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SUPREME COURT OF ARKANSAS

No. CV-17-913

JACK GORDON GREENE APPELLANT V. WENDY KELLEY, DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION APPELLEE	**Opinion Delivered:** November 1, 2018 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CV-17-738] HONORABLE JODI RAINES DENNIS, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

JOHN DAN KEMP, Chief Justice

Appellant Jack Gordon Greene appeals from an order of the Jefferson County Circuit Court dismissing his complaint for declaratory and injunctive relief against appellee Wendy Kelley, Director ("Director") of the Arkansas Department of Correction ("ADC"). For reversal, Greene argues (1) that Arkansas Code Annotated section 16-90-506(d)(1) (Supp. 2017)[1] violates his due-process rights under the United States and Arkansas Constitutions by vesting sole discretion in the Director to determine whether a prisoner is competent to be executed; (2) that section 16-90-506(d) violates the separation-of-powers provision of the Arkansas Constitution because it deprives the courts of the

[1] Greene refers to section 16-90-506(d)(1) as the "Director's Statute," while the State refers to section 16-90-506(d)(1) as the "Stay of Execution" statute. In this opinion, we reference the statute by its section number.

power to make a competency determination; and (3) that executing him after twenty-five years in solitary confinement would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and article 2, section 9 of the Arkansas Constitution. We affirm the circuit court's ruling on the solitary-confinement claim, reverse the circuit court's ruling on the due-process claim, and remand to the circuit court for further proceedings consistent with this opinion.

I. *Facts*

In 1992, Greene was convicted of the July 23, 1991 capital murder of Sidney Burnett and sentenced to death. *See Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994) (affirming conviction but reversing and remanding for resentencing); *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998) (reversing and remanding for resentencing); *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001) (affirming sentence).

On August 25, 2017, following years of litigation, Governor Asa Hutchinson scheduled Greene's execution for November 9, 2017. On September 20, 2017, Greene's attorneys wrote a letter to Kelley claiming that he was incompetent to be executed. The letter described Greene's delusions and paranoia and included an excerpt from a letter that Greene had recently written to Justin Tate, Governor Hutchinson's chief legal counsel. The letter also stated that Dr. George Woods, a psychiatrist, briefly examined Greene on September 14, 2017, and found that Greene's condition had significantly worsened since his previous examination in 2011, rendering him unable to comprehend the reason for his execution. Greene's counsel stated that there were reasonable grounds for believing that

Greene was not competent, due to mental illness, to understand the nature and reasons for his punishment and requested that Kelley utilize her statutory authority under section 16-90-506(d) to declare a doubt on his competency to be executed.

Kelley asked Greene's attorneys to provide any documentation that they believed substantiated their claim. After receiving that material, Kelley responded by letter on October 5, 2017, and indicated that she had considered the documents provided by Greene's counsel. These documents included Dr. Woods's report, letters written by Greene, and affidavits by attorneys who had represented Greene, in addition to the record from Greene's federal habeas proceedings and his mental health file maintained by the ADC. Kelley noted that Greene had stated in his recent writings that he had been sentenced to death three times for the murder of Burnett, that he had also killed his brother in North Carolina, that he had destroyed two families because of those murders, and that he did not want to waste any more tax money on endless appeals. According to Kelley, these writings indicate that Greene understands the reasons why he was convicted and that he desires to request forgiveness prior to his execution. Kelley further stated that she had reviewed the federal-habeas court's 2012 order rejecting a claim of incompetence and the report of Dr. Christina Pietz, a neuropsychologist who had examined Greene in 2010. She also pointed to Dr. Woods's testimony in the federal proceedings that he was unable to make an accurate diagnosis of Greene without conducting a clinical evaluation with which Greene had refused to cooperate. Kelley noted that there was no indication in Dr. Woods's 2017 report that he had subsequently conducted any clinical evaluation of

Greene. Kelley stated that based on the information she had reviewed, she did not find "reasonable grounds for believing that Mr. Greene is not currently competent, due to mental illness, to understand the nature of the punishment and to reach a rational understanding of the reason for the execution."

Meanwhile, on September 27, 2017, Greene's counsel filed the complaint giving rise to this appeal in the Jefferson County Circuit Court. The complaint alleged that Greene was incompetent to be executed and requested a hearing on his competence and a declaratory judgment that his execution would violate the Eighth Amendment to the United States Constitution and article 2, section 9 of the Arkansas Constitution. The complaint prayed that if the requested hearing was not authorized under section 16-90-506(d), the statute be declared unconstitutional on its face or as applied to Greene because it violates his due-process rights guaranteed by the United States and Arkansas Constitutions. Greene further alleged that section 16-90-506(d) is unconstitutional because it violates the separation-of-powers clause found in article 4 of the Arkansas Constitution. Finally, Greene requested a declaratory judgment that executing him after twenty-five years' confinement violates the Eighth Amendment to the United States Constitution and article 2, section 9 of the Arkansas Constitution. Greene prayed that the circuit court issue any writ necessary to enforce its declaratory judgment and to halt his execution. Attached to the complaint were Dr. Woods's 2010 and 2017 reports from his evaluations of Greene, Greene's recent writings, his medical records, his former attorneys' affidavits, and a pen pal's attestation of his worsening mental condition.

On October 20, 2017, Greene filed an amended complaint and attached Kelley's October 5, 2017 letter and a report by Dr. Garrett Andrews, a neuropsychologist who performed a cell-side evaluation of Greene on October 10, 2017. Dr. Andrews stated that while Greene "can and has articulated that the State of Arkansas intends to execute him for the murder of Sidney Burnett," "his conception of his execution is surrounded by delusions." The report indicated that Greene believes his execution is intended to conceal the prison's past misdeeds. Greene stated that he believes "he knows too much to be executed but that they don't want him alive either." Dr. Andrews concluded that, "[b]ecause Mr. Greene has incorporated his execution into his persecutory and somatic delusions, he does not have a rational understanding of his execution."

On November 1, 2017, Kelley filed a motion to dismiss Greene's amended complaint and argued that it failed to state a claim for which relief can be granted pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. Specifically, Kelley contended that section 16-90-506(d) was not unconstitutional on its face or as applied to Greene and cited *Singleton v. Endell*, 316 Ark. 133, 870 S.W.2d 742 (1994) (holding that the statute was not in violation of the requirements set forth in *Ford v. Wainwright*, 477 U.S. 399 (1986)). Kelley averred that Greene had failed to state a valid claim that the statute conflicted with the Arkansas Constitution's separation-of-powers provision or that his execution would amount to cruel and unusual punishment by virtue of his years of solitary confinement on death row. Kelley asserted that the circuit court lacked jurisdiction to order a stay of execution and that Greene's claims were barred by sovereign immunity.

Greene filed a response to the motion to dismiss, and the circuit court conducted a hearing on November 2, 2017. The circuit court heard arguments of counsel, but no additional evidence was introduced at the hearing. On November 3, 2017, the court entered an order granting Kelley's motion to dismiss. In doing so, the circuit court ruled that (1) Greene "has not presented and the court has not located any statute authorizing [it] to conduct a competency hearing"; (2) "the Arkansas Supreme Court has previously determined that A.C.A. § 16-90-506(d) does not violate due process or separation of powers"; (3) executing Greene after twenty-five years of solitary confinement would not be cruel and unusual punishment; and (4) it lacked jurisdiction to stay an execution.[2] Thus, the circuit court found that Greene had failed to state facts on which relief could be granted. Greene filed a notice of appeal from the circuit court's order that same day, and this court granted a stay of his scheduled execution to consider the present appeal.

II. *Greene's Arguments*

On appeal, Greene argues that the circuit court erred by rejecting his claim that section 16-90-506(d)(1) violates his due-process rights under the United States and Arkansas Constitutions by vesting sole discretion in the Director to determine whether a prisoner is competent to be executed. He further contends that he put forth sufficient facts to raise a reasonable question about his competence to be executed under section 16-90-506(d) and that he was entitled to a hearing on the issue.

[2] The circuit court did not rule on the issue of sovereign immunity.

For the reasons set forth in *Ward v. Hutchinson*, 2018 Ark. 313, we hold that section 16-90-506(d)(1) is unconstitutional on its face and violates the due-process guarantees of the United States and Arkansas Constitutions. Because we conclude that section 16-90-506(d)(1) is unconstitutional on its face, we decline to address Ward's as-applied due-process argument, and we do not address his separation-of-powers argument.

Greene also contends that executing him after twenty-five years in solitary confinement would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and article 2, section 9 of the Arkansas Constitution. He argues that it was the State's error, not his, that caused him to be resentenced twice over a period of nearly ten years and that the conditions of his detention have significantly contributed to his mental illness.

This court expressly rejected a similar claim in *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998). In *Hill*, appellant contended that it would be cruel and unusual punishment to resentence him to death after spending fifteen years on death row. We stated,

> We find it significant that the testimony presented in this case did not reveal any prejudice or psychological pain that Appellant now implies he suffers as a result of the delay. *See Janecka v. State*, 937 S.W.2d 456, 475–76 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997). We agree with the State's characterization that the very nature of capital litigation in both state and federal courts suggests that delay in resentencing to death is the product of evolving standards of decency which inures to the defendant's benefit. *See White v. Johnson*, 79 F.3d 432 (5th Cir. 1996), *cert. denied*, 519 U.S. 911 (1996); *McKenzie v. Day*, 57 F.3d 1493 (9th Cir. [1995]), *cert. denied*, 514 U.S. 1104 (1995). In sum, we know of no reason why we should now hold that the imposition of the death penalty is cruel and unusual punishment

> merely because there has been an extended passage of time between the crime and the punishment.

Hill, 331 Ark. at 322–23, 962 S.W.2d at 767.

Greene now claims that he has experienced a mental decline while awaiting execution and emphasizes that the delay at issue is a decade longer than the delay in *Hill*. Based on our holding in *Hill*, Greene's argument on appeal is unavailing. We affirm the circuit court's ruling on Greene's solitary-confinement claim. [3]

Finally, we note that Kelley failed to obtain a ruling on her claim that Greene's suit is barred by the doctrine of sovereign immunity. The failure to obtain a ruling precludes our review on appeal. *E.g.*, *Arnold v. State*, 2012 Ark. 400.

III. *Conclusion*

In sum, we affirm the circuit court's ruling on the solitary-confinement claim, reverse the circuit court's ruling on the due-process claim, and remand to the circuit court for further proceedings consistent with this opinion.

Affirmed in part; reversed and remanded in part.

HART, J., concurs.

BAKER, WOOD, and WOMACK, JJ., dissent.

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[3]This holding does not preclude Greene from presenting certain relevant evidence in a *Ford-Panetti* hearing upon remand. *Panetti v. Quarterman*, 551 U.S. 551 (2007) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the petitioner should have been afforded the opportunity to submit evidence once he made a substantial threshold showing of insanity)).

JOSEPHINE LINKER HART, Justice, concurring.

I. *Introduction*

I join the disposition reached by Justices Kemp, Goodson, and Wynne with regard to the constitutionality of Ark. Code Ann. § 16-90-506(c)–(d) (the "Director's Statute"). I write separately for the reasons stated herein.

Greene was convicted of capital murder for the death of Sidney Jethro Burnett in 1991. He was sentenced to death. Since then, Greene has been involved in numerous appeals and postconviction proceedings, most of which are entirely irrelevant to the issues presented in this appeal. *See Greene v. State*, 317 Ark. 350, 357, 878 S.W.2d 384, 389 (1994) (affirming conviction but reversing for resentencing); *Greene v. State*, 335 Ark. 1, 34, 977 S.W.2d 192, 208 (1998) (again reversing for resentencing); *Greene v. State*, 343 Ark. 526, 542, 37 S.W.3d 579, 590 (2001) (affirming third death sentence). Greene's present appeal is not to re-argue whether Greene killed Ms. Burnett; a jury determined that Greene was guilty of that crime, and the outcome of this case will not disturb Greene's conviction. This appeal is not to re-argue whether Greene should be sentenced to death; a jury determined that Greene should receive the death penalty, and regardless of the outcome of this case, Greene will remain under sentence of death. This appeal addresses two main questions: (1) whether Greene has made an adequate showing that he is presently "insane," in which case the U.S. Constitution requires the suspension of his death sentence pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007); and (2) whether the Arkansas statute that governs claims of insanity

at the execution stage satisfies the constitutional due process requirements set forth in *Ford* and *Panetti*.

II. *Background – The Director's Statute and Greene's Request to the Director*

According to the State, claims of insanity for purposes of execution are to be addressed under Ark. Code Ann. § 16-90-506(c)–(d) (the "Director's Statute"), which provides in relevant part as follows:

> (c) The *only* officers who shall have *the power of suspending the execution* of a judgment of death are:
>
> (1) The Governor;
>
> (2) *In cases of insanity* or pregnancy of the individual, *the Director of the Department of Correction as provided in subsection (d)* of this section; and
>
> (3) In cases of appeals, the Clerk of the Supreme Court, as prescribed by law.
>
> (d)(1)(A)(i) *When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent*, due to mental illness, to understand the nature and reasons for that punishment, the Director of the Department of Correction shall notify the Deputy Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services.
>
> (ii) The Director of the Department of Correction shall also notify the Governor of this action.
>
> (iii) The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification.
>
> (iv) The attorney of record of the individual shall also be notified of this action, and reasonable allowance will be made for an independent mental health evaluation to be made.

> (v) A copy of the report of the evaluation by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall be furnished to the Mental Health Services Section of the Division of Health Treatment Services of the Department of Correction, along with any recommendations for treatment of the individual.
>
> (vi) All responsibility for implementation of treatment remains with the Mental Health Services Section of the Division of Health Treatment Services of the Department of Correction.
>
> (B)(i) If the individual is found competent to understand the nature of and reason for the punishment, the Governor shall be so notified and shall order the execution to be carried out according to law.
>
> (ii) If the individual is found incompetent due to mental illness, the Governor shall order that appropriate mental health treatment be provided. The Director of the Department of Correction may order a reevaluation of the competency of the individual as circumstances may warrant.

Ark. Code Ann. § 16-90-506(c)–(d) (Supp. 2017) (emphases added).[1]

On August 25, 2017, Governor Hutchinson set Greene's execution for November 9. On September 20, Greene's attorney sent a letter to the Director of the Arkansas Department of Correction (the "Director") urging her to assess whether Greene was competent to be executed. At that point, Greene had been in solitary confinement for

[1]The current "reasonable grounds" provision found at Ark. Code Ann. § 16-90-506(d)(1)(a)(i) has been in the Director's Statute since before the United States Supreme Court handed down *Ford* in 1986. After *Ford*, the Arkansas General Assembly amended the Director's Statute in 1993 to add the provision for a "reasonable allowance . . . for an independent mental health evaluation" currently found at Ark. Code Ann. § 16-90-506(d)(1)(a)(iv). Act of Apr. 7, 1993, No. 914, § 1, 1993 Ark. Acts 2614. The Arkansas General Assembly amended the Director's Statute again in 2017 to include numerated subsections and to replace "Division of Behavioral Health Services" with the division's new title, "Division of Aging, Adult, and Behavioral Health Services." Act of Apr. 5, 2017, No. 913, § 42, 2017 Ark. Acts 4870, 4889.

nearly twenty-five years. The Director requested additional materials from Greene's counsel on September 21. On September 22, Greene's counsel provided the materials and several other documents to the Director, including a psychiatric report from Dr. George Woods.

On September 27, having received no further communication from the Director, Greene filed a complaint in the Jefferson County Circuit Court requesting a declaratory judgment. The four-count complaint alleged that (1) Greene's execution would violate the federal and state constitutions because he is incompetent to be executed; (2) Ark. Code Ann. § 16-90-506(d) violates the due-process guarantees of both the federal and state constitutions; (3) Ark. Code Ann. § 16-90-506(d) violates article 4 of the Arkansas Constitution (separation of powers); and (4) Greene's execution after twenty-five years, most of them spent in total, solitary confinement, would violate the federal and state constitutions. On October 5, the Director wrote to Greene's counsel stating she did not find reasonable grounds to question Greene's competence. The Director had conducted no mental-health evaluation of her own since receiving the September 20 letter from Greene's counsel. Instead, the Director's letter pointed to a seven-year-old evaluation by Dr. Christina Pietz, a psychologist for the Federal Bureau of Prisons who examined Greene in 2010, who then determined that Greene did not meet the criteria for a mental illness, but for Antisocial Personality Disorder.

On October 10, Dr. Garrett Andrews, a neuropsychiatrist who had not previously met with Greene, conducted a clinical evaluation of Greene to determine his mental

health status. On October 20, Greene filed an amended complaint with the reports from Drs. Woods and Andrews, transcripts from various proceedings, and other documentation attached as exhibits.

Both Dr. Woods and Dr. Andrews concluded that Greene suffers from a "delusional disorder" along the "schizophrenia spectrum," and that this disorder causes Greene to experience delusions of both the "somatic" and "persecutory" varieties. According to the doctors' reports, this mental illness causes Greene to believe, albeit falsely, that he suffers maladies like the destruction of his central nervous system. It also causes him to constantly contort his body to alleviate perceived pain––Greene regularly leaps into "strange yoga poses" or handstands without any perceivable cause. He also stuffs toilet paper into his ears to prevent what he describes as the "swelling" of his brain. Further, it causes him to believe that his attorneys, his doctors, and the employees of the Arkansas Department of Correction ("ADC") are colluding to conceal the numerous injuries they have inflicted upon him. Greene believes his execution is designed as a final step in this conspiratorial cover-up. In light of these circumstances, both Dr. Woods and Dr. Andrews specifically concluded that Greene is presently incompetent to be executed. Additionally, Greene's counsel attached to the complaint the transcripts from multiple instances dating back to at least 2011 in which witnesses, attorneys, and judges have contemporaneously observed Greene carry out his outlandish inclinations and beliefs.

After Greene's attorneys filed the amended complaint, the Director filed a motion to dismiss. The circuit court held a hearing on the Director's motion where arguments

were heard but no evidence was allowed. The court then granted the Director's motion to dismiss, ruling that Greene was not entitled to an evidentiary hearing addressing his competency under the Director's Statute, that the Director's Statute does not violate due process per this court's prior decisions, that the Director's Statute does not violate the separation of powers, and that Greene's argument regarding the constitutionality of executing him after holding him in solitary confinement for twenty-five years was not cognizable. Greene now appeals to this court.

III. Ford-*Hearing and Due Process*

The analysis of Greene's due process argument begins with *Ford v. Wainwright*, the seminal case in which the United States Supreme Court first held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409–10. There, the petitioner was set to be executed in Florida. *Id.* at 401–02. Florida's statutory procedure for addressing the sanity of a prisoner sentenced to death included a panel of three governor-appointed psychiatrists who would interview the petitioner and then deliver an opinion as to whether the petitioner was competent to be executed. *Id.* at 403–04. The Florida system allowed the petitioner and his counsel to be present for the interview but did not allow the petitioner or his counsel to take part in the decision-making process. *Id.* at 412. The panel of government-appointed psychiatrists, though with some internal disagreement, determined that the petitioner was competent to be executed. *Id.* at 403–04. The petitioner applied for habeas relief in federal district

court pursuant to 28 U.S.C. § 2254. *Id.* at 404. The petition was denied, and a divided Eleventh Circuit panel affirmed the district court's denial of the writ. *Id.* at 405.

The Supreme Court granted certiorari and reversed, ruling that executing the insane violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 409–10. The Court reasoned that executing the insane does not serve the death penalty's traditional justifications of retribution or deterrence; instead, "the intuition that such an execution simply offends humanity is evidently shared across this Nation," in light of the fact that at least some form of a legal bar against executing the insane already exists in every state. *Id.* at 405–10.

However, beyond the prohibition against executing the insane, *Ford* is a splintered opinion, raising two issues that would prove to be points of contention in the analysis of whether one is presently insane, such that the Eighth Amendment prohibits his or her execution: (1) how broad the definition of "insanity" should be in this context, and (2) how much due process the United States Constitution requires states to afford petitioners whose attorneys seek to prove their clients' insanity. In *Ford*, the four-Justice plurality did not speak extensively to the first of these questions, but the plurality did opine that the Constitution requires substantial due process protections for petitioners raising these claims,[2] and that Florida's system was inadequate in this regard.

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[2]The *Ford* plurality observed:

> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or

The *Ford* plurality focused on three specific problems it identified with Florida's system: (1) "its failure to include the prisoner in the truth-seeking process," which the plurality likened to the traditional due process guarantee of a "right to be heard"; (2) a "related flaw, [...] the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions;"; and (3) "perhaps the most striking deficit [...] the State's placement of the decision wholly within the executive branch" . *Id.* at 413, 415, 416. However, the plurality made it clear that there is no singular formula by which all states must abide to ensure that the necessary due process protections are observed:

> We do not here suggest that only a *full trial* on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity.

> sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." *Solesbee v. Balkcom*, 339 U.S., at 23, 70 S. Ct., at 464 (Frankfurter, J., dissenting). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations. *Cf. Woodson v. North Carolina*, *supra*, 428 U.S., at 304, 96 S. Ct., at 2991. In light of these concerns, the procedures employed in petitioner's case do not fare well.
>
> *Ford v. Wainwright*, 477 U.S. at 411–12 (plurality opinion).

Id. at 416–17 (footnote omitted) (emphasis added).

Justice Powell, whose concurring opinion controlled the result in *Ford*, agreed with the plurality's conclusion that the Eighth Amendment prohibits the execution of a presently insane person. *Id.* at 418 (Powell, J., concurring). However, Justice Powell wrote separately to voice his thoughts on the meaning of "insanity" in this context and the level of process the Constitution requires states to afford prisoners who raise such a claim. *Id.* With regard to the "insanity" definition, Justice Powell reasoned as follows:

> If the defendant *perceives the connection between his crime and his punishment*, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. 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*.

Id. at 422 (emphases added).

With regard to the level of due process the Constitution requires states to afford prisoners who assert that they should not be executed because they are insane, Justice Powell's concurrence contains several important observations. First, Justice Powell embraced the plurality's proposed notion of a "substantial threshold showing" of insanity that states could require petitioners to meet in order to trigger the hearing process:

> [P]etitioner does not make his claim of insanity against a *neutral background*. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and *may require a substantial threshold showing of insanity* merely to trigger the hearing process.

Id. at 425-26 (emphasis added) (footnote omitted).

Ultimately, and of particular importance to the case at bar, Justice Powell agreed with the plurality that Florida's system failed to satisfy due process:

> [T]he determination of petitioner's sanity appears to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process. It follows that the State's procedure was not "fair," and that the District Court on remand must consider the question of petitioner's competency to be executed.

Id. at 424–25 (emphasis in original).

However, Justice Powell declined to set out a complex system of rules and procedures that must be observed in all state-sponsored executions, instead leaving it to the states to develop their own systems for addressing claims such as the petitioner's. He wrote,

> We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be *far less formal than a trial*. The State should provide an *impartial* officer or board that can receive *evidence and argument from the prisoner's counsel*, including *expert psychiatric evidence* that may differ from the State's own psychiatric examination. Beyond these basic requirements, *the States should have substantial leeway* to determine what process best balances the various interests at stake. As long as *basic fairness* is observed, I would find due process satisfied[.]

Id. at 427 (emphases added).

I now turn to *Singleton v. Endell*, a 1994 case in which the Arkansas Supreme Court addressed whether the Director's Statute satisfies the constitutional requirements set by the

United States Supreme Court in *Ford*. 316 Ark. 133, 870 S.W.2d 742 (1994). In *Singleton*, the petitioner's counsel had written a letter to the director of the Department of Correction seeking to trigger the director's determination of the petitioner's competence to be executed pursuant to Arkansas Code Annotated § 16-90-506(d), the Director's Statute. *Id.* at 135, 870 S.W.2d at 743-44. The director responded that there was no basis to halt the execution. *Id.* The petitioner then sought a hearing in state circuit court to determine whether he was competent to be executed, which was denied. *Id.*

On appeal, the Arkansas Supreme Court reasoned that the statutory "process" afforded to the petitioner did not run afoul of *Ford*. *Id.* 141, 870 S.W.2d at 747. The *Singleton* court pointed to the fact that *Ford* allowed the States to impose a "substantial threshold" for claims such as the petitioner's, likening the threshold to the "reasonable grounds" provision contained in the Director's Statute:

> Five Justices of the United States Supreme Court have concluded that it may be necessary that a state impose a "high" or "substantial threshold" over which a death row inmate must step in order to be entitled to a hearing on the issue of the Eighth Amendment right not to be executed while insane. Except for the bizarre undated affidavit apparently written by Mr. Singleton, the evidence presented to the Trial Court in this case consisted of *reports of treating physicians that Mr. Singleton's psychosis was in remission*. We cannot say the "threshold," imposed in the statute, i.e., "When the Director ... is satisfied that there are reasonable grounds...." has been crossed.

Id. at 142, 870 S.W.2d at 747 (emphasis added). The *Singleton* court decided that it was constitutionally permissible for the Director's Statute to leave to the discretion of the director whether one has met the "substantial threshold":

> We are not oblivious to the fact that this "threshold" is erected in the executive branch of government. While that may seem incongruous with Mr. Justice Powell's conclusion that a governor should not have the final say after there has been an examination, we are given no guidance on the matter of whether the initial decision whether there is to be an examination, which seems to us to be equally important, must reside somewhere other than with a member of the executive branch such as the Director of the Department of Correction. The only reasonable alternative, it seems, would be to require that such a decision be made by a court, and that would surely be inconsistent with Mr. Justice Powell's reticence to require a "sanity trial" in every case.

Id. Accordingly, the *Singleton* court ruled that the Director's Statute did not violate the due process requirements set forth in *Ford*. *Id.*

After the Arkansas Supreme Court's decision in *Singleton*, the United States Supreme Court revisited these issues in *Panetti*, 551 U.S. 930. *Panetti* is important for several reasons.

First, the Supreme Court acknowledged that, as the narrower holding, Justice Powell's concurring opinion in *Ford* set "the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim." *Id.* at 949 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

> Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. This protection means a prisoner must be accorded an "opportunity to be heard," though "a constitutionally acceptable procedure may be far less formal than a trial." As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists." "Such a procedure invites arbitrariness and error by

> preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations."

Id. (citing *Ford*, 477 U.S. 424–27) (internal citations omitted).

Additionally, the *Panetti* Court observed that the petitioner's claim would not be defeated for failing to meet the "substantial threshold" that *Ford* permitted states to impose in such cases:

> Petitioner was entitled to these protections once he had made a "substantial threshold showing of insanity." He made this showing when he filed his Renewed Motion To Determine Competency—a fact disputed by no party, confirmed by the trial court's appointment of mental health experts pursuant to Article 46.05(f), and verified by our independent review of the record. The Renewed Motion to Determine Competency included pointed observations made by two experts the day before petitioner's scheduled execution; and it incorporated, through petitioner's first Motion To Determine Competency, references to the extensive evidence of mental dysfunction considered in earlier legal proceedings.

Panetti, 551 U.S. at 950 (internal citations omitted).

As far as the petitioner's actual mental health issues, the *Panetti* Court noted the trial testimony by experts who had examined the petitioner:

> One [expert] explained that petitioner's mental problems are indicative of 'schizo-affective disorder,' resulting in a 'genuine delusion' involving his understanding of the reason for his execution. According to the expert, this delusion has recast petitioner's execution as 'part of spiritual warfare … between the demons and the forces of the darkness and God and the angels and the forces of light.' As a result, the expert explained, although petitioner claims to understand "that the state is saying that [it wishes] to execute him for [his] murder[s]," he believes in earnest that the stated reason is a "sham" and the State in truth wants to execute him "to stop him from preaching."

Id. at 954–55.

The Fifth Circuit Court of Appeals had rejected the petitioner's *Ford* claim because, under Fifth Circuit precedent, the petitioner was competent to be executed so long as he knew (1) the fact of his impending execution and (2) the factual predicate for it. *Id.* at 942. The United States Supreme Court reversed, concluding that the Fifth Circuit's conception of *Ford* was "too restrictive." The Court reasoned:

> The Court of Appeals' standard treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. *See* 401 F.Supp.2d, at 712 (indicating that under Circuit precedent "a petitioner's delusional beliefs—even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution—do not bear on the question of whether the petitioner 'knows the reason for his execution' for the purposes of the Eighth Amendment"); *see also id.*, at 711–712. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware[ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Id. at 958. The *Panetti* Court emphasized that the analysis instead turns upon whether the petitioner has a "rational understanding" of his own execution.

> The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution, see [*Panetti v. Quarterman*]448 F.3d [815], at 819, 821, as opposed to the real interests the State seeks to vindicate. We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.

Id. at 959.

Ultimately, the *Panetti* Court reversed and remanded the case to the trial court so that it could develop the record further and then address the petitioner's competence under the appropriate standard. *Id.* at 961-62.

Presently, while much remains unsettled in the realm of *Ford*-based claims of incompetence, there are several constitutional baselines that are definitively discernible from the existing Supreme Court jurisprudence. These baselines address both the definition of "insanity" in this context and the level of due process states must afford to individuals raising such claims.

With regard to the definition of "insanity," we know from Justice Powell's concurrence in *Ford* that, at the very least, the definition includes petitioners who are "*unaware of the punishment* they are about to suffer and *why* they are to suffer it." *Ford*, 477 U.S. at 422 (Powell, J., concurring) (emphases added). Further, *Panetti* makes clear that even if the petitioner knows that the state has identified his crimes as the reason for his execution, he still may be unfit for execution if his delusions "so impair [his] concept of reality that he cannot reach a *rational understanding* of the reason for the execution." *Panetti*, 551 U.S. at 958 (emphasis added).

With regard to the level of due process that *Ford* petitioners must be afforded in order to prove their insanity, we know from Justice Powell's concurrence in *Ford* that, at the very least, the process must comport with "*basic fairness*." *Ford*, 477 U.S. at 427 (Powell, J., concurring) (emphases added). There must be a means by which a petitioner can "*explain the inadequacies* of the State's examinations." *Id.* at 424-25 (emphases added). This

process should take place before an "*impartial officer or board* that can receive *evidence and argument* from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's *own psychiatric examination*." *Id.* at 427 (emphases added). This process also includes a "'*fair hearing*' in accord with *fundamental fairness*," although "a constitutionally acceptable procedure *may be far less formal than a trial*." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 424–27 (Powell, J., concurring) (emphases added)). Furthermore, at least in cases in which the petitioner's mental status has "been sufficiently clear [in previous litigation] as not to raise a serious question for the trial court," states "may properly presume that petitioner remains sane at the time [his or her] sentence is to be carried out, and *may require a substantial threshold showing* of insanity merely to *trigger the hearing process*." *Ford*, 477 U.S. at 426 (Powell, J., concurring) (emphases added). These are the standards by which Greene's due process arguments must be assessed.

I conclude that the Director's Statute fails to provide the minimum level of due process required by *Ford* and *Panetti* in several distinct but related respects. First, the Director's Statute does not provide an "impartial" officer or board to assess whether one is insane for purposes of execution, instead leaving the inquiry to the exclusive discretion of the director of the Department of Correction. As an employee of the executive branch of Arkansas's state government, the Director answers to the Governor, who sets the execution dates for inmates under sentence of death pursuant to Ark. Code Ann. § 16-90-507. The Director is the individual who will ultimately administer the task of ending Greene's life whenever his execution date lawfully arrives, yet that execution date cannot lawfully arrive

until Greene receives the minimum due process required by the United States Constitution. *Ford* makes it clear that this requirement cannot be satisfied by procedures controlled exclusively by the executive branch of state government. *Ford*, 477 U.S. at 424–25 (Powell, J., concurring); *see also Panetti*, 551 U.S. at 949 (noting that Justice Powell's concurring opinion in *Ford* sets "the minimum procedures a State must provide to a prisoner raising a Ford-based competency claim").

Additionally, the Director's Statute does not contain any mechanism whatsoever to guarantee any meaningful participation by the petitioner. The Director's Statute explains what the Director is obligated to do if she "is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent." But it speaks nothing to the manner or procedures by which a petitioner could initiate that inquiry, such as by filing a petition, or to what forum such a petition should be directed, or to when and at what stage such a petition should be filed.[3] In fact, it appears that the only "process" the Director's Statute affords the petitioner is a "[notification to the individual's attorney of record] and [a] reasonable allowance . . . for an independent mental health evaluation[,]" but these processes do not come into effect unless and until the Director "is satisfied that there are reasonable grounds for believing that [the] individual under sentence of death is not competent[.]" Furthermore, the Director's Statute does not

[3]It appears that so-situated petitioners in the past, without any guidance from the Director's Statute, have resorted to simply writing a letter to the Director asking her to determine their mental health statuses.

mention or contemplate any proceeding at any stage of the inquiry that would satisfy the "fair hearing" requirement of *Ford* and *Panetti*, even if the Director was "satisfied that there are reasonable grounds for believing that [the] individual under sentence of death is not competent[.]"

The State takes a different view of the Director's Statute. The State's position is that Greene is not entitled to a "fair hearing" or any of the other protections set out in *Ford* or *Panetti* because he has failed to persuade the Director that there are "reasonable grounds" to believe he is incompetent, as contemplated by the Director's Statute. Pursuant to this rationale, the State asserts that the Director's Statute is not unconstitutional because the statute's "reasonable grounds" provision, which Greene purportedly has failed to satisfy, is a viable example of the "substantial threshold showing" that states may constitutionally require petitioners to meet under *Ford* and *Panetti*.[4]

The State is wrong. Again, the Director's Statute does not provide Greene with any legal mechanism to meet any such threshold, but even so, Greene's attorneys have presented to the Director substantial evidence in support of the assertion that Greene is incompetent. By the time the Director filed the motion to dismiss Greene's first amended complaint, she had been presented with multiple evaluation reports from multiple

[4]The State's brief also suggests that Greene's claims could be barred by sovereign immunity, pointing to this court's decision in *Board of Trustees v. Andrews*, where a majority of this court held that the Arkansas General Assembly lacked the authority to enact legislation that waives the State's sovereign immunity. 2018 Ark. 12, 535 S.W.3d 616. Greene's case concerns no such legislation; accordingly, *Andrews* has no application here.

neuropsychiatrists who concluded specifically that Greene is incompetent to be executed. Regardless of whether the triggering standard is formulated as "reasonable grounds" or as "a substantial threshold," the showing Greene's attorneys have made is more than enough to require a fair hearing under *Ford* and *Panetti*.[5] Leaving this initial but effectively dispositive (at least in cases where the Director is not "satisfied that there are reasonable grounds…") determination in the unreviewable discretion of the Director is simply inconsistent with "basic fairness."

For these reasons, the Director's Statute is unconstitutional. To the extent we held otherwise in *Singleton* or any other case, those decisions must be overturned.[6]

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[5]The Director supported her representation that there are no reasonable grounds to believe Greene is incompetent by pointing to an April 2017 letter bearing Greene's signature directed to a "Ms. Mosley" in North Carolina, whereby Greene purportedly acknowledges the Burnett murder and that his actions destroyed the Burnett family. While this letter would certainly be *relevant* to an actual inquiry into Greene's sanity for purposes of execution, the Director (who has no formal medical training) cannot simply deem the letter so insurmountable as to prevent any such inquiry into Greene's sanity from ever occurring at all, especially when two neuropsychiatrists are actively reporting to the Director that Greene is presently incompetent to be executed. "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even *from explaining the inadequacies of the State's examinations*." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 424-25) (emphasis added). Plainly, if the Supreme Court envisioned that someone like the Director should be able to completely usurp the role of fact-finder at the "substantial threshold showing" stage, then there would be no point to any of the Supreme Court's extensive discussions of a post-threshold "fair hearing" where the evidence and assertions presented to meet the threshold can be tested for their veracity.

[6]*See Nooner v. State*, 2014 Ark. 296, at 14, 438 S.W.3d 233, 242 (reiterating that the Arkansas Supreme Court is "not bound to perpetuate an erroneous decision 'when the great importance of the question as it now presents itself could not be foreseen'"). It suffices to say that the petitioner's claim in *Singleton* was nowhere near as well-supported as Greene's is (in fact, all the medical evidence in *Singleton* indicated that the petitioner's

IV. *Eighth Amendment – Solitary Confinement*

On appeal, Greene also argues that executing a prisoner after holding him in solitary confinement for twenty-five years should be considered, as a matter of law, a violation of the prohibitions on cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution and in art. 2, section 9 of the Arkansas Constitution. As Greene acknowledges, neither the United States Supreme Court nor this court has ruled that such a constitutional protection exists. While at least one United States Supreme Court Justice has opined that there is merit to Greene's proposition (*see Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of certiorari)), this court declines to adopt a rule proscribing execution that turns upon the amount of time one has spent in solitary confinement. Inmates can end up in solitary confinement for a number of reasons, some probably more justified than others. Furthermore, prolonged execution processes will often be attributable to actions by both the state and the inmate, as this court has previously observed. *See Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998). Where the remedy sought is a declaration that one's execution would violate the prohibition on cruel and unusual punishment, it seems that the better approach is to simply treat any circumstances of prolonged solitary confinement as a consideration relevant to, but not dispositive of, a *Ford*-based claim of incompetency.

I concur.

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claim was nonmeritorious), such that the potential for a due process violation was not apparent as it is here.

RHONDA K. WOOD, Justice, dissenting. I respectfully, but strongly, dissent. As Justice Baker aptly wrote in her dissenting opinion in *Ward v. Hutchinson*, 2018 Ark. 313, at 16 (Baker, J., dissenting), the majority's decision to reverse established precedent is erroneous. In *Singleton v. Endell*, 316 Ark. 133, 870 S.W.2d 742 (1994), we held that Ark. Code Ann. § 16-90-506(d)(1) was constitutional. In both *Ward* and in this case, the majority fails to identify any palpable error in the court's analysis in *Singleton* that warrants a change to this precedent. Stare decisis is a hallmark of our justice system. There are occasions when it is necessary to depart from precedent, but we must be diligent to do so only when we can clearly articulate our reasoning.

Additionally, the majority's conclusion that § 16-90-506(d)(1) violates the United States and Arkansas Constitutions is clearly flawed when considering Greene's particular case. The majority opinion is remiss in setting forth the standard Greene must overcome to make a facial due-process challenge. Indeed, a successful facial challenge to a statute's constitutionality is extremely difficult to make. It requires a showing that the statute would be invalid under ***any*** imaginable set of circumstances. *United States v. Salerno*, 481 U.S. 739 (1987); *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). In other words, if there is any conceivable set of circumstances under which the statute may constitutionally be applied, the facial challenge must fail. Moreover, the invalidity of the statute in one particular set of circumstances is insufficient to prove its facial invalidity. *Id.* So long as there exists a situation in which a statute could be validly applied, a facial challenge must fail.

We need not look beyond Greene's own case to find a factual scenario in which § 16-90-506(d)(1) could validly afford a death-row inmate due process. Greene was afforded the due process required by *Ford* and *Panetti*. Approximately one month after Governor Hutchinson scheduled Greene's execution, Greene's attorneys asked Kelley to determine Greene's competency for execution under § 16-90-506(d)(1). In response, Kelley asked for the documentation that Greene's attorneys believed substantiated their claim. After considering the documents his attorneys presented, psychiatric evaluations, as well as other records, Kelley determined that she "did not find there are 'reasonable grounds' for believing that Mr. Greene is not currently competent, due to mental illness, to understand the nature of the punishment and to reach a rational understanding of the reason for the execution." Director Kelley explained that, in addition to relying on the repeated findings of competency over the last decade and the finding of competency by Judge Wright in federal district court, she also based her decision on Greene's own letter that he wrote approximately six months prior to her determination. In it, he clearly explained the deaths he caused, the impact he has had on the victims' families, his death sentence, and his desire to seek forgiveness before his death.

Thus, Greene and his counsel were given an opportunity to present evidence of his insanity, but he clearly failed to make a threshold showing of insanity. The majority is mistaken if it interprets *Ford* and *Panetti* as requiring more due process than Greene received prior to reaching the threshold determination. As Greene shows there is an

occasion in which due process is afforded, a facial challenge to § 16-90-506(d)(1) must fail. For these reasons, I dissent.

BAKER and WOMACK, JJ., join.

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