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Abstract


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**Introduction**

In *Ford v. Strickland*, \(^2\) issued January 7, 1983, a divided United States Court of Appeals for the Eleventh Circuit affirmed the death sentence of Alvin Bernard Ford, condemned for killing a Fort Lauderdale police officer. \(^2\) Its ruling swept aside a major legal barrier to the execution of Ford and 122 other death row inmates, who claimed that the Florida Supreme Court violated their constitutional rights by reading secret psychological reports during its review of their sentences. \(^3\) The 123 inmates first challenged this practice in a 1980 state court lawsuit, *Brown v. Wainwright*. \(^4\) In deciding that case, the Florida Supreme Court denied any wrongdoing and refused to vacate their death sentences. The United States Supreme Court, which still may ultimately decide the issue, declined to hear *Brown* in November, 1981. \(^5\)

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1. 696 F.2d 804 (11th Cir. 1983) (en banc).
2. While the habeas corpus petition filed by Ford and the Eleventh Circuit’s opinion concern seven issues in all, this comment will be restricted in scope to the issue designated as “I” by the court of appeals.
3. That the justices did in fact engage in the practice complained of seems overwhelmingly clear. According to an article in *American Lawyer* magazine, the practice was unearthed by public defenders in 1978, who found during oral argument that they were being challenged on information that the justices had received *ex parte*. Cramer, *Florida Supreme Court Declares Itself Not Guilty*, *Am. Law.*, Apr. 1981, at 24. “But nothing was made public until August, 1980 when . . . the *St. Petersburg Times* reported that the justices had seen profiles of at least 20 men who were waiting on death row for the court to review their sentences.” *Id.* at 25. Closely following this report was the confirmation by a justices’ law clerk “that in 1978 she shredded 30 reports on the advice of another clerk.” *Id.* Ford’s brief to the Eleventh Circuit charges that a purge took place, and this allegation was not controverted. Brief for Petitioner-Appellant at 57-59, *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982) [hereinafter cited as Brief for Petitioner-Appellant].
4. 392 So. 2d 1327 (Fla. 1981, *cert. denied*, 454 U.S. 1000 (1981)).
5. 454 U.S. 1000 (1981). The order denying certiorari in *Brown* was issued on Nov. 2, 1981. Just two days later, a death warrant was signed for Ford. Since Ford was
Ford was scheduled to die on December 8, 1981, when the Eleventh Circuit granted a stay of execution less than fourteen hours before the sentence was to be carried out. Through his appeal, the so-called Brown issue reached a federal appellate court for the first time. Had the federal court ruled in his favor, the death sentences of nearly two-thirds of Florida's 201 condemned inmates might have been invalidated. Ford's request that he be allowed to prove his allegations through evidentiary proceedings further posed the specter of summoning sitting Florida Supreme Court justices, by federal subpoena, for examination regarding their motives and use of the controversial material. A victory for Ford would have dealt a staggering blow to the credibility of Florida's highest court and its overburdened appellate system.

Last April, a three-judge panel of the Eleventh Circuit upheld Ford's sentence, finding "not an iota of evidence" that the Florida justices considered any secret material in his case. The full court then agreed to rehear his case, indicating that its resolution of Ford would dispose of all similar pending appeals by the other affected inmates. The six to five decision in the State's favor reflects recent, conservative trends in federal-state relations and evidences the Eleventh Circuit's reluctance to disregard the Florida Supreme Court's disclaimer in Brown. Most significantly, the Ford ruling moves many death row inmates closer to execution, since Brown was the final issue being raised in their appeals.

Origin of the Issue: Brown v. Wainwright

In the fall of 1980, 123 convicted murderers, at that time comprising nearly all of Florida's death row population, petitioned the Florida Supreme Court for relief from allegedly unconstitutional death sentences. The prisoners' petition alleged that, for a number of years,* a petitioner in Brown, he became the first to satisfy exhaustion requirements and be eligible to raise the claim in his individual habeas corpus action.

7. Id. at 444.
the Florida Supreme Court systematically "'engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal.'" Documented by transmittal letters to Starke Prison requesting that confidential reports be sent directly to the Florida Supreme Court, the suit charged the court with improperly reviewing "pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by prison personnel." Assuming their truth, the allegations in Brown exposed a practice unique to Florida and questionable from a constitutional perspective. By reviewing these reports on an ex parte basis, without allowing defense counsel an opportunity to examine or challenge their contents, the Florida Supreme Court may have violated a United States Supreme Court decision, Gardner v. Florida, relating to proper standards for sentencing in capital cases, and denied due process rights of individual prisoners.

In the Florida Supreme Court's view, the Brown petitioners "contend[ed] that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida, and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation."

A. The Florida Supreme Court's Disclaimer

The acrimonious manner in which the Florida Supreme Court attacked the suit in their ruling demonstrates how deeply rankled the justices were by the prisoners' accusations. First, even though the peti-
tion was filed with the name of each of the 123 participating inmates attached, the court refused to allow what it saw as a type of class action proceeding.\textsuperscript{14} The court pointed out that the petitioners were in different stages of appeal and noted that allowing a joint petition "would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases."\textsuperscript{15} Vowing to reject any such future "class actions" summarily, the court nonetheless stated in the next breath that it would "avoid absurd technicalities" by disposing of the claims for relief of all the \textit{Brown} petitioners in its disposition of \textit{Brown}'s individual petition.\textsuperscript{16}

While declining to make any factual findings or admit to receipt of any non-record material in reviewing capital sentences, the court stated that even if the petitioners' most serious charges were true, the court's review of the challenged material was totally irrelevant to its appellate function or to the validity of any individual death sentence.\textsuperscript{17}

Citing Florida's death penalty statute,\textsuperscript{18} the court proceeded to construe its role in capital cases as qualitatively different from the trial judge's role of sentence "imposition."\textsuperscript{19} Appellate "review" consisted of two very limited functions: first, to determine whether procedural regularities were observed in the sentencing and secondly, to compare the case under review with all past capital cases to ensure relative proportionality. The statute gives the court no independent fact-finding role. So long as the trial court properly followed procedures and no disproportionality exists, it must affirm the sentence. With the court's function so tightly circumscribed, "it is evident . . . that non-record information we may have seen . . . plays no role in capital sentence 'review'."\textsuperscript{20} Finally, the court vigorously disclaimed the possibility that

\begin{itemize}
  \item\textsuperscript{14} \textit{Id.} at 1329-30.
  \item\textsuperscript{15} \textit{Id.} at 1330.
  \item\textsuperscript{16} \textit{Id.} at 1330. Similarly, the Eleventh Circuit would use the \textit{Ford} case to make a sweeping disposition of this issue.
  \item\textsuperscript{17} \textit{Brown}, 392 So. 2d at 1331.
  \item\textsuperscript{18} \textit{FLA. STAT.} \textsection{} 921.141 (1979).
  \item\textsuperscript{19} \textit{Brown}, 392 So. 2d at 1331.
  \item\textsuperscript{20} \textit{Id.} at 1332-33. \textit{Cf.} Shelton v. Tucker, 364 U.S. 479 (1960) (The Supreme Court's expressed concern, in the first amendment area, that irrelevant information may be utilized in rendering administrative decisions, with no effective means of judicial review).
\end{itemize}
it would improperly use any non-record information in fulfilling its duties.

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, [citation omitted] so appellate judges are cognizant of information that they must disregard in performance of their judicial tasks.21

The effect of this disclaimer, however, is somewhat diluted by a footnote comment: "The 'tainted' information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards."22 This cryptic statement intimates that the justices did use the psychological profiles in some manner.

B. Implications of Proffitt v. Florida and Gardner v. Florida

Two leading cases discussed throughout the Florida Supreme Court’s opinion and of paramount importance to the eventual resolution of the Brown issue were Proffitt v. Florida23 and Gardner v. Florida.24 In Proffitt, decided in 1976, the United States Supreme Court approved Florida’s new death penalty statute, enacted in the wake of Furman v. Georgia.25 Since judge, jury and appellate courts were accorded distinct roles, with a minimum of discretion at each level, Florida’s scheme did not violate the eighth or fourteenth amendments’ prohibition against cruel and unusual punishment. The Proffitt plurality emphasized the importance of mandatory appellate review in preventing arbitrary sentencing, noting that “the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.”26 Language in the opinion

21. Id. at 1333.
22. Id. at 1333 n.17.
suggests that appellate review was seen as an arm of the sentencing process. 27 Gardner, a case closely following Proffitt, invalidated a Florida death sentence in which the trial judge overruled the jury's recommendation for a life sentence, relying in part on a confidential report that had not been disclosed to the defendant or to his counsel.

Confronted with the Gardner holding in Brown, the Florida Supreme Court dismissed it rather breezily, stating:

Gardner stands for the proposition that a sentence of death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. Since we do not "impose" sentences in capital cases, Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information. 28

The justices believed Proffitt provided support for their distinction between the trial and appellate levels in capital sentencing.

C. Justice Marshall's Dissent

Although the United States Supreme Court declined to grant Brown's petition for certiorari, 29 Justice Marshall wrote a dissent that portended many concerns echoed by judges passing on the same issue in Ford. Justice Marshall addressed the questionable nature of the Florida court's review practice, which seemed to him a violation of due process. He regarded the practice as inconsistent with his court's past insistence on strict procedural regularity, especially since the material seen by the Florida Supreme Court appeared to be unreliable hearsay. 30 Gardner, he proposed, "suggested no relevant distinction between

27. Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or life imprisonment. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'

Id. at 253 (citations omitted).


30. Id. at 1001 (Marshall, J., dissenting).
the trial court's initial imposition of a sentence and an appellate court's discharge of its mandatory review function." 31 In Justice Marshall's opinion, the imposition/review distinction drawn by the Florida court was irreconcilable with Proffitt. If ex parte reports were actually received, the Proffitt court's premise that the Florida court would undertake rational and consistent review was, in his view, clearly invalid. If sentences had been upheld or vacated based on non-record grounds, there would be no way for the Florida court to conduct a review for proportionality. Finally, Justice Marshall articulated the bottom-line question which resounds throughout the Brown and Ford cases, “If the court does not use the disputed non-record information in performing its appellate function, why has it systematically sought the information?” 32

Ford v. Strickland 33

A. The Facts of Ford 34

The second name listed on the unsuccessful Brown petition was that of Alvin Bernard Ford, a death row inmate convicted of murdering a Fort Lauderdale policeman. On the morning of July 2, 1974, Ford and three accomplices, having decided to commit a robbery, went with weapons to a Fort Lauderdale restaurant. During the robbery, several employees escaped from the restaurant. Realizing the police would soon arrive, Ford's accomplices fled while Ford unknowingly remained behind, completing a theft of approximately $7,000 from the restaurant's vault. As Ford was leaving the building, he was confronted by Officer Dimitri Walter Ilyankoff. Ford fired at the officer, shooting him twice in the abdomen without warning. While Ilyankoff was lying outside the back door of the restaurant, Ford discovered his accomplices had abandoned him. There were no keys in the police cruiser, so Ford returned

31. Id.
32. Id. at 1002.
33. Because of the procedural posture of the Ford case, where the Eleventh Circuit issued two separate decisions, its earlier ruling will be referred to as “Ford I.” Ford v. Strickland, 676 F.2d 434 (1982).
to the officer who had, in the meantime, radioed for assistance and was struggling to get up. Ford demanded the keys; Ilyankoff tried to cooperate. Ford then shot the officer in the head at close range, took the keys, and escaped in the police cruiser at high speed. He soon abandoned the cruiser and stole a Volkswagen, which he was driving when arrested for the murder.

Evidence at the trial included the testimony of an employee who saw and heard the shots as she cowered in a utility room at the back of the restaurant, testimony from a nearby resident who also witnessed the incident, the tape of Ilyankoff's call for help, and Ford's fingerprints which were found in the abandoned police cruiser. The jury found Ford guilty of first degree murder and recommended the death penalty. Entering a judgment on the verdict, the trial judge sentenced Ford to death. On direct appeal, the Florida Supreme Court affirmed both the judgment and sentence, and the United States Supreme Court denied Ford's petition for certiorari. He then joined the unsuccessful Brown petition. Governor Bob Graham signed a death warrant for Ford on November 4, 1981, requiring his execution on December 8, 1981. Represented by a law professor and a staff attorney for the Southern Prisoners Defense Committee, Ford responded with a flurry of legal maneuvers. His post-warrant state appeals were concluded on December 4, when the Florida Supreme Court refused to grant a stay. Ford's recourse was to federal district court in Fort Lauderdale, where his hastily-filed petition for a writ of habeas corpus was entertained. The district judge refused to issue an immediate stay, instead conducting a two-day evidentiary hearing on the merits of the Brown issue and several other claims made by Ford. Finally, on December 7, 1981, the district court ruled against Ford on all points, denying habeas corpus relief or a stay of execution. Prior to this, however, the Eleventh Circuit entered a stay in order to preserve Ford's right to appeal the adverse ruling. With his stay being issued only hours before the

35. Ford v. State, 374 So. 2d 496 (Fla. 1979).
39. This was an unusual procedure, as courts confronted with a petition for a stay of execution prefer to avoid ruling as long as there is any chance of the stay being granted by a lower court.
scheduled execution, Ford had come closer to the electric chair than any other Florida inmate since John Spenkelink. His habeas appeal to the Eleventh Circuit was the first to present that court with the Brown issue. Sensing the need for a rapid, definitive resolution of this recurring claim, the court of appeals made a rare grant of a motion by the State to expedite the appeal.

B. Ford's Legal Argument

In his brief to the Eleventh Circuit, Ford alleged that the Florida Supreme Court's practice infringed numerous constitutional guarantees: the right to due process of law, to the effective assistance of counsel, to confrontation, to be free from cruel and unusual punishment, and to be protected against self-incrimination. Referring to the ex parte nature of the communications in question and the surreptitious manner in which they were received, Ford argued that the Florida Supreme Court's practice posed a greater risk of prejudice and misplaced reliance than the trial court's behavior in Gardner. If it is constitutionally impermissible for trial judges to entertain extra-record material in affirming jury recommendations, should not the logic behind this guarantee extend to the appellate phase? Ford attacked the Brown court's description of its role in capital appeals as myopic, marking a complete departure from its earlier self-characterization as part of a trifurcated sentencing process. The Florida Supreme Court's recognition of itself as a body sharing equally in responsibility for imposing death sentences had been a major factor in the Proffitt court's approval of Florida's death penalty scheme. The court's covert practice, Ford

40. Brief for Petitioner-Appellant supra note 3, at 61.
41. Brief for Petitioner-Appellant, supra note 3, at 63-64 (citing Gardner v. Florida, 430 U.S. 349 (1979)).
42. Id. at 66.
43. See, e.g., Dobbert v. State, 375 So. 2d 1069, 1071 (Fla. 1979); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The three components are the jury, which renders an advisory opinion; the trial court judge, who imposes sentence based on certain enumerated aggravating and/or mitigating factors, and the Florida Supreme Court, which conducts a direct mandatory review of all death sentences. Whether the Florida Supreme Court's role was purely one of review or, as Ford argued, was to equally share in the responsibility of imposing a death sentence, represented a crucial distinction for purposes of applying Gardner.
argued, violated his right to reliable, rational sentencing.

Ford further contended that the secret receipt of non-record information "disrupts the court's role as the guardian of proportionality in capital sentencing." Disproportionate infliction of the death penalty could be anticipated, since the formal record will be incomplete, portions invisible to appellants and other courts, which may really have shaped the outcome. Ford refused to credit the Florida court's disclaimed statement as providing an acceptable explanation for its conduct.

Even though Ford's legal arguments were persuasive, his petition suffered from the lack of documentation supporting the allegation that he had been a target of solicitation. This deficiency forced Ford to charge the Florida Supreme Court with the general claim that it had reviewed extra-record reports on a regular basis, and later purged them from its files. The purge, according to Ford, made factual substantiation of an individual's claim very difficult. Ford claimed he was entitled to an opportunity to prove his allegations, possibly gaining relief from his death sentence. He proposed remanding the case to the district court so that discovery proceedings could be undertaken which, although unstated, seemed almost certain to be directed against the Florida Supreme Court justices. This inability to specifically tie any injury to himself may have been a "fatal flaw" in Ford's petition due to the nature of habeas corpus relief.

44. As required by Lockett v. Ohio, 438 U.S. 586, 604 (1978). "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."

45. As guaranteed by Gardner v. Florida, 430 U.S. 349, 358 (1977). "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."

46. Brief for Petitioner-Appellant, supra note 3, at 72.
47. Id.
48. The possible course such proceedings might have taken is discussed at note 90, infra.

49. The gravamen of habeas corpus relief is that direct harm has occurred to the prisoner as a result of the alleged violation. 28 U.S.C. § 2254 (1976). In rejecting Ford's petition, the federal district judge declared it to be wholly speculative as to him, and labelled Ford's expressed need for discovery a "fishing expedition." Ford v. Strickland, No. 81-6663, slip. op. at 8 (S.D. Fla. Dec. 10, 1981).
C. The State’s Response

The State’s brief emphasized the fact that Ford’s claims were, as to him, totally unsubstantiated.\textsuperscript{50} Moreover, the \textit{Brown} issue involved an interpretation of Florida’s death penalty scheme. As a matter of state law, the Florida Supreme Court’s interpretation should be inviolable. The State defended the Florida court’s distinction between the imposition and review phases of capital sentencing. Since Ford’s constitutional rights were observed at trial, and the sentencer did not use any undisclosed information, his asserted due process violation was unfounded. The State pointed out that when the Florida Supreme Court acts to change a capital sentence, it can only do so in one way - to reduce a sentence from death to life imprisonment. The court has no authority to review a sentence where life imprisonment was imposed and increase it to death. Even if non-record materials were viewed by the Florida Supreme Court during their review, what harm could be done?\textsuperscript{51}

Ford’s proportionality argument is countered with the retort:

If the unstated premise in the Appellant’s argument is that the state appellate court routinely decides cases on bases other than and unrelated to the reasoning stated in the Court’s decision, it must fall for the Appellant’s bare and unsupported allegations fail to overcome the presumption that judges duly and regularly perform their judicial acts and duties.\textsuperscript{52}

Whether the allegations against the Florida Supreme Court were sufficient to overcome this presumption was to become a pivotal issue in the Eleventh Circuit’s analysis. As its final point, the State noted that Ford produced no cases where the sentence of a similarly charged and sentenced defendant was reduced. The State cited numerous cases where capital sentences were affirmed in circumstances similar to Ford’s.\textsuperscript{53}

\textsuperscript{50} Answer Brief of Respondents-Appellees at 51-52, Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982).
\textsuperscript{51} Id. at 56.
\textsuperscript{52} Id. at 58.
\textsuperscript{53} Id. at 60. \textit{See, e.g.,} Tafero v. State, 403 So. 2d 355 (Fla. 1981); Raulerson v. State, 358 So. 2d 826 (Fla. 1978); Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Holmes v. State, 374 So. 2d 944 (Fla. 1977).
D. *Ford v. Strickland I*: The Panel Opinion

Following briefs and oral arguments, Ford’s case was submitted to a three-judge panel of the Eleventh Circuit Court of Appeals in February, 1982. Any doubt that the Eleventh Circuit intended to use *Ford* to make a blanket ruling on the *Brown* issue was dispelled by the strong language and directives in a stay of execution granted another Florida inmate while *Ford* was under advisement. In that order, Chief Judge Godbold characterized the *Brown* issue as “a serious and difficult one” and declared that the district judge erred in not entering a stay while the specially expedited *Ford* case was pending.

On April 15, 1981, the panel rendered a two to one decision affirming the district court’s denial of relief on all grounds, including the *Brown* claim. In an opinion authored by Judge Roney and joined by Judge Virgil Pittman, the panel ruled that the Florida Supreme Court’s disclaimer in *Brown* would be accepted as vindicating them of any wrong. Starting at the outset that they rejected the *Brown* contention “both generally and specifically as made for Ford,” the panel found the Florida Supreme Court’s description of its function to be correct and aptly stated. The Florida court engaged only in sentence review, not imposition, so their distinction of the *Gardner* case was valid.

Ford’s alleged due process violations were found to be without merit. Moreover, the majority ruled that “there is not an iota of evidence to indicate the Florida Supreme Court viewed any extra-record materials in affirming petitioner’s conviction and sentence,” nor that, had it done so, such review would have been harmful. Labelling Ford’s claims bare and unsupported, they approved the district court’s refusal to permit discovery. The majority stressed that principles of comity and federalism demand deference to the Florida court’s interpretation of its legal issues.

54. Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982).
55. *Id.* at 942.
56. *Ford* v. Strickland, 676 F.2d 434 (11th Cir. 1982).
57. Significantly, a visiting judge from the Southern District of Alabama, sitting by designation.
58. *Ford*, 676 F.2d at 444.
59. *Id.*
60. *Id.*
procedural role\textsuperscript{61} and its statement that its members properly perform their functions.

In a biting dissent, Judge Kravitch criticized what she saw as the majority’s wholesale adoption of the Florida Supreme Court’s reasoning.\textsuperscript{62} She inferred that the Eleventh Circuit was more interested in expediting its docket than ensuring that federal standards are applied to capital sentencing cases. Describing herself as disturbed and unpersuaded by the majority’s discussion, Judge Kravitch declared that ambiguities in Brown left the question of the Florida court’s conduct unresolved.\textsuperscript{63} If “tainted” information were used by the court, it would undercut the defendant’s right to a rational, reliable review as guaranteed by the United States Supreme Court in Proffitt. Any attempt to confine the implications of Gardner to the trial level is based on an illusory distinction. An appellate court’s use of erroneous or misinterpreted material may lead to arbitrary imposition of the death sentence as easily as use by a trial judge.\textsuperscript{64} Judge Kravitch skirted the comity issue, but proposed that Ford be given an opportunity to develop a factual record through discovery or an evidentiary proceeding in the district court.

Thirteen days after this divisive opinion was issued, the court of appeals \textit{sua sponte} ordered that Ford be reheard en banc.\textsuperscript{65} Although no reasons were given for this uncommon procedure, perhaps the narrow wording in parts of Ford, which did not foreclose the Brown claim to petitioners with direct evidence, displeased those members of the court hoping for a more broad-brush ruling. Without a complete disposition, the Brown issue would resurface in various forms for years to

\begin{itemize}
\item \textsuperscript{61} “As the highest court in the state, the Florida Supreme Court’s interpretation of its procedural role is the law of the state and we do not question it.” \textit{Id.}
\item \textsuperscript{62} \textit{Id.} at 451.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} “[T]he risk that an appellate court’s reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmance of a sentence on the basis of erroneous or misinterpreted information presents as great a threat of the arbitrary imposition of death condemned in \textit{Furman} as the risk involved when such a procedure is engaged in by the initial sentencer.
\item \textit{Id.} at 454.
\item \textsuperscript{65} \textit{Id.} at 456.
\end{itemize}
come, and the questions involved required a unified, dispositive treatment. The fact that the panel’s ruling turned on the vote of a visiting judge, with the two permanent court members splitting, might have provided an impetus for rehearing. In any event, the number of counsel for both sides multiplied, supplemental briefs were filed, and extended oral arguments were scheduled for June, 1982.

Arguments made in Ford’s supplemental brief remained substantially the same. Buoyed by Judge Kravitch’s dissent, the defense brief emphasized the ambiguities in Brown and hammered away on the possibility of a Gardner violation if the court had actually used non-record material. The fact that the judges systematically solicited the material rather than passively received it belied the suggestion that it was not used, and rebutted the presumption of proper conduct regarded as dispositive by the panel majority.

The State took on a more aggressive tone, relying on a recent United States Supreme Court ruling which pointedly reminded federal courts not to make unwarranted assumptions about the conduct of state judges. As the Court had said, a federal court may not require a state court to explain the reasons for its actions unless it first deter-

66. See supra note 57.
67. A distinguished former federal court judge, Marvin E. Frankel, who had argued Brown to the Florida Supreme Court, was recalled by the NAACP to assist on the brief and deliver Ford’s oral argument. Obviously the defense hoped Frankel would be better received by the federal court than in state court, where his demeanor had been described as patronizing, imperious, and arrogant. Cramer, supra note 3, at 24.
69. The Ford majority determined that the Florida Supreme Court was entitled to the presumption of correctness accorded state court’s findings on factual issues under the federal habeas statute, 28 U.S.C. § 2254(d) (1976); cf. Sumner v. Mata, 449 U.S. 539 (1981). But can the Brown ruling, in which the court’s analysis proceeds from a hypothetical (“Even if petitioners’ most serious charges were accepted as true . . .”) 392 So. 2d at 1331) really be regarded as a proper subject of the presumption?
70. Harris v. Rivera, 454 U.S. 339 (1981), in which a trial judge conducting a bench trial rendered what appeared to be inconsistent verdicts. The Second Circuit Court of Appeals accepted the defendant’s argument that the judge must have considered inadmissible evidence in arriving at his decision, and ordered that relief be granted unless the judge issued an explanation for his actions. The United States Supreme Court reversed this ruling, holding that a federal court may not require a state court to explain itself unless its actions are first determined to be unconstitutional.
mines that those actions violated the Constitution. The Florida court's act of soliciting and receiving non-record information would not violate the Constitution since it cannot be presumed that the reports were considered in passing on the cases. In fact, the court is entitled to the opposite presumption. Judge Kravitch's dissent, raising the possibility of misuse as a rationale for granting relief, showed just the kind of speculation that was disapproved in Harris. The only issue presented was not why the Florida justices acted as they did, but whether they improperly used any non-record information in arriving at decisions. Not only had the Florida Supreme Court disclaimed any consideration of nonrecord material in Brown, but its opinions in capital cases thoroughly discuss the facts and law pertinent to its decision. Speculative assumptions cannot overcome the presumption that the Florida justices acted properly, or justify requiring them to testify to their thought processes in federal court. 71

**Ford v. Strickland II: The En Banc Ruling**

After lengthy and impassioned arguments, the Eleventh Circuit took Ford under advisement in June, 1982. The number of complex issues as well as the divergent attitudes towards their resolution possibly explains why no opinion was issued until January, 1983. In the interim, more stays of execution had been granted based on the pendency of Ford. 72 When finally issued, with a blaze of publicity, the six to five division of the judges and the sheer size of the opinion showed how protracted and diligent the judges' labors were. Their per curiam opinion, which serves as a preface to the five separate opinions, makes reference to the full briefing, extended oral arguments, and months of deliberation which comprised the court's efforts. 73


73. In a bizarre note, the per curiam opinion reveals that, several months into their deliberations, the judges received a communication from Ford purporting to be a request that all appellate proceedings cease and his sentence be carried out. After nine
A. The Eleventh Circuit's Analysis

The author of the panel's opinion, Judge Roney, on rehearing was joined by four others in his opinion affirming the district court's denial of relief to Ford. Judge Tjoflat, through a separate opinion, became the final member of the plurality to reject the Brown issue on its merits.

Judge Roney summarized the issues raised by Ford's Brown claim in the following three questions. If just one were answered affirmatively, the court of appeals would be faced with a possible constitutional violation. The first question, "Does Florida state law permit the use of such non-record material in the review of Ford's sentence, or any other capital sentence?" was answered in the negative, based on the Brown court's statement that factors outside the record were irrelevant and played no part in their sentence review role. Regarding their second question, "Was the material used in contravention of state law?" the plurality replied that they "must be content" to answer no. The highest court of a state must be presumed to follow its own law and procedures. Since Ford was a class petitioner in Brown, he is subject to the court's statement that non-record materials were not used in reviewing the petitioners' sentences. Ford did not specifically allege that he had been treated differently from all others. Referring to "current notions of comity and federalism," the court recoiled from the prospect of requiring a state's appellate judges to respond to questions in federal court concerning what was or was not considered by them in review of years of appeals, it certainly seems incredible that Ford's attitude would so change almost on the eve of a full review of his claims. The court refused to be dissuaded from ruling, however, dismissing his request as "untimely."

Another interesting preface to the court's treatment of the Brown issue is the presence on the court of Judge Hatchett, a former Florida Supreme Court justice who had affirmed Ford's conviction on direct appeal shortly before his appointment to the federal bench. Of course, he recused himself from any part of the Ford case. Considering that, at its most fundamental level, the Brown issue as raised by Ford really does seek to explore the mental processes of judges, it is interesting to contemplate that the judges had in their midst a man, possessed of candid, firsthand knowledge of the Florida court's actual use of non-record material, who was relegated to the role of mute spectator to the proceedings. Had the relief Ford requested been granted, one of the Eleventh Circuit's own brethren would have been subject to whatever discovery procedures the district court authorized.

75. Id.
Finally, in response to its third question, "Would reading the non-record material so affect the Florida judges that the federal court should, for constitutional review purposes, treat the case as if the information had been used by them?" the court ruled that the Florida Supreme Court's holding in Brown supplied a negative answer, thus concluding the matter for purposes of review. Despite his commitment to principles of comity, Judge Roney's uneasiness with the Florida court's ambiguous language and "veiled suggestion(s)" in Brown is expressed in his final comments. He wishes the Florida court had given a candid answer to the perplexing question first raised by Justice Marshall in his dissent to the denial of certiorari in Brown, i.e., if the court did not use the disputed information, then why had it sought it?  

In his separate concurring opinion, Judge Tjoflat agrees that Brown effectively disposed of the issue but adds that a crucial distinction has not been adequately made by the majority. Neither Gardner nor any other authority, he maintains, forbids an appellate court from merely reading non-record material, so long as it does not rely on it. Maybe the Florida court's statement did not deny reading non-record material about the petitioners, but it clearly denied relying on any extra-record factors in reviewing their sentences. Since Ford's case was effectively embraced in the Brown holding, his claim is especially lacking in merit. Judge Tjoflat rejects Ford's contention that an exception be made to the premise that judges disregard what they must simply because the Florida court solicited rather than passively received the reports. If such a capability exists, he responds, it does not logically depend on how the information is obtained. Even if such a distinction were conceptually valid, it would be unworkable as a practical matter. Considering how frequently judges see non-record information, countless claims would be made charging that a judge saw information he could not disregard. If such claims turned on the factual issue of whether the judge requested the information or passively received it, the burden on the justice system would be staggering.  

In conclusion, Judge Tjoflat remarks that the premise of proper judicial conduct falls when a judge's behavior appears so improper that

76. Id. at 811.  
77. Id. at 833.
it is detrimental to society at large. In such a case, appearance rather than a judge’s actual capabilities is at issue. Judge Tjoflat suggests that, had Ford’s claim proceeded on this basis, his “swing vote” might have gone the other way.78

A troublesome aspect of the case is the majority’s failure to meet Ford’s argument that use of non-record material undercuts the mandated “proportionality” review. If extra-record material does influence Florida Supreme Court reviews, the real reasons for upholding or commuting a death sentence will be obscured. Thus, the ability of later appellants to receive a meaningful comparative review will be impaired. Given the tenor of the majority’s decision, however, further arguments on this issue are unwelcome.

B. The Dissenting Opinions

The three separate dissenting opinions share a number of common themes.79 Each expresses dissatisfaction with the Florida Supreme Court’s language in Brown, and an unwillingness to accept it as dispositive. According to Judge Kravitch, the court neither denied that it systematically requested and received such information, nor acknowledged that the practice is legally objectionable. Moreover, it did not specifically disclaim having used the non-record information it admittedly obtained; it said only that such information is “irrelevant.” She maintains the court conceded such use by its footnote statement that “[t]he ‘tainted’ information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards.”80 Likewise, Judge Godbold states that he “cannot find in the Florida Supreme Court’s opinion what the majority describes as ‘the statement that it [extrinsic material] was not used,’ and that the disparate views of the judges on this point further demonstrates the opinion’s

78. Id.
79. Of the five dissenters, three wrote separate opinions. Judge Kravitch wrote a lengthy opinion incorporating many of her earlier criticisms. Chief Judge Godbold issued an opinion joined by Judge Clark. Judge Johnson wrote an independent dissenting opinion and, finally, Judge Anderson, with no separate opinion, joined those of Judges Godbold, Kravitch and Johnson with respect to the Brown issue.
80. Ford, 696 F.2d at 851-52.
‘intractable ambiguity.’” 81 In his opinion, Judge Johnson reads Brown to say that the court actually did consider nonrecord material. 82

Given this difference of opinion as to the extent of the disclaimer, the dissenters maintain that the majority erred in accepting it without a more thorough analysis. In a strident tone, Judge Kravitch characterizes the majority’s analysis as an “attempt to evade the difficult questions presented,” 83 and Judge Johnson states that “the majority simply cannot avoid the direct implication of Gardner.” 84 The gravamen of the dissents is that Gardner does apply to appellate as well as trial courts. Death sentence cases, under Gardner, “require a greater degree of reliability than others” and the Florida Supreme Court’s solicitation of extra-record materials, in Judge Johnson’s opinion, has jeopardized the degree of reliability and rationality required in the administration of the death penalty. 85 A violation of due process and other constitutional protections is thus present. Judge Kravitch confronts the comity issue by stating that where a state court has ruled that its own procedure is legally sound, independent federal constitutional issues are raised making review by a federal court proper. 86

While the dissenters agree as to the nature of the constitutional problem, each proposes a different remedy. Judge Godbold maintains that a direct, unequivocal statement by the Florida Supreme Court would satisfy him. 87 A conditional grant of Ford’s petition by the district court is proposed by Judge Johnson, who also seeks a more definite statement from the Florida court: He would have the writ become final “in the event that the Florida Supreme Court does not grant petitioner a new direct review of his conviction and sentence.” 88 Such a review, to satisfy Judge Johnson, would have to be undertaken without the benefit of non-record material or, if such material were used, with prior notice to Ford and his counsel. Under Judge Kravitch’s analysis, the ambiguous statements by the court overcome the presumption of regularity.

81. Id. at 821.
82. Id. at 874.
83. Id. at 850.
84. Id. at 872.
85. Id. at 872-73.
86. Id. at 852.
87. Id. at 821.
88. Id. at 874.
Accordingly, she would place the burden on the State to affirmatively demonstrate that non-record information was not requested, received, or used by the Florida Supreme Court in connection with Ford’s case. She would deny relief to Ford only if the State met this burden. If not, she would grant Ford a new appellate review of his sentence with the conditions proposed by Judge Johnson.

Interestingly, none of the judges, either in the majority or the dissent, confronted directly the issue of the impact that granting relief to Ford would have had on the Florida justice system. Ford asked for remand to the district court so that he could undertake full discovery. While his counsel at oral argument refused to commit himself as to what the scope of such discovery might encompass, the claims made by Ford, if given cognizance, would seem to require nothing less than an exploration of the justices’ motivations and actual mental processes. 89

89. Id. at 853. It is noteworthy that this remedy differs from that proposed in her dissent to the April panel opinion, where she argued in favor of a remand for evidentiary procedures. Ford v. Strickland, 676 F.2d 434, 455 (11th Cir. 1982). While earlier in her second opinion, Judge Kravitch argues that discovery would not result in embarrassment to the Florida Supreme Court, she is unconvincing and clearly uncomfortable with the sensitive issues a remand would raise.

90. In the words of the opinion:

[I]t is obnoxious both to the traditional role and procedures of the appellate process and to current notions of comity and federalism to suggest that a state appellate judge should be required to respond in a federal court to questions concerning what was or was not considered by him in the review of a state case. Petitioner virtually admits his argument would eventually carry that far if all else failed in obtaining the proof of what he asserts. Any principle that supports the start of that journey would support a conclusion which is not now a part of American law.

Ford, 696 F.2d at 811. (Roney, J., plurality opinion).

While it is speculative to envision what might have followed in the event of a remand, discovery would probably, as a courtesy, have taken the form of depositions or interrogatories rather than examination in open court. The question then posed is whether it would be sufficient to undertake discovery only in Ford’s case. Perhaps the procedures would have to be repeated 123 times to vindicate the claims of all similarly situated inmates.

If, instead, the relief granted were a right to a fresh, direct review, how could the court of appeals overcome the argument that the Florida justices were already tainted? Justice Marshall, joined by Justice Brennan, made this point in a recent dissent to a denial of certiorari in another Florida case. A trial judge found to have previously considered inadmissible material re-imposed a death on remand. The justices objected
Had Ford prevailed, the stage would have been set for vacating the death sentences of nearly two-thirds of Florida’s death row inmates. The upheaval such an outcome would have caused can easily be imagined. Quite possibly, the Brown issue provided a greater threat to Florida’s statutory death penalty scheme and its judiciary than any claim raised by death row inmates since Furman v. Georgia.

Conclusion

Unlike the more narrowly-worded panel opinion, the en banc ruling on Ford clearly intended to sweep within its scope the similar claims of all Florida inmates, regardless of their ability to document their allegations. As a blanket ruling, it effectively disposes of the Brown issue unless certiorari is granted by the Supreme court. In a press interview given January 10, 1983, Florida Attorney General Jim Smith stated that, for many death row inmates, the decision ended their avenues of appeal, and predicted that executions would resume in four to six months. Pending disposition of his petition for certiorari, however, the stay of Ford’s execution remains in effect.

Whether the Supreme Court will agree to hear Ford on certiorari is debatable. It refused to hear Brown less than two years ago, and declined to grant a stay of execution in the Spenkelink case. The Ford case only affects Florida and thus may not be seen of sufficient national importance to justify the court’s review. Sentiment on the current court to stretch comity notions and leave unchallenged the highest to the same judge reviewing his previously imposed sentence. Harvard v. Florida, No. 82-5444, 51 U.S.L.W. 3505 (U.S. Jan. 11, 1983). Fairness standards articulated in Gardner require that resentencing be entrusted to a different judge, to avoid the possibility that the judge previously imposing a death sentence may do so again based on a “natural human tendency to rationalize it and suppress doubts.” Id. at 3507. It is thus likely that if granted, a viable review of Ford’s case would have required appointment of special associate justices.

91. As a most dire speculation, the public outcry that would surely accompany a ruling that the Florida justices had caused their death penalty statute to be invalidated, by virtue of their own furtive behavior, might have shamed the responsible members of the court into resigning.
state court's interpretations of state law may prevail over the dissenters' suggestion that the Florida Supreme Court's disclaimer should be discounted. Moreover, both sides to the debate realize that the Brown issue has been reviewed fully and conscientiously. The fact that the Eleventh Circuit twice entertained the case and twice ruled in favor of the State may discourage the Supreme Court from feeling that it would elicit any new perspective.

As a countervailing consideration, Florida's death row population stands at 201. Although only one state would be affected by a Supreme Court decision in Ford, the number of inmates whose lives are at stake is the nation’s largest. Finally, because the Ford opinion was so closely divided, the Court may see the lack of consensus as signaling a need for its consideration. Unless certiorari is granted, however, the mystery and unanswered questions which surrounded the Florida Supreme Court's practice seem destined to remain so.

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