IN THE SUPREME COURT OF FLORIDA

GARY ELDON ALVORD, a/k/a
ROBERT PAUL BROCK, a/k/a
GARY ELDON VENZCEL,

Petitioner.

vs.

STATE OF FLORIDA

Respondent.

Death Warrant Signed for Execution Between Noon, Friday November 23, 1984 And Noon Friday, November 30, 1984; Execution Presently Scheduled For 7:00 A.M., Thursday, November 29, 1984

Case No.

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

The Petitioner, GARY ELDON ALVORD, by and through undersigned counsel, petitions this Court for issuance of a Writ for Extraordinary Relief and in support thereof says that:

JURISDICTION

1. Petitioner seeks to invoke the "all Writs" jurisdiction of this Court on the basis of Fla. R. App. P. 9.030 (a)(3) and 9.100(a) and Article V, Section 3, Florida Constitution, which authorize this Court to issue All Writs necessary to the complete exercise of its jurisdiction, the appropriate remedy based on the facts and relief sought herein as noted below.

INTRODUCTION

2. This petition seeks a fair, judicial determination of the competency of Gary Eldon Alvord, who is presumptively insane to be executed on November 29, 1984. The Florida courts have long held that it is "well settled that a person while insane cannot be tried, sentenced, nor executed." State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 465-467, 152 So. 207, 211 (1933). Accord, Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) and Goode v. State, 448 So.2d 999 (Fla. 1984). The test of sanity under such circumstances is one that is well known to this Court, focusing on two aspects of the defendant's capacity: whether the

defendant is capable of understanding the nature of the proceedings against him, and whether the defendant is capable of assisting in his defense in connection with those proceedings. See, Dusky v. United States, 362 U.S. 402 (1960); Solesbee v. Balkcom, 339 U.S. 9, 16-17 (1950)(Frankfurter, J., dissenting); § 922.07 Fla. Stat. (1983). See also Fla. R. Crim. P. 3.221(a). In the case before this Court, Mr. Alvord is presently insane and accordingly, incapable of understanding he is to be executed or to comprehend the proceedings against him.

Although the Florida Rules of Criminal Procedure do not specify the procedure for the determination of competency at the time of the execution of a death sentence, those rules have established the familiar procedure for the determination of competency at the pretrial, trial, or sentencing stages of proceedings. Fla. R. Crim. P. 3.210 and 3.720 et seq. The procedures established by these rules are similar to the common law procedures established by the Supreme Court of Florida for the determination of competency at the time of the execution of a death sentence. See Hysler v. State, 136 Fla. 563, 187 So. 261 (Fla. 1939). Accordingly, although this Court may not before have been faced with the determination of competency at this stage of a criminal proceeding, the procedures and principles for the resolution of this issue are ones familiar to the Court. Moreover, on the record in this case, Gary Eldon Alvord has a continuing presumption of insanity by virtue of his having been found not guilty by reason of insanity in Michigan in 1970. Alvord v. State, 396 So.2d 184, 190 (1981).

STATEMENT OF THE CASE

3. On August 1, 1973, an indictment was filed in the Circuit Court for the Thirteenth Judicial Circuit Hillsborough County, Florida, charging Gary Eldon Alvord with the June 17, 1973, murders of Georgia Tully, Ann Hermann and Lynn Herman. On

April 4, 1974, Mr. Alvord, was convicted of murder in the first degree. On April 9, 1974, following a jury recommendation of death, Mr. Alvord was sentenced to death.

4. The Supreme Court of Florida with one justice dissenting, affirmed the conviction and death sentence on September 17, 1975. Alvord v. State, 322 So.2d 533 (Fla. 1975). Certiorari was denied on July 6, 1976. Alvord v. Florida, 428 U.S. 923 (1976). Defendant's Petition for Rehearing was denied on October 4, 1976, with two justices dissenting. Alvord v. Florida, 429 U.S. 874 (1976).

5. Mr. Alvord thereafter filed in this court a Motion for Psychiatric, Psychological and Neurological Examination and for Reduction of Sentence, pursuant to Fla. R. Crim. P. 3.800 (b). On December 3, 1976, after hearing this court declared that it was without jurisdiction to hear the motion. A Petition for Writ of Mandamus, was filed with the Supreme Court of Florida which denied said petition without a hearing or written opinion, on March 10, 1977.

6. Thereafter, Mr. Alvord pursued state post-conviction and federal habeas corpus remedies. His motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 was denied by the Circuit Court in Hillsborough County, and its denial was affirmed by the Supreme Court of Florida. Alvord v. State, 396 So.2d 184 (Fla. 1981). Mr. Alvord's subsequent Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida was granted in part and denied in part, Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983), and Mr. Alvord appealed. The State took a cross-appeal. On February 10, 1984, the United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part the

district court's opinion. Alvord v. Wainwright, 725 F.d 1282 (11th Cir. 1984). 1/ Rehearing en banc was denied with opinion. Alvord v. Wainwright, 731 F.2d 1486 (11th Cir. 1984). Certiorari was thereafter denied. Alvord v. Wainwright, _____ U.S. _____, Case No. 83-6807 (October 27, 1984).

7. During the pendency of post-conviction proceedings, on July 10, 1979, pursuant to § 922.07, Fla. Stat. (1979), Governor Graham issued Executive Order 79-53, establishing a Commission to determine the mental competency of the Petitioner and appointing three psychiatrists to serve on that Commission. The three appointed psychiatrists reported to Governor Graham in accordance with said Executive Order that Mr. Alvord's attorney had invoked his client's Fifth Amendment privilege against self-incrimination and refused to permit his client to be examined.

8. On November 2, 1984, Governor Bob Graham signed a warrant for the execution of Mr. Alvord during the week of November 23, 1984 through November 30, 1984. Mr. Alvord's execution presently is scheduled for November 29, 1984 at 7:00 a.m..

9. On November 16, 1984, undersigned counsel invoked the procedures of § 922.07 Fla. Stat. (1983), on behalf of Mr.

1/ The district court's opinion affirmed Mr. Alvord's conviction, but reversed his sentence of death on the basis of Goode v. Wainwright, 704 F.2d 593, 612 (11th Cir. 1983), reversed, sub nom Wainwright v. Goode, ___ U.S.___, 78 L.Ed.2d 187 (9183). Upon the vacation of Goode by the United States Supreme Court, Mr. Alvord's sentence of death was reinstated.

Alvord. A copy of the letter requesting the Governor invoke § 922.07 Fla. Stat. (1983) is attached as Exhibit "A" and incorporated by this reference. Additional information was furnished to the Governor on November 18, 1984 by letter a copy of which is attached as Exhibit "B" and incorporated by this reference. As of this date, no such examination of Mr. Alvord has been conducted.

STATEMENT OF FACTS

10. Undersigned counsel brings this petition on behalf of Gary Eldon Alvord because Mr. Alvord is presently psychotic. As undersigned counsel's certificate of good faith at the end of this pleading signifies, counsel believes that Mr. Alvord is so severely psychotic that he no longer has the capacity to understand his execution or why he is to be executed -- i.e., the nature and effect of execution or why he is to be executed -- or to communicate meaningfully to counsel any fact heretofore not communicated which would make his execution unjust or unlawful. While the facts material to the question of Mr. Alvord's competency are set forth in detail infra, a summary of these facts at the outset is helpful in order to help the court understand the process of Mr. Alvord's deterioration which has led to the instant application.

(a) By virtue of his previous adjudication of insanity, Mr. Alvord is presumptively insane under the laws of the State of Florida.

(b) Mr. Alvord's current psychosis is in part the product of an almost complete absence of psychiatric treatment since his incarceration. The overt symptoms of this long term illness, however, have recently begun to manifest themselves. Since the end of 1983, Mr. Alvord has gradually worsened, so that, at present, he is delusional and unresponsive to outside stimulus. His delusions center primarily around his belief that he is an individual by the name of "Lactoo-decendent of the I." As Lactoo, he believes he has been tortured since early childhood by communist agents who are attempting to destroy the Polish race. He describes his thirteen year involuntary hospitalization in Michigan as his incarceration in a Nazi prisoner of war camp.

In the last few weeks, Mr. Alvord has begun to believe that his counsel is not an attorney but is instead, a double agent. Assistant Attorney General Carolyn Snurkowski is the object of many of Mr. Alvord's delusions (he believes she is a transsexual agent from Poland), as is Governor Graham. He is completely unable to engage in any coherent discussion with his attorney and is incapable of a meaningfully understanding the fact that he is presently is scheduled to be executed.

(c) Through much of the time that Mr. Alvord has been ill, he has periodically refused to meet with his attorneys. On at least three occasions, he has attempted to fire them and dismiss his legal proceedings. In all instances, these proceedings were at critical stages and his actions appeared to be the result of irrational thought processes by him. These actions are indicative of the apparent recurrence and remission of the mental illness which afflicts Mr. Alvord.

11. The facts concerning Mr. Alvord which must be taken into account in conjunction with the present petition come from the following sources: the entry of an adjudication that Mr. Alvord is insane which creates a presumption of Mr. Alvord's insanity; testimony in Mr. Alvord's trial; his written

correspondence over the last few years; a series of psychiatric interviews and evaluations of Mr. Alvord by Dr. Emanuel Tanay, Dr. Francis Walls, and Dr. Harry Krop; interviews with Mr. Alvord by his attorneys. The facts presented by the sources are set forth as follows:

Mr. Alvord's Letters

12. Mr. Alvord has always been an introverted person, who kept mostly to himself and did not interact a great deal with others. Because his mother suffers from a severe form of schizophrenia, which has worsened since the imposition of a death sentence upon her son, he has not had a great deal of contact with his family. He has developed few friends outside Florida State Prison. Consequently, the bulk of his correspondence has been with his lawyers or other people involved in his legal representation. As of late, these letters have become increasingly bizarre and incoherent. The letters, which are attached as Exhibit "C-1" through "C-3" and incorporated herein, are produced in their entirety as follows:

> Bill Sheppard
>
> Want you to know it won't work. That whore Snurkowski them giving me drugs to steal my mind. It wouldn't work in Iona or Albania. I know your [sic] involved in it. She's transexual, has them giving me chemicals like she and Robey did. They put plants next to me and I know all the games and you know I know, your [sic] in it with them, you Allgood, Snurkowski. She use to be a man back in Poland and now a transsexual agent. Home-base is Governor's mansion. The Gov. is a transvestite working for Reagan, Falwell, trying to take over/circumvent the U.S. The Greek whore of Rome is involved. Giant locust shall arise from the earth (MX. missles, Reagan, Rome, Falwell) Their [sic] squeezing my brain with drugs, drifting. It won't work! I'm dieing [sic], always in state of dieing [sic]. I'm in touch with spirit world, knowing all. You can't kill me. I'm sacred, held in immortality. They read my mail, dope my food. I may quit eating. Enemy plants.
>
> Tip O'Neal, Command Post I, U.S. Sup. Ct. Burger had Kennedy killed. Justice Douglas was killed to put Sindy baby (Snurkowski) in control. Infiltaction [sic]. I'm losing touch with mortality but they can't kill the spirit. The spiritual world knows and sees all. I know your [sic] involved in these drugs. You, Snurkowski, Robey. The Great lie, Great Death. Its been tried before, Yougaslavia [sic], commies. Leo Alford, Spinkellink. Light rays, psychosynthesis, labotomies,

electroshock, drugs. They did it before. You can't kill me so the Great whore is trying to shed my mortal mind. I can't die, mission, spirit world prevails all. I am I am I am. I can't eat, can't talk, you don't fool me. My wife was in on it before, now and future. Female genocide to the whores. The whores, the Great Roman whore and her agent whores. They'll burn. Save yourself. I can't think, losing touch, spiritual eyes and ears. Leaving your world into a higher place. Silence, infinity, Akastic. Lactco I. That bitch Snurkowski, Polish sister, lead whore. Save your soul, leave the commies. Abandon your covert pretention. I know who you are. It won't work. Deb Finns, Bill Sheppard, Allgood, Sindy, Carol. I shall return as I have before from Poland before your birth. Respecting.

Your know I know so don't waste your time. We shall talk in higher world, face your enemies before the light. Save your souls from false prophets. Face the whore. They'll not over-take. Drifting, space-travel. You'll not win.

Gary Strozeski

Lactcoo

Tip O'Neal

* * * *

Bill Sheppard
Agent of State
Jacksonville, Fla. U.S.A.

Bill Sheppard.

I got your "trap" that you want to have me examined. Your [sic] so foolish. You think because my body is being held in Poland that I don't know your game. I wrote Krentzman to call out the Marshalls to arrest you and Snurkowski, Reagan. I know your game and I know what is happening. That fowl bitch Snurkowski, prostitute of the Mother whore. They teleported me to Poland or Germany because I wouldn't give in to their chemicals. Your [sic] a fool to think I'm not on to you and Robey trying to get into my head. I have nothing to say to you commies, enemies of U.S. and God. You'll be overthrown and your soul shall burn a death beyond life. The Brown shirt army of Hitler I see everyday. Their [sic] holding Spinkellink and Antone here but refuse to let me talk to them. The Brown shirts. I refused their chemicals and now its in my food. A grain of sand amongst knowledge, your efforts and tricks are so clear. You see Robey and you be examined. Save yourself, Snurkowski tries everything. She's attempted cortas [sic] trickery to prevade my body with her fowlness. Reagan, Falwell, they suckle her pussy for strength, her odors are repugents of satan's kitchen. Satan the pimp, Snurkowski the whore, agent of commies and the Great whore of Rome. Falwell is constituent of the Catholic whore. The Florida Governor is a faggot, Snurkowski sodomizes him to fill his sick soul. She urinates on him as sacred satan water. They have no sex bodies. They can be boy and girl at will. Metamorphism of satan. No X or Y Chromosomes, hermaphredites of 666, Chromosome ( ) Bloody Bob the wimp trying to play man.

Men don't kill. Save the Manatee, kill the people. Graham, Falwell, Reagan, kill the people, stop abortion, liquidate the U.S. citizens who are anti-commie. Contact Tip O'Neal Their [sic] wrecking my body, trying to kill me, probe my mind. They did it before. Spiritual world keeps me informed to their plots and evils. Metal cures all illness. He comes with a sword to kill the Roman whore. I am! Lactoo! Lactoo, decendant of the I, soldier. Yin, Yang, moon, Schizoid Heir Sheppard, I know your [sic] with them heir Sheppard. I am! The force is to [sic] great. Spiritual world, contact point, Tip O'Neal, Pit of fire. School, shock treatment, PM 1090. They put wires on my head. The media won't believe me. Commies control media. They torture Spinkellink. Mom died, Hail Mary! Silence, Lactoo, Lactoo.

Lake of fire (Snurkowski) Lactoo Gary Strozeski
( )
Hermaphrodite Eldon, Dad, Brother,

* * * *

Ms. Deb Finns
Att. at Law
99 Hudson St.
N.Y. N.Y. 10013

Ms. Finns:

I heard you moved and think I know why. I remember when I told you most all lawyers were jerks that I no longer saw you. Now you left. I'm pretty sure your [sic] in conspiracy with Carol Snurkowski in dual plot. Snurkowski is a transexual employed by the Polish Commies which has [sic] been after me for years for they know I'm on to them and the U.S. take over of Govn't. Reagan, Falwell, Sandra O'Connor, you can see in their trend to invoke restrictions against U.S. Freedom. As Commies their [sic] trying to liquidate not just me, (they've tried that all my life) but any of us who oppose. They want us to believe that Spinkillink, Antone, Washington were terminated as enemies of the state. You'll note now people go to Q wing and "vanish". The people are brainwashed via commie media. Spink and they are being held in Poland under secrecy, tortured by commies. Reagan, Falwell, many U.S. judges and states are co-conspiratorees in a covert plot against U.S. People. Their [sic] now trying to get me on Q-wing, out of sight, so I can suddenly vanish. The fools been trying to kill me all my life. They even employed my wife to try to drive me crazy and state conspired to lock me up as insane. When mental torture didn't work, they attempted drugs. Dr. Robey was one of them. He was having a affair with my wife but I played stupid. Their [sic] now using chemicals on me in attempt to drive me insane and get me to Q-wing. Snurkowski is a personal agent. They have been after me for years as I'm Polish. Snurkowski is a transexual agent. Bob Graham is a homosexual agent working for Fla. They use their sexual perversions to make contact while Graham dresses up as a female. He works for the network of Polish Commies and is why he has people put on Q-wing to vanish. They know I know. I know about

you also. I know your part in it, using the L.D.F. to circumvent. Your [sic] part of the Clearinghouse conspiracy with Bob Graham. The Clearinghouse sends females here to obtain info. Anyone can see Holdman is a German redneck using female tactics. I've long been aware. These fools can't kill me and they know it. I'm protected by the spiritual powers of Polish God, but, the Pope is a Commie plant in subterfuge. I just want you to know I know. They can't kill me so they try to use chemicals and mental torture to keep me isolated, It won't work. They tried it all my life. They put me in Ionia and that didn't work. Now their [sic] trying it again but it won't work. I know about you, the state, tactics used. State forces me to accept a lawyer, court says it's okay, state employ more agents as you and Sheppard. I'm wise to it all. Sheppard knows I know. I even informed Judge Krentzman so he might suddenly vanish also. You won't win. Your [sic] just a agent. I've fought the network all my life, before you were born. In day of judgement, and, an anti commie resistance, you all will pay, in earth and God. The Dark Vaders are know and won't succeed. Reagan, Falwell, Graham, judges, you all will fail. Snurkowski is personal for she is a fello [sic] Pole. She's not even a human being, prostituting her soul to kill people for money. She will be a personal judgement, first, in "my court, then world, then God. She hangs out with Graham is their perversions. Graham is more of a female than her and not much in brains either.

It won't work Deb Finns (or whatever your real name is.)

Gary Strozeski Alvord

Lactoo

P.S. I'll seek your failure, be there
for your exposure, but, till then,
I'll pray for your soul.

Observations of Dr. Francis Walls

13. From May of 1972, until the summer of 1975, Dr. Walls was employed as a psychiatrist at Florida State Prison. During that time, he was in contact with Mr. Alvord on many occasions and had the opportunity to observe Mr. Alvord's mental condition. Based upon his observations, Dr. Walls wrote a letter to Governor Graham, a copy of which is attached hereto and incorporated by reference as Exhibit "D". In his letter he wrote:

> This young man suffers from one of the most severe and devasting [sic] type of real mental illness. Its broad spectrum is covered diagnostically by the term "schizophrenia." In Mr. Alvord's case, by virtue of its longstanding, [sic] it is further differentiated into chronic, and by virtue of its multiple differing signs and

> symptoms, undifferentiated. Precisely then, Mr. Alvord was a chronic undifferentiated schizophrenic.
>
> I should point out that the nature of this severe illness allows periods of medicinally induced remissions of symptoms, but unfortunately, are followed by undifferentiated relapses. The prognosis for continued normalcy, as such, is very poor. With Mr. Alvord I witnesses both ends of the spectrum.

(emphasis added). In Dr. Walls' opinion, Mr. Alvord is subject to remissions and relapses, which have occurred over a significant period of Mr. Alvord's life. Undersigned counsel has recently been in telephone contact with Dr. Walls, who has reconfirmed his previous opinion that Gary Alvord suffers from chronic mental illness which has its periods of recurrences and remissions.

Evaluation By Dr. Emanuel Tanay 2/

14. At the request of undersigned counsel, Dr. Emanuel Tanay met with and evaluated Mr. Alvord's mental condition. In addition to examining Mr. Alvord on November 13, 1984, Dr. Tanay reviewed all the documents relative to Mr. Alvord's hospitalization, treatment and incarceration, as well as Mr. Alvord's correspondence to various individuals.

During Dr. Tanay's examination of him, Mr. Alvord maintained a "delusional posture", refusing to acknowledge that William Sheppard was his attorney. Rather, he again insisted Mr. Sheppard was part of a large conspiracy against him. His affect remained flat throughout the examination and he was unresponsive to many of Dr. Tanay's inquiries.

2/ A copy of the curriculum vitae of Dr. Tanay is attached hereto as Exhibit "E" and incorporated by this reference.

Based upon his observation and experience, Dr. Tanay concluded that Mr. Alvord's condition had "significantly deteriorated since the setting of his execution date." (See, Report of Dr. Tanay, attached hereto as Exhibit "F" and incorporated by reference, at p. 14). Dr. Tanay further concluded that Mr. Alvord's mental condition was the result of a "psychotic adaptation" to his impending execution. Finally, he concluded, " In the event that Mr. Alvord is executed on November 29, 1984, there is no doubt in my mind that he will die in a psychotic state. Mr. Alvord has no meaningful understanding of the death penalty and his relationship to the crimes he has committed due to his mental illness." (Tanay Letter, at p. 16).

Evaluations By Dr. Harry Krop 3/

15. At the request of counsel, on November 12, 1984, Dr. Harry Krop conducted a psychodiagnostic interview with Mr. Alvord. Mr. Alvord refused to take any psychological tests and refused to acknowledge Mr. Sheppard was his attorney. He persisted in his belief that there exists a world-wide conspiracy involving Mr. Sheppard, Ms. Snurkowski, the "Fallen Angel" and the "brown shirts". He maintained he is dead yet immortal and his responses to Dr. Krop's questions were irrelevant, illogical and paranoid in nature. He exhibited spontaneous, inappropriate crying.

Based upon his observations, Dr. Krop concluded Mr. Alvord suffers from "chronic paranoid schizophrenia which has manifested in the form of bizarre, delusional and negativistic behavior since childhood..." with intermittent remissions (See, Report of

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3/ A copy of Dr. Krop's curriculum vitae is attached hereto as Exhibit "G" and incorporated by this reference.

Dr. Krop, attached hereto as Exhibit "H" and incorporated by this reference, at p. 1). Dr. Krop further diagnosed Mr. Alvord as suffering from a severe state of paranoid schizophrenia 4/ and concluded:

> It appears, however, that at the present time, Mr. Alvord has deteriorated to the extent that, despite the proximity of his execution, he could not understand the nature and effect of his death penalty, nor could he understand why it is to be imposed upon him. In view of his fixed delusional state, he is certainly not mentally or legally competent to assist counsel in any post conviction proceedings.

(Krop letter, at p. 2)

Current Observations About Mr. Alvord

16. Counsel has recently communicated with an inmate who has had direct contact with Mr. Alvord and who has communicated facts sufficient to conclude that Mr. Alvord is presently insane and incompetent. On November 12, 1984, Wm. J. Sheppard received a telephone call from an individual who represented himself as Jesse Tafero and who counsel from prior communications identified as Mr. Tafero. (Mr. Tafero had been represented in civil actions by Wm. J. Sheppard and was calling to obtain papers from said representation). Mr. Tafero indicated he was on that date in the

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4/ Paranoid schizophrenia is a type of schizophrenia dominated by one or more of these four features:

(a) Persecutory delusions
(b) Grandiose delusions
(c) Hallucinations with Grandiose content or persecutory content
(d) Jealousy delusions

The essential features are prominent persecutory or grandiose delusions or hallucinations with a persecutory or grandiose content. In addition delusional jealousy may be present. Associated features include: 1) unfocused anxiety; 2) anger; 3) argumentativeness and 4) violence. American Psychiatric Association, Diagnostic and Statistical Manual III, 295.3 (3d Ed. 1980).

Broward County Jail, having been transported there from Florida State Prison's Death Row for post-conviction hearings. Mr. Tafero upon questioning related that he knew Gary Eldon Alvord and in fact was, since November, 2, 1984, housed on Death Watch next to Mr. Alvord until Mr. Tafero's transfer to the Broward County Jail on or about November 7th and 8th, 1984. Mr. Tafero also related he had been housed next to Mr. Alvord on Death Row for one and one half to two years. During that time period and at present Gary Eldon Alvord would "come and go".

Mr. Tafero related that after approximately two days on "Death Watch" that Mr. Alvord became progressively more withdrawn and talked in incoherent phrases. Mr. Alvord refused to sleep on the bed in the cell because of his reported belief that it was occupied by Timothy Palmes (executed November 8, 1984).

17. On November 6, 1984, Wm. J. Sheppard traveled to Florida State Prison to counsel with his client Gary Eldon Alvord. While waiting to see Mr. Alvord, Assistant Superintendant Barton communicated that on November 2, 1984, while calling counsel's office to communicate the fact a death warrant had been signed by the Governor for Mr. Alvord's execution Mr. Alvord refused to talk to counsel even though given that opportunity.

ARGUMENT AND CITATIONS OF AUTHORITY

Mr. Alvord is entitled to a judicial determination of whether he is competent to be executed -- a determination based, essentially, on his rights to due process of law and protection from cruel and unusual punishment.

That Florida grants condemned inmates a substantive right not to be executed while insane is manifest in Florida. Under the common law of Florida, "one cannot be ... executed while insane." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957).

See also Ex parte Chesser, 93 Fla. 291, 111 So. 720, 721 (1927)(a person condemned to die, "if found to be insane," shall be "committed until his return to sanity is duly determined"); Hysler v. State , 136 Fla. 563, 137 So. 261, 262 (1939)(if prisoner is found to be insane, an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated..."). Accord, Ford v. Wainwright , 451 So.2d 471, (Fla. 1984) and Goode v. Wainwright , 448 So.2d 999, (Fla. 1984).

Independent of Florida's common law right not to be executed while insane is the more extensive common-law right not to be forced through criminal proceedings while incompetent. This Court in Brown v. State, 245 So.2d 68 (Fla. 1971)(judgment vacated and case remanded on the authority of Stewart v. Massachusetts, 408 U.S. 845 (1972) by the United States Supreme Court in Brown v. Florida, 408 U.S. 938 (1972)), explicitly acknowledges a defendant's common law right to a post-conviction competency determination:

> At common law, if at any time while criminal proceedings are pending against a person accused of crime, whether before or during or after the trial, the trial court either from observation or upon the suggestion of counsel has facts brought to its attention which raise a doubt of the sanity of the Defendant, the question should be settled before further steps are taken. See State ex rel Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207, 211 (1933). Where no doubt is created in the mind of the Court as to the present insanity of the Defendant, it is under no obligation to have the question determined. Southworth v. State, 98 Fla. 1184, 125 So. 345, 347 (1929).

245 So.2d at 70 (emphasis added). This Court, quoting from Brock v. State, 69 So.2d 344 (Fla. 1954), continued:

> Under our statute, as at common law, a hearing upon the issue is obligatory if a reasonable doubt is raised as to the defendant's sanity.

245 So.2d at 70. See also Hayes v. State, 343 So.2d 672 (Fla. 2d DCA 1977). Here of course, Petitioner's presumption of insanity raises such a doubt.

As noted recently by the Fifth Circuit Court of Appeals, the principle that a person presently insane shall not be executed is well-established in all State jurisdictions, as well as in the ancient common law. Gray v. Lucas, 710 F.2d 1048, 1053 (5th Cir. 1983), cert. denied, _____U.S._____, 104 S.Ct. 211 (1983). A survey of present legislative enactments reveals that "virtually every state that authorizes the death penalty have adopted by case law, statute, or implication, the common law rule prohibiting the use of that sanction against an insane prisoner." Note, Insanity of the Condemned, 88 Yale L.J. 533, 533 (1979). See also Jones v. United States, 327 F.2d 867, 873 (D.C. Cir. 1963) (there is a "common law duty of the court to determine the question of this man's present mental condition, as to whether or not the sentence should be carried out").

There are a myriad of explanations advanced by the Courts for the exemption of insane persons from the death penalty. All of the explanations are founded on two basic permises; first, society will not benefit from such an execution and secondly, it is manifestly unfair to the defendant. In fact, the present explanations justifying the exemption for insane persons were developed by the English common law commentators, collected in Justice Franfurter's dissent in Solesbee v. Balkcom, 339 U.S. 9, 17-19 (1950). Blackstone and Hale explain the fairness aspect of the principle by noting that if the defendant is sane, he might urge some reason why the sentence should not be carried out. An insane prisoner may be unable to reflect intelligently on his crimes, his trial and the proceedings employed after trial. Without such reflection, the prisoner is deprived of the opportunity to articulate grounds justifying a stay of execution. Id. at 18-19.

It is this aspect of the rule exempting insane persons from execution that is the focus of the first determination of competency requested in this Petition; that is, that the Peittioner is entitled to a determination of whether he is competent to engage in post-conviction proceedings. To force a defendant through the post-conviction process while incompetent, or to preclude a defendant from vigorously pursuing the post-conviction avenues of relief available to him because of his current incompetency, strikes at the very heart of the common law principle prohibiting execution of the insane. While incompetent, the defendant, such as the Petitioner in the instant case, is unable to reflect on the circumstances underlying his conviction and sentence, his trial, and post-trial proceedings; he cannot articulate or discuss grounds justifying post-conviction relief and/or a stay of execution. Thus, the common law, both Florida and Federal, articulate the essential princples underlying the right asserted on behalf of Mr. Alvord for a determination of whether he is competent to pursue avenues of post conviction relief available to him in the State Courts of Florida. Articulation of these princples in the common law, alone, is sufficient to justify a judicial determination of Mr. Alvord's competency in the post-conviction context. However, constitutional considerations noted below further support the contention that this man must be examined by Court-appointed psychiatrists and/or psychologists to evaluate his current competency.

A defendant faced with pursing a legal process which could culminate in the deprivation of his very life deserves no less procedural protection than one faced with a trial which could at worse result in the loss of only a few years from his life.A person who is mentally incapable of understanding the nature and object of the proceedings against him, and assisting

counsel in preparing his defense, may not be forced to stand trial. Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966). By analogy, executing the insane also is offensive to the Constitution: If the State cannot take advantage of a defendant's incapacity to deprive him of his right to a fair trial, the State should be forbidden from taking advantage of a defendant's incapacity to foreclose his final right to challenge the legality of his sentence. In both cases, the prisoner's mental disability is irrelevant to either his guilt or the legality of his punishment, and, by definition is beyond his voluntary control. The prisoner should not be forced to forfeit his last right to prove his innocence or the unlawfulness of his sentence because he is mentally incapable of presenting his position. Thus, Mr. Alvord is entitled to a determination of:

> ...whether he (the Defendant) has sufficient present ability to consult with his lawyer with a resonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. § 916.12 (12), Fla. Stat. (1983).

See also 3.211 (a) Fla. R. Crim. P.; Drope v. Missouri, 420 U.S. at 170 n. 7.

Article I, § 2 of the Florida Constitution guarantees the basic right "to enjoy and defend life", and § 21 guarantees:

> The Court shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

Counsel for the Petitioner argues that these constitutional provisions are rendered meaningless if Mr. Alvord is denied his ability to pursue post-conviction relief because the Courts of this state will not grant him a determination of whether he is competent to proceed in such proceedings. Forcing Mr. Alvord, for whom there is "reasonable grounds" to believe is incompetent

to engage in post-conviction proceedings, to proceed forward in those proceedings despite his incompetency effectively denies him the right to defend his life, which is at stake in these proceedings, and his access to the Courts, which is rendered meaningless if he is unable to understand the nature of the proceedings against him and to assist counsel in pursuing relief. Further, forcing the Petitioner to proceed in such a manner vioaltes his right to due process of law as guaranteed by § 9, and his right against excessive punishment as guaranteed by § 17 of the Constitution of Florida.

Independent of, but related to, Mr. Alvord's entitlement to a competency hearing under the Fifth and Fourteenth Amendments is his right to such a hearing under the Eighth Amendment's prohibition against cruel and unusual punishment. In the last decade the United States Supreme Court has on two occasions explicitly held that the Eighth Amendment not only limits the State's power to impose punishment, e.g., Furman v. Georgia, 408 U.S. 238 (1972), but also regulates the actual carrying out or application of validly imposed sentences. Hutto v. Finney, 437 U.S. 678, 685-87 (1978); Estelle v. Gamble, 429 U.S. 97, 103 (1976).

In light of present Eighth Amendment jurisprudence, a death sentence validly imposed upon a sane individual could be prohibited from its execution by the Eighth Amendment if the individual subsequently becomes incompetent. Mr. Alvord presents this Court with just such a situation. It is not argued that he was not competent at trial and sentencing -- rather, his condition is one of current incompetency, to the extent that to

force him to die will constitute an aberration and application of capital punishment that would violate the Eighth and Fourteenth Amendments to the United States Constitution. 5/

The defendant, Gary Eldon Alvord, has a right not to be executed while he is insane. That right is absolute under Florida law and under the Eighth and Fourteenth Amendments. No matter what process is given him, if he is insane he cannot lawfully be deprived of his life. In the same manner, an innocent man cannot lawfully be deprived of his liberty. The purpose of the Due Process Clauses of the Fifth and Fourteenth Amendments is to assure that people are not unlawfully or improperly deprived of property, liberty or life. The question becomes: What procedures must the state follow before it determine that a man is competent to be executed?

In Solesbee v. Balkcom, 338 U.S. 9 (1950), the Court considered a due process challenge by a Georgia death row inmate to Georgia's procedure for determining the competency of the condemned at the time of execution. The procedure for such a determination in Georgia expressly prohibited judicial resolution

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5/ Finally, undersigned counsel respectfully suggest that a Court of competent jurisdiction has the inherent right to conduct a determination of competency should there be reasonable grounds to believe that a defendant engaged in the post-conviction process is incompetent to proceed. There are such reasonable grounds to belive that Mr. Alvord is incompetent; it is respectfully submitted that if there is any doubt whether he is competent or not, a judicial determination of his competency must be made at this time, before he is executed.

Additionally, counsel submits that the Petitioner is entitled to such a determination to guarantee the full enjoyment by the Petitioner of his Fifth, Sixth and Fourteenth Amendment rights to effective assistance of counsel. Counsel cannot effectively assist or represent the Petitioner, as stated in the Petition at the present time, because the Petitioner is incompetent to assist them.

of execution competency, 6 / and instead provided a discretionary procedure by which the governor had the exclusive power to determine any question of competency to be executed. 7 / The petitioner argued that this exclusive procedure deprived him of his due process right to have his sanity "originally determined by a judicial or administrative tribunal after notice and hearings in which he could be represented by counsel, cross-examine witnesses and offer evidence," and to judicial review thereafter if the original tribunal was administrative. Id. at 10. The Court rejected the argument on two principles.

First, the Court analogized the process of postponing execution because of insanity to "reprieves of sentences in general." Thus the "suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the tribunal which is asked to postpone sentence." Id. at 13. Second, relying on Williams v. New York, 337 U.S. 241 (1949), the Court explained that it had already "emphasized that certain trial procedure standards are not applicable to the process of sentencing." Id. at 12. Both Solesbee rationales have been thoroughly eroded by subsequent jurisprudential developments.

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6 / "No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." Ga. Code Ann. § 27-2601, § 1073, P.C., Acts 1903, p. 77.

7/ "Disposition of insane convicts... Upon satisfactory evidence being offered to the Governor that the perosn convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital under his sanity shall have been restored, as determined by laws now in force..." Ga. Code Ann. § 27-2602, 1074, P.C., Acts 1903, p. 77.

Solesbee was decided at a time when the procedural protections of the due process clause were applicable only to "rights", not "privileges." See, e.g., Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd by equally divided court, 341 U.S. 918 (1951); Phyle v. Duffy, 34 Cal. 2d 144, 208 P.2d 668, 677-78 (1949) (Traynor, J., concurring in judgment). "Rights" were deemed to be "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Hurtado v. California, 110 U.S. 516, 535 (1884), the source of which was either a constitutional guarantee more specific than due process, see e.g., Board of Regents v. Roth, 408 U.S. 564, 575 n. 14 (1972), or "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." Tumey v. Ohio, 273 U.S. 510, 523 (1927). See generally L. Tribe, American Constitutional Law, 507 (1978).

Implementing the due process analysis as it then existed, the Solesbee Court held that the insanity of the condemned did not give rise to a "right" not to be executed. The Court found the tribunal charged with determining post-sentencing insanity or the sentence itself exercised wide discretion. Such discretion was not historically "hedged in by strict evidentiary procedural limitations," Williams, 337 U.S. at 246. Therefore, the Williams Court "emphasized that certain trial procedure safeguards are not applicable to the process of sentencing." Solesbee, 339 U.S. at 12. "This principle applie[d] even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction. Id. Post-sentencing determinations of sanity were essentially discretionary, and the condemned had no "right"

to due process determination of sanity. The condemned could appeal only to the conscience of the tribunal charged with making a determination.

In the more than three decades since Solesbee, three doctrines have developed which, taken together, have eroded the reasoning of Solesbee. Due process protection is now afforded against the arbitrary denial of state-created rights, as well as of specific constitutional and common law rights. In addition, due process now applies to sentencing proceedings, and capital sentencing proceedings in particular deman stringent due process protections.

In the 1970's the Supreme Court clearly discarded "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'". Graham v. Richardson, 403 U.S. 365, 374 (1971). See, also, Morrissey v. Brewer, 408 U.S. at 481. This in turn depends upon "the extent to which an individual will be 'condemned to suffer grievous loss'" if the interest at issue is arbitrarily withdrawn or withheld. Id. (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Under this analysis the Court determines whether the individual has a "justifiable expectation," Vitek v. Jones, 445 U.S. 480, 489 (1980), that the state will not arbitrarily withdraw a benefit conferred or withhold a benefit expected to be conferred. See, also, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 17 (1979); ("[T]o obtain a protectible right 'a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it,'") (quoting Board of Regents v. Roth, 408 U.S. at 577); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed

except 'for cause.'").

Solesbee in no way applied such an analysis, and so its holding is no longer authoritative or even persuasive. It is simply immaterial to modern due process analysis. Accordingly, the evolution of due process jurisprudence requires a new evaluation of the applicability of the due process clause to the determination of the sanity of the condemned at the time of execution.

Two other jurisprudential developments, examined in Gardner v. Florida, 430 U.S. 349 (1977), confirm the necessity of reevaluating Solesbee:

> In 1949, when the Williams case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.
>
> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country .... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempha v. Rhay, 389 U.S. 128; Specht v. Patterson, 386 U.S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See Witherspoon v. Illinois, 391 U.S. 510, 521-23.

Gardner, 430 U.S. at 357-38 (footnotes and citations omitted).

Gardner substantially undermined Williams; Solesbee relied heavily on Williams to demonstrate that sentencing proceedings give rise to no "rights" protected by due process because the determination of sentence was a wholly discretionary act. Solesbee, 339 U.S. at 12; Williams, 337 U.S. at 251-52. Accordingly, the undermining of Williams by subsequent developments in the law clearly indicates the undermining of the validity of Solesbee.

Finally, Florida law is markedly different from the statute considered in Solesbee. Florida has, by common law and statute, adopted the fundamental principle that one who is incompetent cannot be executed. The prohibition against the execution of the incompetent in Florida, however, is not a mere "matter of grace," or "appeal to the conscience and sound wisdom" of the executive, cf. Solesbee v. Balkcom, which is left to his "unfettered discretion". Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466 (1981). Instead, as demonstrated earlier, it is a "protectible expectation" under the due process clause of the fourteenth amendment.

For at least sixty years, Florida law has flatly prohibited the execution of a person who is insane at the time of execution. Ex parte Chesser, 93 Fla. 590, 112 So. 87 (1927). The prohibition is clear and absolute. "[A]n insane person cannot be executed." Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984). The Florida Supreme Court first articulated its adherence to the common law prohibition in Chesser:

> Since there is in this state no statute governing the question before us, the principles of the common law apply ....
>
> The rule of the common law is stated in Hammond's Blackstone's Commentaries, book 4, c.2, pp. 24, 25 and in Cooley's Blackstone (4th Ed.) vol. 2, pp. 1230, 1231,as follows:
>
> > "If, after he (the defendant) be tried and found guilty, he loses his senses, before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged somewhat in stay of judgment or exectuion ...."

112 So. at 89 (emphasis supplied). The absolute prohibition against the state's execution of the incompetent has continued in equal

force to the present. See also Ex Parte Chesser, 9 Fla. 291, 111 So. 720, 721 (1927) (a person condemned to die, "if found to be insane," shall be "committed until his return to sanity is duly determined"); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933)("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed"); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939)(if prisoner is "found to be insane, an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated when the sentence should be executed"); Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984) ("[w]e agree with [Goode's] contention that an insane person cannot be executed"). The Florida statute itself is clear. "If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane." Fla. Stat. §922.07(3) (1983).

The nature of the right of a condemned person in Florida not to be executed when incompetent is thus critically different from the "right" asserted in Solesbee v. Balkcom. In Solesbee the right not to be executed when incompetent was described as "an appeal to the conscience and wisdom of the governor. 339 U.S. at 13. It was only a matter of executive grace. However, in Florida an incompetent has the right not to be executed, not a mere "unilateral expectation". Board of Regents v. Roth, 408 U.S. at 577. The incompetent in Florida is not appealing to the conscience of the governor for "an 'equity' type judgment," Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. at 8. Instead, he has "legitimate claim of entitlement," Board of Regents, 409 U.S. at 577, of the very same character as the right not to be tried or sentenced when incompetent. See State ex rel. Deeb v. Fabisinski, 111 Fla. at 465-467, 152 So. at 211 ("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed" (emphasis supplied).

Solesbee was decided thirty five years ago and based on legal premises which are no longer valid. As shown, due process has evolved extensively. For that reason alone Solesbee is not controlling. Further, whatever may have been the common law in Georgia in 1949, in Florida in 1984 an insane person cannot be executed. The Florida statutes expressly forbid execution of an insane man. Solesbee, then, is not determinative of what process is due Mr. Alvord.

Rule 3.210-3.212 of the Florida Rules of Criminal Procedure provides a cogent procedure whereby, after examination by psychiatrists appointed by the Court, the defense and the State are provided copies of the evaluation reports by the psychiatrists (Rule 3.211). Rule 3.212 then provides:

> The experts preparing the reports may be called by either party or the Court, and additional evidence may be introduced by either party.

As noted in the Committe Note to Rule 3.212, "[i]n the event that there should have been other experts involved who were not appointed pursuant to this Rule, provision is made that such experts may be called by either party." The Rule further provides for determination regarding insanity.

Thus, the Florida Rules of Criminal Procedure provide a viable and workable procedure for post-conviction determinations of incompetency or insanity. Either these procedures or procedures similar to those under the rules of Criminal Procedure should have been used by the trial Court to determine whether Mr. Alvord is, in fact, currently incompetent to engage in post-conviction proceedings. See also Chapter 916 of the Florida Statutes. The Florida Rules of Criminal Procedure and the Florida Statutes provide minimum standards of due process to be followed -- evaluation of the Petitioner, the right to an adversary hearing at which the psychiatrist appointed by the Court can be examined by defense counsel and additional evidence presented on behalf of the Petitioner on the issue of competency, the requirement that the trial Court enter an

Order determining whether the Petitioner is competent or incompetent, and the ability to appeal from such Order.

Further, once a constitutionally protected interest is identified, the extent of procedural protection must be ascertained, but "[a] procedural rule that may satisfy due process in one context may not satisfy procedural due process in every case," Bell v. Burson, 402 U.S. at 540. In order to determine what process is due for a particular interest, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), employed a balancing process that weighs three factors: the private interest that will be affected by the government action at issue, the public interest, and the probable effect procedural safeguards will have on reducing the risk of erroneous decisions. See also Logan v. Zimmerman, 455 U.S. 422, 434 (1982). In taking the measure of these factors in a death penalty context, however, the balance must in addition reflect a fourth factor: the death penalty jurisprudence that has developed under the rubric of the eighth amendment. The past decade's decisions make clear that the extraordinarily weighty individual interest at stake in death penalty cases justifies heightened procedural due process protections so that safeguards which might suffice in less sensitive contexts will not meet the mark here.

(1) The Private Interest at Stake

Mr. Alvord's interests are of extraordinary weight": the right to have one last opportunity to assert matters known only to him which would make his execution unlawful or unjust, and the right to appreciate and prepare himself for the termination of his life. More importantly, his interests in not being executed while insane are insurmountable. He cannot, under Florida law or under the Eighth and Fourteenth Amendments, be executed while insane. His interests are of such fundamental character that they should weigh the balance heavily towards postponing execution long enough to determine his competency in a fair proceeding.

(2) The Government's Interests at Stake

The state has three interests at stake here. The first, cost, while legitimate, cannot overcome the important life interests at stake. "'While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.'" Goldberg v. Kelly, 397 U.S. at 261 (quoting Kelly v. Wyman, 294 F.Supp. 893, 901 (S.D.N.Y. 1968)). The second interest is in avoiding frivolous and time-consuming procedures, but that interest would not necessarily be thwarted by a procedure as extensive as that presently allowed under Florida law for the determination of trial competency. In addition, the state-created procedure, while not adequate to satisfy due process, is itself subject to the same potential abuse. The third interest has been clearly expressed by the Florida legislature and the Supreme Court. The state has an interest in not executing insane persons. The legislature has determined that the state does not desire to execute the insane, so the state has an interest which parallels that of Mr. Alvord.

(3) Risk of Erroneous Deprivation and the Benefit of Additional Safeguards

When the private interest at issue is life itself, any risk or error is intolerable. Accordingly, the risk of the erroneous deprivation of a condemned person's life, or the risk that a condemned person will be executed when he is incapable of preparing for death, demands the most effective safeguard that due process can provide -- an adversarial hearing. See Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Central Hanover Trust, Co., 339 U.S. 306, 313 (1950)(quoted in Goss v. Lopez, 419 U.S. 565, 579 (1979).

At least three societal goals are served by an adversarial hearing held before an impartial decisionmaker. First, a hearing provides the "adversarial debate our system recognizes as essential to the truth seeking function." Gardner v. Florida, 430 U.S. at 359. Our adversary process of adjudication is itself based on the belief that "no better instrument has been devised for arriving at truth" than the collision of opposing views before a neutral decisionmaker. Joint Anti-fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (Frankfurter, J., concurring). Secondly, a hearing serves

as an "institutional check on arbitrary or impermissible action." Gray Panthers v. Schweiker, 652 F.2d 146, 162 (D.C. Cir. 1980).

> An oral hearing requirement thus serves to ensure that decisionmakers recognize that their decisions affect the lives of human beings.
>
> We do not believe it unwarranted to recognize that human nature frequently leads to careless and arbitrary action when the decisionmaker can retreat behind a screen of paper and anonymity. The principle that those who govern must be accountable to those whose lives they affect informs not only our representative system of government, but on a broader scale, forms the very essence of what we expect from the Government in its dealings with us. Providing a personal, oral hearing can be one expression of that principle.

Id. Finally,

> A third and perhaps most important reason for generally insisting upon an oral hearing is that no other procedure so effectively fosters a belief that one has been dealt with fairly, even if there remains a disagreement with the result. Our system of government is founded on respect for, and deference to, the integrity and dignity of the individual. In the Government's dealings with individuals ... some mechanism must exist to ensure that those values are left intact, even when action is finally taken against the person. In a society like ours, which operates on the assumption of and relies for its continued stability on respect for our institutions and voluntary compliance with the dictates of the law, it is crucial that its members perceive that their rights and interests are taken seriously and thoughtfully by the officials who are deciding their claims. During an oral hearing, the "Government" loses its nameless, faceless quality and comes into focus as another human being with whom the citizen can speak, present his or her case, and look to for a responsible decision. To quote Justice Frankfurter again, no better way has "been found for generating the feeling, so important to a popular government, that justice has been done." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. at 172.

Id.

(4) Due Process and the Death Penalty

The three Mathew v. Eldridge factors cannot of themselves constitute a sufficient analysis, because this is a death case. This is not a case involving welfare benefits or the job security of non-tenured teachers. In death cases, courts must provde what one commentator has described as "super due process." Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

The Supreme Court's death penalty jurisprudence underscores that the likelihood of error and the gravity or cost of error call for the strictest of procedural safeguards. The reason for this is not difficult to fathom. Death is irrevocable and the state cannot cancel or even ameliorate the effects of such action should it wrongly impose this punishment. Irrevocability calls for the strictest scrutiny. Because irrevocable deprivations cannot be undone or mitigated, it is appropriate to weigh and consider them with the utmost care in the first instance.

The heightened due process rationale has grown from the fact that the Court, in recognizing death to be a "qualiatively different penalty," Woodson v. North Carolina, 428 U.S. at 350, has adopted more stringent procedural requirements to guarantee the constitutionality of capital sentencing processes and to reduce improper death sentences. The Court's heightened due process decisions have paralleled its eighth amendement decisions and reinforced the protections guaranteed by Furman, Proffitt, and their progeny; in many instances the Court applies both an eighth amendment and a due process rationale almost interchangeably. See, e.g., Gardner v. Florida, 430 U.S. at 357, 358-61; Green v. Georgia, 442 U.S. 95, 97 (1979); Beck v. Alabama, 447 U.S. 625, 627, 638 (1980).

Applying to the present case the Mathews factors, along with the need for enhanced reliability in every decision leading to the execution of the condemned, will lead to one conclusion. Where a condemned has made a legitimate showing that he is insane he must be afforded a full and fair hearing, i.e., an adversarial hearing. The current due process analysis has not been applied to the right of a condemned in not being executed while insane. In addition, it could be argued that the process due depends on the source from which the right flows. Consequently, this brief will next consider the way the United States Supreme Court has applied due process to protect various constitutional rights and state-created rights.

Constitutional Rights

Fortunately, the United States Supreme Court has rarely had to worry about protecting persons from cruel and unusual punishment, prohibited by the Eighth Amendment. The major Eighth Amendment case was Furman v. Georgia, supra, where the Supreme Court held the death penalty violative of the Eighth Amendment because it was arbitrarily imposed. As a result, a requirement of heightened due process was imposed upon the states before they could execute a man. The Court demonstrated appropriate concern over possible misuse of society's most extreme sanction. The concern can be no less here, where an insane person's right to life is at stake. Mr. Alvord does not suggest that the state must repeat the entire capital punishment scheme where it has been informed a condemned man is insane. An adversarial hearing with a decision made on the record appears to be the main process required by the heightened concern over cruel and unusual punishment.

Few cases deal with the Eighth Amendment in contexts other than the death penalty. However, the Court has delineated the process due other explicitly guaranteed rights. Other than consitutionally guaranteed criminal rights, no right explicitly guaranteed by the Constitution has been atacked by the state more than those in the First Amendment. The Supreme Court has consistently held that the state must guarantee procedural safeguards including a judicial determination before speech is restrained, except in rare cases. Indeed in Freedman v. Maryland, 380 U.S. 51 (1965), the Court considered censorship of movies and wrote:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

Id. at 58. In addition, the Court required expedited action on the part of the state, including prompt judicial review. Id. at 60. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). These procedural requirements were placed on the state even though it was clear beyond cavil that the state had an absolute right to prohibit the showing of obscene movies.

The Supreme Court also guaranteed a hearing in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). In Mt. Healthy, Doyle claimed that he as not rehired as a teacher because he had exercised his First Amendment right to express himself. The Court rejected the argument that he was not entitled to a trial in the federal district court and wrote,

> "Even though [Doyle] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, (citation omitted), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."

Id. at 283-284.

In Mt. Healthy the state could, without cause, refuse to rehire Doyle. In this case the state has the right to execute a condemned man. However, in both cases the state is forbidden to exercise its rights in violation of the Constitution. In Mt. Healthy the state may not refuse to rehire because a teacher has exercised his constitutional rights. Similarly, in this case the state may not execute a man in violation of the Eighth and Fourteenth Amendments. The only major difference is that Mr. Alvord cannot vindicate his constitutional rights after the state acts.

In order for a First Amendment right to be protected there must be a procedure providing for judicial review of executive or legislative infringements. The Court does not demand that the hearing be held prior to a restraint being placed on First Amendment rights, but it does require a judicial hearing. In the criminal context as well the Supreme Court has, in effect, required that a prisoner or defendant be given a full and fair hearing in a state or federal court if he claims the state has violated his constitutional rights. Townsend v. Sain, 372 U.S. 293 (1963).

Constitutional rights are the most valuable rights possessed by citizens of this country. The Supreme Court has consistently held that when such rights are threatened a judicial hearing is necessary. Mr. Alvord, then, is entitled to a judicial adversary hearing in order to assure that the state does not violate his constitutional right not to be executed while insane.

Mr. Alvord's right to a judicial hearing will mean nothing, however, unless that hearing is held prior to the state violating his right not to be executed while insane.

State-Created Right

For Fourteenth Amendment purposes, the due process protections associated with a particular right are not diminished by the fact that the right originates in state law. The United States Supreme Court has "repeatedly held that state [law] ... may create ... interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment," Vitek v. Jones, 445 U.S. at 488. "Once a State has [created a right of this sort] ... due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Id. at 488-89. See also Logan v. Zimmerman Brush Co., 455 U.S. at 430-32. For "the touchstone of due process is the protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. at 558. Thus it is that "an arbitrary disregard of a [state-created right] ... is a denial of due process of law." Hicks v. Oklahoma, 447 U.S. at 346.

That the state-law right of a condemned person not to be executed when incompetent can be the kind of right entitled to due process protection, as distinct from the kind of "right" to appeal to conscience asserted in Solesbee, is a settled matter in the federal courts. In the former fifth circuit, for example, it has been settled for almost two decades. As the fifth circuit observed in 1966:

> [T]he Texas law creates in petitioner a substantive right not to be executed while insane, even if such right is not contained in the due process clause of

> the Fourteenth Amendment. Appellant is "entitled to have procedural process observed in the protection of these substantive rights even though substantive due process would not compel the rights to be given."

Welch v. Beto, 355 F.2d 1016, 1019 (5th Cir.66).

Once it is established that the due process clause does protect the state-created right not to be executed while insane, it follows that the federal Constitution -- not state-created procedures -- sets the measure of the process due. This principle reflects the Supreme Court's definitive rejection of a latter-day recasting of the right-privilege doctrine, which would have dictated that citizens take "the bitter with the sweet" -- i.e., the procedural protections, however limited, which the government establishing the substantive right has chosen to provide. See Arnett v. Kennedy, 416 U.S. 134, 164-167 (1974)(Powell, J., joined by Blackmun, Jr., concurring); id. at 177-86 (White, Jr., concurring in part and dissenting in part); id. at 210-11 & n.7 (Marshall, Jr., joined by Douglas, J., and Brennan, J., dissenting). This theory, voiced by a plurality in Arnett, 8/ but not accepted there by a majority of the Court, has been repeatedly rejected:

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Viteck v. Jones, 445 U.S. 480, 491 (1980). See Arnett v. Kennedy, 416 U.S., at 166-167 (Powell, J., opinion concurring in part); id., at 211 (Marshall, J. dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "'While the legislature may elect not to confer a property interest ... it may not consitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards .... [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" Vitek v. Jones, 445 U.S., at 490-491 quoting Arnett v. Kennedy, 416 U.S., at 167 (opinion concurring in part).

Logan v. Zimmerman Brush Co., 455 U.S. at 432.

8/ "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant ... must take the bitter with sweet. 416 U.S. at 153-154 (plurality opinion).

Under the old right/privilege analysis of due process, interests in parole and probation were seen as identical to the interest of the condemned in not being executed when insane: each had previously been classified only as "privileges," which the state could grant or revoke wholly within its discretion because each "comes as an act of grace to one convicted of crime." Escoe v. Zerbst, 295 U.S. at 492; Ughbanks v. Armstrong. Compare Solesbee v. Balkcom, 339 U.S. at 13 ("a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence"). This earlier view of probation and parole has been overruled. The states create entitlements to both that are protected by due process. Such an entitlement was first found in connection with the interest of a parolee in not having his parole arbitrarily revoked.

> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables his to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonalbe promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.
>
> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss: on the parolee and often in others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process however informal.

Morrissey v. Brewer, 408 U.S. at 481-82 (footnotes omitted) (emphasis supplied).

On the basis of the same consideration, the Court thereafter held that probation could not be revoked without due process protections. Gagnon v. Scarpelli, 411 U.S. 778, 782 & n.4 (1973). The Court has even held that the interest of a prisoner in obtaining parole in the first instance was also protected by due process. A "protectible expectation of parole" was created by statutory language because it required discretion to be exercised in a prisoner's favor if a certain set of facts was shown, an entitlement was created. Id., at 10-11.

These cases require, at a minimum

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole. Morrissey v. Brewer, 408 U.S. at 489."

Gagnon, 411 U.S. at 786. The interest an insane man has in his life is much greater than a parolee has in his liberty. An insane man subject to execution should be given at least these minimal requirements of due process.

Another guide to what process is due is the Florida Administrative Procedures Act. Fla. Stat., Chapter 120. Substantial interests of a party can be affected by agency action, only if the agency follows statutory procedures, including giving notice, allowing parties to present evidence, to cross examine, and to be represented by counsel. Fla. Stat., §120.57(1)(b). The agency proceeding must be recorded and findings of fact may be made only on the record. 9/ The Act also permits judicial review. Fla. Stat. §120.68. "The Governor in the exercise of all executive powers other than those derived from the constitution" is an agency. Fla. Stat. §120.52(1)(a). The Govenor cannot be forced to comply with the Florida Administrative Procedure Act

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9/ The pertinent sections of the Florida Statutes are attached.

with regard to a competency-to-be-executed determination because the state statute explicitly prohibits prisoners from Fla. Stat. 120.52(11).

In light of the requirements under Florida and Federal Statutory and Constitutional Law, Florida's § 922.07 procedure can in no way substitute for, or affect, the proceeding mandated for the determination of incompetency to engage in post-conviction proceedings. What Florida law permits, and Federal Constitutional Law requires, is a determination of Mr. Alvord's competency in a judicial proceeding similar to that established for the determination of trial competency. A question may arise as to the proper relationship between this proceeding and the proceeding the Governor established by § 922.07. The simple but conclusive answer is that § 922.07 can have no effect on the judicial proceeding. The reasons for this are apparent. Two different determinations of competency are at issue.

First, § 922.07 provides only -- although importantly -- for the determination of whether a person is competent to be executed. The standard employed is whether the "convicted person ...understands the nature and effect of the death penalty and why it is to be imposed upon him." §922.07(1).

The determination of whether a defendant is competent to engage in post-conviction proceedings, on the other hand, must consider "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual understanding of the proceedings against him." See e.g., Rule 3.211(a) of the Florida Rules of Criminal Procedure. See also § 916.12(1) of the Florida Statutes.

The concept of a post-conviction determination as to competency is not a novel one. Whether the right is founded in Florida statutory law, the common law, by constitutional mandate or simply by the inherent judicial pwoer of a Court to administer justice in proceedings in which it has competent jurisdiction, the concept has precedent.

In both Reese v. Patton, 384 U.S. 212 (1966) and Gilmore v. Utah, 429 U.S. 989 (1976) such a judicial determination of post-conviction competency was employed. Reese and Gilmore, death row inmates, attempted to abandon legal efforts to prevent their executions. In Reese, the Court refused to allow the prisoner to withdraw his appeal without a judicial determination that he was incompetent to make his decision. 483 U.S. at 313-14. The Court retained jurisdiction over Reese's case but ordered the Federal District Court to conduct any hearing "suitable" to determine Reese's competency. Id.

In Gilmore, the state trial court held a post-conviction hearing on the issue of competency before Gilmore's case reached the United States Supreme Court. As a result of the State judicial inquiry into Gilmore's competency, the Court had extensive evidence that Gilmore was competent. Because this psychiatric evidence uniformly stated that Gilmore was competent to forego his appeal, no further hearing was needed. 429 U.S. at 1015-16 nn. 4 & 5 (Burger, C.J., concurring).

No such hearing has ever been held in Mr. Alvord's behalf in the post-conviction setting. It is imperative that before the State takes this man's life, some determination that he is competent to pursue all of his post-conviction rights be made. That responsibility lies with the courts of this state, as it did in Gilmore with the state courts. Certainly Mr. Alvord is entitled to the same such determination.

Mr. Alvord has a right not to be executed while insane. That right stems from the Eighth and Fourteenth Amendments, as well as through Florida state law. As a right it cannot be taken away arbitrarily. Solesbee v. Balkcom does not apply to this case. It was based on subsequently discarded analysis and based on different state law. Even though Florida purports to give some procedural protection, its adequacy is to be judged by the Fourteenth Amendment. The Due Process Clause requires in this

case that at a minimum, Mr. Alvord be afforded a full and fair adversarial hearing in front of a neutral person who must make a decision on the record. The Eighth and Fourteenth Amendments forbid the execution of an insane man. Thus, the vindication of this right is the province of the judiciary.

Mr. Alvord is entitled to a judicial determination of whether he is competent to be executed , in addition to and aside from that determination made under § 922.07 of the Florida Statutes (1983) by the Governor's commission of psychiatrists, and should be afforded minimum standards of due process in said judicial determination, pursuant to Article I, §§ 2, 9, 17 and 21 of the Constitution of the State of Florida, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Gary Eldon Alvord, respectfully petitions this Court to issue a Writ for Extraordinary Relief; to appoint impartial and qualified experts to make a determination of Mr. Alvord's present competency to be executed; to enter a stay of execution in this case; and to grant any further relief which it deems necessary in order to exercise jurisdiction in this matter.

Respectfully submitted,

LAW OFFICES OF WM. J. SHEPPARD, P.A.

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Attorneys for Gary Eldon Alvord

CERTIFICATE OF GOOD FAITH AND VERIFICATION

WE, WILLIAM J. SHEPPARD and ELIZABETH L. WHITE hereby certify that the foregoing motion is made in good faith and on reasonable grounds to believe that Gary Eldon Alvord is not competent to be executed. We further certify that the facts set forth herein are true and accurate to the best of our knowledge.

Wm. J. Sheppard, Esquire

Elizabeth L. White, Esquire

STATE OF FLORIDA:
: ss.
COUNTY OF DUVAL :

Sworn to and subscribed before me this 20th day of November, 1984.

NOTARY PUBLIC, State of Florida
At Large.

My Commission Expires: Notary Public, State of Florida My Commission Expires May 1, 1988 Bonded Thru Troy Fain - Insurance, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Ann Garrison Paschall, Assistant Attorney General, Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, by ~~mail~~ Hand, this 20th day of November, 1984.

Attorney