

TIME FOR A LEGISLATIVE CHANGE: FLORIDA'S STAGNANT STANDARD GOVERNING COMPETENCY FOR EXECUTION

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I. INTRODUCTION

The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.¹

In 1986, the United States Supreme Court used Florida's procedure for determining mental competency for execution as a test case for banning execution of the mentally ill.² Under *Ford v. Wainwright*, "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."³ Even before it officially held that executing the insane violated the Eighth Amendment, the Supreme Court recognized that the government must perform its duty to execute sentences with "scrupulous fairness" to the accused.⁴ By deeming execution of the mentally ill cruel and unusual, the Court afforded a degree of due process to inmates on death row.⁵ No longer is taking the life of the mentally ill simply within the "benevolent discretion" of the State.⁶

Although Florida's procedure may now be constitutional on its face, in practice, Florida continues to execute the mentally ill.⁷ Thomas Provenzano, for example, thought he was Jesus Christ.⁸ He lived

1. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). For a discussion on the modern view of capital punishment, see Alex Kozinski & Stephen Bright, *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353 (1997); Symposium, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351 (2003).

2. *Ford v. Wainwright*, 477 U.S. 399, 416 (1986).

3. *Id.* at 410.

4. *Solesbee v. Balkcom*, 339 U.S. 9, 13 (1950).

5. See *Ford*, 477 U.S. at 399. For more information on due process and capital punishment, see Robert McAuliffe, *A Procedural Due Process Argument for Proportionality Review in Capital Sentencing*, 21 COLUM. J.L. & SOC. PROBS. 385 (1988).

6. *Solesbee*, 339 U.S. at 15-16 (Frankfurter, J., dissenting).

7. It is important to note from the outset that this Comment does not advocate that the mentally ill should go unpunished when they commit heinous crimes. Nor does it try to undermine the resulting emotions experienced by victims and their families. It simply puts forth an alternative view for determining competency for execution. For a rationale supporting the commuting of sentences to life in prison, see Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996); Lindsay A. Horstman, Comment, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823 (2002).

8. See Initial Brief of Appellant at 5, *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999) (No. 96,453). The doctor examining Provenzano stated:

Mr. Provenzano knows, not thinks or believes, that the reason that he is to be executed is because "They" believe that he is Jesus Christ. Those who seek to execute him hate and fear Jesus Christ and if he is dead then Jesus Christ is dead and that is their goal

He does not connect the courthouse shooting with the execution. It is unrelated because he is innocent.

on Florida's death row until he was executed on June 21, 2000, believing that "They" wanted to execute him because "They" hated and feared Jesus.⁹ Pedro Medina, who was a nineteen-year-old inmate of a Cuban mental asylum, also lived on Florida's death row.¹⁰ The State executed him even though he spent most of his life confined for paranoid schizophrenia and organic brain damage.¹¹ Before their executions, Florida expressly declared both men mentally competent.¹²

This Comment takes a closer look at Florida's procedures for assessing mental competency for execution and proposes a new statute to reduce the number of inaccurate evaluations. Part II begins by examining *Ford v. Wainwright* as the potential cause of Florida's insufficient procedure,¹³ and *Atkins v. Virginia*¹⁴ as a possible solution to the questions left by *Ford*.¹⁵ Part III explains Florida's current procedure for determining competency for execution and discusses substantive and procedural inadequacies in the present process. Part IV delves into alternative statutory models, including the American Bar Association standards and Florida's procedure for determining competency to stand trial. Based on these standards, this Section also includes the ideal Florida statute, elaborates the reasons and mechanisms for bolstering the ideal statute's substantive inquiry into mental health, and notes the particular need for experts to pay attention to schizophrenia and post-traumatic stress disorder. The two tables at the end of this Comment show which types of tests measure cer-

Id. The State executed Provenzano on June 21, 2000. Information on dates of execution and a current listing of death row inmates is available at <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited Oct. 2, 2003).

9. Initial Brief of Appellant at 5, *Provenzano* (No. 96,453).

10. See *Medina v. State*, 690 So. 2d 1241, 1250 (Fla. 1997).

11. See *id.* at 1250-51 (Anstead, J., concurring in part, dissenting in part) (pointing out that the majority failed to acknowledge that Medina was a nineteen-year-old inmate of a Cuban mental asylum, that he was psychotic, had organic brain damage, and paranoid schizophrenia). Medina was executed on March 25, 1997, despite the fact that "the State possessed evidence that implicated Joseph Daniels in the murder and failed to disclose this evidence to the defendant." *Id.* at 1252. Information on dates of execution and a current listing of death row inmates is available at <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited Oct. 2, 2003).

The Cuban government exported Medina on the Mariel boat lift. In 1980, the Cuban government allowed 124,776 Cuban migrants, including a number of criminals and persons with mental illnesses to leave Cuba during the Mariel boat lift. U.S. Coast Guard Alien Migrant Interdiction, *Mariel Boat Lift*, at <http://www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm> (last visited Oct. 2, 2003).

12. See *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999); *Medina*, 690 So. 2d at 1241. The State executed Provenzano on June 21, 2000. The State executed Medina on March 25, 1997. Information on dates of execution and a current listing of death row inmates is available at <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited Oct. 2, 2003).

13. 477 U.S. 399 (1986).

14. 536 U.S. 304 (2002).

15. Although *Ford v. Wainwright* banned the execution of the mentally ill, it provided little procedural guidance to the states.

tain mental illnesses and provide a list of specific questions for mental health examiners to answer when determining competency for execution.

II. AMBIGUITY IN THE WAKE OF SUPREME COURT DECISIONS

A. *The Beginnings of the Prohibition on Executing the Mentally Ill: Ford v. Wainwright*

The ban on executing the mentally ill officially began with the Supreme Court's decision in *Ford v. Wainwright*.¹⁶ In 1974, Florida convicted Alvin Ford of murder and sentenced him to death.¹⁷ Although Ford raised no competency issues at the trial level, after being imprisoned his behavior changed and he demonstrated symptoms of confusion, delusion, and psychosis.¹⁸ He believed the Ku Klux Klan formulated a conspiracy to force him to commit suicide.¹⁹ The prison guards, as part of the "plan," were "killing people and putting the bodies in the concrete enclosures used for beds."²⁰ His tormenters supposedly began by taking his family hostage, but by "day 287" of the "hostage crisis," the list expanded to 135 people, including senators.²¹ He believed he could not be executed because he owned the prisons and controlled the Governor through mind waves.²² Eventually regressing into total incoherence, he spoke only in a code saying things such as, "Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one."²³

After the defense's psychiatrist examined Ford for fourteen months, the psychiatrist concluded that Ford suffered from paranoid schizophrenia with suicide potential that hindered Ford's ability to assist in defending his life.²⁴ On the other hand, the three governor-appointed psychiatrists jointly examined Ford for only thirty minutes.²⁵ Though each found that Ford exhibited some kind of disorder, they concluded that he "comprehend[ed] his total situation including

16. *Ford*, 477 U.S. at 399. For additional commentary on *Ford v. Wainwright*, see KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD (1993); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100 (1986). For a description of competency for execution assessments post-*Ford*, see Kirk S. Heilbrun, *The Assessment of Competency for Execution*, in DEATH PENALTY (1987).

17. *Ford*, 477 U.S. at 401.

18. *Id.* at 402.

19. *Id.*

20. *Id.*

21. *Id.* (citation omitted).

22. *Id.* at 403.

23. *Id.* (citation omitted).

24. *Id.* at 402-03.

25. *Id.* at 404.

being sentenced to death, and all of the implications of that penalty."²⁶

When the case reached the Supreme Court, the Court's plurality opinion began by observing that no states allowed the execution of mentally incompetent persons.²⁷ By noting that "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today," the Court essentially required full sanity prior to execution.²⁸

Justice Powell's concurrence in *Ford* suggested a procedure, used by Florida today, that does not require full sanity prior to execution and ignores the need for an individual to be able to assist counsel in his or her defense.²⁹ Justice Powell stated, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."³⁰ This view overlooks the possibility that the State may execute an inmate due to the inmate's inability to communicate new exculpatory information to the attorney. Justice Powell also disregarded the need for protection through procedural safeguards.³¹

On the other hand, Justice Marshall, writing for the plurality, suggested that Florida create procedures resembling those used in competency to stand trial or civil commitment-type situations.³² Before trial, individuals must be able to understand the nature of criminal proceedings against them, have a rational and factual understanding of those proceedings, and assist counsel in the defense.³³ Rather than dictate a possible standard as Justice Powell did, the plurality left the implementation of its opinion open to the states.³⁴ This resulted in a montage of procedures without uniformity and without a standard due process for evaluating mentally incompetent death row inmates.³⁵

Reading the *Ford* opinion in line with earlier Supreme Court opinions at least suggests the Court's intended direction. *Trop v. Dulles* indicated that the concept behind the Eighth Amendment was "nothing less than the dignity of man [It] must draw its meaning from

26. *Id.*

27. *Id.* at 408.

28. *Id.* at 409.

29. *Id.* at 422 n.3 (Powell, J., concurring).

30. *Id.* at 422 (Powell, J., concurring).

31. See *Solesbee v. Balkcom*, 339 U.S. 9, 15-16 (1950) (Frankfurter, J., dissenting).

32. See *Ford*, 477 U.S. at 412. This level of sanity generally conforms to the *Dusky* standard promulgated by the Court for competency-to-stand trial. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

33. *Dusky*, 362 U.S. at 402.

34. *Ford*, 477 U.S. at 416-17.

35. In its conclusion to *Ford*, the Court simply stated, "[t]he Eighth Amendment prohibits a State from inflicting the penalty of death upon a prisoner who is insane." *Id.* at 410.

the evolving standards of decency that mark the progress of a maturing society.”³⁶ This statement, coupled with the open-ended invitation to the states to implement their own procedures, indicates flexibility in the process and the Court’s desire for states to continually assess needs and deficiencies in their own laws.

Although the Court left the standard and procedures open-ended, it clearly indicated that Florida’s procedures violated the Eighth Amendment in three ways: (1) by denying the prisoner a mechanism to challenge the findings and impeach the opinions of the governor-appointed psychiatrists, (2) by placing the entire competency determination in the hands of the governor, and (3) by preventing the condemned from playing any relevant part in the quest for the truth.³⁷ The Florida Legislature had to act quickly to eliminate these blatant procedural flaws and prevent further constitutional violations.³⁸ Hindsight, however, illuminates the imprecision and dangers resulting from the quick fix.³⁹

B. Applying Atkins v. Virginia to Mental Competency Standards

After the plurality opinion in *Ford*,⁴⁰ the Supreme Court, in *Atkins v. Virginia*, garnered six votes to decisively prohibit executions of the mentally retarded under the Eighth Amendment.⁴¹ Although the Court again left the task of developing procedures to enforce this prohibition to the states,⁴² the Court’s rationale provides insight into drafting acceptable methods to prevent the State from executing the mentally ill.

The Court recognized that the mentally retarded often know the difference between right and wrong and seem superficially competent to stand trial, yet cannot provide meaningful assistance to their attorneys.⁴³ Because of their impairments, the mentally retarded “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand

36. 356 U.S. 86, 100-01 (1958).

37. *Ford*, 477 U.S. at 413-16.

38. See *In re Amendments to the Fla. Rules of Criminal Procedure*, 518 So. 2d 256 (Fla. 1987).

39. See, e.g., *Sanchez-Velasco v. Sec’y of the Dep’t of Corr.*, 287 F.3d 1015 (11th Cir. 2002); *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001); *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999); *Carter v. State*, 706 So. 2d 873 (Fla. 1997); *Medina v. State*, 690 So. 2d 1241 (Fla. 1997); *Wuornos v. State*, 676 So. 2d 972 (Fla. 1996).

40. *Ford*, 477 U.S. at 399.

41. 536 U.S. 304 (2002). For additional commentary on *Atkins v. Virginia*, see, James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003); Note, *Implementing Atkins*, 116 HARV. L. REV. 2565 (2003).

42. *Atkins*, 536 U.S. at 317.

43. *Id.* at 318, 320.

the reactions of others.⁴⁴ The same is true for the mentally ill. In *Atkins*, this inability to assist in one's own defense categorically excluded the mentally retarded from execution.⁴⁵ Yet, Florida does not require that the mentally ill have the ability to communicate with counsel.⁴⁶

The Court also noted the contrast between the State and defense experts' examinations. To determine whether Daryl Atkins qualified as mentally retarded, the defense's forensic psychologist interviewed Atkins, members of Atkins' family, and even deputies working in the jail where Atkins had lived for the preceding eighteen months.⁴⁷ The defense psychologist also reviewed school and court records and administered a standard intelligence test that showed Atkins's IQ level to be fifty-nine.⁴⁸ According to the Wechsler Adult Intelligence Scales test (WAIS-III), an IQ of less than seventy is considered mentally retarded.⁴⁹

The State's expert witnesses testified that Atkins was not mentally retarded.⁵⁰ They based their testimony on two interviews with Atkins, a brief review of his school records, and a few interviews with correctional staff.⁵¹ The State's experts did not administer an intelligence test, yet they concluded that Atkins was of "average intelligence, at least."⁵²

The Court relied on the defense expert's testimony to ban execution of the mentally ill.⁵³ In doing so, it introduced and accepted standardized measurement instruments in the field of psychology. Although the WAIS-III measures intelligence, numerous other scientifically sanctioned instruments exist for psychological testing.⁵⁴ These tests include accurate provisions to detect malingering, or "faking."⁵⁵

44. *Id.* at 318.

45. *Id.* at 320.

46. See FLA. STAT. § 922.07 (2002).

47. *Atkins*, 536 U.S. at 308 n.4.

48. *Id.* at 308-09.

49. *Id.* at 309 n.5. (citing B. SADOCK & V. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (7th ed. 2000)). Only about one percent of the population has an IQ this low. *Id.* Dr. Nelson, the defense's forensic psychologist, testified that in evaluating over forty capital defendants, "Atkins was only the second individual who met the criteria for mental retardation." *Id.* (citation omitted).

50. *Id.* at 309.

51. *Id.* at 309 n.6.

52. *Id.* at 309 (citation omitted).

53. See *id.*

54. See Table 1, *infra* Part VI.

55. For example, decrements in the WMS-R concentration/attention index are atypical and signal the need for full assessment of malingering. Mark A. Small & Randy K. Otto, *Evaluations of Competency to Be Executed: Legal Contours and Implications for Assessment*, 18 CRIM. JUST. & BEHAV. 146, 153 (1991).

Experts inevitably disagree on the meaning of test results or evaluations on some occasions. However, the State's experts who examined both Atkins and Ford based their opinions on considerably less evaluation and reached conclusions that not only contradicted those of the defense experts, but also were explicitly rejected by the Supreme Court. A standardized evaluation instrument would improve and streamline the process by allowing the fact finder to focus on valid differences in opinion rather than inadequate evaluation techniques.

III. FLORIDA'S "STANDARD" FOR EVALUATING MENTAL COMPETENCY FOR EXECUTION

A. *The Substantive Law and Procedures*

Florida's process does not contain a standardized evaluation instrument, nor does it incorporate the rationale in *Atkins*. Instead, Florida continues to use the approach suggested by Justice Powell's concurrence in *Ford v. Wainwright*.⁵⁶ This sixteen-year-old approach considers only the individual's cognitive capacity for understanding the penalty and disregards the individual's need to be able to communicate with his or her attorney.⁵⁷ Florida continues to define insanity as "lack[ing] the mental capacity to understand the fact of the impending execution and the reason for it."⁵⁸

1. *Trying for a Hearing*

In Florida's current procedure, inmates, or people acting on their behalf, may raise issues of competency for execution only after the governor signs the death warrant.⁵⁹ Once raised, the governor appoints a commission of three psychiatrists to examine the inmate and determine "whether he or she understands the nature and effect of the death penalty and why it is to be imposed upon him or her."⁶⁰

Prior to 1970, the commission of mental health evaluators had to include "two competent disinterested physicians."⁶¹ The Florida legislature has since removed the requirement that the psychiatrists be disinterested.⁶² Now the State appoints disinterested physicians only

56. 477 U.S. 399, 422 (1986) (Powell, J., concurring).

57. *See id.*

58. FLA. R. CRIM. P. 3.811(b).

59. *See Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001).

60. FLA. STAT. § 922.07(1) (2002).

61. Ch. 70-339, § 134, 1970 Laws of Fla. 1058, 1059 (codified at FLA. STAT. § 922.07(1) (2002)).

62. *See* FLA. STAT. § 922.07(1) (2002).

if the inmate ultimately obtains a hearing and then only if the judge thinks it necessary.⁶³

The commission of the three governor-appointed psychiatrists must examine the inmate at the same time.⁶⁴ The defense attorney and the state attorney may also attend.⁶⁵ After receiving the commission's report, the governor decides whether the person is mentally competent.⁶⁶ Florida's governors are notorious for their "ghoulish rivalry" in support of the death penalty.⁶⁷ Consequently, an individual must not only navigate the competency process, but the political one as well. Only after the governor's decision may the inmate move for a stay of execution in the circuit court.⁶⁸ The motion may contain the defense psychiatrist's testimony as well as any other relevant evidence.⁶⁹

Since many death row inmates require pro bono services,⁷⁰ they typically have only one mental health expert.⁷¹ The judge, when evaluating a motion that could include three state expert opinions versus one defense expert, shall grant a stay of execution and may order further proceedings if he or she has "reasonable grounds" to believe that the prisoner is insane.⁷² The inherent danger exists that a

63. FLA. R. CRIM. P. 3.812(c). For a look at the willingness of Florida's mental health examiners to participate in competency hearings, see Mary Ann Deitchman, *Self-Selection Factors and Willingness of Florida Mental Health Professionals to Participate in Competency for Execution Evaluations* (1988) (unpublished M.S. thesis, Florida State University) (on file with the Florida State University Library).

64. § 922.07(1). For an explanation of problems associated with joint examinations, see, *infra* Part IV.B.1.b.

65. *Id.*

66. *Id.* § 922.07(2).

67. *The Politics of Death*, ECONOMIST, Mar. 24, 1990, at 26. In Bob Martinez's campaign, he boasted, "I now have signed ninety death warrants in the state of Florida . . ." Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 246 n.28 (citing Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19). In Florida Governor Bob Graham's race for the United States Senate, he bragged about signing four death warrants between February and the election in November. *Id.* at 246.

68. FLA. R. CRIM. P. 3.811(d).

69. *Id.*

70. See generally Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

71. Mental health experts face an interesting ethical dilemma in death penalty cases since they must take an oath to preserve life. For more information on this ethical dilemma, see Douglas Mossman, *The Psychiatrist and Execution Competency: Forging Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1 (1992); David L. Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177 (1997); Donald H. Wallace, *The Need to Commute the Death Sentence: Competency for Execution and Ethical Dilemmas for Mental Health Professionals*, 15 INT'L J.L. & PSYCHIATRY 317 (1992).

72. FLA. R. CRIM. P. 3.811(e). "Reasonable grounds" may exist when a defendant presents both an expert report that alleges he or she is incompetent and other corroborating evidence of strange behavior that creates a question of fact on the issue. Provenzano v. State, 751 So. 2d 37, 40 (Fla. 1999).

trial judge will summarily accept the multiple opinions of the State's experts rather than the one presented by the defense.⁷³ If the judge refuses to grant a hearing, the inmate never receives a full-scale de novo determination of competency that would allow the judge to evaluate all of the evidence.⁷⁴

2. *In the Event of a Hearing*

Florida does not, as a matter of law, grant hearings to determine competency for execution even though the execution may be unconstitutional. *Medina v. State* was the closest the Florida Supreme Court came to granting a hearing as a matter of law.⁷⁵ In *Medina*, the court held that reports by two psychologists and one psychiatrist, which concluded that Medina was insane, met the "reasonable-ground threshold" and required an evidentiary hearing.⁷⁶ The impossibility of psychiatric post-execution evaluations forecloses any further constitutional challenges.

If the petitioner actually receives a hearing, he or she must prove incompetency by "clear and convincing" evidence.⁷⁷ Although the hearings are technically de novo, the court is not bound by the rules of evidence.⁷⁸ When presented with an issue of competency for execution, the judge may do one of three things: "(1) require the presence of the prisoner at the hearing; (2) appoint no more than 3 disinterested mental health experts to examine the prisoner . . . ; or (3) enter such other orders as may be appropriate"⁷⁹ Of the three, only appointing disinterested experts contains any substance. If the judge finds, by clear and convincing evidence, that the individual is incompetent, then the judge enters an order continuing the stay of execution until the individual is restored to sanity.⁸⁰

73. See *Medina v. State*, 690 So. 2d 1241, 1254 (Fla. 1997) (Anstead, J., concurring in part, dissenting in part). Although Florida created the Capital Collateral Representative (CCR), these agencies have limited funding and must serve all 334 of Florida's death row inmates. Thus, it is far more likely that the defendant's odds are three-to-one. In *Provenzano v. State*, the defense was concerned not only with prejudice, but with even being able to present defense expert testimony since the expert was in Wyoming and could not testify on the short notice provided by the court. 750 So. 2d 597, 599-601 (Fla. 1999).

74. See *id.*

75. *Id.* at 1242.

76. *Id.* at 1246.

77. FLA. R. CRIM. P. 3.812(e).

78. *Id.* at 3.812(d).

79. *Id.* at 3.812(c).

80. Although much controversy exists over the administration of antipsychotic medication to render an inmate competent for execution, a full discussion is beyond the scope of this Comment. The Eighth Circuit recently held that the Constitution does not forbid a state to force a psychotic death row inmate to take drugs making him sane for execution. *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (en banc). Ironically, the medication, according to the test in *United States v. Sell*, 282 F.3d 560, 567 (8th Cir. 2002), vacated by 123 S. Ct. 2174 (2003), remained in the inmate's "best medical interest" once an

All of Florida's procedures seem targeted toward expediting competency cases to avoid the risk of delay and false claims. However, history suggests that a perception of increasing delay and false claims is inaccurate.⁸¹ Even during the period surrounding the high-profile case of *Ford v. Wainwright*, fewer than five percent of Florida's death row inmates claimed mental incapacity.⁸²

A more comprehensive system of evaluating mental health that includes standardized procedures and a threshold showing of incompetency before reaching a hearing could retain expediency without compromising due process. This revamped system would require a psychiatrist's report certifying that, in his or her expert opinion, the inmate would not meet the competency test. Only upon receipt of expert evidence would the issue go to a full competency assessment procedure. Three neutral psychiatrists would then examine the inmate. Their reports, in addition to other opinions the defense or State wished to include, would go to a hearing. This would effectively avoid the prolonged process of going through the governor, and would require specific findings up front to reach a more in-depth analysis.⁸³

B. *Flaws in Florida's Process*

Reform begins with an understanding of how the present system may run awry. Accordingly, four impediments to accurate determinations of competency exist in Florida's procedures: (1) no assessment of assistance capabilities to ensure that prisoners could assist counsel in their own defense by communicating any fact that would make their execution improper or unlawful; (2) no standardized procedure for psychiatrists to follow when evaluating competency for execution; (3) no adherence to the rules of evidence, including hearsay; and finally, (4) an inmate's burden to prove insanity by clear and convincing evidence is too high and should remain consistent with the burden of proving competency to stand trial.

1. *Communication with Counsel*

First, Florida's statute fails to include an assistance prong to determine whether the inmate can communicate with counsel.⁸⁴ This

execution date was set. For more information on the ethics of administering antipsychotic drugs in death penalty cases, see Michael D. Grabo & Michael Sapoznikow, *The Ethical Dilemma of Involuntary Medication in Death Penalty Cases*, 15 GEO. J. LEGAL ETHICS 795 (2002).

81. See Paul F. Enzinna & Jana L. Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency to Be Executed After Ford v. Wainwright*, 41 FLA. L. REV. 115, 129 (1989).

82. *Id.*

83. *See id.*

84. See FLA. STAT. § 922.07 (2002).

becomes particularly important in light of numerous procedural errors in death penalty proceedings. A national study conducted by Columbia University found, based on direct appeals, post-conviction reviews, and federal habeas corpus petitions, that Florida's prejudicial error rate in death penalty cases is *seventy-three percent*.⁸⁵ An incomplete list from 1973 to 2000 revealed that *twenty-four* cases were re-examined due to ineffective counsel.⁸⁶ Nine cases were reevaluated because the State suppressed crucial evidence.⁸⁷ In light of these statistics, by not including an evaluation of the inmate's ability to consult with counsel, the State takes advantage of the inmate's mental incompetency to foreclose his or her final right to challenge the execution.

The argument arises that, since post-conviction proceedings afford more procedural safeguards, the State can safely satisfy due process concerns with a quick checklist. In the post-conviction process, however, an individual receives a competency hearing only "when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input."⁸⁸ Ironically, an inmate cannot raise a factual issue if he or she is not competent. Thus, the circularity of the process precludes effective review at this stage.

An individual may be competent for execution if he or she understands the facts and reasons for the impending execution. However, since the current standard does not require sufficient capacity to consult with an attorney, the inmate may be unable to raise a genu-

85. JAMES S. LIEBMAN ET AL., CRIMINAL JUSTICE REFORM EDUCATION FUND, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, app. A, at A34 (June 2002), available at <http://justice.policy.net/cjedfund/jpreport/florida.pdf>.

86. *Id.* at app. C, C-12 to C-16, available at <http://justice.policy.net/cjedfund/jpreport/liebapp5.pdf>; see also *Clark v. State*, 690 So. 2d 1280 (Fla. 1997); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Torres-Arboleda v. Dugger*, 636 So. 2d 1321 (Fla. 1994); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Heiney v. State*, 620 So. 2d 171 (Fla. 1993); *Hudson v. State*, 614 So. 2d 482 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992); *Bates v. Dugger*, 604 So. 2d 457 (Fla. 1992); *Mitchell v. State*, 595 So. 2d 938 (Fla. 1992); *State v. Lara*, 581 So. 2d 1288 (Fla. 1991); *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989); *Bassett v. State*, 541 So. 2d 596 (Fla. 1989); *State v. Michael*, 530 So. 2d 929 (Fla. 1988); *Fitzpatrick v. Wainwright*, 490 So. 2d 938 (Fla. 1986); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985); *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984); *Vaught v. State*, 442 So. 2d 217 (Fla. 1983); *Williams v. State*, 438 So. 2d 781 (Fla. 1983); *Holmes v. State*, 429 So. 2d 297 (Fla. 1983); *Leduc v. State*, 415 So. 2d 721 (Fla. 1982).

87. LIEBMAN ET AL., *supra* note 85, at app. C, C-12 to C-15, available at <http://justice.policy.net/cjedfund/jpreport/liebapp5.pdf>; see also *Young v. State*, 739 So. 2d 553 (Fla. 1999); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Roman v. State*, 528 So. 2d 1169 (Fla. 1988); *Arango v. State* 497 So. 2d 1161 (Fla. 1986); *Arango v. State*, 467 So. 2d 692 (Fla. 1985).

88. *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997).

ine issue to reach a post-conviction proceeding.⁸⁹ Consider the following analogy: If the State required a child with learning disabilities to read before qualifying for help, then the child may never receive that help. Likewise, the inmate must first have the capacity to recognize and communicate new facts or issues to qualify for a post-conviction competency hearing.

Both the common law and Justice Frankfurter, in his dissent in *Solesbee v. Balkcom*, recognized the need for an assistance component in determinations of competency.⁹⁰ Sir John Hawles, Hale, Hawkins, and Blackstone noted that “were [the inmate] of sound memory, he might allege somewhat’ to save himself from doom.”⁹¹ As Justice Frankfurter considered these writings in *Solesbee*, he concluded:

It is not an idle fancy that one under sentence of death ought not, by becoming *non compos*, be denied the means to “allege somewhat” that might free him. Such an opportunity may save life, as the last minute applications to this Court from time to time and not always without success amply attest.⁹²

These last minute applications to the Supreme Court suggest that two things happen with frequency once the governor signs a death warrant: (1) new or suppressed evidence appears and (2) the inmate may retain new counsel.⁹³ New counsel is often state-appointed, may be less experienced in handling death penalty cases,⁹⁴ and would be less knowledgeable about the specific case.⁹⁵ When the governor signs a death warrant, he or she starts the clock ticking. A new attorney faces mountains of paper and boxes of files. Thus, the burden to point out the significance of new material falls partly on the inmate.

Pedro Medina, the defendant in *Medina v. State*, serves as an example of the problems prisoners face when new or, as in his case, suppressed evidence arises after trial.⁹⁶ Medina was a nineteen-year-old inmate of a Cuban mental asylum who was taken from the asy-

89. See FLA. R. CRIM. P. 3.811.

90. *Solesbee v. Balkcom*, 339 U.S. 9, 19 (1950) (Frankfurter, J., dissenting).

91. *Id.* (quoting writings of Hawles, Hale, Hawkins, and Blackstone).

92. *Id.* at 19-20.

93. See, e.g., *Banks v. Cockrell*, 123 S. Ct. 1511 (2003) (staying execution). Banks came within ten minutes of execution before the Supreme Court granted him a stay based on an allegation that prosecutors withheld evidence and two witnesses lied on the stand. *Medina v. State*, 690 So. 2d 1241 (Fla. 1997) (hearing testimony on newly discovered evidence); James Kimberly, *Victim's Family Stunned by Stay in Banks Case*, HOUSTON CHRON., Mar. 14, 2003, available at 2003 WL 3244083. For additional information on close-call executions, see MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR. (2003).

94. Capital Collateral Representative (CCR) is largely underfunded. As a result, the agency often hires young attorneys who must go up against experienced state attorneys.

95. See FLA. STAT. § 922.07(1) (2002) (allowing new counsel to be appointed).

96. See 690 So. 2d 1241 (Fla. 1997).

lum and shipped to the United States in the 1980 Mariel boat lift.⁹⁷ Two years later, Florida charged Medina with murder.⁹⁸ One psychiatrist and two psychologists established that Medina suffered from organic brain damage, schizophrenia, or a major depressive disorder categorized as both long-standing and recurrent.⁹⁹ Only the psychiatrist believed that Medina could be rehabilitated if “stabilized by proper medication and therapy.”¹⁰⁰ Unlike Ford, who developed his mental illness after being imprisoned,¹⁰¹ Medina had a history of serious, and often crippling, mental illness.¹⁰² He exhibited hallmark characterizations of schizophrenia that included major disturbances in thought content and involved multiple, fragmented, and bizarre delusions.¹⁰³

The Florida Supreme Court, in its majority opinion reviewing Medina’s request for an evidentiary hearing on competency for execution, did not include a single fact about his history of mental illness.¹⁰⁴ In denying post-conviction relief, the majority also failed to mention that the State indisputably “possessed evidence that someone else other than Medina killed the victim . . . and failed to disclose that evidence to the defendant.”¹⁰⁵ A dissent and concurrence by Justice Anstead discussed not only Medina’s history of mental illness, but also the newly furnished materials provided by the State.¹⁰⁶ These materials implicated someone else in the murder and recognized that not even the victim’s daughters believed Medina killed their mother.¹⁰⁷ In fact, the daughters testified in Medina’s favor.¹⁰⁸

Had Medina been competent, might he have alleged something regarding this new evidence to show not only that he did not deserve the death penalty but that he was innocent? The question remains unanswered. The State executed Medina on March 25, 1997.¹⁰⁹

Including the ability to assist counsel as a component of mental competency determinations is a necessary step toward providing

97. *Id.* at 1250. For information on the Mariel boat lift, see *supra* note 11.

98. *Medina*, 690 So. 2d at 1250.

99. *Id.* at 1251.

100. *Id.*

101. *Ford v. Wainwright*, 477 U.S. 399, 402 (1986).

102. *Medina*, 690 So. 2d at 1251.

103. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) 188 (3d ed. rev. 1987).

104. See *Medina*, 690 So. 2d at 1250 (Anstead, J., concurring in part, dissenting in part).

105. *Id.* at 1252.

106. *Id.* at 1250-53.

107. *Id.* at 1251-52.

108. *Id.* at 1251.

109. Fla. Dep’t of Corr., Execution List, 1976-Present, at <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited Oct. 2, 2003).

meaningful due process before executions.¹¹⁰ In its examinations, Florida should inquire whether an inmate lacks either (1) the capacity to recognize or understand any fact that would make punishment by death unjust or unlawful, or (2) the ability to communicate this information to counsel. This component would bolster the constitutionality of the punishment and give meaning to the post-conviction process by removing its circularity.¹¹¹

2. *Arbitrary Psychiatrist Determinations*

In addition to its minimal competency standards, Florida lacks a standardized procedure for expert examiners to follow in determining competency for execution.¹¹² Florida minutely details its execution day procedures to ensure “that the salt-free, hypoallergenic electrically-conductive gel is applied to the crown of the shaven head and calf of the right leg in a total application of approximately 4 ounces.”¹¹³ Yet, the competency standard is vague and asks only whether the inmate “understands the nature and effect of the death penalty and why it is to be imposed upon him or her.”¹¹⁴ The ambiguity of the words “understands” and “nature . . . of the death penalty” cause particular problems for examiners.¹¹⁵

(a) *Ambiguity Within the Definition*

“Understand” is difficult to define in the competency context.¹¹⁶ Does it require an intellectual understanding of impending death, or does it also require some sort of emotional appreciation for it?¹¹⁷ In a sense, the answer depends on the rationale behind capital punishment.¹¹⁸ In *Atkins v. Virginia*, the United States Supreme Court focused on retribution and deterrence as the primary rationales supporting the death penalty.¹¹⁹

Concentrating only on the Supreme Court’s reasoning, a “retributionist” would advocate an intellectual and emotional understanding

110. See ABA CRIMINAL JUSTICE STANDARDS COMM., ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 290 (1989).

111. See *id.*

112. See FLA. STAT. § 922.07 (2002) (providing no procedure for experts to follow).

113. *Provenzano v. State*, 739 So. 2d 1150, 1158 (Fla. 1999) (Appendix on Execution Day Procedures Effective for Executions After April 16, 1997).

114. FLA. STAT. § 922.07 (2002).

115. See *id.*

116. Michael L. Radelet & George W. Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 42 (1986).

117. Enzinna & Gill, *supra* note 81, at 117-18 n.14.

118. *Id.*

119. 536 U.S. 304, 319 (2002).

of both the crime and the impending punishment.¹²⁰ This would force individuals to recognize their “guilt” and “moral indiscretions.”¹²¹ When an inmate’s understanding of the death penalty is so mistaken that the individual believes, as Ford did, that the state could never impose the death penalty because the individual could manipulate the governor through “mind control,” then the inmate lacks the requisite understanding.¹²² The *Atkins* decision noted that the main aspect of retribution depended on culpability.¹²³ Thus, since the mentally retarded and the mentally ill are less culpable, the Supreme Court reasoned that this decreased the retribution “value.”¹²⁴

A similar rationale applies to deterrence. In *Atkins*, the Court decided that the same cognitive difficulties that made the mentally retarded less morally culpable also made it less likely that they could adequately process the information of impending execution and control their behavior based on such information.¹²⁵ The same reasoning applies to the mentally ill.¹²⁶ When interpreting the term “understanding,” examiners must keep these ends in mind. Full appreciation of the crime prior to death would be necessary under either the deterrence or retribution rationale.¹²⁷

Regardless of rationale, if “understand” merely means that the inmate should possess a bare mental awareness of execution, then many severely mentally ill people will be deemed competent. A paranoid schizophrenic may not outwardly display functional disabilities and may be able to interact with others.¹²⁸ This same schizophrenic may even be able to describe the process of execution, but would not show any emotional reaction to facing execution.¹²⁹ It would be akin to waking up and thinking, “Today I will wash my face, brush my

120. See Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 52-54 (1986).

121. See *id.*

122. *Ford v. Wainwright*, 477 U.S. 399, 403 (1986).

123. *Atkins*, 536 U.S. at 319.

124. See *id.*

125. *Id.* at 320; see also Kristen F. Grunewald, Note, *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), 15 CAP. DEF. J. 117, 119 (2002).

126. Deterrence as a rationale applies less to people like Medina whose illness began prior to incarceration. See *Medina v. State*, 690 So. 2d 1241, 1250 (Fla. 1997) (Anstead, J., concurring in part, dissenting in part) (stating Medina had a long history of mental illness).

127. See Enzinna & Gill, *supra* note 81, at 118 n.14.

128. Schizophrenia has both an active and regressive phase. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 103, at 187. Its essential feature is the presence of psychotic symptoms during the active phase and at some point during this active phase includes “delusions, hallucinations, or certain characteristic disturbances in affect and the form of thought.” *Id.* Delusions often involve “the belief that others are spying on, spreading false rumors about, or planning to harm the person.” *Id.* at 188. Schizophrenia is more common among lower socioeconomic groups. *Id.* at 191.

129. Enzinna & Gill, *supra* note 81, at 118 n.14.

teeth, and be executed." A prisoner should possess a mental ability greater than a simple cognitive acknowledgement of his or her fate.¹³⁰

Although practical difficulties arise in precisely defining the term "understanding" within different circumstances, the ambiguity of the word and the range of possible responses indicate the critical need for a standardized mechanism of evaluation. Similar impediments arise in interpreting "nature of the penalty." Since society does not agree on what the phrase means in the larger context of the death penalty's rationale, experts cannot look to a uniform societal justification for information on how to apply the standard.¹³¹

(b) *Rationality Element*

Recently, the Florida Supreme Court decided that the need for an inmate to "have the mental capacity to understand the fact of the impending execution and reason for it" was a "rationality element."¹³² This designation was necessary to make Florida's Rule of Criminal Procedure 3.811 constitutional. The rationality element requires that an inmate be given the opportunity to cross-examine psychiatrists concerning the "rational appreciation of the connection between [the person's] crime and the punishment [the person] is to receive."¹³³ Webster's defines *rational* as "able to reason" or "sensible."¹³⁴ A logical response from a sensible or reasonable person facing death would be an emotional reaction. Thus, by requiring a rational connection, the court seemed to indicate that the prisoner should exhibit both an intellectual understanding of the death penalty and an emotional response to his or her impending execution.

Although the Florida Supreme Court read the rationality element into the existing statutory framework, in its opinion, the court admitted that the element is a "limited one."¹³⁵ The court neglected to define what would actually constitute a rational connection and provided no additional guidance for examiners. Therefore, instead of bolstering the constitutionality of the process, the court left examining experts to implement its decision completely unaided.

A standardized evaluation process would eliminate the need for judges to sift through the differences in expert evaluators' opinions to ascertain which differences simply resulted from less time spent with the inmate, fewer questions asked, and less research conducted.

130. *Id.*

131. *Id.* at 117 n.14 (citing Radelet & Barnard, *supra* note 116, at 37, 42). Societal disagreement may stem from the lack of statistical data supporting any economic or deterrence rationale for the death penalty.

132. *Provenzano v. State*, 750 So. 2d 597, 602 (Fla. 1999).

133. *Id.* at 602-03.

134. WEBSTER'S NEW WORLD DICTIONARY 619 (2d Concise ed. 1982).

135. *Provenzano*, 750 So. 2d at 602.

Since experts inevitably disagree at some level, minimizing actual disputes over implementation of the statute would bolster accuracy and expend less judicial resources.¹³⁶ The same mental health experts do not evaluate each claim. Consequently, one prisoner may be declared incompetent, while another, perhaps with an identical illness, would be considered competent simply because of varying examination methods.¹³⁷

If Florida's procedure provided experts with a basic methodology for conducting mental competency evaluations, then the experts could present the court with specific disagreements over certain areas.¹³⁸ This would decrease variations in opinion due to an insufficient understanding of the individual and assure the judge that the psychiatrist based his or her opinion on a solid foundation of uniform information.

3. Lenient "Rules" of Evidence

Florida's process for evaluating competency for execution is also undermined by the lack of standards for admitting evidence in competency hearings. Florida allows courts to haphazardly apply the rules of evidence in these hearings, if it decides to apply them at all.¹³⁹ According to Florida's Rules of Criminal Procedure, courts "may admit such evidence as the court deems relevant to the issues, including but not limited to the reports of expert witnesses, and the court *shall not be strictly bound* by the rules of evidence."¹⁴⁰

Although suspension of the psychotherapist-patient privilege, which assures confidentiality between psychotherapists and patients within the scope of their relationship, would be necessary to admit expert evidence, disposing of *all* evidentiary formalities and rules undermines the fairness of the proceedings.¹⁴¹ This casual approach to evidentiary standards creates problems by (1) allowing experts to rely on unscientifically validated methods to reach their competency conclusions, and (2) permitting hearsay in competency hearings.

136. See Enzinna & Gill, *supra* note 81, at 118 n.14; see also Petition for Writ of Certiorari at 39, *Ford v. Wainwright*, 477 U.S. 399 (1986) (No. 85-5524) (explaining the differences of expert opinion over the proper standard to employ when evaluating Ford).

137. See Petition for Writ of Certiorari at 39, *Ford* (No. 85-5542) (explaining the differences of expert opinion over the proper standard to employ when evaluating Ford).

138. See Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 46-50 (2001).

139. See FLA. R. CRIM. P. 3.812(d).

140. *Id.* (emphasis added).

141. See FLA. STAT. § 90.503 (2002).

(a) *Unscientifically Validated Methods*

If enforced, Florida's Evidence Code already contains a safeguard to prevent expert testimony based on unreliable methodology.¹⁴² Without this safeguard, experts may conduct evaluations using unacceptable testing instruments that do not contain the high degree of reliability required by the Evidence Code.¹⁴³

The Florida Supreme Court, in *Stokes v. State*,¹⁴⁴ adopted the "Frye test" to determine the admissibility of testimony based on scientific principles. The Frye test, established by the United States Court of Appeals for the District of Columbia Circuit in *Frye v. United States*, requires that an underlying scientific principle be "sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁴⁵ Not only must the methodology be scientifically valid, the procedures used in administering the instrument to the individual must be generally accepted in the psychiatric community.¹⁴⁶ Thus, a psychiatrist's opinion on competence is admissible only when the underlying examination instrument is generally accepted in the field of psychiatry.¹⁴⁷

A court should not admit an expert's opinion on competency unless the court determines that the expert reliably applied valid clinical instruments and methods.¹⁴⁸ The circuit court should not have to bear the additional burden of sorting through numerous mental health testing instruments to determine validity and reliability.¹⁴⁹ Conversely, the inmate should also be able to rely on the validity of testing instruments offered into evidence both for and against him or her.

(b) *Hearsay*

Hearsay also becomes an issue when a court does not enforce the rules of evidence.¹⁵⁰ Competency for execution hearings present a unique risk of reliance on hearsay because of the impossibility of eliciting first hand testimony from some neighboring death row inmates.

142. FLA. STAT. § 90.704 (2002) (allowing experts to base opinion testimony on facts or data of a type reasonably relied upon by experts in the subject).

143. Thus, this type of evidence opens the door to the possibility of malingering.

144. 548 So. 2d 188, 193-95 (Fla. 1989).

145. 293 F. 1013, 1014 (D.C. Cir. 1923).

146. See CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 702.3, at 609 (2002 ed.).

147. See *id.* While "pure opinions" of incompetency in and of themselves need not comply with Frye, if a test or methodology is used in reaching that opinion then the test itself must be Frye-tested. See *id.* § 702.3, at 590.

148. See *id.* § 702.3, at 591.

149. For reliable methods, see *infra* Part VII.

150. Although the rules do not apply in sentencing phases to allow for broad character testimony, a similar necessity does not exist in hearings on competency. See FLA. STAT. § 921.141 (2002).

These inmates may be executed before the court or attorneys realize that they need the inmate's testimony. Without the executed inmate's testimony, an individual may face a one-sided accusation by a state-interested prison guard who claims to have overheard statements between the two inmates.

This situation arose in *Medina v. State* where a correctional officer claimed that he overheard Medina telling another death row inmate that his attorney instructed him to "act crazy."¹⁵¹ The neighboring inmate's execution was scheduled for four days after the officer allegedly overheard the conversation.¹⁵² Although Medina's counsel took the neighboring inmate's deposition before the inmate was executed,¹⁵³ this may not always be possible.

Three levels of hearsay and all of its inherent dangers exist in the *Medina* situation: (1) an attorney makes a statement to his client, (2) the client makes a statement to another death row inmate concerning the first statement, and (3) the correctional officer claims to overhear this second interaction.¹⁵⁴ In *Medina*, if the inmate had not been deposed, a "catch-22" situation would have arisen. The correctional officer could testify against the inmate, but the inmate's attorney, as the alleged declarant, could do very little in light of the attorney-client privilege unless the inmate was of sound mind to waive the privilege.¹⁵⁵ In *Medina*, because the Florida Evidence Code did not apply, the court accepted the officer's hearsay affidavit.¹⁵⁶ The court then took it upon itself to waive the attorney-client privilege even though the privilege is not for the court to waive.¹⁵⁷

Since the officer in a *Medina*-type situation is a second-hand party to the information, the court would typically exclude his or her testimony as hearsay.¹⁵⁸ Even if the officer's statement fell within a hearsay exception or exclusion,¹⁵⁹ the statement's probative value might be substantially outweighed by the danger of unfair prejudice, which would make the testimony inadmissible.¹⁶⁰ Although the dangers of admitting inadmissible evidence are less in a bench trial than a jury trial, judges are entitled to rely on expert testimony based on trustworthy methods and first hand testimony. Turning the entire body of

151. *Medina v. State*, 690 So. 2d 1241, 1246 (Fla. 1997).

152. *Id.* at 1246 n.5.

153. *Id.*

154. Although the danger was apparent in Medina's case, the Florida Supreme Court expressly authorized Medina's counsel to testify under oath at the evidentiary hearing. *See id.* at 1246.

155. *See* FLA. STAT. § 90.502 (2002).

156. *See Medina*, 690 So. 2d at 1246.

157. *See id.*

158. *See* FLA. STAT. § 90.801 (2002).

159. *See id.* § 90.804.

160. *See id.* § 90.403.

evidence into a gray area undermines due process and procedural fairness. The result produces more confusion than reliability.

The best answer is to suspend only the psychotherapist-patient privilege.¹⁶¹ Due to the unique circumstances of competency for execution hearings, a residual “catch-all” exception, akin to Rule 807 of the Federal Rules of Evidence,¹⁶² should be included in Florida’s competency statute. This exception to the hearsay rule, like the federal one, would allow courts to admit evidence having circumstantial guarantees of trustworthiness if the court determines that:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement of evidence.¹⁶³

The proponent of the otherwise inadmissible evidence must notify the adverse party sufficiently in advance of the hearing.¹⁶⁴ This solution, which increases procedural safeguards, would bolster the reliability of the evidence, and consequently, the accuracy of competency determinations.

4. *Excessive Burden of Proof*

The fourth procedural inadequacy in the current system concerns the high burden of proof placed on the inmate.¹⁶⁵ Given that the courts determined the inmate competent to stand trial at one time, it is fair to allocate the burden of proof to the inmate to demonstrate the contrary.¹⁶⁶ Florida places the burden of proof on the inmate to prove incompetency for execution by “clear and convincing evidence.”¹⁶⁷

In *Cooper v. Oklahoma*, the Supreme Court unanimously held that requiring a criminal defendant to prove incompetence to stand trial by clear and convincing evidence violated the Due Process Clause.¹⁶⁸ The mentally incompetent have a right not to stand

161. *Id.* § 90.503.

162. FED. R. EVID. 807.

163. *Id.*

164. *See id.*

165. *See* FLA. R. CRIM. P. 3.812(e).

166. *See* *Ford v. Wainwright*, 477 U.S. 399, 425-26 (1986) (Powell, J., concurring); *State v. Harris*, 789 P.2d 60, 68-69 (Wash. 1990); *see also* James R. Acker & Charles S. Lanier, *Unfit to Live, Unfit to Die: Incompetency for Execution Under Modern Death Penalty Legislation*, 33 CRIM. L. BULL. 107, 134 (1997).

167. FLA. R. CRIM. P. 3.812(e); *see also* *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999) (claiming that the clear and convincing evidence standard does not violate the Eighth Amendment).

168. 517 U.S. 348, 362 (1996).

trial.¹⁶⁹ The clear and convincing standard allowed “the State to put to trial a defendant who is more likely than not incompetent”¹⁷⁰ The Florida Supreme Court summarily dismissed a challenge to Florida’s burden of proof in *Medina v. State* by citing the State’s substantial interest in competency for execution.¹⁷¹ The court quoted Justice Powell’s concurring opinion in the earlier case of *Ford v. Wainwright*;¹⁷² however its only attempt to distinguish *Cooper* was a short statement that the issue in that case involved competency to stand trial which was “clearly different from a determination of sanity to be executed.”¹⁷³

In *Medina*, the Florida Supreme Court failed to recognize the sweeping language used in *Cooper* that encompassed not just competency to stand trial, but all “cases in which competence is at issue.”¹⁷⁴ The United States Supreme Court assumed that “questions of competence will arise in a range of cases.”¹⁷⁵ In hearings on competency for execution, the State’s interests are protected by requiring the inmate to bear the burden of proof and by the threshold showing of incompetency needed to obtain a hearing.¹⁷⁶ Conversely, the “prisoner’s [life] interest in avoiding an erroneous determination” of competency for execution “is very great.”¹⁷⁷

Similar policy reasons apply to both competency to stand trial and competency for execution. The State may violate the Constitution in both instances. Executing the mentally ill violates the Eighth Amendment just as trying the incompetent defendant violates the Due Process Clause.¹⁷⁸ Since respective interests and policy reasons are similar for both, the standard for competency to be executed should also be a preponderance of the evidence.

IV. A STANDARD SOLUTION WITH SUBSTANCE

Florida’s new statute and procedure should incorporate these lessons from the past sixteen years and seek to remedy the current flaws. Two existing standards provide guidance for creating a workable ideal standard for Florida: (1) the American Bar Association standard and (2) Florida’s current standard for competency to stand trial.

169. *Id.* at 369.

170. *Id.*

171. *Medina v. State*, 690 So. 2d 1241, 1247 (Fla. 1997).

172. *Id.*

173. *Id.*

174. *Cooper*, 517 U.S. at 366.

175. *Id.*

176. *See id.*; *Martin v. Dugger*, 686 F. Supp. 1523, 1559 (S.D. Fla. 1988).

177. *Martin*, 686 F. Supp. at 1559.

178. *Acker & Lanier*, *supra* note 166, at 135.

A. Statutory Models

1. American Bar Association Standard

In 1989, the American Bar Association (ABA) published a book of criminal justice mental health standards.¹⁷⁹ In promulgating a standard for mentally incompetent death row inmates, the authors addressed the concern that individuals should not be executed when they cannot understand the nature of the proceedings or the penalty imposed.¹⁸⁰ The authors also included a component to ensure that an inmate can communicate information that might be exculpatory or mitigating to his or her attorney.¹⁸¹ This concern parallels that of Justice Frankfurter in *Solesbee v. Balkcom*.¹⁸² The standard reads:

(b) 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 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.¹⁸³

The ABA's recommendations adopt an intermediate position between Florida's current competency for execution and competency to stand trial standards.¹⁸⁴ The recommendations require several procedures: (1) a threshold conclusion by the court to find "reasonable cause" of incompetency in the petition before ordering an evaluation,¹⁸⁵ (2) appointment of counsel and mental health professionals for indigent inmates at the State's expense,¹⁸⁶ (3) permission for any interested party to petition the court for a competency evaluation,¹⁸⁷ and (4) placement of the burden of proof on the prisoner to show incompetence by a preponderance of the evidence.¹⁸⁸ These points of procedure and the ABA standard provide a solid starting point for

179. ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 110. For a commentary on the ABA Criminal Justice Standards, see Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3 (1996).

180. See ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 110, at 290.

181. *Id.* at 293-94.

182. 339 U.S. 9, 19-20 (1950) (Frankfurter, J. dissenting); see also *supra* Part III.B.1.

183. ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 110, at 290.

184. See FLA. STAT. § 922.07 (2002); FLA. R. CRIM. P. 3.211.

185. ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 110, at 293-94.

186. *Id.*

187. *Id.*

188. *Id.* Both the standard for competency to stand trial and the ABA standards decrease the burden of proof.

Florida's standards. However, the ABA standard does not address evidentiary concerns or provide guidance to experts in conducting examinations.

2. Florida's Standard for Competency to Stand Trial

Florida's standard governing competency to stand trial should supplement the ABA standard. Unlike *Ford v. Wainwright*,¹⁸⁹ which left procedures for determining competency for execution to the states, the Supreme Court, in *Dusky v. United States*, mandated a specific and useful standard for competency to stand trial.¹⁹⁰ In *Dusky*, the Court held that "the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as [a] factual understanding of the proceedings against him.'"¹⁹¹ This standard ensures that a person is able to both communicate with an attorney and understand the nature of the proceedings in a rational and intellectual sense.¹⁹² Florida codified the *Dusky* standard in its Rules of Criminal Procedure, and even set forth considerations and factors to aid experts in evaluating competency to stand trial.¹⁹³

In considering competence to proceed, Florida's rules require experts to consider and report on the defendant's capacity to: (1) "appreciate the charges or allegations . . . ;" (2) "appreciate the range and nature of possible penalties, if applicable, that may be imposed . . . ;" (3) "understand the adversary nature of the legal process;" (4) "disclose to counsel facts pertinent to the proceedings at issue;" (5) "manifest appropriate courtroom behavior;" and (6) "testify relevantly."¹⁹⁴ Experts may also include anything else they consider relevant.¹⁹⁵ Additionally, the rules direct experts to report on the kind of mental illness or retardation, appropriate treatments, availability of those treatments, and the likelihood and time frame of restoring the defendant's competence.¹⁹⁶ Expert reports must include (1) the "matters referred for evaluation;" (2) a description and purpose of the techniques, tests, and procedures used in examination; (3) clinical observations, findings, and opinions or instances in which the expert could not state an opinion; and finally, (4) the sources used for information as well as the factual basis for the conclusions.¹⁹⁷ When com-

189. 477 U.S. 399 (1986).

190. 362 U.S. 402, 402 (1960).

191. *Id.* (quoting the Solicitor General).

192. A rational response would include an emotional connection since a rational person facing death would, most likely, exhibit some sort of emotional response.

193. FLA. R. CRIM. P. 3.211.

194. *Id.* at 3.211(a)(2)(A).

195. *Id.* at 3.211(a)(2)(B).

196. *Id.* at 3.211(b).

197. *Id.* at 3.211(d).

bined with the ABA standard, these substantial procedures and methods for competency to stand trial provide a suitable framework for clarifying and defining competency for execution.

With some adjustments, Florida could easily transition from its current competency for execution standard to procedures akin to the well-defined procedures for determining competence to stand trial. Rules 3.811 and 3.812 of the Florida Rules of Criminal Procedure already provide a *de novo* evidentiary hearing when “reasonable grounds” showing insanity exist. Rule 3.210(b), governing competency to stand trial, is almost identical and reads:

If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant’s mental condition¹⁹⁸

According to Justice Anstead, the Florida Supreme Court and the district courts consistently interpreted Rule 3.210(b) to require competency hearings based on a broad array of evidence that might suggest “reasonable grounds to believe that [a defendant] might be incompetent.”¹⁹⁹ In the past, these grounds ranged from a defendant’s refusal to cooperate with his or her attorney and accept favorable agreements, to cases that actually involved long histories of mental illness.²⁰⁰

3. *The Ideal Florida Statute and Rules of Criminal Procedure*

The ideal statute seeks to remedy past statutory and procedural flaws and to ensure that psychiatrists apply the same basic procedures to every inmate evaluated. Accordingly, the ideal statute should read:

922.07 Proceedings when a person under sentence of death appears to be insane.²⁰¹

(1) When the Governor receives certification from a psychiatrist that a person under sentence of death may be insane, the Governor shall stay the execution of the sentence and appoint a commission of three disinterested psychiatrists to examine the inmate to help

198. *Id.* at 3.210(b).

199. *Medina v. State*, 690 So. 2d 1241, 1253 (Fla. 1997) (Anstead, J., concurring in part, dissenting in part) (quoting *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990)).

200. *Id.*; see also *Hill v. State*, 473 So. 2d 1253 (Fla. 1985); *Scott v. State*, 420 So. 2d 595 (Fla. 1982) (discussing grounds where the defendant refused to cooperate with counsel).

201. Much of the language in this proposed statute is derived from the current statute. See FLA. STAT. § 922.07 (2002).

determine if the inmate is incompetent to be executed. If the inmate is indigent and does not have a psychiatrist for either the initial certification or the post-certification process, one shall be appointed upon request pursuant to Florida Statute section 916.115. The commission's determination shall be conducted in accordance with Florida's Rules of Criminal Procedure, and the results shall be included in a final report. To the extent the report complies with evidentiary rules in the Rule of Criminal Procedure 3.812, it shall be submitted as evidence in the hearing on competency for execution. Hearings shall be granted upon proper initial certification from the psychiatrist and motion of the court in accordance with Florida's Rule of Criminal Procedure 3.811.

(2) An inmate is incompetent to be executed if:

(a) as a result of mental illness or mental retardation, the inmate does not have sufficient present ability to understand, with a reasonable degree of rational and factual understanding, the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment; or

(b) as a result of mental illness or mental retardation, the inmate lacks sufficient present ability to consult with counsel with a reasonable degree of rational and factual understanding, or if the inmate cannot 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.

(3) If the court decides that the inmate does not have the mental capacity to be executed as defined in section (2), then the Governor shall have the inmate committed to a Department of Corrections mental health treatment facility.

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

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

*Florida's Rule of Criminal Procedure 3.811. Insanity at the Time of Execution: Capital Cases*²⁰²

(a) Insanity to Be Executed. A person under sentence of death shall not be executed while insane.

(b) Insanity Defined. A person under sentence of death is insane for purposes of execution if the person lacks mental capacity as defined section 922.07(2) of the Florida Statutes.

202. Much of the language in this revised rule of criminal procedure comes from the current rule. See FLA. R. CRIM. P. 3.811.

(c) Procedure for Determining Insanity. Each psychiatrist's evaluation (including initial certification to the Governor) shall include a review of the inmate's background history, appropriate psychological testing, interview of collateral contacts, administration of the questions in Table 1 (below), and at least three clinical interviews lasting one to two hours each that include tests to determine malingering. Each examiner must conduct individual examinations, though the other two in the commission, as well as the state and defense attorneys, may observe without presence, through either simultaneous video, two-way mirror, or the like. All relevant information shall be summarized in the expert's report. The expert's report must also include (1) a description and purpose of the techniques, tests, and procedures used in the examination; (2) clinical observations, findings, and opinions or instances in which the expert could not state an opinion; and (3) the sources used for information as well as the factual basis for the expert's conclusions.

(d) Stay of Execution. No motion for a stay of execution pending a hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have received certified notice from a psychiatrist in accordance with the appropriate Florida Statutes.

(e) Motion for Stay After Governor's Determination of Sanity to Be Executed. After the Governor signs a death warrant for a prisoner under sentence of death and has received a certified opinion of insanity by a psychiatrist that the prisoner lacks competency for execution, counsel for the prisoner may move for a stay of execution and a hearing.

(1) The motion shall be filed in the circuit court of the circuit in which the execution is to take place and shall be heard by one of the judges of that circuit or such other judge as shall be assigned by the Chief Justice of the Florida Supreme Court to hear the motion. The state attorney of the circuit shall represent the State of Florida in any proceedings held on the motion.

(2) The motion shall be in writing and shall contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner to be executed is insane.

(3) Counsel for the prisoner shall file, along with the motion, all reports of experts that were submitted to the Governor pursuant to the statutory procedure for executive determination of sanity to be executed. If any of the evidence is not available to counsel for the prisoner, counsel shall attach to the motion an affidavit so stating, with an explanation of why the evidence is unavailable.

(4) Counsel for the prisoner and the State may submit such other evidentiary material and written submissions including reports of experts on behalf of the prisoner as shall be relevant to determination of the issue.

(5) A copy of the motion and all supporting documents shall be served on the Florida Department of Legal Affairs and the state attorney of the circuit in which the motion has been filed.

(f) Order Granting. If the circuit judge, upon review of the motion and submissions, has reasonable grounds to believe that the prisoner to be executed is insane, the judge shall grant a stay of execution and may order further proceedings which may include a hearing pursuant to rule 3.812.

*Florida's Rule of Criminal Procedure 3.812. Hearing on Insanity at Time of Execution: Capital Cases*²⁰³

(a) Hearing on Insanity to Be Executed. The hearing on the prisoner's insanity to be executed shall be a hearing de novo.

(b) Issue at Hearing. At the hearing the issue shall be whether the prisoner presently meets the criteria for insanity at time of execution as detailed in section 922.07(2) of the Florida Statutes.

(c) Evidence. At hearings pursuant to this rule, the psychotherapist-patient privilege, found in Florida Statute 90.503 shall be suspended. A statement not specifically covered in the Evidence Code but having equivalent circumstantial guarantees of trustworthiness as in 90.803 and 90.804 of the Evidence Code, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes it known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of it, including the name and address of the declarant.²⁰⁴

(d) Order. If, at the conclusion of the hearing, the court shall find, by a preponderance of the evidence, that the prisoner to be executed is insane, the court shall enter its order continuing the stay of the death warrant; otherwise, the court shall deny the motion and enter its order dissolving the stay of execution.

B. Procedural Requirements To Determine Mental Incapacity

1. Information Necessary for a Standard Determination of Competency

Proposed rule 3.811(c) provides a list of procedures that experts should follow in determining competency. Accordingly, this Section

203. Some of the language in this revised rule of criminal procedure comes from the current rule. See FLA. R. CRIM. P. 3.812.

204. Language comes from FED. R. EVID. 807.

explains how to fulfill those requirements as well as the rationale for including them.

(a) *Background History*

Since many mental illnesses have active and recessive phases, an examiner should begin by completely reviewing the inmate's background history.²⁰⁵ Gathering an inmate's history need not be done at a psychiatrist's rate, particularly if the attorney raised an issue of competency at the trial stage. Most of the necessary information may already exist in attorney files and prison records. A file of purely factual background history should remain available so that a psychiatrist could simply review the file and request additional information.²⁰⁶

Historical information on the inmate should include the following: (1) military experience, including disciplinary actions taken against the inmate, time in combat, experiences which may have led to post-traumatic stress disorder, contact with hazardous chemicals, psychological or behavioral problems, and special privileges such as clearance; (2) education; (3) marital or relationship history; (4) a review of the inmate's records;²⁰⁷ (5) a synopsis of involvement with the legal system to determine whether prior competency determinations were conducted; (6) past mental health evaluations; (7) familial background with a focus on tragic occurrences;²⁰⁸ (8) employment; (9) alcohol or drug use; and (10) social functioning.²⁰⁹ Reviewing significant events in an inmate's life aids in understanding the inmate and may provide information on conduct-disordered symptoms, cognitive deficits, or even spells of maladjustment.²¹⁰ This background information

205. For example, schizophrenia has both an active and regressive phase. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 103, at 187.

206. This file should remain free of the attorney's opinion work product so that it may be used by the State's experts as well.

207. Relevant records include:

(1) prison medical records; (2) prison psychiatric records; (3) psychiatric records prior to incarceration; (4) academic records, including prior intellectual testing with raw data; (5) records of past psychological evaluations; (6) any and all videotapes made of the inmate; (7) military or veterans affairs records; (8) records/transcripts of testimony of the inmate; (9) writings/letters of the inmate with[in] the prior year; (10) videotapes of the inmate demonstrating bizarre behavior, and; (11) art work of the inmate.

Ebert, *supra* note 138, at 49. The records should also contain a history of prison transfers, the rationale behind the transfer, and any disciplinary actions taken against the inmate. *Id.* at 48.

208. Some disagreement exists over the importance of this information. For a view that family history does not typically assist with diagnosis, see RICHARD ROGERS & DANIEL W. SHUMAN, *CONDUCTING INSANITY EVALUATIONS* 180 (2d ed. 2000).

209. Ebert, *supra* note 138, at 47-48.

210. ROGERS & SHUMAN, *supra* note 208, at 180.

supplies a basis for questions in the clinical interview and may help detect malingering.

(b) *Clinical Interview & Tests to Determine Malingering*

Clinical interviews form the cornerstone of insanity evaluations by providing the bridge between static background information and present competency assessment.²¹¹ Meeting and speaking with the inmate allows examiners to integrate clinical data and acquire essential information needed to apply the legal standard in a meaningful way.²¹² To evaluate competency for execution, an expert should conduct at least three to four clinical interviews,²¹³ each lasting one to two hours.²¹⁴ Increased dialogue supplies additional data about the inmate and fosters more accurate competency assessments.²¹⁵

Contrary to the procedures in the current Florida Statutes,²¹⁶ the commission of three examiners should not conduct a joint evaluation. Each psychiatrist should conduct his or her own evaluation without the physical presence of others in the examining room.²¹⁷ Although other examiners, and even counsel, could unobtrusively observe through the use of a two-way mirror or simultaneous video taping, group interviews lead to inaccuracies.²¹⁸ The presence of any third party, including correctional officials and attorneys, undermine the effectiveness of the interview by prejudicing and impeding the relationship between the patient and examiner.²¹⁹

In conducting the interview, the examiner should ask questions similar to those provided in Table 1 below.²²⁰ These questions focus on determining the inmate's "understanding of the reasons for his imprisonment and impending execution."²²¹ Questions and observations should also focus on attorney-client interaction.²²² The interviewer should draw conclusions based on the rapport between the attorney and client, the inmate's trust in his or her attorney, and any communication difficulties between the two.²²³

211. *Id.* at 151.

212. *Id.*

213. Ebert, *supra* note 138, at 51; see also DAVID A. SHAPIRO, FORENSIC PSYCHOLOGICAL ASSESSMENT 54-55 (1991).

214. Ebert, *supra* note 138, at 51.

215. See *id.*

216. See FLA. STAT. § 922.07 (2002).

217. Enzinna & Gill, *supra* note 81, at 141.

218. See *id.*

219. *Id.*

220. *Infra* Part VI.

221. Small & Otto, *supra* note 55, at 154; see also Ebert, *supra* note 138, at 56.

222. Small & Otto, *supra* note 55, at 154. The inmate's attorney could, of course, be present for this part of the examination. This would give the psychiatrist the opportunity to observe interaction between the two.

223. *Id.*

The clinical interview provides not only a vital tool for assessing attorney-client relations and general mental competency, but also remains the most common and respected method to detect malingering.²²⁴ General malingering is defined as “the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives, such as financial compensation.”²²⁵ Other types of malingering include pure malingering, defined as “feigning of a disorder that does not exist at all in a particular patient,” partial malingering, defined as a “conscious exaggeration of existing symptoms,” and finally, false imputation, which refers to the “ascribing of actual symptoms to a cause consciously recognized by the patient to have no relationship to the symptoms.”²²⁶

Regardless of its type, an expert’s ability to recognize malingering is of vital interest to a court when determining mental competency for execution. Since an inmate faces impending death, the stakes are high for self-interested feigning. However, many instruments and methods exist to ferret out the mentally ill from the sane.²²⁷

Experienced mental health professionals look for certain cues and indicators based on “etiology, onset, course of treatment, prognosis, and other aspects of various mental disorders.”²²⁸ Techniques used to evaluate authenticity include questioning the individual about unlikely symptoms and using methods that require a specified accuracy rate by chance.²²⁹ Red flags for professionals include: (1) dramatic and exaggerated self-presentation;²³⁰ (2) deliberate and careful manner in answering questions;²³¹ (3) discrepancy between behavior and psychiatric diagnosis, including rare or unusual combinations of symptoms;²³² and (4) inconsistent self-reporting that indicates contradictory symptoms.²³³ Requiring an expert to conduct three to four interviews that each last one to two hours ensures that an expert has ample time and opportunity to detect malingering.

224. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 54 (2d ed. 1997).

225. RICHARD ROGERS, *CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* 131 (2d ed., Guilford Press 1997).

226. *Id.*

227. *See id.*

228. MELTON ET AL., *supra* note 224, at 54.

229. Small & Otto, *supra* note 55, at 153. These authors also suggest the use of sodium amytal interviews. However, the administration of this drug has not been found useful in certain situations. *See* ROGERS, *supra* note 225, at 143.

230. MELTON ET AL., *supra* note 224, at 54. This self-presentation includes “theatrical style, eagerness to discuss symptoms, reports of extreme symptom severity, and indiscriminant endorsement of symptoms.” *Id.*

231. *Id.* Carefulness may be demonstrated by slowed speech, hesitations, repetition of questions, and “extensive use of qualifiers.” *Id.*

232. *Id.*

233. *Id.*

(c) *Psychological Testing*

Unlike clinical interviews that are often conducted on a case by case basis, many standardized instruments aid the examiner in psychological testing. Since a myriad of instruments exist to evaluate mental competency, a court may not know whether it is reviewing the most reliable data.²³⁴ No standardized instrument covers all mental illnesses.²³⁵ Thus, the rules of evidence need to govern competency hearings to ensure that all reports conducted by psychiatrists meet a threshold of reliability. Certain instruments are better indicators for different types of disorders.²³⁶ The need for background history and clinical observation will help determine which types of tests examiners should administer to evaluate the inmate.

Further difficulty stems from the typical conclusion of "the newer the better." This conclusion is not always accurate in the field of psychiatry.²³⁷ For example, although the third edition of the Diagnostic and Statistical Manual of Mental Disorders is newer, the Schedule of Affective Disorders and Schizophrenia (SADS) is a better instrument for determining malingering and reliability in certain disorders.²³⁸

Although the legislature could certainly codify a specific test, this one-size-fits-all approach would not address the multi-faceted problems and methods undertaken by psychiatrists. Instead, adhering to Florida's Rules of Evidence would ensure that the expert based his or her opinion on reliable instruments.²³⁹ This also provides the flexibility necessary to accommodate new technology and differing expert opinions. To aid a judge faced with having to determine whether the instrument meets the *Frye* test, Table 2 provides a list of conditions and specific tests used to evaluate those conditions.²⁴⁰

234. Table 2 supplies a list of standardized instruments that experts commonly use to test for various mental defects. *Infra* Part VII.

235. *See id.*

236. *See id.*

237. ROGERS & SHUMAN, *supra* note 208, at 217-18.

238. *Id.* at 218. SADS is a test that takes about two to four hours and is used to help diagnose psychotic and mood disorders. It uses "an informal rapport-building interview," akin to the clinical interview, to increase reliability and prevent patient alienation. *Id.* at 219. Once the examiner completes the informal interview, formal questions consisting of three main inquiries are asked: (1) "standard questions," performed on all patients; (2) "optional probes," used to elicit additional information for clarification; and (3) "unstructured questions," for extensive additional information. *Id.* Examiners base final ratings not only on the patient's answers, but on the totality of the clinical data. *Id.*

239. *See* EHRHARDT, *supra* note 146, § 704.1, at 641. The psychotherapist-patient privilege would not apply.

240. *See infra* Part VII.

(d) *Interview of Collateral Contacts*

In addition to using the appropriate methodology in psychological testing, examiners should collect and review information from collateral contacts.²⁴¹ Collateral contacts may include health care providers, former psychiatrists, family members, attorneys, friends, and correctional officers. This information provides important clinical data about the inmate's day to day functioning.²⁴² Friends and family members may supply a well-rounded history about specific symptoms and impairments the inmate experienced before his or her prison sentence.²⁴³

Examiners should use collateral contacts only as additional sources of information for comparison purposes.²⁴⁴ Given the subjective nature of mental illness, these collateral interviews should not outweigh or discount self-reporting mechanisms.²⁴⁵ The interviews add to the overall picture and aid in assessing the individual in his or her entirety.²⁴⁶

2. *Pertinent Conditions in Competency Determinations*

When conducting interviews and administering tests, two conditions merit special attention. Although a myriad of conditions, if severe enough, could lead to a finding of incompetency, schizophrenia and post-traumatic stress disorder seem to recur frequently in death row inmates. Courts often recognize schizophrenia as a mentally debilitating disease; however, they often overlook post-traumatic stress disorder due to a lack of outward manifestations and the disease's relative infancy in the field of psychiatry.²⁴⁷

(a) *Schizophrenia*

Schizophrenic disorders comprised 62.2% of defendants acquitted due to insanity in general post-verdict diagnoses.²⁴⁸ Schizophrenia may, at certain times, be difficult to diagnose because it has both an active and regressive phase.²⁴⁹ An essential feature of the illness is the presence of psychotic symptoms during the active phase.²⁵⁰ Psychotic symptoms include "delusions, hallucinations, or certain char-

241. ROGERS & SHUMAN, *supra* note 208, at 180.

242. *Id.*

243. *Id.*

244. Ebert, *supra* note 138, at 50.

245. ROGERS & SHUMAN, *supra* note 208, at 181.

246. *See id.*

247. *Id.* at 161.

248. *Id.* at 159.

249. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 103, at 187.

250. *Id.*

acteristic disturbances [that] affect . . . the form of thought.”²⁵¹ Delusions often involve the belief that “others are spying on, spreading false rumors about, or planning to harm the person.”²⁵² Possibly due to the disease’s outward manifestations, courts tend to agree with experts’ recommendations when the recommendations include a psychotic diagnosis such as schizophrenia.²⁵³

(b) *Post-Traumatic Stress Disorder*

Courts seem more hesitant to qualify a person with post-traumatic stress disorder (PTSD) as mentally ill.²⁵⁴ However, PTSD’s prevalence and recognition may increase after Operation Iraqi Freedom.²⁵⁵ Despite the fact that PTSD often causes flashbacks that impair cognitive or volitional capacity, examiners rarely assert these disorders as a primary diagnosis in insanity cases.²⁵⁶ Historically, verdicts of not guilty by reason of insanity (NGRI) are less successful in PTSD cases, comprising only 28.6% of NGRI verdicts.²⁵⁷ Other disorders have a 41.5% success rate.²⁵⁸ Yet, since the third edition of the Diagnostic and Statistical Manual of Mental Disorders officially recognized PTSD as an official diagnosis in 1980, diagnostic criteria have been modified and refined to enable clinicians to not only diagnose the disease, but also to recognize any malingering associated with it.²⁵⁹

Using an inmate’s background history, examiners should look for eleven pre-trauma vulnerability factors:

- (1) female gender, (2) early sexual or other childhood trauma, (3) parental poverty, (4) behavior disorder in childhood or adolescence, (5) early separation or divorce of parents before age 10, (6) introversion, (7) poor self-confidence before age 15, (8) prior psychiatric disorder, (9) a history of psychiatric illness among first-degree

251. *Id.*

252. *Id.* at 188.

253. ROGERS & SHUMAN, *supra* note 208, at 159-60.

254. For an overview on post-traumatic stress disorder in civil claims, see Nicholas J. Motherway, *Post-Traumatic Stress Disorder*, in 49 AM. JUR. PROOF OF FACTS 2D 73 (1987).

255. Veterans’ hospitals are gearing up for the increase in patients. See *The Early Show: Benefits for Returning Vets?*, (CBS television broadcast, Apr. 15, 2003), at <http://www.cbsnews.com/stories/2003/04/15/earlyshow/health/main549434.shtml> (last visited Oct. 2, 2003). For an article concerning post-traumatic stress disorders after Vietnam, see Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 HOW. L.J. 183 (1994).

256. ROGERS & SHUMAN, *supra* note 208, at 160-61.

257. *Id.* at 161.

258. *Id.*

259. ROGERS, *supra* note 225, at 131.

relatives, (10) life stress before and after the trauma, and (11) high neuroticism.²⁶⁰

Examiners may diagnose malingering by carefully examining the inmate's background history, treatment efforts, and corroboration of information.²⁶¹ If Florida adopts the suggested ideal statute and procedure, examiners will have ready access to information that would set off red flags and trigger the need for a closer PTSD examination.

Although PTSD may not always be severe enough to result in incompetency for execution, its debilitating nature combined with the probable increase of post-war cases merits special attention in competency examinations. PTSD and schizophrenia stand out due to their prevalence in death row inmates; however, any severe mental illness could render an inmate incompetent for execution.

V. CONCLUSION

Florida's procedure and standard for assessing competency for execution remain the same today as they did sixteen years ago when the legislature hastily responded to the Supreme Court's decision in *Ford v. Wainwright*.²⁶² Rather than supplying consistency, this stagnation simply perpetuates Florida's status as an equal-opportunity state for executions. Regardless of whether the incarcerated individual believes he is Jesus and that the Government wants to execute him for saving the world,²⁶³ or whether the individual is a nineteen-year-old inmate of a Cuban mental asylum with paranoid schizophrenia,²⁶⁴ until the law changes, they both remain competent in the eyes of Florida. By affording inmates on death row one final due

260. *Id.* at 141 (citing J. Davidson, *Issues in the Diagnosis of Posttraumatic Stress Disorder*, in *REVIEW OF PSYCHIATRY* (J.M. Oldham et al. eds., 1993)).

261. *Id.*

262. *See In re Amendments to the Fla. Rules of Criminal Procedure*, 518 So. 2d 256 (Fla. 1987).

263. *See* Initial Brief of Appellant at 5, *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999) (No. 96,453). The doctor examining Provenzano stated:

Mr. Provenzano knows, not thinks or believes, that the reason that he is to be executed is because "They" believe that he is Jesus Christ. Those who seek to execute him hate and fear Jesus Christ and if he is dead then Jesus Christ is dead and that is their goal

He does not connect the courthouse shooting with the execution. It is unrelated because he is innocent."

Id.

264. *See Medina v. State*, 690 So. 2d 1241, 1250 (Fla. 1997) (Anstead, J., concurring in part, dissenting in part) (pointing out that the majority failed to mention that Medina was a nineteen-year-old inmate of a Cuban mental asylum, that he was psychotic, and had organic brain damage as well as paranoid schizophrenia). Medina was executed on March 25, 1997, despite the fact that "the State possessed evidence that implicated Joseph Daniels in the murder and failed to disclose this evidence to the defendant." *Id.* at 1252.

process right, Florida will not only increase the legitimacy of its own process, but may find that the condemned are actually innocent.²⁶⁵

Bruce Ebert, Ph.D., J.D., ABPP, produced the following two tables to facilitate effective competency for execution evaluations.²⁶⁶ Ebert is a clinical and forensic psychologist as well as an attorney. He also works as a professor of psychology at the Professional School of Psychology and as an assistant professor of psychiatry in the School of Medicine at the University of California Davis. In addition, he serves as president and CEO of the Center for Mental Health Law and Ethics.

Table 1 provides psychiatrists with a standardized list of questions to ask each inmate examined. This table guarantees that all inmates will answer the same minimal questions. Of course, examiners are encouraged to investigate additional conditions. Judges presiding over competency for execution hearings may find Table 2 particularly helpful in determining whether the evaluation methods meet the *Frye* test requirements.

VI. TABLE 1: A PROPOSED INSTRUMENT FOR EVALUATING COMPETENCY FOR EXECUTION²⁶⁷

Ratings should be as follows:

- 0: No Capacity
- 1: Some Incapacity
- 2: Mild Incapacity
- 3: Moderate Incapacity
- 4: Severe Incapacity
- 5: Complete Incapacity

The inmate's cognitive level should be evaluated by the factors in the numbered subsections. Under each subsection is a general list

265. The Innocence Project's work just began in Tallahassee, Florida, with the help of Florida State University College of Law students. As of May 2, 2003, the project has exonerated 127 inmates nationally by using DNA evidence. This evidence may play a vital role in helping wrongfully convicted, mentally ill prisoners currently serving time on death row. See also Michael Mello, *Outlaw Judiciary: On Lies, Secrets, and Silence: The Florida Supreme Court Deals with Death Row Claims of Actual Innocence*, 1 N.Y. CITY L. REV. 259 (1996).

266. These tables have been changed somewhat, and Table 1 is actually Ebert's Table 2 and vice versa.

267. This table is derived from Ebert, *supra* note 138, at 56-57.

of questions. A rating of 3-5 should result in a determination of insanity, and the inmate is not competent for execution.

(1) Ability to identify what is about to happen.

What is set for ____, 200_ (date of execution)?

What is going to happen to you?

(2) Ability to understand and conceptualize that the person is housed on death row.

What happens to other inmates on death row?

What do you do everyday?

How is what you do from day-to-day now different from when before you were in jail?

(3) Ability to understand the meaning of the term and concept of punishment.

What does it mean to punish someone?

For what type of things should someone be punished?

(4) Ability to work with attorney.

What is your attorney's name?

How often do you speak with your attorney?

Do you trust your attorney?

Do you think your attorney has a good understanding of the factual background of your case?

If you heard of new evidence what would you do? Who would you tell?

(5) Ability to understand the sentence of death.

What is going to be your punishment for your conviction?

Tell me what the death penalty means to you.

Do you agree with things that people have told you about the death penalty?

(6) Ability to understand the reason for the punishment of death.

Why are you going to be executed?

Tell me the reason the judge/jury decided that you should die.

What did you do to be given the death penalty?

(7) Ability to conceptualize what will happen when the punishment is carried out.

What will happen when you are executed?

Where will you go after you are put to death?

(8) Ability to describe the role of the key people involved in the punishment.

Defense attorney

Correctional officers who will escort the inmate

Executioners (those involved in carrying out the sentence)

Minister

Victim's family

Inmate's family and friends

(9) Ability to provide recent facts that may be helpful to deal with the issue of current competency.

Ask conversational questions about day-to-day life, how the inmate is feeling both physically and emotionally.

Ask if anything unusual has happened.

Look for ability to speak spontaneously and make sense.

Look for coherent, logical thought patterns.

(10) Ability to voluntarily control thoughts.

Look for spontaneous outbursts.

Look for coherent sentence patterns and logical connections between conversation topics.

(11) Ability to perceive reality in the present.

How old are you?

When is your birthday?

What did you have for breakfast this morning?

What year is it?

VII. TABLE 2: PSYCHOLOGICAL TESTING AND SPECIFIC USES²⁶⁸

Condition	Tests used to Evaluate
(1) Intellectual Deficits	Wechsler Adult Intelligence Scale Third Edition (WAIS-III)
	Wechsler Adult Intelligence Scale Revised (WAIS-R)
	Wechsler Intelligence Scale for Children Revised (WISC-R)(children under 16)
	Wechsler Intelligence Scale for Children Third Edition (WISC-III)(Children under 16)
	Kaufman
	Shipley
	Otis Quick Score
	Peabody Picture Vocabulary Test (PPVT)
	Ravens Progressive Matrices
	Stanford-Binet Intelligence Scale
	Severe Cognitive Impairment Profile (SCIP)
	Differential Ability Scales (DAS)
	Kaufman Brief Intelligence Test (K-Bit)
	Ray Auditory Verbal Learning Test (RAVLT)
	Bender
	Benton
	Cognitive Difficulties Scale
	Scales of Independent Behavior

268. Ebert, *supra* note 138, at 53-55.

	Vineland
	MicorCog: Assessment of Cognitive Functioning
(2) Memory Problems	Wechsler Memory Scale – Revised (WMSR)
	Wechsler Memory Scale (WAS)
	Wechsler Memory Scale III (WAS-III)
	WRAT-3
	Memory for Designs
	Wide Range Assessment of Memory and Learning (WRAML)
(3) Personality Disorder	Minnesota Multiphasic Personality Inventory (MMPI; scale 4 and subscales)
	Minnesota Multiphasic Personality Inventory-2 (MMPI-2; scale 4 and subscales)
	Millon Clinical Multiaxial Inventory (MCMI)
	Millon Clinical Multiaxial Inventory (MCMI-II)
	Sixteen Personality Factor Questionnaire (16PF clinical)
	Stait-Trait Anger Inv.
	Personality Assessment Inventory; antisocial and borderline features scales
	Personality Inventory for Children
(4) Personality Functioning	Above tests listed in (3)
	California Psychological Inventory (CPI, Form 34, 3rd Edition)
	Rorschach
	HTP
(5) Interpersonal Relations	Thematic Apperception Test
	Children's Appreciation Test
	MMPI; MCMI-II
	PIC
	HTP
	Family Drawings

(6) Depression	MMPI and MMPI-2
	MCMI and MCMI-II
	Beck Depression Inventory
	IPAT Depression Scale
	Rorschach Depression Scale
(7) Suicide	Suicide Probability Scale
	MMPI and MMPI-2 Scale 2 Elevation
	Rorschach Suicide Constellation
(8) Alcohol Problem	Alcohol Use Inventory
	Michigan Alcoholism Screening Test (MAST)
	MMPI and MMPI-2 MacAndrews Alcohol Scale
	MCMI and MCMI-II Alcohol Scale
(9) Schizophrenia	Rorschach; Schizophrenia Scale; F-R's
	MMPI and MMPI-2 Scale 8 and Subscales
	MCMI and MCMI-II Thought Disorder Scale
	WAIS-R (examining intellectual deterioration)
	HTP
(10) Post Traumatic Stress Disorder (PTSD)	MMPI-2 PTSD Scales (2 such scales)
	MCMI-II
	Rorschach (examining trauma indicators)
(11) Bipolar Disorder	MCMI-II Mania Scale
	MMPI and MMPI-2 Scale 9
(12) Anxiety Disorder	IPAT Anxiety Scale
	Stait-Trait Anxiety Inventory
	MMPI and MMPI-2 Scale and 8 and Anxiety Subscales
	MCMI-II
	PAI
	PIC

	HTP with specific scoring criteria (UCLA)
	Phobia and Anxiety Checklist
(13) Adjust- ment Disor- ders	MMPI and MMP-2
	MCMI-II
	Symptom Checklists such as MOONey or SCL-90-R
	Rorschach
	16PF
(14) Psycho- somatic Dis- orders	Million Behavioral Health Inventory (MBHI)
(15) Neuro- psychological Problems	Henry Reitan Neuropsychological Tests
	Luria-Nebraska
	WAIS-R, WAIS-III
	Maddis Dementia Rating Scale
	Process Assessment