

felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.”¹⁴⁶

***Limitations on Capital Punishment: Diminished Capacity.*—**

The Court has grappled with several cases involving application of the death penalty to persons of diminished mental capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright*¹⁴⁷ that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of sanity at the time of execution must be determined in a proceeding satisfying the minimum requirements of due process.¹⁴⁸ The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continued to be so viewed. And, although no states purported to permit the execution of the insane, Florida and some others left the determination to the governor. Florida’s procedures, the Court held, violated due process because the decision was vested in the governor without the defendant’s having the opportunity to be heard, the governor’s decision being based on reports of three state-appointed psychiatrists.¹⁴⁹

In *Panetti v. Quarterman*,¹⁵⁰ the Court considered two of the issues raised, but not clearly answered, in *Ford*: what definition of

¹⁴⁶ 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O’Connor’s opinion for the Court viewed a “narrow” focus on intent to kill as “a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers,” *id.* at 157, and concluded that “reckless disregard for human life” may be held to be “implicit in knowingly engaging in criminal activities known to carry a grave risk of death.” *Id.*

¹⁴⁷ 477 U.S. 399 (1986).

¹⁴⁸ There was an opinion of the Court only on the first issue: that the Eighth Amendment creates a right not to be executed while insane. The Court’s opinion did not attempt to define insanity; Justice Powell’s concurring opinion would have held the prohibition applicable only for “those who are unaware of the punishment they are about to suffer and why they are to suffer it.” 477 U.S. at 422.

¹⁴⁹ There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that “the ascertainment of a prisoner’s sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding “far less formal than a trial,” that the state “should provide an impartial officer or board that can receive evidence and argument from the prisoner’s counsel.” *Id.* at 427. Concurring Justice O’Connor, joined by Justice White, emphasized Florida’s denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell’s opinion, requiring the opportunity to be heard before an impartial officer or board, set forth the Court’s holding.

¹⁵⁰ 549 U.S. 1106 (2007).