determination of sanity.

We submit this is akin --

QUESTION: Wasn't there a contrary opinion?

MS. SHEARER: There was an opinion which was a psychiatrist that Ford's attorneys asked to go and see Ford. He was of the opinion that Ford --

QUESTION: He was not one of the commissioners?

MS. SHEARER: No, that's correct.

QUESTION: So they did have a -- they were allowed to submit that evidence from their independent psychiatrist?

MS. SHEARER: They gave this report to the commissioners and they sent it to the Governor's office, although there was no solicitation of this material by the Governor.

This doctor, however, only disagreed on one prong. He agreed that Ford understood the nature of the death penalty, but he said Ford apparently did not understand why it was to be imposed upon him.

QUESTION: There was no hearing. The Governor

did not hold a hearing.

MS. SHEARER: That's correct.

We submit the Florida statute carries through the common law humanitarian policy and that this does not give rise to an Eighth Amendment right. In the first place, the deferment of execution of the insane is only a temporary reprieve. It does not affect the fact that the sentence of death is lawful and it does not in any way cancel it or suggest that its imposition was wrong. For this reason, we submit that the claim raised by Ford does not fall within the traditional scope of the Eighth Amendment.

There have been various justifications advanced, both at common law and now, as to why this prohibition should exist. But none of them are -- there is no one single compelling rationale which has been generally accepted or which Ford suggests now.

As to the argument that it would perhaps prematurely cut off access to the courts, Ford concedes that this is not true in his case because he had ten years of litigation and ample opportunities for judicial review prior to any claim of insanity being made.

As to the insanity perhaps being punishment enough, of course, this isn't true either, because upon restoration to mental health the sentence would be

imposed.

As to the argument that there should be opportunity to prepare for death, I think we should put this is perspective and consider the very little opportunity the victim in this case had to prepare for death. He saw a shotgun pointed at his head and saw a shot go off, and that was the end of his opportunity. And Ford certainly had ten years to prepare himself.

And the analysis to the Elizabeth Kubler-Ross writings --

QUESTION: Let me interrupt you, if I may, with that one. Are you saying that even if there were no opportunity -- I know you say in this case he had plenty of opportunity. But even if the particular convicted person had no opportunity to prepare for death, whatever might be appropriate in his case, that still should not matter because of what he did to the victim?

MS. SHEARER: Well, I think the fact that he has heard the sentence pronounced upon him in court gives him the opportunity to prepare for death. And the fact that there is -- we know in any capital case there is going to be several years of review, and this does not --

QUESTION: Well, supposing at the time of

imposing the sentence he fully understands, but then a month later he loses the capacity to prepare for death. Are you saying that that should not prevent the state from going forward with the execution?

MS. SHEARER: Yes.

QUESTION: I see.

MS. SHEARER: I am. I think that the Florida standard is appropriate and it should be the only criteria that is necessary to determine, and that is again if he understands the nature of the penalty and why it's to be imposed. That somewhat incorporates preparation for death also, because if he understands what's happening that should be sufficient.

We submit the penalty is just and therefore this determination, like clemency, falls outside the judicial process.

In Roberts versus the United States, to answer a couple of questions that came up, the D.C. Circuit held that the development of a mental disorder after incarceration is not cruel and unusual and unusual punishment because the sentence itself remains lawful, and the fact that a particular person has a problem adapting to prison does not cancel the punishment or give rise to an Eighth Amendment claim.

QUESTION: Well, could I ask, suppose Florida

had no provision at all for determining whether a person were competent to be executed, and the law of Florida was that once you're convicted, the fact that you become incompetent and don't know what's going on doesn't make any difference, we'll still execute you. Would there be any constitutional barrier to that?

MS. SHEARER: Unless there was going to be an argument that the common law prohibition should carry over and that there was some sort of fundamental --

QUESTION: Well, I just asked you. Do you think the federal Constitution would require that Florida first determine whether he's competent?

MS. SHEARER: No. No, Your Honor.

QUESTION: So Florida could just say, we intend to execute people who become incompetent after they are sentenced to death?

MS. SHEARER: Well, of course we haven't.

QUESTION: I know. But as far as the federal Constitution is concerned, that's your position?

MS. SHEARER: That's correct, that there is no constitutional right, because it's like clemency and it falls outside any stage of the judicial process.

This Court has long recognized taht there is not an entitlement to litigate every federal claim in a federal court, and even if the Court finds an Eighth

Amendment right we submit that our Governor acted as a neutral and detached decision maker and that, since the actual carrying out of the sentence is an executive function, it's appropriately entrusted to him to determine the competency of one who is to be executed; and that likewise, our standard is adequate and that it doesn't need to be further expanded.

We submit that this Court's decision in Solesbee versus Balkcom, which the Court of Appeals applied in this case and held controlling, was correctly decided. In Solesbee, this Court held that a determination of competence for being executed is an executive function, like clemency, and that the Governor, with the aid of expert opinion, can make this decision and due process is satisfied.

Nothing, no developments in the law that have occurred since Solesbee have in any way diluted the validity of the Court's reasoning in that opinion. The Gardner case, which came up in recent times, dealt with the initial selection of persons who were to be sentenced to death and did not deal with post-conviction insanity, like this case.

We submit that, since all judicial remedies had been exhausted at the point when the claim was made and that due process can be flexible, that this

procedure that we have in Florida adequately balances the competing interests identified by this Court is the Mathews versus Eldridge opinion.

We submit that Ford's private interest at this point is minimal, because he has had many, many years in which the validity of the judgment and sentence have been litigated directly and collaterally. And on the other hand, the state does have a valid interest in bringing an end to litigation and carrying out this sentence.

In this case, no claim of insanity was every presented to any court until ten days prior to the scheduled date of execution, although, the claim being that the Governor's procedure was inadequate, certainly a judicial determination could have been sought at an earlier time.

The district court did find an abuse of the writ in this case, and the Eleventh Circuit didn't reach that issue, but I think it's appropriate to note that we do have a valid interest in finality and that this is one reason why our present procedure is appropriate. The Governor can make the determination in a reasonably expeditious manner, and that properly respects the individual's interest, but it also serves the state's interest.

We submit that the risk of erroneous deprivation is negligible because the Governor is advised by a panel of experts. In the Gilmore versus Utah case, this Court was willing to accept expert determinations in the state system of competency to waive direct appellate rights. So certainly in this case, many years after the original conviction, the Governor's determination, which was based on expert opinions, can be accepted and it can bring this matter to a conclusion. Our statute strikes the proper balance between these interests.

In Barefoot versus Estelle, this Court took note that federal habeas corpus is not a forum to relitigate state trials. And certainly, it's even less so a means by which a defendant can indefinitely delay execution.

Therefore in this case, bearing that in mind, we submit that the state has properly respected Alvin Ford's concerns and that the judgment and sentence are lawful, his competency has been determined, and that the Eleventh Circuit properly ruled in this case to affirm the judgment denying the petition for habeas corpus.

If there are no further questions, I'd ask that that decision be affirmed. Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:40 p.m., oral argument in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

85-5542 - ALVIN BERNARD FORD, ETC., Petitioner v. LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)