CAPITAL CASE
EXECUTION SCHEDULED AUGUST 5, 2025 AT 10:00 A.M.

No.

IN THE
Supreme Court of the United States

IN RE: BYRON LEWIS BLACK

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0203p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: BYRON LEWIS BLACK,

Movant.

No. 25-5677

On Motion for Leave to File a Second or Successive Habeas Corpus Petition.
United States District Court for the Middle District of Tennessee at Nashville.
No. 3:00-cv-00764—Eli J. Richardson, District Judge.

Decided and Filed: August 1, 2025

Before: BOGGS, GRIFFIN, and DAVIS, Circuit Judges.

COUNSEL

ON MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION: Byron Lewis Black, Nashville, Tennessee, pro se. **ON CORRECTED MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION, ON MOTION TO REMAND, ON MOTION FOR STAY OF EXECUTION, and REPLY:** Kelley J. Henry, Amy D. Harwell, Marshall A. Jensen, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Movant. **ON RESPONSE:** John H. Bledsoe, Sarah J. Stone, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Respondent.

ORDER

The district court transferred to this court the numerically second 28 U.S.C. § 2254 habeas corpus petition filed by Byron Lewis Black, a prisoner on Tennessee's death row, for treatment as a motion for authorization to file a "second or successive" § 2254 petition under 28 U.S.C. § 2244(b). *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Black has filed a motion to remand, arguing that his petition was improperly transferred.

In 1989, Black was convicted for the murders of his girlfriend and her two daughters and sentenced to death for one murder and life imprisonment for the other two murders. The Tennessee Supreme Court affirmed Black's convictions and sentences. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991). His state-postconviction action was unsuccessful, *see Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8, 1999), as was his motion to reopen that proceeding, *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005).

Black filed his first § 2254 habeas petition in 2000, arguing that he was intellectually disabled and that the Eighth Amendment barred application of the death penalty to him, a claim that he has continued to pursue up to the present day. *See Black v. Carpenter*, 866 F.3d 734, 737 (6th Cir. 2017). After the district court denied relief, we remanded for the limited purpose of considering Black's "mental retardation" claim in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). The district court on remand concluded that Black could not establish an intellectual disability by a preponderance of the evidence under *Atkins*, and we affirmed. *Black*, 866 F.3d at 750. The Supreme Court denied Black's certiorari application. *Black v. Mays*, 584 U.S. 1015 (2018).

After the State moved to set an execution date in 2019, Black raised the issue of his competency to be executed under Tennessee case authority. An execution date was set and then stayed on two occasions, once based on the COVID pandemic and subsequently on changes to the Tennessee statutes governing intellectual-disability claims. Finally, in March 2025, the Tennessee Supreme Court set Black's execution date for August 5, 2025. On July 8, 2025, that court affirmed the denial of Black's latest state postconviction petition, which urged that he was incompetent to be executed under the common-law criteria for "idiocy." *See Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 WL 1927568 (Tenn. July 8, 2025).

Black filed his current § 2254 petition on July 18, purportedly relating "solely to [his] competency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986)." Marshalling the evidence he has submitted in support of his mental-retardation and intellectual-disability claims during the last quarter-century, he contends that he meets the criteria for "idiocy" at common law and is incompetent to be executed. Black maintains that the Supreme Court held in *Ford* that

"idiots" and "lunatics" are incompetent to be executed. And citing *Panetti v. Quarterman*, 551 U.S. 930 (2007), he argues that his petition does not qualify as second or successive for purposes of 28 U.S.C. § 2244(b)'s restrictions because his "idiocy" claim did not ripen until his execution date was set.

The respondent countered that Black's new petition must be transferred to this court for treatment as a motion for authorization to file a second or successive petition under 28 U.S.C. § 2244(b), arguing that he is merely rehashing his mental-retardation or intellectual-disability claim per *Atkins* rather than actually contending that he is incompetent to be executed per *Ford* and its progeny.

The district court agreed with the respondent, reasoning that although *Ford* held that the Eighth Amendment barred execution of the "insane," that decision left open the standards for applying this prohibition. Tracing the development of the standards of the prohibition in *Panetti* and *Madison v. Alabama*, 586 U.S. 265 (2019), the district court emphasized that "the critical question [in the competency-to-be-executed analysis] is whether a prisoner's mental state is so distorted by mental illness that he lacks a rational understanding of the State's rationale for [his] execution." (quoting *Madison*, 586 U.S. at 269). The district court reasoned that Black's claim is not based on *Ford* because it does not turn on whether he can rationally understand the reasons for his death sentence per *Madison*. Thus, the district court ultimately concluded that Black's petition requires authorization from this court under § 2244(b), and it transferred the case to this court for that purpose under *In re Sims*, 111 F.3d at 47.

We may authorize the filing of a second or successive habeas petition only if the applicant makes a prima facie showing that the proposed petition contains a new claim that relies on either (A) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (B) new facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C). But "[a] claim

presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1).

Black has filed a motion to remand, arguing that his latest habeas petition does not qualify as "second or successive" at all, at least not for § 2244(b) purposes, and that authorization from this court is thus unnecessary. "[A] petition is not second or successive when it raises a claim that was unripe for review when the first habeas petition was filed." *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (order) (citing *Panetti*, 551 U.S. at 945–47). "A claim is unripe when 'the events giving rise to the claim had not yet occurred.'" *Id*. (quoting *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). Black argues that his claim is based on his competency to be executed and that under *Panetti* such a claim requires examination of his "current mental state," an analysis that can be undertaken only close in time to his execution date. He insists that the district court misconstrued his "idiocy" claim, arguing that, even if his brain damage was caused early in life, "its full effects were not apparent until decades later." And he contends that his "idiocy" claim has always been a question of competency.

We agree with the district court and disagree with Black. "[A]ny claim that has already been adjudicated in a previous petition must be dismissed." *Franklin v. Jenkins*, 839 F.3d 465, 473 (6th Cir. 2016) (citing 28 U.S.C. § 2244(b)(1)). And "[a]ny claim that has not been adjudicated must also be dismissed unless 'it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence.'" *Id*. (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005)).

In his prior § 2254 habeas petition, Black asserted that he was incompetent to be executed under *Ford*. *See Black v. Bell*, 181 F. Supp. 2d 832, 882 (M.D. Tenn. 2001). The district court determined that the claim was not ripe for decision and dismissed it. *Id*. at 882–83. Black now seeks to revisit that claim, arguing that he satisfies the criteria for common-law idiocy and therefore is incompetent to be executed.

In *Ford*, the Supreme Court held that "the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has 'lost his sanity' after sentencing." *Madison*, 586 U.S. at 268 (quoting *Ford*, 477 U.S. at 406). Later, however, the Supreme Court

explained that when determining which prisoners cannot be executed under the Eighth Amendment, the "critical question is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's rationale for [his] execution.'" *Id.* at 269 (alteration in original) (quoting *Panetti*, 551 U.S. at 958–59). In *Madison*, the Supreme Court recognized that the Eighth Amendment may bar execution for someone suffering from dementia but not for someone suffering from memory loss and emphasized that "[w]hat matters is whether a person has the 'rational understanding' *Panetti* requires—not whether he has any particular memory or any particular mental illness." *Id.* at 275.

Relying on a variety of centuries-old treatises, Black submits that common-law idiocy is characterized by "significant deficit of intellectual capacity," an "inability to manage [one's] own affairs," "the presence of 'unsound memory,'" and "brain malformation," though "not [being] devoid of reason or intellect." Similarly, the American Association on Mental Retardation and the American Psychiatric Association adopted standards for determining intellectual disability that "required both 'subaverage intellectual functioning' and 'significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.'" *Shoop v. Hill*, 586 U.S. 45, 49 (2019) (per curiam) (quoting *Atkins*, 536 U.S. at 318). Indeed, Black refers to *Atkins* to establish criteria that satisfy his interpretation of common-law idiocy.

Contrary to his assertions, Black does not currently raise a *Ford* claim, effectively arguing only that he belongs to a class of individuals (those with "idiocy") who could not be executed under common law. As explained previously, that is not the controlling standard. *See Madison*, 586 U.S. at 275. *Panetti* explicitly clarified the "scope" of *Ford* "by focusing on whether a prisoner can 'reach a rational understanding of the reason for [his] execution.'" *Id.* at 268 (alteration in original) (quoting *Panetti*, 551 U.S. at 958). And although Black points to evidence of his progressive dementia, he does not make an argument in his habeas petition that his mental condition is such that he cannot rationally understand the reason for the State's punishment. As explained above, Black instead argues that his claim should be construed as a *Ford*-based claim because "historical analysis conclusively shows that the 'idiocy' standard that existed at common law . . . offered substantive protection to individuals outside of *Panetti*'s

ambit." That argument runs headlong into binding precedent, specifically the Supreme Court's holding in *Madison* that "the *Panetti* Court set out *the* appropriate 'standard for competency.'" 586 U.S. at 269 (emphasis added) (quoting *Panetti*, 551 U.S. at 957); *id.* at 276 ("[R]ational understanding of the State's reasons for resorting to punishment . . . is the *Panetti* standard's singular focus."); *id.* at 277 ("[T]he sole inquiry for the court remains whether the prisoner can rationally understand the reasons for his death sentence."). Black's petition does not address that "critical question."[1]

At bottom, Black's alleged *Ford* claim is, as the district court observed, "masquerading as a claim of incompetency" under *Atkins* based on the same arguments advanced in his first habeas petition. *See Black*, 866 F.3d at 737 ("In 2000, Black filed a federal habeas petition in which he raised various claims including a claim that his mental retardation precluded the imposition of the death penalty."). That is, Black alleges he is categorically ineligible for execution based on the common law understanding of "idiocy" and is therefore ineligible to receive the death penalty. For the reasons explained above, and elaborated on in the district court's opinion, *Ford*-based claims cannot be categorical; they must instead be based on an argument that the petitioner is incompetent *at the time of execution* and therefore ineligible *for execution*—not necessarily ineligible to receive the death penalty when sentenced. This court affirmed the district court's denial of Black's prior § 2254 habeas petition on a nearly identical claim. *Id.* at 750. And because the claim was raised previously, it cannot be considered newly "ripe" so as to render his latest § 2254 petition non-successive for § 2244(b) purposes. *See In re Tibbets*, 869 F.3d at 406. Instead, because Black has raised his current claim in a prior § 2254 habeas petition, it is subject to dismissal. 28 U.S.C. § 2244(b)(1). And because it is effectively an "old" claim, we need not address whether § 2244(b)(2)'s gatekeeping provision applies. *See In re Hill*, 81 F.4th 560, 569 (6th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 2531 (2024).

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[1]Black's petition likely omits any argument under the controlling *Panetti* standard because such an argument almost certainly could not have succeeded. Black's own expert who "was hired 'for a mental health evaluation to assess [Mr. Black's] competency to be executed,'" (Exhibit 15, Vol. VI, 778), concluded that Black demonstrated a rational understanding of the reason for his execution. *See Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 WL 1927568, at *8 (Tenn. July 8, 2025) ("Mr. Black's own expert . . . found him likely competent to be executed under the *Panetti* standard."). And when interviewed regarding his understanding of his legal circumstances, Black correctly identified his execution date, understood that he would be "put to death" on that date, and stated that he was "given the death sentence for the murder of the youngest victim." (Exhibit 10, Vol. I, 110).

Black also moved for a stay of execution. "[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). We consider the following factors in deciding whether to stay an execution:

(1) whether there is a likelihood he will succeed on the merits of the appeal;
(2) whether there is a likelihood he will suffer irreparable harm absent a stay;
(3) whether the stay will cause substantial harm to others; and
(4) whether the injunction would serve the public interest.

Workman v. Bell, 484 F.3d 837, 839 (6th Cir. 2007). For the reasons explained above, and detailed in the district court's opinion, Black has not demonstrated a likelihood of success on the merits. Although he will undeniably suffer irreparable harm, the other three factors weigh in favor of denying the stay. *See Hill*, 547 U.S. at 584 (emphasizing the state's "strong interest in enforcing its criminal judgments [including death-penalty executions] without undue interference from the federal courts").

Finally, in a last-minute motion for leave to file a second or successive habeas petition, Black argues in the alternative to the above that, even if we construe his claim as second or successive, he satisfies the requirements of § 2244(b)(2)(B) on the basis that the worsening of his intellectual disability is "of a recent onset" and could not have been known at the time of earlier proceedings. We deny Black's motion.

As stated above, this court "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies" one of two alternative statutory requirements. 28 U.S.C. § 2244(b)(3)(C). Black relies on the second of two alternatives in his motion, asserting that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). A prima facie showing requires the presentation of "sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration by the district court.'" *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

Black has not made the requisite showing. To the extent that Black submits that he is ineligible for the death penalty under the *Ford* exception, his argument fails as a matter of law for the reasons already discussed above—Black's purportedly new evidence makes no showing that he does not have a rational understanding of the State's reasons for his execution. Insofar as Black is pressing to relitigate his *Atkins* claim, we hold that his purportedly new evidence does not "warrant a fuller exploration by the district court," *ibid.*, because his "idiocy" claim is based on the same operative facts offered in his first habeas petition in support of his intellectual disability claim. *See Black*, 866 F.3d at 750 (rejecting Black's *Atkins* claim and holding that "Black cannot show that he has significantly subaverage general intellectual functioning that manifested before Black turned eighteen").

For these reasons, we **DENY** Black's motion to remand, we **DENY** authorization to file a second or successive § 2254 petition, and we **DENY** Black's motion for a stay of execution.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BYRON LEWIS BLACK, Petitioner, v. KENNETH NELSEN, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION Respondent.	)	No. 3:00-cv-00764 JUDGE RICHARDSON

ORDER

Pending before the Court is Petitioner's "Petition for Writ of Habeas Corpus" (Doc. No. 176, "Petition") as well as Petitioner's "Application For A Stay of Execution" (Doc. No. 177, "Application for Stay"). Respondent filed an "Answer to Petition For Writ of Habeas Corpus" (Doc. No. 185, "Answer") in opposition to the Petition, as well as "Respondent's Response to Petitioner's Motion For Stay Of Execution" (Doc. No. 186, "Response") in opposition to the Application for Stay. Petitioner thereafter filed a "Reply to Respondent's Answer to Petition For Writ of Habeas Corpus & To Respondent's Response To Motion For Stay of Execution" (Doc. No. 188, "Reply").

For the reasons stated herein, the Court finds that the Petition is a "second or successive" petition and therefore must be transferred to the United States Court of Appeals for the Sixth Circuit for a determination of whether Petitioner shall receive permission to proceed with the Petition.

PROCEDURAL HISTORY

The procedural history in this death penalty case is lengthy. It is recounted well in the

recent Tennessee Supreme Court order ("Order"),[1] *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 WL 1927568 (Tenn. July 8, 2025), that was issued shortly before the filing of the Petition:

> Over thirty-six years ago, the defendant, Byron Lewis Black, was convicted of the March 1988 triple murders of his girlfriend, Angela Clay, age 29, and her two daughters, Latoya, age 9, and Lakeisha, age 6. Mr. Black received consecutive life sentences for the murders of Angela Clay and Latoya Clay, and he was sentenced to death for the murder of Lakeisha Clay based on six aggravating circumstances found by the jury. On direct appeal, this Court affirmed Mr. Black's convictions and sentences. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991), *reh'g denied* (Tenn. Sept. 3, 1991).
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> In 1992, Mr. Black sought state post-conviction relief. After a hearing, the post-conviction court denied relief. The Tennessee Court of Criminal Appeals affirmed the post-conviction court's judgment, and this court denied Mr. Black's application for permission to appeal. *Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8, 1999), *perm. app. denied* (Tenn. Sept. 13, 1999), *cert. denied*, *Black v. Tennessee*, 528 U.S. 1192 (2000).
>
> Mr. Black's extensive efforts to establish that he was intellectually disabled at the time of the crime began in August 2000, when he filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee. *See Black v. Bell*, 181 F.Supp.2d 832, 839 (M.D. Tenn. 2001). Among other claims, the petition argued that Mr. Black was "mentally retarded" (now "intellectually disabled"). The district court granted the State's motion for summary judgment and dismissed the petition. *Id*. at 883.
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> Mr. Black appealed the district court's ruling to the United States Court of Appeals for the Sixth Circuit. However, in this time frame, this Court issued its opinion in *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), holding as a matter of first impression that the execution of a "mentally retarded" person violates the Eighth Amendment to the United States Constitution and Article I, section 16 of the Tennessee Constitution. Significantly, *Van Tran* further held that retroactive application of this new rule was warranted for cases on collateral review. Approximately six months later, on June 20, 2002, the United States Supreme Court held that the execution of "mentally retarded" persons violates the Eighth Amendment to the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002).
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> The Sixth Circuit held the appeal in abeyance while Mr. Black pursued a motion to reopen his state post-conviction proceedings seeking to establish his

[1] The Order is found on the docket of this case at Docket No. 176-4.

ineligibility for the death penalty based on the "mental retardation" categorical exclusion announced in *Van Tran* and *Atkins*. After an evidentiary hearing, the state post-conviction court found that Mr. Black was not "mentally retarded." The Tennessee Court of Criminal Appeals affirmed, and this Court denied Mr. Black's application for permission to appeal. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006), *cert. denied*, *Black v. Tennessee*, 549 U.S. 852 (2006).

The Sixth Circuit then remanded the case to the federal district court for the limited purpose of reconsidering Mr. Black's "mental retardation" claim in light of *Atkins*. In April 2008, the federal district court dismissed Mr. Black's *Atkins* claims, and the case returned to the Sixth Circuit in a consolidated appeal.

During the pendency of the Sixth Circuit appeal, this Court released its decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), which clarified Tennessee's intellectual disability statute. The Sixth Circuit affirmed the district court in part; however, the panel again remanded the case for further proceedings related to the impact of *Coleman*. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011), *reh'g denied* (6th Cir. Jan. 4, 2012). On this second remand, the federal district court concluded that Mr. Black failed to carry his burden of demonstrating intellectual disability (formerly "mental retardation") by a preponderance of the evidence. *Black v. Colson*, No. 3:00–0764, 2013 WL 230664 (M.D. Tenn. Jan. 22, 2013), *aff'd sub nom.*, *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), *reh'g en banc denied* (6th Cir. Oct. 27, 2017), *cert. denied sub nom.*, *Black v. Mays*, 584 U.S. 1015 (2018). The Sixth Circuit affirmed that decision, agreeing with the district court that Mr. Black had not proved by a preponderance of the evidence that he had significantly subaverage general intellectual functioning as evidence by an I.Q. score of 70 or below. *Black v. Carpenter*, 866 F.3d at 744–50. Notably, the Sixth Circuit evaluated Mr. Black's intellectual disability claim in light of this Court's decision in *Coleman* as well as the United States Supreme Court's then-recent guidance on intellectual disability determinations in *Moore v. Texas*, 581 U.S. 1 (2017), *Brumfield v. Cain*, 576 U.S. 305 (2015), *Hall v. Florida*, 572 U.S. 701 (2014).

Upon the conclusion of the standard three-tier appeals process, on September 20, 2019, the State filed a motion to set an execution date for Mr. Black in accordance with Tennessee Supreme Court Rule 12(4). In response to the motion, Mr. Black raised the issue of his competency to be executed and requested a hearing pursuant to *Van Tran v. State*, 6 S.W.2d 237 (Tenn. 1999). *See* Tenn. Sup. Ct. R. 12(4)(A).

On February 24, 2020, this Court granted the State's motion to set an execution date for Mr. Black and established deadlines for proceedings to consider Mr. Black's claim that he is not competent to be executed, citing *Van Tran v. State*, 6 S.W.3d at 267-68, *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010), and *Madison v.*

Alabama, 586 U.S. 265 (2019). Upon the motion of Mr. Black, the Court reset the execution for April 8, 2021; however, the Court ultimately stayed the execution due to the COVID-19 pandemic.

In 2021, the Tennessee General Assembly amended Tennessee's intellectual disability statute. *See* Act of April 26, 2021, ch. 399, 2021 Tenn. Pub. Acts, https://perma.cc/CKC7-HVRD (codified at Tenn. Code Ann. § 39-13-203(g)). Relevant here, the revisions established a procedure authorizing certain death-row inmates to raise an intellectual disability claim by filing an appropriate motion with the trial court; however, the amended statute prohibited such a motion for any inmate whose intellectual disability claim had been "previously adjudicated on the merits." *See id.* at §2 (codified at Tenn. Code Ann. § 39-13-203(g)). On June 3, 2021, pursuant to the revised statute, Mr. Black filed a "Motion to Declare Defendant Intellectually Disabled," again seeking categorical exclusion from the death penalty. After reviewing the procedural history of the case, the trial court denied the motion, finding that Mr. Black's intellectual disability claim had been previously adjudicated on the merits. The Tennessee Court of Criminal Appeals affirmed. *Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397 (Tenn. Crim. App. June 6, 2023), *no perm. app. filed.*

During this time, this Court lifted the previous stay of execution and reset Mr. Black's execution for August 18, 2022. However, in April 2022, Tennessee Governor Bill Lee granted a temporary reprieve to death-row inmate, Oscar Franklin Smith, and subsequently paused all executions, including the scheduled execution of Mr. Black.

Tennessee resumed executions in 2025, adopting a revised single-drug protocol utilizing pentobarbital. By order dated March 3, 2025, this Court reset Mr. Black's execution for August 5, 2025, with corresponding deadlines for proceedings to consider Mr. Black's competency-to-be-executed claim, including (per *Van Tran*) an initial determination by the trial court of whether Mr. Black had made the requisite threshold showing to warrant a competency hearing.

On May 29, 2025, Mr. Black filed a petition in the Circuit Court for Davidson County, Tennessee, to be declared incompetent to be executed under common law principles prohibiting execution of the "*non compos mentis*." The petition identified three experts, whose recent reports were among the exhibits attached to the petition. The State filed a response to the petition, asserting that the allegations "raise no doubt about [Mr. Black's] present competency," and emphasizing that Mr. Black's own expert found him competent to be executed under the prevailing competency standard. The State asked the trial court to summarily dismiss the petition because Mr. Black failed to make the threshold showing required by *Van Tran*.

On June 5, 2025, the trial court entered a "Memorandum and Order" concluding that Mr. Black's petition and attachments failed to make the requisite

> threshold showing of a genuine disputed issue regarding Mr. Black's present competency to be executed necessary to warrant an evidentiary hearing. Mr. Black now appeals.

Black v. State, 2025 WL 1927568, at *1-4 (Tenn. July 8, 2025) (footnotes omitted). The Order resolved that appeal, affirming the trial court's decision.[2] Ten days later, on July 18, 2025, Petitioner filed his Petition in this Court, seeking the kind of relief that the Tennessee Supreme Court had denied via its Order. Specifically, Petitioner requests that this Court: 1) declare that Mr. Black is presently incompetent to be executed; 2) issue a stay of execution; 3) order Respondent to file with this Court the record of state court proceedings;[3] 4) order an evidentiary hearing; and 5) grant other relief as law and justice require. (Doc. No. 176 at 77). [4]

FORD-BASED CLAIMS

In his Answer and Response, Respondent asserts that the Petition must be transferred to the Sixth Circuit because (according to Respondent)[5] the Petition is a "second or successive" habeas corpus petition, in which case it is currently not within this Court's jurisdiction and must

[2] The state trial court assessed Mr. Black's incompetency claim under the below-described *Panetti* standard and "declined to consider Mr. Black's assertion of incompetency to be executed under the common law 'idiocy' principle [advanced by Mr. Black] for 'want of jurisdiction.'" (Doc. No. 176-4 at 10). The Tennessee Supreme Court found that the "trial court properly declined to consider Mr. Black's common law idiocy argument because it fell outside the scope of the order remanding the case" (*Id.* at 12). Further, the Tennessee Supreme Court stated, "To the extent Mr. Black is arguing for a new categorical exclusion from execution that is distinct from incompetency under the *Panetti* standard . . . he had ample opportunities to raise that argument at an earlier stage." (*Id.* at 12). The Tennessee Supreme Court further elaborated, "to the extent Mr. Black is asking this Court to reconsider the standard for competency to be executed, he offers no compelling reason for us to adopt a standard that differs from longstanding precedent from this Court and the United States Supreme Court. We respectfully decline to do so." (*Id.* at 12).

[3] Respondent has since done that on his own initiative. (Doc. Nos. 182, 183).

[4] When citing to a page in a document filed by one of the parties, the Court endeavors to cite to the page number (denoted by "Page ___ of __") added by the Clerk's Office as part of the pagination process associated with Electronic Case Filing if such page number differs from the page number originally provided by the author/filer of the document.

[5] (Doc. No. 185 at 3, 9; Doc. No. 186 at 2, 4, 8, 9).

be transferred (along with the Application for Stay) to the Sixth Circuit. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) ("[W]hen a second or successive petition for habeas corpus relief . . . is filed in the district court without . . . authorization [to do so] from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631.").

To determine whether the Petition constitutes a "second or successive" petition (an issue the Court at times herein calls the "'second or successive' issue"), for reasons discussed below it is important to understand what constitutes a "*Ford*-based claim"[6] under current Supreme Court jurisprudence. The Court therefore will analyze the three main Supreme Court cases discussing such claims,[7] namely *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Madison v. Alabama*, 586 U.S. 265 (2019). So doing, the Court arrives at the following conclusion: for purposes of rules that apply only to *Ford*-based claims, a *Ford*-based claim refers only to a claim analyzed under the below-discussed *Panetti* standard, which prohibits "the execution of a prisoner whose mental illness prevents him from 'rational[ly] understanding' why the State seeks to impose that punishment." *Madison v. Alabama*, 586 U.S. 265, 267 (2019)

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[6] To describe the kind of claim the Court is talking about here, the Supreme Court has used the terms *"Ford* claim," "*Ford*-based incompetency claim," and "*Ford*-based competency claim." *Panetti v. Quarterman,* 551 U.S. 930, 942, 943, 949 (2007). The Court herein generally uses "*Ford*-based claim" because that term strikes the Court as being the most precise and neither overinclusive nor underinclusive in its suggestion as to the specific nature and scope of the claim as it is now conceived by the Supreme Court. The Court is not the first district court in this circuit to use that term. *See*, *e.g.*, *Jackon v. Shoop*, No. 2:18-CV-215, 2018 WL 3462509, at *3 (S.D. Ohio July 17, 2018). The Court notes, however, that as indicated by the Supreme Court's terminology in *Panetti,* a *Ford*-based claim is an *incompetency* claim; the claim is that the Eighth Amendment prohibits the execution of the petitioner due *specifically* to the petitioner's alleged *incompetency* to be executed.

An additional point about terminology: as indicated by the Supreme Court's terminology in *Panetti*, the term "competency claim" can be used interchangeably with "incompetency claim" (or "claim of incompetency").

[7] The discussion herein may go beyond what is, strictly speaking, necessary to decide the "second or successive" issue, particularly insofar as the discussion delves in great detail into the rationale(s) that at various times have been given for a prohibition (under the Eighth Amendment or at common law) of the execution of what *Ford* called "the insane."

(citing *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007)) (brackets in original). The upshot—which is quite relevant to the "second or successive" issue—is that if a claim does not assert that the petitioner can satisfy this particular standard, then the claim (irrespective of whether it is *some* kind of incompetency claim) is not a *Ford*-based claim.

Ford

In *Ford v. Wainwright*, 477 U.S. 399 (1986) the Supreme Court held that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."[8] *Ford*, 477 U.S. at 409-10. Justice Marshall's plurality opinion invoked the common law to ascertain "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," in order to define the scope of the Eighth Amendment's protections.[9] *Id.* at 405. Surveying the common law, Justice Marshall found that the legal principle prohibiting the execution of the insane was clearly stated, but that the rationales for such a principle were grounded in a broad variety of historical, moral, and legal sources. He wrote:

> As is often true of common-law principles, see O. Holmes, The Common Law 5 (1881), the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity, Coke 6; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. *Ibid*. Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it," Hawles 477. It is also said that execution serves no purpose in these cases

[8] This quote is from Justice Marshall's opinion, which, being merely a plurality opinion, could not suffice by itself to be a holding of the Court. As discussed below, however, it is properly deemed a holding of the Court because it came from a part of the plurality opinion that Justice Powell joined in his concurring opinion.

[9] It should be noted that in addition to canvassing common law sources, Justice Marshall stated that "the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789." *Ford*, 477 U.S. at 406. He also opined that "evolving standards of decency that mark the progress of a maturing society" should inform the scope of the Eighth Amendment and wrote, "In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects." *Ford*, 477 U.S. at 406 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

> because madness is its own punishment: *furiosus solo furore punitur*. Blackstone * 395. More recent commentators opine that the community's quest for "retribution"—the need to offset a criminal act by a punishment of equivalent "moral quality"—is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L.Rev. 381, 387 (1962). Unanimity of rationale, therefore, we do not find. "But whatever the reason of the law is, it is plain the law is so." Hawles 477. We know of virtually no authority condoning the execution of the insane at English common law.

Id. at 407-8. These rationales are clearly diverse, ranging from the view that "madness is its own punishment," to the view that execution of an insane person "simply offends humanity," to the perceived lack of retributive force that would accompany the execution of "an insane person." *Id*. at 407-8. Justice Marshall also referred to Blackstone's statement, "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." *Ford*, 477 U.S. at 406 (quoting 4. W. Blackstone, Commentaries *24-*25) (alteration original). It is clear from the plurality opinion, therefore, that the uniform legal principle prohibiting the execution of the insane was grounded in various different rationales reflected in common law sources.

In discussing the Eighth Amendment's prohibition on executing the insane, Justice Marshall further wrote:

> The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 777, n. 58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of

> exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Id. at 409-10. Justice Marshall's opinion clearly recognized that there were "various reasons" found at common law for this prohibition, although it did not clearly opine as to which of these rationales, if any, was worthy of recognition as the basis for the Eighth Amendment prohibition. And it appears that in making his assessment that the prohibition should be read into the Eighth Amendment, Justice Marshall also considered the then-prevailing attitude towards executing the insane. *Id.* at 408-409 (focusing on the "intuition" that these executions "offend humanity" because no "State in the Union permit[ted] the execution of the insane" at the time the opinion was authored). Concluding the plurality opinion, Justice Marshall wrote, "Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417. Therefore, although Justice Marshall cited various rationales as supporting the prohibition of executing the "insane," he ultimately did not (i) clearly identify which one(s) of these rationales he was relying on, or (ii) describe their relative weight, via-a-vis one another, in supporting the prohibition.

Justice Powell wrote a concurring opinion in *Ford*, which as noted below is the "controlling" opinion because the Court's holding in *Ford* consisted only of those (non-dictum) points on which the plurality opinion and Justice Powell's opinion agreed.[10] In his concurring opinion, Justice Powell focused specifically on the "differing theories" that underpinned "the ancient prohibition on [the] execution of the insane." *Ford*, 477 U.S. at 419 (Powell, J.,

[10] Justice Marshall's plurality opinion alone did not suffice to announce *any* holding. The holding of *Ford* instead has to be derived by looking at Justice Powell's concurring opinion. *See Thompson* v. *Bell*, 580 F.3d 423, 434 (6th Cir. 2009) ("Powell's concurrence, needed to create a majority, became the controlling opinion in *Ford* . . . ").

concurring). Analyzing these various theories, Justice Powell found that they "d[id] not provide a common answer when it comes to defining the mental awareness required by the Eighth Amendment as a prerequisite to a defendant's execution." *Id.* Justice Powell then walked through several of the rationales at common law prohibiting execution of the "insane," which included: (1) the preservation of the defendant's ability to make arguments on his own behalf, (2) the concern expressed by Coke that the execution of a "mad man" was "such a miserable spectacle … of extream [sic] inhumanity and cruelty" that it "can be no example to others," and (3) the principle announced by Hawles that it is "against christian charity to send a great offender quick … into another world, when he is not of a capacity to fit himself for it." *Id.* at 419-20 (citations omitted).

Justice Powell largely dismissed this first justification, finding it "ha[d] slight merit today." *Id.* at 420. In so doing, he stated that modern practices include more extensive review of convictions and sentences than did the common law, and that the modern right to the effective assistance of counsel at trial and on appeal are "guarantees . . . far broader than those enjoyed by criminal defendants at common law." *Id.* at 420. He further added that execution at common law "often followed fairly quickly after trial," so in effect "incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself." *Id.* at 420-21.

Justice Powell then moved on to focus specifically on two rationales that he considered compelling. The first rationale was that the "more general concern of the common law" dating back to (at least) Lord Coke in the early 17th century, was "that executions of the insane are simply cruel." *Id.* at 421. Justice Powell opined that this rationale "retain[ed] its vitality" into present times.[11] *Id.* The second rationale, which he described as a key underpinning of the Eighth

[11] It is admittedly unclear whether the third justification listed above (that such executions were "against christian charity") was subsumed into this broader rationale that these executions are "simply cruel."

Amendment's prohibition on executions of "insane" persons, related to the extent to which such executions would serve the retributive purposes of criminal sanctions. He wrote that "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose" and that "it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally." *Id.* at 421. Justice Powell therefore seemingly identified as persuasive these two rationales reflected in the common law sources.

Justice Powell then used these rationales to identify a standard that in his view "define[d] the kind of mental deficiency that should trigger the Eighth Amendment prohibition" which he thought necessary to define. *Id.* at 422. To that effect, he stated that:

> 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. Accordingly, I would hold that the Eight 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.[12] This standard thereby appeared to cabin the rationales supporting the Eighth Amendment prohibition on executing "insane" persons to those previously endorsed by Justice Powell, and it simultaneously restricted the prohibition to a particular category of persons, i.e., those "unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422. And as further discussed below, Justice Powell noted that *Ford* left unresolved the issue of what it meant to be "insane" for purposes of *Ford*'s holding that the Eighth Amendment prohibited the execution of the "insane." *See id.* at 418.

[12] It appears that Justice Powell's concern that an executed person have the ability to "prepare himself for his passing" was necessary to avoid executions that are "cruel," which was his first rationale, even if this concern seems reminiscent of Hawles' separate justification that "christian charity" requires that no one be sent by execution "into another world, when he is not of a capacity to fit himself for it." *Id.* at 419.

To summarize, although the plurality and Powell opinions in *Ford* together clearly established that the Eighth Amendment prohibited the execution of the "insane," they left some uncertainty regarding the underpinnings and scope of this prohibition.

Panetti

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), in a majority opinion authored by Justice Kennedy, the Supreme Court first held that a *Ford*-based claim is not "second or successive" if it is brought when the claim is first ripe. *See Panetti*, 551 U.S. at 947. Notably, as Respondent recognizes, the Sixth Circuit has interpreted *Panetti* to say also that a *Ford*-based claim becomes ripe only once an execution date is set. (Doc. No. 185 at 8-9) (citing *In re Hill*, 81 F.4th 560, 568 n.6 (2023)).[13]

The majority in *Panetti* then addressed a second issue, namely whether the Fifth Circuit below had erred in preventing the petitioner from seeking to establish incompetency specifically via "a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Panetti*, 551 U.S. at 956. In answering that question in the affirmative, the majority illuminated the holding in *Ford* and provided additional instruction regarding the contours of a *Ford*-based claim. Justice Kennedy stated that "[t]he opinions in *Ford*, it must be acknowledged, did not set forth a precise standard for competency" and then conducted an examination of those opinions. *Panetti*, 551 U.S. at 957. In so doing, he explained that "[w]riting for four Justices, Justice Marshall concluded by indicating that the Eighth Amendment prohibits execution of "'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications'" and "Justice Powell, in his separate opinion, asserted that the Eighth Amendment

[13] Petitioner certainly agrees that *Panetti* held that a *Ford*-based claim becomes ripe only once an execution date is set. (Doc. No. 176 at 16-17). The Court does not see where *Panetti* expressed such a black-and-white rule, but the Sixth Circuit cited *Panetti* in announcing such a rule, so the Court recognizes it as the law.

'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 957 (quoting *Ford*, 477 U.S. at 417, 422). Justice Kennedy then conducted an analysis examining primarily how Justice Marshall arrived at his conclusion.

Justice Kennedy referenced the following passage from *Ford* as the "foundation for th[e] principle" that the Constitution places a substantive restriction on the state's power to execute an insane prisoner:[14]

> "[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life .... Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."

Id. at 957 (quoting *Ford*, 477 U.S. at 409-10). He then acknowledged the various rationales underpinning this prohibition mentioned by Justice Marshall in *Ford*, writing:

> Explaining the prohibition against executing a prisoner who has lost his sanity, Justice Marshall in the controlling portion of his opinion set forth various rationales, including recognition that "the execution of an insane person simply offends humanity," that it "provides no example to others," that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it,"; that "madness is its own punishment," and that executing an insane person serves no retributive purpose.

Id. at 958 (citations omitted). Justice Kennedy then focused in on the last of these listed rationales:

> Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.

[14] Justice Kennedy noted that Justice Powell joined the part of the opinion that produced the quoted language, and accordingly found that it constituted a "majority" opinion (capable, then, of announcing a holding, i.e., precedent).

Id. at 958. In so finding, Justice Kennedy ultimately found that "[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.

Panetti therefore implied that the numerous common law rationales underpinning the prohibition on the execution of the "insane" remained relevant when determining the proper scope of *Ford*-based claims asserting an Eighth Amendment prohibition of petitioners' executions. *Id.* ("[U]nder a similar logic the other rationales [the rationales unrelated to effectuate the retributive purpose of criminal sanctions] set forth by *Ford* fail to align with the distinctions drawn by the Court of Appeals.").[15] However, despite the various rationales still apparently at play, Justice Kennedy seemed to focus in on the above-referenced statements of Justices Marshall and Powell in their respective *Ford* opinions. [16]

Madison

In *Madison v. Alabama*, 586 U.S. 265 (2019), in a majority opinion authored by Justice Kagan, the Supreme Court ultimately announced the standard hinted at in *Panetti*[17] and also

[15] It is important to note the context of the decision in *Panetti*. In essence, the Fifth Circuit had furnished a test from its reading of *Ford* that stated that "competency is determined by whether a prisoner is aware that he is going to be executed and why he is going to be executed." *Id.* at 956 (quotations and citations omitted). The majority in *Panetti* found this test "too restrictive" because under the rationales embraced by the majority, execution of a petitioner is impermissible unless the petitioner has a "rational understanding"—and not just an "aware[ness]" of the reason for his execution. *Id.*at 956-58.

[16] The Court is referring here to the statements from *Ford* that Justice Kennedy identified as follows: (i) "Justice Marshall['s] . . . indicat[ion] that the Eighth Amendment prohibits execution of 'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications'"; and (ii) "Justice Powell['s] . . . assert[ion] 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.'" *Panetti*, 551 U.S. at 957 (quoting *Ford*, 477 U.S. at 417, 422).

[17] Although this Court is not necessarily convinced that *Panetti* in fact announced any "standard," *Madison* interpreted that case as providing one (which it then called the *Panetti* standard). The so-called *Panetti* standard—which is actually a test specifically for determining the success of a *Ford*-based claim—asks "whether a prisoner's mental state is so distorted by a mental illness that he lacks a rational understanding of the State's rationale for his execution." *Madison*, 586 U.S. at 269 (quotations omitted). The Court is

identified the rationales that actually support the substance of that standard.[18] Regarding the *Panetti* standard, Justice Kagan wrote that in the analysis of *Ford*-based claims, "the critical question is whether a prisoner's mental state is so distorted by a mental illness that he lacks a rational understanding of the State's rationale for [his] execution." *Madison*, 586 U.S. at 269 (internal quotation marks omitted) (brackets original). In discussing how the Supreme Court arrived at this test in *Panetti*, Justice Kagan explained:

> *Ford*, the Court now noted, had not provided specific criteria [for the appropriate standard of competency]. But *Ford* had explored what lay behind the Eighth Amendment's prohibition, highlighting that the execution of a prisoner who cannot comprehend the reasons for his punishment offends moral values and serves no retributive purpose. Those principles, the *Panetti* Court explained, indicate how to identify prisoners whom the State may not execute.

Madison, 586 U.S. at 269 (internal quotation marks and citations omitted). From this discussion, it is clear that the various rationales (for prohibiting executions of the insane) found at common law and discussed in *Ford* had been whittled down to just two: 1) such executions' offending of moral values and 2) the failure of such executions to achieve a retributive purpose. It is not clear whether the other rationales mentioned in the plurality opinion in *Ford* (such as, for example, *furiosus solo furore punitur*, or the purported common law prohibition on executing "idiots") somehow were folded into or reflected in these rationales or whether they were disregarded

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bound by *Madison's* interpretation of *Panetti* as having announced the standard in advance of *Madison* stating the standard; therefore, the Court uses "*Panetti* standard" to refer to the test for *Ford*-based claims that, according to Justice Kagan's majority opinion in *Madison*, *Panetti* announced.

In this Court's view, what *Panetti* actually *did* do was find that (as previously discussed) the Fifth Circuit's standard for *Ford*-based claims was too restrictive under the opinions in *Ford*. That is not the same as *Panetti* announcing a comprehensive standard of its own. But again, the Court refers to this as the "*Panetti* standard," rather than as the "*Madison* standard" as the Court is tempted to do.

[18] The Court reiterates that the Supreme Court in *Madison* identified *Panetti* as having created such a standard. Therefore, although the Court continues to refer to this standard as the "*Panetti* standard" it makes clear that it, in its view, was *Madison* that genuinely announced such a standard.

altogether. Nevertheless, *Madison* made clear that these two rationales (referred to herein as the "offense to morality" and "no retributive purpose" rationales) were the ones that supported the *Panetti* standard.[19]

At various places in *Madison*, Justice Kagan further identified these two rationales as underpinning the *Panetti* standard. First, she discussed the question of whether failure to remember committing a crime was enough, on its own, to "prevent a State from executing a prisoner[.]" *Id.* at 276. She opined that the application of the *Panetti* standard demonstrated that it was not. In explaining why, Justice Kagan wrote:

> The same answer follows from the core justifications *Panetti* offered for framing its Eighth Amendment test as it did. Echoing *Ford, Panetti* reasoned that execution has no retributive value when a prisoner cannot appreciate the meaning of a community's judgment. But as just explained, a person who can no longer remember a crime may yet recognize the retributive message society intends to convey with a death sentence. Similarly, *Ford* and *Panetti* stated that it "offends humanity" to execute a person so wracked by mental illness that he cannot comprehend the meaning and purpose of the punishment. But that offense to morality must be much less when a person's mental disorder causes nothing more than an episodic memory loss. Moral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall.

Id. at 276-77. Justice Kagan thus again emphasized the "offense to morality" and "no retributive purpose" rationales in explaining how the *Panetti* standard operated to produce the answer that the state was not prevented from executing a prisoner merely because the prisoner could not remember

[19] True, Justice Kagan had the following to say about the Supreme Court's discussion in *Ford* finding that the Eighth Amendment prohibited executing prisoners who have "lost their sanity": "Surveying both the common law and state statutes, the Court found a uniform practice against taking the life of such a prisoner. *Among the reasons* for that time-honored bar, the Court explained, was a moral 'intuition' that 'killing one who has no capacity' to understand his crime or punishment 'simply offends humanity.'" *Madison*, 586 U.S. at 268 (quoting *Ford*, 477 U.S. at 407, 409) (emphasis added). This represents an acknowledgment that there were reasons, in addition to the "offense to morality" rationale and the "no retributive purpose" rationale, that underpinned the Supreme Court's conclusion in *Ford* about the Eighth Amendment prohibition of the execution of the insane. However, Justice Kagan, in explaining *Panetti*, illustrates that *Panetti* picked "[t]hose principles" to identify prisoners that the state may not execute. *Id.* at 269. As such, the Court is bound by *Madison's* interpretation of *Panetti*, and the apparent "whittling down" of the rationales from those originally announced in *Ford* to that of "offense to morality" and "no retributive purpose."

committing his capital offense. This clearly marks an indication that the *Madison* Court read *Panetti* as focusing on these two rationales.

Second, Justice Kagan discussed the question of whether the Eight Amendment prohibited the execution of an inmate suffering from dementia (as opposed to a "delusional disorder," something perhaps more associated with "insanity" than is something like dementia). Justice Kagan found that the content of the *Panetti* standard revealed the answer to that question: an inmate suffering from dementia would be afforded the protections of the Eighth Amendment only if he was unable to rationally understand why the State was seeking execution. In explaining this conclusion, Justice Kagan wrote:

> [H]ere too, the key justifications *Ford* and *Panetti* offered for the Eighth Amendment's bar confirm our conclusion about its reach. As described above, those decisions stated that an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence. See *Panetti*, 551 U.S. at 958–959, 127 S. Ct. 2842; *Ford*, 477 U.S. at 409, 106 S.Ct. 2595; *supra,* at ——— – ———. And they indicated that an execution offends morality in the same circumstance. See 551 U.S. at 958, 960, 127 S.Ct. 2842; 477 U.S. at 409, 106 S.Ct. 2595; *supra,* at ——— – ———. Both rationales for the constitutional bar thus hinge (just as the *Panetti* standard deriving from them does) on the prisoner's '[in]comprehension of why he has been singled out' to die. 477 U.S. at 409, 106 S.Ct. 2595.

Madison, 586 U.S. at 278-79 (brackets original). Again, this discussion clearly indicates that the majority in *Madison* read *Panetti* as focusing on the "offense to morality" and "no retributive purpose" rationales. Further, the use of "both rationales" implies that these two rationales are the *only* two remaining rationales underpinning the "constitutional bar" as well as the "*Panetti* standard." *Id.*

Summary of the "Rationale" Discussions in *Ford*, *Panetti*, and *Madison*

In summary, this Court finds that, although *Ford* originally discussed multiple potential rationales found at common law for prohibiting the execution of the "insane", the Supreme Court

has culled the rationales supporting what ultimately became the *Panetti* standard to just two: the "offense to morality" rationale and the "no retributive purpose" rationale. This Court finds that in so doing, the Supreme Court has limited *Ford*-based claims to those that are supported by both of the remaining rationales underpinning the *Panetti* standard. The result is that the scope of *Ford*-based claims is now clearly defined, in a manner consistent with those rationales, via the *Panetti* standard.

Scope of the *Panetti* Standard

The answer to the second question posed in *Madison* is telling as to how the Supreme Court conceived the scope of the *Panetti* standard. As previously discussed, "the second question raised [in *Madison* was] whether *Panetti* permit[ted] executing Madison merely because he suffer[ed] from dementia, rather than psychotic delusions." *Id.* at 274. The core of this question went to whether the *Panetti* standard applied to dementia, or whether instead it was cabined to the "psychotic delusions" that affected the prisoner in *Panetti* itself. Justice Kagan wrote that:

> *Panetti* has already answered the question. Its standard focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. Conversely, that standard has no interest in establishing any precise *cause*: psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.

Id. at 278 (citations omitted) (emphasis original). Justice Kagan went on to explain that "most important[ly], *Panetti* framed its test, as just described, in a way *utterly indifferent to a prisoner's specific mental illness*. The *Panetti* standard concerns, once again, not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Id.* at 278 (emphasis added).

Clearly, then, the *Panetti* standard encompasses all "mental illness" with which a prisoner could be afflicted. *Madison* clearly states that the specific type of illness or a particular diagnosis

is not what is important; rather, what matters is only the *effect* of that illness on the prisoner—the requisite lack of comprehension of the reason for the prisoner's execution. Therefore, this Court finds that there simply is no room under *Madison* for treating *Ford*-based claims as protecting a separate and distinct category of persons (such as common law "idiots"). A claim based on a prisoner falling within a group of persons would sidestep the *Panetti* standard, which has nothing to do with whether a person falls into a particular category of individuals (or, for that matter, has a particular *cause* for the kinds of mental issues that *Madison* recognized brought persons within the scope of "the insane"). And because *Panetti* is the standard for all *Ford*-based claims, a claim that sidesteps the *Panetti* standard is not a *Ford*-based claim. And, relatedly, such a claim would not effectuate the second rationale for the *Panetti* standard, because such a claim could exempt a petitioner from execution—based merely and solely on his being a particular kind of person—entirely irrespective (and without asking the question) of whether his execution would serve no retributive purpose.

Conclusion

Ultimately, the Court in *Madison* made clear, even if not explicitly, that, for *Ford*-based claims, the category of defendants protected from execution by the Eighth Amendment contains only those defendants that cannot reach a rational understanding of the reason for their executions. The Supreme Court practically said as much at the start of its opinion in *Madison*, where Justice Kagan wrote:

> The resulting rule, now stated as a matter of constitutional law, held a category of defendants defined by their mental state incompetent to be executed. The Court clarified the scope of that category in *Panetti v. Quarterman* by focusing on whether a prisoner can reach a rational understanding of the reason for [his] execution.

Madison, 586 U.S. at 268 (citations and quotations omitted).

For a *Ford*-based claim, the "sole inquiry" is whether that prisoner can rationally understand the reasons for their execution. *Madison*, 586 U.S. at 277. This Court therefore finds that the *Panetti* standard necessarily applies to all *Ford*-based claims and that a *Ford*-based claim purportedly separate and distinct from one subject to the *Panetti* standard is neither anticipated nor allowed by the Supreme Court after *Madison*.[20]

ANALYSIS OF SECOND OR SUCCESSIVE ISSUE

Having painstakingly explained what a *Ford*-based claim is and is not, the Court next addresses the crucial issue that, as explained below, turns primarily on whether Petitioner's claim is a *Ford-based* claim: the "second or successive" issue.

I. Legal Standards Governing Transfer of Habeas Corpus Cases from the District Court to the Court of Appeals.

Another district court in this circuit, in part by extensively quoting a Sixth Circuit opinion, provided the following helpful summary of the law and procedure regarding the conditional requirement to transfer habeas corpus cases to the Court of Appeals:

> "Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 'a state prisoner always gets one chance to bring a federal habeas challenge to his conviction.' " *In re Hill*, 81 F.4th 560, 567 (6th Cir. 2023) (quoting *Banister v. Davis*, 140 S. Ct. 1698, 1704 (2020)). "But after that, the road gets rockier." *Id.* "For petitions filed after the first one – 'second or successive' petitions in the

[20] The Court notes that in Petitioner's Reply, he argues that:

> The inquiry is not whether *Panetti* may conceivably protect "idiots." The query is whether our existing constitutional protections are consistent with the original meaning of the Eighth Amendment at the time of the Founding. Mr. Black's historical analysis conclusively shows that "idiocy" standard that existed at common law was not only different from the *Panetti* standard but offered substantive protection to individuals outside of *Panetti's* ambit.

(Doc. No. 188 at 35-36).

Without further commenting on this argument, the Court will note that (as discussed herein), the "second or successive" issue is a threshold issue, and that issue does not turn on whether our existing constitutional protections are consistent with the original meaning of the Eighth Amendment at the time of the Founding.

language of the statute – applicants must overcome strict limits before federal courts will permit them to seek habeas relief." *In re Stansell*, 828 F.3d 412, 413 (6th Cir. 2016) (citing 28 U.S.C. § 2244(b)(3)(A)). "To file a second or successive application in a district court, a prisoner must first obtain leave from the court of appeals based on a 'prima facie showing' that his petition satisfies the statute's gatekeeping requirements." *Banister*, 140 S. Ct. at 1704 (citing 28 U.S.C. § 2244(b)(3)(C), (b)(1) and (b)(2)); *see also Magwood v. Patterson*, 561 U.S. 320, 330-31 (2010); Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).").

This District Court lacks jurisdiction to consider a "second or successive" petition filed without authorization and must transfer such a petition to the Court of Appeals for the Sixth Circuit for consideration. *Franklin v. Jenkins*, 839 F.3d 465, 475 (6th Cir. 2016); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam); 28 U.S.C. § 1631. The Sixth Circuit may authorize the district court to consider a successive petition only if petitioner makes the prima facie showing required in the statute. 28 U.S.C. § 2244(b)(3). The determination of whether a habeas application is second or successive, however, is committed to the district court in the first instance. *In re Smith*, 690 F.3d 809, 810 (6th Cir. 2012).

The Sixth Circuit recently provided a "roadmap" for determining whether a petition is second or successive. *In re Hill*, 81 F.4th at 569 (6th Cir. August 25, 2023). The [Sixth Circuit] said:

> So first, we ask, is the second petition challenging a new judgment or an old judgment? *See Magwood*, 561 U.S. at 330-33, 130 S. Ct. 2788; *In re Caldwell*, 917 F.3d 891, 893 (6th Cir. 2019); *In re Stansell*, 828 F.3d 412, 415 (6th Cir. 2016); *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015).
>
> If it's a new judgment, then the petition is not "second or successive," and we turn to the merits of the petition. *See King*, 807 F.3d at 157. If it's the old judgment that the petitioner challenged in his first petition, we next ask, is the claim presented an old claim or a new claim? *See In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). If it's an old claim—that is, one that was presented in the first petition—then it's a "second or successive" petition that must be dismissed under § 2244(b)(1). If it's a new claim, we ask whether it was either unripe or ruled unexhausted at the time of the first habeas filing. If so, then the petition isn't "second or successive." *See id.* at 627. If not, under the guidance we have from the Supreme Court, the petition is "second or successive," and the claim must meet the gatekeeping provisions under § 2244(b)(2)(B) to survive.

> Although a mouthful, we can sum it up this way: When a second-in-time petition raises a new claim purporting to question the previously challenged judgment, the new claim was neither unripe nor unexhausted the first go-around, and the petitioner nevertheless failed to raise the claim, it is "second or successive." *See In re Coley*, 871 F.3d 455, 457-58 (6th Cir. 2017).

In re Hill, 81 F.4th at 569.

Sevilla v. Shoop, No. 2:23-CV-3297, 2023 WL 7018975, at *2–3 (S.D. Ohio Oct. 25, 2023).

Notably, a petitioner is challenging an "old" judgment within the meaning of the above analytical framework if he "is challenging the same judgment he challenged in his first petition [rather than] a different judgment." *In re Hill*, 81 F.4th at 570.

II. Analysis of Whether Petitioner's Case Must Be Transferred to the Sixth Circuit as Second or Successive.

As indicated above, the Court must determine at the outset whether Petitioner is challenging an "old" judgment or a "new" judgment. *In re Hill*, 81 F.4th at 569. Petitioner is plainly challenging an old judgment because he is challenging the same judgment he challenged in his first petition (Doc. No. 8, "First Petition"), namely the state-court judgment imposing his death sentence.

Next, the Court must ask whether Petitioner is raising an old claim or a new claim. *Id.* at 569. To answer that question, the Court must "define the claim at issue." *Id.* at 570. In broadest strokes, the claim is that Petitioner is "incompetent to be executed." (Doc. No. 176 at 14). (*See also, e.g., id.* at 77) (praying that the Court "[d]eclare [only] that [Petitioner] is presently incompetent to be executed."). More precisely (and narrowly), the claim is that Petitioner is incompetent because three premises are true—all of which, the Court notes, need to be true in order for the claim to have merit if indeed it can even be entertained.

The first premise is that (according to Petitioner), the Eighth Amendment incorporates common law prohibitions of execution that existed at the time that the Eighth Amendment was adopted. (*Id.* at 51) (asserting that "*Ford* long ago established that common law prohibitions were incorporated into the Eighth Amendment"); (*id.* at 46) (asserting that "any punishment that was barred at the Founding was incorporated into the Eighth Amendment's protection against cruel and usual punishment" (citing *Ford*, 477 U.S. at 405)).[21]

The second premise is that the common law prohibited the execution of "idiots."[22] (Doc. No. 176 at 53) (asserting that "[a]s explained in *Ford*, the common law prohibits the execution of the non compos mentis, which includes both the 'insane' and 'idiots.'").[23] The third and final premise is that Petitioner falls within the category of "idiots." (Doc. No. 176 at 76) ("[Petitioner] meets the criteria for 'idiocy' at common law and is incompetent to be executed.") (*id.* at 77)

[21] This premise is reflected elsewhere in the Petition as well. (Doc. No. 176 at 48) (asserting that "the Eighth Amendment codified a pre-existing right" (internal quotation marks omitted)); (*id.* at 49) (asserting that "to animate the text of the Eighth Amendment, courts and litigants must examine the common law at the time of the Founding"); (*id.* at 52) (stating that "'[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" (quoting *Ford*, 477 U.S. at 405)); (*id.* at 52) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments." (quoting *Solem v. Helm*, 463 U.S. 277, 286 (1983))).

[22] The Court notes that Petitioner's attorneys, who naturally would have no desire to insult or make fun of their client, clearly use the terms "idiot[s]" and "idiocy" (the adjectival form of the word "idiot") in a legal/technical sense rather than a pejorative or flippant sense, as is denoted by their use of quotation marks around those terms. The Court herein follows their lead.

[23] In at least one place, Petitioner forgoes asserting the first two premises and, essentially in their place, states a proposition (which, if true, would eliminate the need to separately establish each of the first two premises): "In *Ford v. Wainwright*, the Supreme Court expressly held that both 'idiots' and 'lunatics' were incompetent to be executed. *Ford*, 477 U.S. at 406." (Doc. No. 176 at 45). As noted below, however, this proposition is simply false.

("[Petitioner] has demonstrated that he meets the common law 'idiocy' standard and is therefore incompetent to be executed.").

Respondent seems to imply that Petitioner's pending claim is in substance, not one of incompetency (under *any* theory of incompetency, be it a *Ford*-based theory or otherwise), but rather one of categorical ineligibility for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002) based on intellectual disability, a claim that Petitioner previously asserted[24] without success.[25] (Doc. No. 186 at 2) (asserting that Petitioner's "argument for idiocy mimics his

[24] (Doc. No. 176 at 16) (where Petitioner notes the "state court adjudication of his intellectual disability claim filed pursuant to *Atkins*").

[25] In *Atkins*, the Court held that the execution of mentally retarded offenders constituted "cruel and unusual punishment" prohibited by the Eighth Amendment. *Atkins*, 536 U.S. at 321. Significantly, however, the majority opinion in *Atkins* did not present its rule as one regarding competence; at no point did the majority refer to mentally retarded offenders as being "incompetent," lacking the "competency," etc., to be executed. Instead of describing "mentally retarded" offenders as a category of offenders who are incompetent (or lacking the competency) to be executed, the majority referred to mentally retarded offenders as a category of offenders "ineligible" for the death penalty. *See Atkins*, 536 U.S. at 320 ("The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty."). The Supreme Court has since then referred to an *Atkins* claim as a claim of *ineligibility* for the death penalty. *See, e.g., Schriro v. Smith,* 546 U.S. 6, 6 (2005) (referring to a claim the petitioner previously could have made (but did not make) under *Atkins* as a claim that "he was mentally retarded [and] that his mental retardation made him ineligible for the death penalty.").

The Sixth Circuit has since done likewise. *See, e.g., Hill v. Shoop*, 11 F.4th 373, 434 n.18 (6th Cir. 2021) ("conclu[ding] that Hill is intellectually disabled and thus ineligible for execution under *Atkins*"); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (characterizing the issue on an *Atkins* claim as "whether [the] particular claimant is retarded and ineligible for death."). Cases like these do not refer to the petitioner therein as being incompetent (or lacking competence) to be executed; to the extent that they refer to competence or lack thereof, it is merely to note that being "intellectually disabled" (or, synonymously, having "intellectual disability") does *not* mean that the petitioner had been *incompetent to stand trial*. *See Hill*, 11 F.4th at 434 n.18. The cases tend not to note additionally that having intellectual disability does not necessarily mean that the petitioner is *incompetent to be executed* (as opposed to ineligible for the death penalty), but some case certainly seem to imply this.

In short, a claim under *Atkins* is a claim that the offender who received a death sentence falls into a category of persons *ineligible for the death penalty* from the outset. In an *Atkins* claim, of course, the category was defined (using now outdated terminology) as "mentally retarded" offenders, but that is not the only such category. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 466 n.1 (2012) ("Jackson was ineligible for the death penalty under *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion), which held that capital punishment of offenders under the age of 16 violates the Eighth Amendment.").

argument in support of his rejected intellectual disability claim."). The two kinds of claims are distinct; the latter kind of claim is not a claim of incompetency, and still less could it be a claim of incompetency based specifically on "idiocy," as Petitioner acknowledges. (Doc. No. 176 at 38) (asserting that "the common law conception of 'idiocy' differs greatly from our modern conception of intellectual disability."). Were Petitioner's current claim properly treated as a claim of categorical ineligibility based on intellectual disability, merely masquerading as a claim of incompetency, that would independently support Respondent's "second or successive" argument in particular ways the Court forgoes discussing herein. But to Petitioner's benefit, the Court treats the claim in the Petition as if it is indeed a claim of incompetency.[26]

Nevertheless, the Court must treat Petitioner's incompetency claim for what it is. That is, the Court must recognize the *kind* of incompetency claim that it is (and is not). It is a claim based

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Notably and thankfully, as indicated in the above quote from the Order from the Tennessee Supreme Court, the terminology of "mentally retarded criminals" used in *Atkins* has since been replaced with the terminology of offenders "with intellectual disability." *See Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Atkins* for the proposition that under the Eight Amendment, "persons with intellectual disability may not be executed."); *id.* at 704 ("Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."). Also notably, *Hall* addressed the question of "how intellectual disability must be defined in order to implement . . . the holding of *Atkins*." *Id.* at 709. Herein, the Court need not address that question.

A final point about terminology. Herein, when reference is made to competency or incompetency without specification of the kind of competency to which reference is made, the reference is to (in)competency to be executed rather than (in)competency to stand trial.

[26] If Respondent is correct that Petitioner's claim "mimics" his prior *Atkins* claim, (Doc. No. 186 at 2), that does not necessarily negate that Petitioner's claim is a genuine claim of incompetency in the sense that it is based on an argument (be it persuasive or unpersuasive) for why the Eighth Amendment prohibits his execution on the grounds of incompetency in particular. As noted herein, the Court assumes for present purposes that the Petitioner does present such a claim. Nevertheless, to the extent that Petitioner's claim (even if treated as a genuine, not to say persuasive, claim of incompetency) resembles an *Atkins* claim, such resemblance still could potentially hurt Petitioner's position on the "second or successive" issue—and in fact it does. As discussed herein, in key respects, his current claim *does* resemble an *Atkins* claim (rather than a *Ford*-based claim), and this resemblance indeed is telling as to why he does not prevail on the "second or successive" issue—more specifically, why his petition cannot avoid "second or successive" status based on the purported applicability of the special ripeness rule that exists for *Ford*-based claims but not for claims like an *Atkins* claim.

on Petitioner being a particular *kind* of person—an "idiot"—i.e., falling into a particular category of persons ("idiots"). Even assuming arguendo (as the Court has done herein) that this is a claim of *incompetency to be executed* rather than a claim of *ineligibility for the death sentence*,[27] the

[27] In arguing that the Eighth Amendment categorically prohibits the execution of "idiots," Petitioner does not necessarily persuade the Court that such a prohibition would properly be perceived as a prohibition on *execution* based on *incompetency* rather than a prohibition on a *death sentence* based on *ineligibility for the death penalty*. As the Court hopes it has made clear, the two are not the same thing, and the Court does not see where Petitioner establishes (or even truly attempts to explain) that the common law prohibition of the execution of "idiots"—which as noted is central to Petitioner's claim—was based on "idiots" being deemed incompetent to be executed rather than ineligible for the death penalty. Take, for example, the following portion of the Petition:

> In *Ford v. Wainwright*, the Supreme Court expressly held that both "idiots" and "lunatics" were incompetent to be executed. *Ford*, 477 U.S. at 406. The Supreme Court again affirmed that such a protection exists in *Penry v. Lynaugh. Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("It was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities.").

(Doc. No. 176 at 45-46). The second sentence actually suggests, if anything, that any such prohibition was based on *ineligibility* for the death sentence (and indeed ineligibility for *any* criminal sanctions). As for the first sentence, it is inaccurate in multiple respects.

First, *Ford* did not hold (and certainly did not "expressly" hold) that "idiots" (or, for that matter, "lunatics") were incompetent to be executed. *Ford* mentions "idiots" (or any version of that word) only once, in the plurality opinion. There, the plurality merely mentioned that Blackstone had commented that "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities." *See Ford*, 477 U.S. at 406 (brackets in original). As previously mentioned, the plurality opinion alone, of course, by itself does not suffice to announce *any* holding. The holding of *Ford* instead has to be derived by looking at Justice Powell's concurring opinion. *See Thompson* v. *Bell*, 580 F.3d 423, 434 (6th Cir. 2009) ("Powell's concurrence, needed to create a majority, became the controlling opinion in *Ford* . . . ."). And Powell's concurrence says nothing about the Eighth Amendment categorically prohibiting the execution of "idiots." What it does say, consistent with the plurality opinion, is that "the practice of executing the insane is barred by our own Constitution." 477 U.S. at 418 (Powell, J., concurring). And thus, the Sixth Circuit has stated the holding of *Ford* as follows (quoting words from Part II of the plurality opinion, which Justice Powell joined): "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Thompson*, 580 F.3d at 434 (quoting *Ford*, 477 U.S. at 409–10) (brackets in original). But it is by no means clear from *Ford* that for purposes of this rule, an offender is automatically included within the category of "insane" merely because the offender qualifies as an "idiot." To the contrary, Justice Powell noted that the holding left open the issue of what it meant to be "insane" for purposes of this rule and that on this issue, he and the plurality "differ[ed] substantially." *Ford*, 477 U.S. at 418. And indeed not even the plurality itself defined "insanity." *See Panetti*, 551 U.S. at 939 (Thomas, J., concurring) ("The four-Justice plurality in *Ford* did not define insanity"). And although the two differing views (of Justice Powell and the plurality) were similar in an important respect, *see Madison,* 586 U.S. at 290, they did not converge in a way establishing that to be an "idiot" was necessarily to be "insane" for purposes of *Ford*'s incompetency rule.

claim is not a *Ford*-based claim. That is because, as indicated above, by now such a claim turns on "whether the prisoner can [as of the time of the scheduled execution] rationally understand the reasons for his death sentence." *Madison v. Alabama*, 586 U.S. 265, 277 (2019). Such a claim has absolutely nothing to do with whether the petitioner fits into a particular category of persons, let alone a particular category of persons that is defined by immutable characteristics present at birth or shortly thereafter—which, according to Petitioner, is true for "idiots." (*See* Doc. No. 176 at 62).

So, Petitioner's claim is not a *Ford*-based claim,[28] which is highly relevant to the analysis below. But it *is* a new claim because Petitioner plainly has not previously presented his instant novel incompetency claim. So the Court next asks "whether [the claim] was either unripe or ruled unexhausted at the time of the first habeas filing." *In re Hill*, 81 F.4th at 569.

The time of Petitioner's first habeas filing was April 16, 2001.[29] (Doc. No. 8). As discussed above, Petitioner's current incompetency claim—unlike a *Ford*-based claim—is one based on Petitioner being a kind of person (an "idiot") who by Petitioner's own definition has personal

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Second, even if it were true that the Court should accept the *Ford* plurality's single reference to "idiot[s]," made by quoting Blackstone, as a holding that the Eighth Amendment prohibits the execution of someone who is an "idiot," as indicated above, that would not support the notion that the prohibition is based specifically on *incompetency to be executed* rather than ineligibility for the death sentence.

But as noted above, the Court nevertheless assumes for present purposes that the categorical prohibition Petitioner asserts via his claim is a prohibition based on incompetency in particular.

[28] One might ask why the Petition did not assert a *Ford*-based claim, given that such a claim clearly would now be ripe and yet not second or successive and is, of course, a well-established (and perhaps the only cognizable) kind of incompetency claim. Although the Court need not and does not provide an answer, the answer may be that for reasons to which Respondent alludes (but the Court forgoes discussing herein), Petitioner may face daunting obstacles to establishing such a claim.

[29] Given the history of Petitioner's filings of habeas corpus petitions in this Court, the Court could imagine an argument for why the time of Petitioner's first habeas filing, for purposes of the above-quoted rule from *In re Hill*, could be deemed to be later. But that actually would hurt Petitioner's position on the "second or successive" issue because it would mean that his current incompetency claim would have had *more* time to become ripe and thereby make the current Petition second or successive.

characteristics that are present at birth or very early in life. (Doc. No. 176 at 62). And it strikes the Court as virtually impossible that the kinds of characteristics that make an offender an "idiot" could somehow remain unrecognized until the offender is old enough to reach the federal habeas phase of a capital case. The Court agrees with Respondent that there is no reason why a petitioner could not bring such a claim "much sooner than when an execution date is scheduled." (Doc. No. 185 at 21) ("It is also readily apparent that, due to the early onset and permanence of idiocy (however defined), any purported claim for sentencing relief based on idiocy could and should be raised much sooner than when an execution date is scheduled."). The Court further agrees with the following from Respondent regarding Petitioner's claim in particular:

> A ready review of the facts presented by [Petitioner] to support his new idiocy claim confirms that it is not newly ripened, as those facts existed at the time of his first habeas corpus petition. Indeed, he offered the same proof in support of his rejected intellectual disability claim. Black first relies on various intelligence quotient (I.Q.) tests conducted over a span of many years to support his new claim of idiocy. (D.E. 176, PageID# 1484-1486, 1533.) He relied on those same test results during his prior habeas corpus proceedings to support his intellectual disability claim. *Black*, 866 F.3d at 738. Black also relies on facts about his childhood, his poor performance in school, and various facts concerning his overarching assertion that he "has always been incapable of managing his own affairs." (D.E. 176, PageID# 1486-1490, 1534-35.) He offered the same evidence in this Court to support his intellectual disability claim. *Black*, 2013 WL 230664, at *15- *19.
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> Black does rely upon new evidence to show that he has moderate dementia. (D.E. 176, PageID# 1481-82, 1516.) But dementia is already a relevant consideration in a true Ford claim, which Black does not advance in this Court. *See Madison*, 586 U.S. at 275 ("[A] person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution.").
>
> Black failed to raise an idiocy claim in his first habeas corpus petition, when he fully litigated an intellectual disability claim under the same proof. He could and should have raised this claim at that time. For that reason, his idiocy claim is not newly ripened, and the petition is second or successive under 28 U.S.C. § 2244(b).

(Doc. No. 185 at 23).

In the Court's view, Petitioner does not challenge Respondent's factual recitation of the evidence purportedly supporting Petitioner's current claim that was also available at the time of the First Petition. Petitioner instead does two things. First, he asserts that "Respondent's assertion that proof supporting Mr. Black's idiocy claim 'emerge[d] long before the filing of a first habeas corpus petition' is false" (Doc. No. 188 at 10) (alteration in original). To support this assertion, he writes:

> Mr. Black put forth new evidence to support his "idiocy" claim that was not, and could not have been, presented to support an intellectual disability claim. This new evidence comes from evaluations conducted in 2025 and includes Mr. Black's diagnosis of moderate dementia and brain atrophy. R. 183-17, PageID#2653 (Martell); id., PageID#2684-89 (Gur). His new diagnoses of dementia and progressive erosion of brain tissue could only be presented now because they did not exist previously and were not diagnosed until his most recent 2025 evaluations.

(*Id.* at 9-10). This argument by Petitioner is a red herring. The 2025 evaluations support a claim *of recent changes* to Petitioner's mental or intellectual capacity, and thus could conceivably support a *Ford*-based claim. But as noted, by Petitioner's own reckoning, "idiocy" is defined by characteristics present at or shortly after birth. So evidence of recent changes with respect to Petitioner (an elderly man) is irrelevant to the claim that he is an "idiot."

Second, Petitioner challenges Respondent's conclusion that (because evidence to support a claim of "idiocy" was available at the time of filing the First Petition) Petitioner's current claim could and should have been brought earlier. In Petitioner's view, essentially, even if evidence to support a claim of "idiocy" was available at the time of Petitioner's First Petition, that is irrelevant because the claim was categorically unripe for roughly another 24 years (until his execution date was set). Petitioner claims in effect that his current claim was categorically unripe when his First Petition was filed because it is an incompetency claim and "[t]he Supreme Court has repeatedly ruled that a competency to be executed claim is not ripe until execution is imminent." (Doc. No.

176 at 37) (citing *Panetti*, 551 U.S. at 947; *Martinez-Villareal*, 523 U.S. at 643). But neither cited case supports the quoted proposition. A review of the cited pages reveals that neither case addressed whether an incompetency claim that (like Petitioner's current claim) is *not* a *Ford*-based claim is unripe until execution has been scheduled (or is otherwise imminent). Instead, they addressed the ripeness only of a claim of incompetency that is a *Ford*-based claim *in particular*. It is telling that the Petition itself in places refers specifically to "*Ford* claim[s]" (rather than incompetency claims of all kinds) as being the subject of the ripeness rule upon which Petitioner relies. (Doc. No. 176 at 14-15).

It is true that *Ford*-based claims are unripe until an execution date is set. But there is every reason to believe that an incompetency claim like Petitioner's (again, treating it as an incompetency claim even though it is actually not easily distinguishable from a claim of *ineligibility* for the death penalty) is covered *not* by the rule of ripeness governing *Ford*-based claims but rather by the normal rules of ripeness, the application of which favors Respondent's conclusion that the claim was ripe at the time the First Petition was filed. To begin with, the language of the ripeness rule from *Panetti* on which Petitioner relies refers *only* to *Ford*-based claims, and not to just *any* claim that a petitioner can convince a court to treat as a claim of *incompetency for execution* rather than *ineligibility for the death penalty*. *Panetti*, 551 U.S. at 947 ("The statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."). Additionally, the rationale for *Panetti*'s ripeness rule is closely tied to the specific nature of *Ford*-based claims. Respondent accurately explains that rationale:

> A true Ford claim that a capital defendant "has 'lost his sanity' after sentencing," *Madison*, 586 U.S. at 268, does not ripen until execution is imminent because "mental competency is subject to variance over time." *Cooey v. Strickland*, 479 F.3d 412, 423 (6th Cir. 2007) (quoting *Alley v. Little*, 186 Fed. Appx. 604, 607

> (6th Cir. Jun 24, 2006)). "It is indeed possible that last-minute first-instance *Ford* petitioners could be justified by a change in a defendant's mental health." *Id.* (quoting *Alley*, 186 Fed. Appx. at 607).

(Doc. No. 185 at 21).[30] This rationale does not apply at all to the kind of incompetency claim presented in the Petition, as Respondent (adopting a view of "idiocy" that is consistent with Petitioner's view) cogently explains and as the Court has suggested above:

> [A] "last-minute first-instance" capital defendant raising an idiocy claim will never be justified in doing so because the claim would have ripened long before execution became imminent. *Id.* "Idiocy was understood as 'a defect of understanding from the moment of birth,' in contrast to lunacy, which was 'a partial derangement of intellectual faculties, the senses returning at uncertain intervals.'" *Penry*, 492 U.S. at 331 (quoting 1 W. Hawkins, Plea of the Crown, 2 n.2 (7th ed. 1795)). "There was no one definition of idiocy at common law, but the term 'idiot' was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil." *Id.* at 331-32. "[T]he old common law notion of 'idiocy'" placed an "emphasis on a permanent, congenital mental deficiency." *Id.* at 332.

(*Id.* at 21-22). For these reasons, *Panetti*'s special ripeness rule for *Ford*-based claims is simply inapplicable to Petitioner's current claim, even assuming arguendo that (for whatever reason) it is properly considered a claim of incompetency to be executed rather than a claim of ineligibility to receive the death penalty in the first place.[31]

In summary, the Court concludes that Petitioner's (novel kind of) incompetency claim was not unripe at the time of Petitioner's first habeas filing. Therefore, the Court determines that the

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[30] In case the Court has not already made this clear, it notes that *Madison* left no doubt that loss of "sanity" for purposes of a *Ford*-based claim is broad enough to include situations involving not just things like delusion-inducing psychosis, but also "mental illness," "mental disorder," and "psychological dysfunction" writ large. *Madison* 586 U.S. at 278. Relatedly, and as noted above, *Madison* made clear that for purposes of a *Ford*-based claim, what matters is not the specific cause of the petitioner's mental disorder, but rather whether it has the effect of preventing the petitioner from "reach[ing] a rational understanding of why the State wants to execute him." *Id.* at 266.

[31] The Court does wonder why a claim based on personal characteristics present from birth or soon thereafter would not be one for ineligibility for the death penalty in the first place, rather than a claim of incompetency to be executed at the time of execution. But the Court need not resolve that question at this time.

petition is "'second or successive,' and the claim must [be transferred to the Sixth Circuit and there must] meet the gatekeeping provisions under § 2244(b)(2)(B) to survive."[32] *In re Hill,* 81 F.4th at 569.

CONCLUSION

For the reasons stated above, the Court concludes that the Petition (Doc. No. 176) is a second or successive petition under 28 U.S.C. § 2244. Accordingly, the Clerk shall transfer this case to the United States Court of Appeals for the Sixth Circuit.[33]

IT IS SO ORDERED.

Eli Richardson
ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

[32] Alternatively, the claim could survive without meeting those "gatekeeping provisions" if the Sixth Circuit were to disagree with this Court's determination that the Petition is "second or successive."

[33] The Sixth Circuit sometimes refers to transfers based on a petition being second or successive, as transfers of the *petition*, i.e., the document that is the petition. *E.g.*, *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) ("[W]e hold that when a prisoner has sought § 2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631.").

Other times, the Sixth Circuit refers to transfers being of the "case." *See Tyler v. Anderson*, 749 F.3d 499, 508 (6th Cir. 2014) (stating that because the pending petition was appropriately deemed second or successive, "the proper course was for the district court to transfer the case to this court for certification."). The Court follows the latter practice, believing that it more fully reflects that the district court lacks jurisdiction over any aspect of the case and the fact that motions to stay execution—and not just petitions—surely should be deemed to be among whatever it is that is transferred to the Sixth Circuit. Here, the Application For Stay (Doc. No. 177) thus is transferred to the Sixth Circuit as part of the case; for its part, the Court takes no action on it at this time based on the Court's conclusion herein that it lacks jurisdiction over this case due to the Petition being, in the Court's view, a second or successive petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BYRON LEWIS BLACK, Petitioner, v. KENNETH NELSEN, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 3:00-cv-00764 **CAPITAL CASE** **EXECUTION DATE:** **AUGUST 5, 2025**

PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner Byron Black, pursuant to all rights available under Article I § 9 and Article III of the United States Constitution, the Eighth, and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. § 2201, and 28 U.S.C. § 2241 et. seq., including 28 U.S.C. §§ 2241 & 2254, respectfully moves this Court for a writ of habeas corpus declaring he is incompetent to be executed.

I. INTRODUCTION

This is a second in time, non-successive petition for a writ of habeas corpus that relates solely to Mr. Black's competency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). "[T]he Supreme Court has said that not all petitions filed second in time are second or successive. And when a numerically second petition is not second or successive, it isn't subject to the restrictions of 28 U.S.C. § 2244(b)." *In re Hill*, 81 F.4th 560, 568 (6th Cir. 2023), *cert. denied sub nom. Hill v. Shoop*, 144 S. Ct. 2531 (2024) (citations omitted). A petitioner filing a second or successive habeas corpus petition must first move in the appropriate court of appeals to issue an order authorizing the district court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). When a petitioner files a second in time, non-successive habeas petition based on a *Ford* claim, "§ 2244(b)

restrictions simply do not apply." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998). The second-in-time habeas petition may be filed in the appropriate district court without authorization from the court of appeals. It is well-established that habeas petitions based on *Ford* claims are not successive because they typically do not become ripe until an execution date is set. *See Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) ("The statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe.")

Mr. Black first brought this Court a habeas petition in 2000. R. 1, Pro Se, Initial, Unamended Petition.[1] He amended his initial pro se petition in 2001. R. 8, Amended Petition. At that time, Mr. Black raised a claim that he was incompetent to be executed (*id.* at 44), but, following governing precedent, this Court determined that that claim was not yet ripe. R. 82, Memorandum at 71–72. In 2007, Mr. Black returned to this

[1] For the ease of the parties and the Court and in light of Mr. Black's impending execution date, Mr. Black is filing the state court technical record as his exhibit 1 to this petition. All citations in this petition to the state court record will, accordingly, be marked with the pagination of the state court technical record. Citations to the Record in this case will be designated "R."

Court following the state court adjudication of his intellectual disability claim filed pursuant to *Atkins v. Virginia*, 536 US 304 (2002). R. 97 Remand; R. 98, Amendment to Petition for Writ of Habeas Corpus. This Court, again, dismissed Mr. Black's petition. R. 128 at PageID#618. The Sixth Circuit reversed and remanded for further consideration. R. 134, Remand; *Black v. Bell*, 664 F.3d 81, 97-100 (6th Cir. 2011). This Court, finding itself constrained by the scope of the remand, did not consider Mr. Black's proof of his intellectual disability presented for the first time in federal court. R. 161 at PageID#961 ("This Court subsequently considered Petitioner's request to introduce new evidence, and denied the request based on the language of the Sixth Circuit's opinion directing the Court to 'review the record based on the standard set out in *Coleman* . . .'") (citing R. 150, at PageID#742).

On March 3, 2025, the Tennessee Supreme Court set Mr. Black's execution for August 5, 2025. At the time of that setting, Mr. Black's incompetency to be executed claim—previously dismissed by this Court—became ripe. *Martinez-Villareal*, 523 U.S. at 643 (finding that an incompetency to be executed claim was "unquestionably ripe" upon the setting of an execution date); *Panetti*, 551 U.S. at 945 (holding that a *Ford*

claim filed after an execution date is set is not second-or-successive under the meaning of 28 U.S.C. 2241); *see also*, TR at 1 (Order of the Tennessee Supreme Court (setting execution date and ordering Mr. Black to file his "petition alleging incompetency to be executed in the trial court . . .")).

On May 29, 2025, Mr. Black filed his petition alleging his incompetency to be executed in state court. TR at 28-54 (Petition). The state trial court denied his petition without a hearing on June 6, 2025. TR at 768-84 (Order). Mr. Black appealed the trial court's denial of process to the Tennessee Supreme Court on June 9, 2025. TR at 787-88 (Notice of Appeal); Ex. 2, Appellate Brief. The Tennessee Supreme Court affirmed the trial court's denial of a hearing on July 8, 2025. Ex. 3, Order.

Because Mr. Black has exhausted all state remedies for his incompetency to be executed claim, his claim is now ripe for review in this Court. This petition does not constitute a second or successive petition for a writ of habeas corpus under the governing law. *Panetti*, 551 U.S. at 945 ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon

as that claim is ripe."). "AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent." *Id.* at 945. As such, the filing of this writ of habeas corpus in the district court is appropriate and the matter should not be transferred to the United States Court of Appeals for the Sixth Circuit, as it does not constitute a successive habeas petition.

II. JURISDICTION/VENUE

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241(a), and 2254(a). Venue is proper in the Middle District of Tennessee. 28 U.S.C. § 2241(d).

III. PARTIES

Petitioner Byron Black is an inmate of the Tennessee Department of Corrections (TDOC). Mr. Black's TDOC number is 00126220. The TDOC currently houses Mr. Black in Unit 2, Riverbend Maximum Security Institution (RMSI), 7475 Cockrill Bend Industrial Road, Nashville, Tennessee, 37209.

Respondent, Kenneth Nelsen, is the RMSI Warden and an agent of the state. Warden Nelsen's address is Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee, 37209.

IV. PROCEDURAL BACKGROUND

Mr. Black was convicted and sentenced to death in 1989. On direct appeal, a divided Tennessee Supreme Court affirmed his convictions and sentences. *State v. Black*, 815 S.W.2d 166, 170 (Tenn. 1991). Mr. Black exhausted the standard, three-tier appellate review process. *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017); *Black v. State*, No. M2004-01345-CCA-R3PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005); *Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8, 1999); *Black*, 815 S.W.3d at 170. On March 3, 2025, the Tennessee Supreme Court set Mr. Black's execution for August 5, 2025. Pursuant to the procedures outlined in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), the Tennessee Supreme Court remanded Mr. Black's case to the trial court to determine his competency to be executed.

On June 5, 2025, the Tennessee trial court entered a memorandum and order denying relief. The Tennessee Supreme Court denied Mr. Black relief on July 8, 2025.[2]

[2] Mr. Black field a petition for certiorari on July 16, 2025, seeking review of this judgment.

V. FACTS

Mr. Black has dementia, is intellectually disabled, and suffers from profound brain damage. The combination of these conditions results in severely limited intellectual capacity, significant memory loss, and an inability to manage his own affairs.

A. Mr. Black suffers from progressive, debilitating dementia.

Dr. Dan Martell diagnosed Mr. Black with moderate dementia with severe impairment of executive function. TR 63 (Martell 2025). He did so because of Mr. Black's dismal performance on the Dementia Rating Scale-2, a test "that measures multiple cognitive functions associated with dementia." *Id.* Those standardized scores place Mr. Black's functionality in the bottom 3–5% of others his age and, notably, show that he has deficits that "affect his functional independence and decision-making capacity." *Id.*

Mr. Black's neurocognitive deficits also result in "a substantial loss in his ability to find words to express himself." TR 64 (Martell 2025). In 2019, when Dr. Martell first assessed Mr. Black, "he was severely impaired in this area" and fewer than one in 1,000 individuals performed

worse. *Id.*, *see also* TR 532 (Martell 2020). Currently, Mr. Black's expressive language capabilities are "profoundly disabled" and fewer than one in 10,000 individuals performed worse than Mr. Black in this area. *Id.* Further, Mr. Black's "higher order cognitive abilities required for reasoning, problem solving, and abstract thinking have also diminished significantly." *Id.* Mr. Black's dementia is progressive, causing significant impairments in memory, verbal fluency, and executive functioning. TR 63 (Martell 2025); TR 528–29 (Martell 2020). Dr. Martell's neuropsychological testing is confirmed by his clinical assessment and that of Dr. Lea Ann Baecht. TR 111–12 (Baecht 2025) (diagnosing Major Neurocognitive Disorder).

B. Mr. Black suffers from an intellectual disability.

As the State stipulated in 2022, Mr. Black is intellectually disabled. Mr. Black meets all three prongs of the diagnosis. "Because these experts have concluded Petitioner does, in fact, meet the criteria for a diagnosis of intellectual disability, the State stipulates that Petitioner would be found intellectually disabled were a hearing conducted." TR 517 (State's

Response).[3] The record supports the State's stipulation. Numerous experts have concluded that he meets the criteria for intellectual disability. TR 520–44 (Martell 2020); TR 428–39 (Martell 2021); TR 56–68 (Martell 2025); TR 110–112 (Baecht 2025); TR 440–59 (Greenspan 2008); TR 460–74 (Tasse 2008); TR 475–500 (Grant 2001); TR 501–08 (Globus 2001); TR 509–11 (Globus 2004). Notably, the State's expert who previously testified that Mr. Black was not intellectually disabled revisited her opinion and subsequently concluded that under current legal and diagnostic criteria, Mr. Black is intellectually disabled. TR 557–563 (Vaught 2022).

Intellectual disability "is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."

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[3] Precedent is clear that such a factual stipulation is binding on the parties. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 677 (2010) (A party is "bound by the factual stipulations it submits."). The doctrine of judicial estoppel prohibits the State from now disputing Mr. Black's intellectual disability. *Sibley v. McCord*, 173 S.W.3d 416, 419 (Tenn. Ct. App. 2004) ("The doctrine of judicial estoppel prevents a litigant who has taken a position in one judicial proceeding from taking a contradictory position in another."). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich,* 530 U.S. 211, 227, n.8 (2000)).

Diagnostic and Statistical Manual of Mental Disorders (5th ed. Text Rev. 2022, p. 37). An individual with intellectual disability must meet the following three criteria:

> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
> B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community,
> C. Onset of intellectual and adaptive deficits during the developmental period.

Id. As discussed below, Mr. Black meets these three criteria.

1. Evidence of sub-average intellectual functioning

Mr. Black exhibits significantly subaverage intellectual functioning. Throughout his life, intelligence testing has consistently shown Mr. Black's intelligence to be in the intellectually disabled range. Below are the results of all individually administered, psychometrically valid IQ tests that Mr. Black has taken. *See e.g.,* TR 564–65 (Blair 1993); TR 566–70 (van Eys 2001); TR 428–39 (Martell 2021). The chart below

also includes adjusted scores based on the standard error of measurement and the Flynn Effect, as required by prevailing standards. *Hall v. Florida*, 572 U.S. 701, 723 (2014) (instructing courts to take into consideration the standard error of measurement in evaluating intellectual disabilities); *Coleman v. State*, 341 S.W.3d 221, 242 n.55 (Tenn. 2011) (applying the Flynn Effect and holding "scores must be correspondingly adjusted downward" due to test obsolescence).[4]

Year (expert)	**Test**	**Full Scale IQ**	**SEM (Score range)**	**Flynn Adjusted IQ**
1993 (Blair)	WAIS-R	73	+/- 5	67
1997 (Auble)	WAIS-R	76	+/- 5	70
2001 (Grant)	Stanford-Binet-4th ed.	57	+/- 2.5	52
2001	WAIS-III	69	+/- 3	67

[4] These precedents post-date the Tennessee courts' rejection of Mr. Black's intellectual disability claim. *Hall* is of particular relevance to the Court of Criminal Appeals decision in Mr. Black's case that held that an IQ score of 70 was a "bright-line cutoff," a ruling plainly repudiated by *Hall*. *Black v. State*, No. M2004-01345-CCA-R3PD, 2005 WL 2662577, at *12 (Tenn. Crim. App. Oct. 19, 2005). Similarly, the Court of Criminal Appeals' reliance upon Mr. Black's adaptive strengths such as being employed, caring for an automobile, or generally getting along well with others has also been rejected by a subsequent Supreme Court decision. *Compare Id.* at *15 *with Moore v. Texas*, 581 U.S. 1, 15 (2017) (mandating that courts examine adaptive deficits, not adaptive strengths). Thus, while the State may claim that Mr. Black failed to demonstrate that he is intellectually disabled, it is beyond dispute that the Tennessee courts' adjudication of Mr. Black's claim was unreliable for reasons elucidated by the Supreme Court in *Hall* and *Moore*.

(Van Eys)				
2021 (Martell)	WAIS-IV	67	+/- 3	63

Mr. Black's IQ test scores have consistently demonstrated that his intelligence is in the intellectually disabled range. In fact, the scores show remarkable congruence over time and exhibit significantly subaverage intellectual functioning. All the scores above indicate an IQ at least two standard deviations below the mean and, as such, satisfy prong one of an intellectual disability diagnosis.

2. Evidence of Adaptive Deficits

Mr. Black exhibits deficits in adaptive functioning in multiple domains. In the conceptual domain, which includes skills such as language, math, money, and self-direction, Mr. Black exhibits marked deficits. TR 534–44 (Martell 2020). Academically, Mr. Black was held back and required to repeat the second grade.[5] TR 571–72 (School

[5] Mr. Black attended underperforming, segregated schools. *Black*, 2005 WL 2662577, at *2. His education predated federal legislation such as the Education for All Handicapped Children Act, assuring "free and appropriate education" to all students. TR 453 (Greenspan 2008); Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, 775. In prior proceedings, his teacher admitted "I would never let a student get a bad grade." TR 453 (Greenspan 2008). The fact that Mr. Black was held back in such an environment is telling.

Records). Neuropsychological testing indicates that Mr. Black's abilities in math fall in the 2nd percentile and his reading abilities in the 4th percentile. TR 527 (Martell 2020). Put differently, 98% of the population exhibits stronger performance in math and 96% of the population exhibits better reading skills. *Id.*

Early indications of Mr. Black's deficits in the conceptual domain are confirmed by individuals that knew him as a child. For example, Rossi Turner grew up with Mr. Black, attended the same school, and lived on the same street. TR 573–576 (Turner Decl.). Turner recounts that when neighborhood children played simple games, Mr. Black struggled to understand how to play the game and consistently was the first child to lose because he could not grasp the concept of the game or its rules. *Id.* at 575 (Turner Decl.); TR 537–38 (Martell 2020). Dr. Martell's recent testing confirms that Mr. Black has "severe impairment in applying reasoning and decision-making to real-world situations." TR 62 (Martell 2025). These deficits make him "[u]nable to make sound, independent decisions." *Id.*

Across the decades of evaluations, neuropsychological testing consistently shows sharp deficits in memory, word finding, verbal

expression, and attention. TR 56–68 (Martell 2025); TR 520–44 (Martell 2020); TR 475–500 (Grant 2001); TR 577–78 (Auble 2008). Dr. Martell's recent assessment shows that these deficits have only worsened with time and age. TR 63–65 (Martell 2025).

In the social domain, Mr. Black exhibits deficits indicative of intellectual disability. Several informants note that Mr. Black is unsuitably familiar with strangers, smiles inappropriately, and fails to maintain customary distance in social interactions. TR 537–39 (Martell 2020); *see also* TR 567 (van Eys 2001) at 2; TR 579–580 (Alderman Decl.). Likewise, informants from Mr. Black's childhood remember that in addition to failing to "catch on" to games, he missed social cues and had few close friends. TR 537–39 (Martell 2020).

Finally, Mr. Black's deficits in the practical domain are the most severe. Mr. Black never lived independently, even after marrying and fathering a child. TR 582 (Corley Decl.); TR 456 (Greenspan 2008). His ex-wife described him as "childish" and reliant on family members for financial support. TR 539 (Martell 2020). Mr. Black could not perform simple tasks such as assuming responsibility to take care of his son,

cooking, or operating a washing machine. TR 492–93 (Grant 2001); TR 583-4 (Whitney Decl.).

Mr. Black never had a checking account and neuropsychological testing shows deficits in money management. TR 539–40 (Martell 2020); TR 61 (Martell 2025). Mr. Black's money management scores acquired by Dr. Martell in 2025 are "extremely low" and "[i]ndicate[] severe difficulty with financial management." *Id.* Scores at this level low indicate that an individual is at "high risk" or "not safe" to manage money independently. *Id.*

Childhood informants recall Mr. Black consistently forgot to do his limited chores as a child. Rossi Turner recalls that it was Mr. Black's job to fetch coal and kindling, which he was unable to reliably perform. TR 575 (Turner Decl.). Turner believes that Mr. Black did not fail to do his chores out of defiance; rather, he forgot his chores and required repeated instruction about how to do them properly. *Id.* at 575–76.

In 2008, Dr. Stephen Greenspan, a widely respected expert on intellectual disability, administered the Vineland-2 retrospectively by interviewing Mr. Black's sisters Melba Black Corley and Freda Black Whitney, as well as his friend Rossi Turner, and his football coach Al

Harris. TR 440–59 (Greenspan 2008). The Vineland-2 is "the most widely-used and respected adaptive behavior rating instrument." *Id.* at 457. The informants showed remarkable consistency and revealed Mr. Black's adaptive functioning measured more than two standard deviations below the mean. *Id.* at 457-59.

In short, numerous experts have concluded that Mr. Black exhibits deficits in adaptive functioning. Their conclusions are confirmed by empirically validated, psychometrically valid testing.

3. Evidence of onset during the developmental period

Mr. Black's intellectual disability manifested during the developmental period. Mr. Black's academic difficulties were evident as early as the second grade when he was held back due to poor performance. TR 453 (Greenspan 2008). As discussed above, his friends and family attest to early, indicative difficulties such as Mr. Black's inability to grasp simple childhood games and his inability to recall and perform his chores. TR 575 (Turner Decl.). His high school football coach recounts that although Mr. Black exhibited athletic ability, he stood out as especially slow and was unable to understand and execute offensive

plays, such that his coach had to create a highly simplified playbook for him. TR 456–57 (Greenspan 2008) (documenting interview of Al Harris, Football Coach). Mr. Black was more capable of grasping defense, where the task at hand was simpler: to run and tackle the ball carrier. *Id.* The reports of Drs. Martell, Greenspan, Tasse, Grant, and Vaught (State's expert) all support the conclusion that Mr. Black's impairments manifested during the developmental period. TR 520–44 (Martell 2020); TR 440–59 (Greenspan 2008); TR 460–74 (Tasse 2008); TR 475–500 (Grant 2001).

C. Mr. Black is unable to manage his affairs.

Mr. Black has always been incapable of managing his own affairs. Prior to his incarceration at age 32, Mr. Black never lived independently, did not know how to perform basic functions like doing laundry or cooking, and did not have a checking account. TR 539 (Martell 2020). At present, Mr. Black's ability to manage his own affairs has deteriorated significantly. TR 62 (Martell 2025). Even in the prison, he has an inmate helper to assist him with tasks like laundry, using the microwave, and cleaning his cell. Objective neuropsychological testing shows that Mr. Black cannot safely take care of himself and exhibits severe deficits in

the areas of health, safety, money management, and problem solving. *Id.* at 61–62. He has "marked global impairment in skills necessary for independent living." *Id.* at 62.

Mr. Black's ability to care for himself and navigate in his limited world is further compromised by the debilitating effects of progressive dementia. As a result, 99 out of 100 individuals his age and education have a better memory. TR 64 (Martell 2025). He struggles to express himself and less than one in 10,000 individuals have deficits in verbal fluency as bad as his. *Id.* His higher order executive functioning and problem-solving abilities are extremely limited and have deteriorated significantly in recent years. *Id.*

D. Mr. Black suffers from brain damage and brain atrophy.

In 2001, brain imaging showed significant deficits in Mr. Black's overall brain volume, including several regions that were two to three standard deviations below the mean. TR 95 (Gur 2025). Imaging conducted in 2022 showed a severe worsening of this condition. Dr. Ruben Gur describes this decline saying, "several brain regions exhibited marked volumetric changes." *Id.* at 96. Between 2001 and 2022, several

regions of Mr. Black's brain declined in volume and exhibit "measurable regional atrophy." *Id.* The imaging also showed a "structural expansion in fluid-filled and periventricular regions, as when tissue dies, it is replaced by fluid." *Id.* In other words, the existence of more fluid in Mr. Black's brain is the result of the death of brain tissue.

The most recent imaging studies demonstrate that Mr. Black's brain volume "is 3.49 standard deviation below the normal." *Id.* at 94. The volume reductions "are especially severe in bilateral limbic and medial temporal regions." *Id.* "[B]ilateral hippocampal volume is profoundly reduced" and is more than four standard deviations below the mean. *Id.* These deficits "are likely to impair Mr. Black's ability to regulate behavior, integrate emotional and cognitive input, and reason effectively." *Id.* Furthermore, "[t]he extensive damage to hippocampal and thalamic structures, together with posterior cingulate hypotrophy, strongly suggests memory impairment, difficulty with orientation, and compromised ability to learn from prior experience." *Id.* The damage to Mr. Black's parietal lobe "portend difficulties in integration of multimodal information and the sense of self-agency," which "increase vulnerability to confusion, suggestibility, and confabulation—wherein

memory gaps may be unintentionally filled with inaccurate information." *Id.* In short, Mr. Black has "profound and widespread volume loss" that causes significant deficits "across cognitive, emotional, and social domains." *Id.*

Dr. Gur's conclusions are confirmed by Dr. Martell's neurocognitive testing, which also shows a "very significant neurocognitive decline" since Dr. Martell's previous evaluation in 2019. TR 63 (Martell 2025). In the areas of memory and attention, Mr. Black's "scores have fallen significantly" and memory testing now indicates that he is in the bottom first percentile. *Id.* at 64.

Mr. Black's brain sustained numerous, significant insults at an early age that likely compromised his neurocognitive functioning. Mr. Black "was exposed to neurotoxins in utero and as a small child." TR 267 (Gur 2001). Dr. Gur concluded that "[e]xposure to these toxins causes structural damage to the brain, including orbital frontal and temporal lobes that contribute to attention disorder and motor impairment." *Id.* at 268. Both of these exposures have significant neurocognitive effects and

may account for his deteriorating functioning.[6] *See, e.g., id.*; TR 400 (Family Interview Memos); TR 425 (Finas Black Test.).

Dr. Gur noted that Mr. Black was "an avid football player at varsity level and has suffered several head injuries." TR 268 (Gur 2001); *see also* TR 374–395 (VUMC childhood medical records) (documenting head injury). Based upon the brain imaging studies in 2022, Dr. Gur stated that "[t]raumatic brain injury is also consistent with several findings of structural and functional abnormalities, such as decreased metabolism in the cingulate gyrus and signs of diffuse axonal injury." TR 98 (Gur 2025). Repeated blows to the head, as Mr. Black sustained, likely play a role in his neurocognitive decline.

While it is difficult to identify with precision all the sources of Mr. Black's numerous neurocognitive problems, his history contains ample

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[6] Exposure to alcohol in utero causes significant neurocognitive and development deficits in individuals. Andrea Zevenbergen, Assessment and Treatment of Fetal Alcohol Syndrome in Children and Adolescents 13 J. DEV. AND PHYSICAL DISABILITIES 123, 124 (2001). Such exposure can cause neurobehavioral deficits, delayed speech and language acquisition, and lower intellectual functioning. *Id.* at 124–25; Natalie Novick Brown, et al., A proposed model standard for forensic assessment of Fetal Alcohol Spectrum Disorders 38 J. OF PSYCH. & L 383, 389–90 (2010).

evidence of multiple injuries and exposures that are capable of causing his deficits.

VI. PROCEDURAL DEFENSES

Procedural default is an affirmative defense that must be invoked by the Respondent. *Gray v. Netherland*, 518 U.S. 152, 165 (1996). However, Mr. Black anticipates that the State of Tennessee will invoke the defense of procedural default of this claim, as it did in the state courts. This argument is unavailing. In the state courts, the State argued that Mr. Black's "idiocy" claim was not properly before the courts because it should have been raised at an earlier time. This argument is wholly inconsistent with Supreme Court jurisprudence regarding when a competency to be executed claim should be filed.

The Supreme Court has repeatedly ruled that a competency to be executed claim is not ripe until execution is imminent. *Panetti*, 551 U.S. at 947; *Martinez-Villareal*, 523 U.S. at 643. Tennessee state law holds the same. *Van Tran*, 6 S.W.3d at 267 ("In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and

correctness of the prisoner's conviction and sentence and this Court has set an execution date upon motion of the State Attorney General.").

The only way to avoid the conclusion that Mr. Black's claim was properly before the Tennessee courts is to recast it as something as something it is not. Contrary to the view of the Tennessee Supreme Court, nothing in Mr. Black's petition requested a "new categorical exclusion from execution." *Black*, 2025 WL 1927568, at *9.[7] Nor was his petition an effort "to relitigate his intellectual disability claim." *Id.* at *8. "Idiocy" is, and always has been, a question of competency. The formation of the legal concept of non compos mentis is in the common law, not to mention plastered all over Mr. Black's petition. Furthermore, Mr. Black has emphasized throughout this litigation that although the definition of "idiocy" includes low intellectual functioning, the common law conception of "idiocy" differs greatly from our modern conception of intellectual disability. As such, any attempt to assert procedural default in this matter is wholly specious.

[7] If anything, the rule Mr. Black asked the Tennessee courts to apply is quite old, dating back to the early common law.

Prior to its decision in *Black*, the Tennessee Supreme Court had never addressed the scope of common on law rights under its competency jurisprudence. But in the seminal case of *Van Tran v. State*, the Tennessee Supreme Court unambiguously indicated that such rights existed: "Accordingly, we exercise our inherent supervisory authority and hereinafter adopt and set forth the procedure that a prisoner sentenced to death must follow in order to assert his or her *common law* and constitutional right to challenge competency to be executed." *Van Tran*, 6 S.W.3d at 265 (emphasis added).

For a state procedural rule to serve as a bar to federal habeas review, it must be a "firmly established and regularly followed state practice." *James v. Kentucky*, 466 U.S. 341, 348 (1984). Prior to *Black*, Tennessee jurisprudence had never held that common law competency claims were limited to claims "grounded in insanity." *Black*, 2025 WL 1927568, at *8. And as described above, there was ample reason to believe that common law competency claims were cognizable under *Van Tran*. Under these circumstances, an inmate "could not be 'deemed to have been apprised of [the rule's] existence.'" *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *Nat'l Ass'n for Advancement of Colored People v.*

State of Ala. ex rel. Patterson, 357 U.S. 449, 457 (1958)). Thus, any rule established for the first time in Mr. Black's case, cannot serve as a procedural bar to federal habeas review.

VII. STANDARD OF REVIEW/APPLICABILITY OF THE AEDPA

A. Standard for claims adjudicated on the merits in state court.

When a state court adjudicates the merits of a petitioner's claim, the claim is subject to deferential standards outlined in 28 U.S.C. § 2254(d). In those circumstances, an application for a writ of habeas corpus shall not be granted unless that state court resolution of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.§ 2254(d)(1). "To show that a state court unreasonably applied clearly established federal law, a petitioner must show that the court unreasonably applied the holdings, as opposed to the dicta, of this Court's decisions." *Andrew v. White*, 145 S. Ct. 75, 80 (2025) (cleaned up). As interpreted, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so

long as 'fairminded jurists could disagree' on the correctness of that decision." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Section 2254(d)(2) permits a federal court to grant a writ of habeas corpus where the state court resolution of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under this provision, "it is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). Furthermore, a state court factual finding is not unreasonable merely because this Court "would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (cleaned up). "[H]owever, '[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Id.* at 314 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003)).

B. Standard for claims presented to the state court that were not adjudicated on the merits.

Not all claims exhausted in state court, however, are subject to AEDPA deference. "The language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was 'adjudicated on the merits in State court.'" *Johnson v. Williams*, 568 U.S. 289, 302 (2013). "Claims that were not 'adjudicated on the merits in State court proceedings' receive the pre-AEDPA standard of review: de novo for questions of law (including mixed questions of law and fact), and clear error for questions of fact." *Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011); *see also Cone v. Bell*, 556 U.S. 449, 472 (2009).

The presumption that state courts adjudicated a claim on the merits, "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Harrington*, 562 U.S. at 99–100. For example, a claim is not adjudicated on the merits when the state court "made a point of *not deciding* the issue." *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 460 (6th Cir. 2015) (emphasis original). Nor can an "offhand remark . . . be taken as an adjudication on the merits." *Id.* at 461.

Furthermore, when the state courts "made clear that they were applying a procedural bar and thus not considering the merits," the requirements of Section 2254(d) likewise do not apply. *Id.*; *Maslonka v. Hoffner*, 900 F.3d 269, 278 (6th Cir. 2018) (reviewing a claim de novo when the state court "enforced a procedural bar" rather than "adjudicate[ing] [petitioner's] claims on the merits"). "When a state court does not address a claim on the merits, as when it applies a state law procedural bar, 'AEDPA deference' does not apply and we will review the claim de novo." *Bies v. Sheldon*, 775 F.3d 386, 395 (6th Cir. 2014); *see also Hughbanks v. Hudson,* 2 F.4th 527, 535 (6th Cir. 2021) (applying de novo review when the state court ruled a claim was procedurally barred and did not rule on the merits); *Hill v. Mitchell*, 842 F.3d 910, 938 (6th Cir. 2016) (same).

C. Mr. Black's claim is not subject to Section 2254(d) because the state courts "respectfully declined" to consider the merits of the claim.

Mr. Black's claim is not subject to Section 2254(d) because the Tennessee courts "made a point of *not deciding* the issue." *Barton*, 786 F.3d at 460. The Tennessee Supreme Court did not consider the merits of Mr. Black's common law "idiocy" claim and expressly said as much:

"[T]o the extent Mr. Black is asking this Court to reconsider the standard for competency to be executed, he offers no compelling reason for us to adopt a standard that differs from longstanding precedent from this Court and the United States Supreme Court. We respectfully decline to do so."[8] This was the sole statement of the Tennessee Supreme Court regarding the substance of Mr. Black's "idiocy" claim. It is not a merits determination and expressly declined to consider the substance of the claim. As such, the Tennessee courts made a point of not deciding Mr. Black's claim and consequently, the strictures of Section 2254(d) do not apply and de novo review is required. *Barton*, 786 F.3d at 460.

D. In the alternative, even if Mr. Black's claims are subject to Section 2254(d), the state courts unreasonably applied clearly established federal law.

Even if this Court holds that Mr. Black's claim is subject to the requirements of Section 2254(d), Mr. Black's claim must be reviewed de novo because the Tennessee's court's resolution of Mr. Black's claim was contrary to clearly establish federal law and the state courts

[8] The trial court likewise "decline[d] to wade into the asserted common law claim of 'idiocy.'" *State v. Black*, No. 88-S-1479, at 14 n.5 (Davidson Cnty Crim. Ct. June 5, 2025) (Memorandum and Order).

unreasonably applied clearly established Supreme Court precedent. The Tennessee courts' resolution of Mr. Black's claim were unreasonable applications and/or contrary to clearly established federal law at least three reasons: 1) Supreme Court precedent clearly establishes that "idiots" are incompetent to be executed and the failure of the Tennessee courts to recognize this facet of competency to be executed law was contrary to clearly established precedent; 2) Clearly established federal law holds that incompetency is not limited to insanity and the Tennessee Supreme Court's decision is fundamentally at odds with this precedent; 3) The Tennessee's courts failure to engage in *any* historical analysis of the common law at the time of the Founding is an unreasonable application of clearly established federal law.

1. Clearly established federal law bars the execution of "idiots."

In *Ford v. Wainwright*, the Supreme Court expressly held that both "idiots" and "lunatics" were incompetent to be executed. *Ford*, 477 U.S. at 406. The Supreme Court again affirmed that such a protection exists in *Penry v. Lynaugh*. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("It was well settled at common law that 'idiots,' together with 'lunatics,' were not

subject to punishment for criminal acts committed under those incapacities."). In spite of the "impressive historical credentials" of the prohibition upon the execution of "idiots," *Ford*, 477 U.S. at 406, the Tennessee Supreme Court held that Tennessee competency procedures were limited "to adjudicating Ford-based claims of incompetency grounded in insanity." *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 WL 1927568, at *8 (Tenn. July 8, 2025).

In its holding, the Tennessee Supreme Court dismissed the common law as a quaint relic of the operative law. *Ford*, however, unambiguously held that any punishment that was barred at the Founding was incorporated into the Eighth Amendment's protection against cruel and usual punishment. *Ford*, 477 U.S. at 405. Indeed, *Ford* merely "explicitly recognized in our law a principle that has long resided there." *Id.* at 417. In light of that, the Tennessee Supreme Court's decision was contrary to clearly established federal law as set out by the Supreme Court in *Ford*. While the precise contours of the prohibition on the execution of "idiots" may be reasonably debated, it was unreasonable to conclude that no such prohibition exists and that an inmate was not permitted an opportunity

to demonstrate that he met the criteria for "idiocy." As such, no deference is owed.

2. Clearly established federal law states that incompetence is not limited to insanity.

In *Madison v. Alabama*, 586 U.S. 265 (2019), the Supreme Court held that incompetence to be executed is not limited to insanity. The Court specified that the petitioner's type of impairment does not matter: "[i]n evaluating competency to be executed, a judge must therefore look beyond any given diagnosis to a downstream consequence." *Madison*, 586 U.S. at 279.

The Tennessee Court, however, held that Tennessee's procedures for adjudicating competency to be executed are "limited to adjudicating *Ford*-based claims of incompetency *grounded in insanity*." Ex. 3, Order (emphasis added). This holding is explicitly contrary to *Madison*. Given *Madison*'s openness to incompetence claims without regard to etiology, it was unreasonable for the Tennessee courts to fail to provide Mr. Black a procedure by which to adjudicate his incompetency-due-to-"idiocy" claim.

Accordingly, section 2254(d)(1) does not limit the federal courts' review of this claim.[9]

3. Binding Supreme Court precedent mandates that courts must examine the history and tradition at the time of the Founding to determine the scope constitutional rights.

The Supreme Court has held repeatedly that the proper constitutional inquiry must investigate whether a right is "'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022) (quoting *Timbs v. Indiana*, 586 U.S. 146, 149 (2019)). It is widely understood that the Eighth Amendment "codified a *pre-existing* right." *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis original); *Ford*, 477 U.S. at 405; *Solem v. Helm*, 463 U.S. 277, 286 (1983). "The Amendment 'was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors.'" *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597

[9] The Tennessee Supreme Court's decision also failed to appreciate that *Panetii* did "not attempt to set down a rule governing all competency determinations." *Panetti*, 551 U.S. at 960–61.

U.S. 1, 20 (2022) (quoting *Heller*, 554 U.S. at 599); *Ford*, 477 U.S. at 405; *Helm*, 463 U.S. at 286. As such, the Supreme Court's caselaw "require[s] courts to consult history to determine the scope of that right." *Bruen*, 597 U.S. at 25.

Supreme Court jurisprudence holds that to animate the text of the Eighth Amendment, courts and litigants must examine the common law at the time of the Founding and other relevant historical materials such as legal treatises, commentary, and state practices. *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020) (resolving the question of jury unanimity with reference to the common law, state practices in the

founding era, and opinions and treatises written soon afterward).[10] This is because "the Framers' view provides a baseline for our own day: The Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'" *Lange v. California*, 594 U.S. 295, 309 (2021) (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis original)).

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[10] The Supreme Court has applied this methodology in numerous cases across multiple subject areas. *United States v. Rahimi*, 602 U.S. 680, 691 (2024) ("A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, apply[ing] faithfully the balance struck by the founding generation to modern circumstances.") (cleaned up); *Erlinger v. United States*, 602 U.S. 821, 843 (2024) (relying on the "carefully studied . . . original meaning of the Fifth and Sixth Amendments"); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 433 (2024) (examining the "even deeper roots, tracing far back into the common law") (Gorsuch, J., concurring); *Bruen*, 597 U.S. at 22 (holding that Second Amendment constitutional inquiries are "centered on constitutional text and history."); *Dobbs*, 597 U.S. at 239 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of . . . 'liberty[.]'"); *Lange*, 594 U.S. at 309 (2021) (The common law is "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); *Ramos*, 590 U.S. at 90 ("[W]hether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict."); *Heller*, 554 U.S. at 584 (relying on a "review of founding-era sources" to determine the scope of the Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The founding generation's immediate source of the concept, however, was the common law."). The Sixth Circuit has similarly applied this methodology in an array of subject areas. *See, e.g., Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, 117 F.4th 389, 399 (6th Cir. 2024) ("History should therefore guide our First Amendment jurisprudence.") (Thapar, J., concurring)); *United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024) ("To understand [our Second Amendment] right, then, we must look to history and tradition.")

In light of this overwhelming precedent, a state court may no longer "respectfully decline" to engage in the historical analysis mandated by Supreme Court. As discussed above, *Ford* long ago established that common law prohibitions were incorporated into the Eighth Amendment. And *Ford* established that principle by examining the very history and tradition disregarded by the Tennessee Supreme Court. That history and tradition are central to the animation of constitutional provisions is now beyond dispute.

Although analysis of history and tradition is a general methodological tool of constitutional analysis, its use is no less mandated than any other rule of constitutional law. "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court." *Andrew*, 145 S. Ct. at 82. "'[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'" *Id.* (quoting *Taylor v. Riojas*, 592 U.S. 7, 9 (2020)). "Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

The Tennessee courts wholly resisted doing any historical analysis regarding the common law or the historical traditions that animate the Eighth Amendment. They did so in spite of *Ford*'s clear commandment that "[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405; *see also Helm*, 463 U.S. at 286 ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments."). Because Tennessee courts "respectfully" declined to conduct this basic historical analysis, its decision was contrary to *Ford* and numerous other cases that hold that courts must analyze history and tradition to determine the scope of constitutional rights.

VIII. CONSTITUTIONAL CLAIM FOR RELIEF

1. Mr. Black meets the criteria for "idiocy" at common law and consequently is incompetent to be executed.

A. Applicable Law

As explained in *Ford*, the common law prohibits the execution of the non compos mentis, which includes both the "insane" and "idiots." *Ford*, 477 U.S. at 406. Under the common law—and thus the law in place at the Founding—being non compos mentis is a broad concept that encompasses a variety of conditions that cause individuals to be considered not of sound mind. *See, e.g.*, Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).[11]

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[11] Much the Anglo-American common law regarding "idiocy" comes from civil proceedings, where "idiots" were considered incompetent in a wide variety of contexts. *See, e.g., Chew v. Bank of Baltimore*, 14 Md. 299, 309 (Md. Ct. App. 1859) ("An idiot or lunatic cannot contract marriage, because marriage is a civil contract, the basis of which is consent, which idiots and lunatics are incapable of giving, and therefore of entering into that *or any other contract*.) (emphasis original); *Stewart's Ex'rs v. Lispenard*, 26 Wend. 255, 297, 1841 WL 3916, at *23 (N.Y. 1841) ("[A]ll persons except idiots, persons of unsound mind, married women and infants, may devise their real estate by their last will and testament duly executed."). "Idiocy" thus constituted a broad form of civil incompetency. Significantly, Lord Coke noted that "idiocy" had broader effect in criminal law than it did in civil proceedings. "But this holdeth only in civil causes; for in criminal causes, as felonie, &c. the act and wrong of a madman shall not bee imputed to him, for that in those causes, actus non facit reum, nisi mens sit rea, and he is amens (id est) sine mente, without his minde or discretion; and furiosus solo furore punitur, a madman is only punished by his madnesse." Coke, *supra*, at 247b.

The most discussed and defined of these debilitating conditions at common law was the notion of a "lunatic." "Lunatics" were individuals who "had understanding, but by disease, grief, or other accident, has lost the use of his reason." Anthony Highmore, *Treatise on the Law of Idiocy and Lunacy* 2 (1822) (citing William Blackstone, 1 *Commentaries on the Laws of England* 304 (1826)). Lunacy was not a static condition. *Id.* at 3. The common law recognized that individuals' level of competency varied with the vicissitudes of mental illness. *See, e.g., Person v. Warren*, 14 Barb. 488, 494, 1852 WL 4762, at **5 (N.Y. S. Ct. 1852) (noting that lunatics had "lucid intervals"); *In re Hanks*, 3 Johns. Ch. 567, 568, 1818 WL 1768, at **1 (N.Y. Ch. 1818) (outlining the process for reevaluating lunacy).[12] There is, of course, a direct line from this common law tradition to *Ford* and *Panetti*, each of which involved an inmate with significant mental illness.

Often discussed alongside lunatics were "idiots." At common law, an "idiot" was an individual lacking intellectual capacity. Highmore, *supra*, at 1. "Idiots" were "'[t]hose who cannot distinguish, compare, and

[12] The state court cases cited in this brief that post-date the Founding relied on common law or statutes that incorporated common law doctrines.

abstract, would hardly be able to understand and make use of language, or judge, or reason to any tolerable degree; but only a little and imperfectly about things present, and very familiar to their senses.'" Shelford, *supra*, at 5 (quoting John Locke, *Essay on Human Understanding* 120 (1824)). It is this feature of the common law that is applicable to Mr. Black.

1. Characteristics of "idiocy" at common law

The defining characteristic of "idiocy" at common law was a significant deficit of intellectual capacity. An "idiot" "is one that hath had no understanding from his nativity; and there is by law presumed never likely to attain any." William Blackstone, 1 *Commentaries on the Laws of England* 302 (1826). One early American treatise defined an idiot as "one without the power of reason." Highmore, *supra*, at 2. "By the very nature of these cases, the intelligence is involved." Francis Wharton & Moreton Stille, *Wharton and Stille's Medical Jurisprudence* 859 (1905). Although low intellectual functioning was at the core of idiocy, three other characteristics were commonly described as associated with "idiocy": an inability to manage one's affairs, the existence of "unsound memory," and the presence of brain "malformations."

2. An inability to manage one's own affairs

By the time of the Founding, the defining characteristic of individuals who were non compos mentis, which included both "idiots" and "lunatics," was their inability to manage their own affairs. William Blackstone, 1 *Commentaries on the Laws of England* 304 (1826); George D. Collinson, *Treatise on the Law Concerning Idiots, Lunatics, and Other Person Non Compotes Mentis* 58 (1812); Edward Coke, *1 Institutes of the Laws of England* 247 (1633); *see also* Simon Jarrett, *Those They Called Idiots* 25 (2020). Founding era common law cases often focused on whether an individual was capable of "government of himself, and of the management of his goods and chattels, lands, and affairs." *In re Mason*, 1 Barb. 436, 437, 1847 WL 4122, at **1 (N.Y. S. Ct. 1847); *L'Amoureux v. Crosby*, 2 Paige Ch. 422, 427, 1831 WL 2894, at **3 (N.Y. Ch. 1831) ("[T]he jury must find distinctly that he is of unsound mind, and mentally incapable of governing himself or of managing his affairs.").

In his seminal *Institutes of the Laws of England*, Lord Coke originally defined three categories of individuals who the law considered to be non compos mentis and thereby incompetent to be executed: 1) "ideota which from his nativity, by a perpetual infirmity is non compos

mentis"; 2) "Lunatique that hath sometime his understanding and sometime not;" and 3) Hee that by sicknesse, griefe, or other accident wholly loseth his memorie and understanding." Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).[13] By the third category, Lord Coke refers to dementia *accidentalis vel adventitia*. Matthew Hale, 1 *History of Pleas of the Crown* 29–30 (1736). This category of incompetency includes individuals "not born without reason; but, who has lost it from sickness, grief, or other accident." *Ex Parte Cramner*, (1806) 33 E.R. 168, 170 (Ch.). Individuals in each of these three categories of idiocy were incompetent to be executed. *Ford*, 477 U.S. at 406; Ellis Lewis, *An Abridgement of the Criminal Law of the United States* 601 (1847) ("A person made non compos mentis by sickness, or, as it been expressed, a person afflicted with dementia *accidentalis vel advenitia*, is excused in criminal cases from such as are committed while under the influence of this disorder.").

[13] Lord Coke recognized a fourth category, not relevant here: "he that by his owne vicious act for a time depriveth himself of his memory and understanding, as he is drunken." As Lord Coke went on to explain, those individuals whose insanity was the result of their own acts were not exempt from execution. Coke, *supra*, at 247.

The jurisprudence of Lord Coke is widely regarded as having expanded the definition of what constituted non compos mentis to an additional category that included individuals who could not manage their own affairs. By 1812, George D. Collinson's comprehensive treatise attributed the following rule directly to Lord Coke: "Non compotes mentis comprehend, not only idiots and lunatics, but all other persons, who from natural imbecility, disease, old age, or any such causes, are incapable of managing their own affairs." Collinson, *supra*, at 58.

One historian has noted the significance of Lord Coke's influence on the law of competency by stating:

> The still quite vague legal definition of what constituted idiocy was shaken up by the jurist Lord Coke in 1628. He defined four categories of "non compos mentis" . . . However, Coke then added something of a catch-all fifth category of incapacity, which he defined as "all other persons, who from natural imbecility, disease, old age, or any such causes, are incapable of managing their own affairs." These "natural imbeciles" were a new legal concept. They were not idiots, but they had an impaired mind from birth and a question mark over their capacity . . . This was the point at which the idea of the imbecile as a type of idiot—a person mentally feeble from birth but not quite idiotic—was born.

Jarrett, *supra*, at 25. Although treatises ascribe to Lord Coke the rule that non compos mentis includes those individuals who could not manage

their own affairs, unquestionably by 1765, when William Blackstone wrote, the definition included such persons:

> A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is indeed properly one that hath had lucid intervals: sometimes enjoying his senses, and sometimes, not and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name) are comprised not only lunatic, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short *as are judged by the court of the chancery incapable of conducting their own affairs.*

William Blackstone, 1 *Commentaries on the Laws of England* 304 (1826) (final emphasis added). Thus, as early as the days of Lord Coke or at latest in the days of Blackstone, non compos mentis was an umbrella term that indicated a broad form of civil incompetency. Under that general umbrella fell "lunacy" and "idiocy," the definitions of which were refined by common law to include individuals the courts deemed incapable of managing their own affairs.

An early legal treatise recounts this change in the law:

> Non compos mentis was much more restricted in its signification, in the time of Lord Hardwicke [1690–1764], than is the case at present, excluding person incapable of managing their own affairs through mere weakness of understanding; to who the court have been subsequently

> induced, upon mature reflection, and after considerable hesitation, to extend the same relief as to lunatics.

Collinson, *supra*, at 59; *see also* Highmore, *supra*, at 3 (noting Lord Coke defined individuals as non compos mentis when they were "incapable of conducting their own affairs").

Founding era Anglo-American common law cases reflect this evolution and expressly adopted a standard that included an assessment of an individual's capacity for managing their own affairs into the definition of being non compos mentis.

> At a later day, the decision of Lord Erskine in the case *Ex parte Cranmer*, [(1806) 33 E.R. 168 (Ch.)] gave a more enlarged and extended jurisdiction to this paternal care of the court; and he held that it embraced cases of imbecility resulting from old age, sickness, or other causes. The question, he said, was whether the party had become mentally incapable of managing his affairs. In a previous case, Lord Eldon had decided that it was not necessary, in support of a commission in the nature of a writ de lunatico inquire, to establish lunacy; but it was sufficient if the party was shown to be *incapable of managing his own affairs*.

In re Mason, 1 Barb. at 440, 1847 WL 4122, at *3 (emphasis original); *see also Penington v. Thompson*, 5 Del. Ch. 328, 363 (Del. Ch. 1880) (noting the change in the common law doctrine and holding "where the party was not absolutely insane, but was unable to act with any proper and provident management" it was proper to find the party non compos

mentis); *Foster v. Means*, 17 S.C. Eq. 569, 571 (S.C. App. Eq. 1844) (holding an individual "a degree removed from idiocy" lacked legal capacity); *In re Morgan*, 7 Paige Ch. 236, 237, 1838 WL 2811, at **1 (N.Y. Ch. 1838) ("It was formerly doubted whether the court could proceed upon a commission which did not find the party to be either a lunatic or an idiot. But at a more recent period, in England it was held that the court had jurisdiction in cases where the mind had become unsound from old age or infirmity, or any other cause of a permanent nature."); *L'Amoureux*, 2 Paige Ch. at 427 n.1, 1831 WL 2894, at *427 n.1 ("The jurisdiction of the court over the person and property of persons of unsound mind is not restricted to cases of idiocy or lunacy, strictly speaking; it extends also to cases of every person who, in consequence of old age, disease, or any other cause, is in such a state of mental imbecility as to be incapable of conducting his affairs with common prudence, and leaves him liable to become the victim of his own folly, or the fraud of others; but the jurisdiction should be assumed and exercised with great caution, and the case should be clear.").

Reflecting on these changes, the widely regarded 19th century scholar of medical jurisprudence Francis Wharton observed:

> Idiocy, therefore, represents a state of arrested development. The defect dates back to a period in which the brain was still in process of formation; consequently, to a period preceding birth; or, at least, to a period in very early life, before the brain of the infant or young child had fully developed. Imbecility is only a milder grade of idiocy and is often found in those patients whose arrest of developments dates from early childhood. The distinction, therefore, between idiocy and imbecility is quite arbitrary; the two conditions merge into one another.

Wharton, et al., *supra*, 858. The notion that "idiocy" and "imbecility" merge is born out in case law. *See, e.g., Fisher v. Brown*, 1 Tyl. 387, 404, 1802 WL 745, at *10 (Vt. 1802) ("If they have not arrived at years of discretion, or if of adult age they are incapacitated by reason of idiocy, insanity, total imbecility, or other dispensation of Divine Providence, the law will avoid their contract, and has provided guardians to contract for them."). Similarly, in *State v. Crow* the court noted that all of the definitions of "idiocy:"

> imply either a *weakness or perversion* of the mind or its powers, not their *destruction*. The powers are still all present, but in an impaired and weakened state. Hence, an idiot cannot be said to have *no will*, but a *will weakened and impaired*, a will acting, but not acting in conformity to those rules, and motives, and views, which control the action of the will in persons of sound mind.

1 Ohio Dec. Reprint 586, 588, 1853 WL 3649, at *2 (Ohio Com. Pl. 1853) (emphasis original).

3. Unsound Memory

Another defining characteristic of "idiocy" at common law was the presence of "unsound memory." Thomas W. Powell, *Analysis of American Law* 550 (1878) (defining "idiots" as "those who are person of unsound memory and understanding from their nativity, or such as become so by the visitation of God, as by sickness or accident"); *Millison v. Nicholson*, 1 N.C. 612, 616 (N.C. Super. Ct. L. & Eq. 1804) ("[H]e who is of unsound memory hath not any manner of discretion."); *Bevereley's Case*, (1598) 76 E.R. 1118, 1122 (K.B.). One influential common law medical treatise stated that "[f]rom the defective condition or dimension of the brain of an idiot, his powers of attention are so small that he cannot even correctly perceive or acquire a new idea, and consequently his memory of it will be comparatively defective." Joseph Chitty, *A Practical Treatise on Medical Jurisprudence, with So Much of Anatomy, Physiology, and Pathology, and the Practice of Medicine and Surgery as are Essential to Be Known by Members of Parliament, Lawyers, Coroners, Magistrates, Officers in the Army and Navy, and Private Gentlemen* 327 (1835). So essential was memory to conceptions of "idiocy" that one historian remarked that "[w]hen lawyers discussed idiots and lunatics, they commonly referred to

them in terms of memory; thus an idiot or lunatic was of non sane memoriae." Margaret McGlynn, *Idiots, Lunatics, and the Royal Prerogative in Early Tudor England* 26 J. LEGAL HIST., at 7 (April 2005).

Common law assessments of unsound memory, like the overall assessment of non compos mentis, examined an individual's capacity to manage his or her own affairs. For example, the Alabama Supreme Court held that an individual must have "memory enough to understand the business in which he is engaged." *Stubbs v. Houston*, 33 Ala. 555, 567 (Ala. 1859); *accord In re Lindsley*, 10 A. 549, 549 (N.J. Ch. 1887) ("The unsoundness of mind, then, from whatever cause it arises, must be such as to deprive the person, concerning whom the inquiry is made, of ability to manage his estate and himself."). Many cases recognized that individuals may become of unsound memory due to aging or what in modern terms is referred to as dementia. *See, e.g.*, *In re Barker*, 2 Johns Ch. 232, 234, 1816 WL 1112, at **1 (N.Y. Ch. 1816) (noting that one may be rendered incompetent by "the imbecility of extreme old age"). Unsound memory was understood as a constituent part of "idiocy" and was often used interchangeably with "idiocy." *See, e.g.*, Chitty, *supra*, at 329 ("So

essential is the power of memory to the perfect mind, that in some of our older statutes the expression 'unsound memory' or 'non-sane memory' was used to denote as well an idiot and lunatic as every person incapable of managing his own affairs."). Accordingly, the existence of significant deficits of memory that impaired an individual's ability to manage his own affairs were prima facie evidence of being non compos mentis. Hale, *supra*, at 30.

4. Brain Malformation

Through the nineteenth century, "idiocy" increasingly, though not exclusively, was defined with reference to observable medical characteristics. Wharton, for example, observed that oftentimes evidence of "idiocy" was apparent upon examination of the brain.

> It follows that idiocy is sometimes associated with gross malformations of the brain—defects never seen in insanity. But these malformations vary widely, from a slight defect to an almost complete absence of the organ. In some cases, however, even of a low grade of idiocy and imbecility, there is no such gross malformation, but mental faculties have not properly developed; doubtless because of the defects in the finer elements of the brain-mass, such the nerve cells in the cortex.

Wharton, et al., *supra*, at 858. Earlier treatises concur: "In cases of congenital idiotcy [sic] there will not be much difficulty in pronouncing

judgment, for as it arises from malformation of the cerebral organ, the diagnosis must be adverse to every hope of recovery." J.A. Paris & J.S.M. Fonblanque, *Medical Jurisprudence* 308 (1823); *see also* Chitty, *supra*, at 270 ("Idiotism is generally the result of an original malformation of the cranium, sometimes in respect of a subsequent thickening, but more frequently in respect to shape; both of which diminish the internal cavity and consequently lessen the volume or capacity of the brain.").

These observations about brain malformation are significant on a few levels. First, the level of brain malformation in "idiots" varied widely, ranging from slight defects to almost complete absence of the organ altogether. This again emphasizes that, while profoundly disabled individuals were certainly "idiots" at common law, a severe level of disability was not required to be considered afflicted with the condition. Hale, *supra*, at 29 (noting that indications of profound disability "may be evidences, yet they are too narrow"). Furthermore, this analysis reflects the common law understanding of brain disorders and understanding that observable defects often resulted in "idiocy." While not present in all cases of "idiocy," brain defects, according to these sources, were strong evidence of "idiocy."

5. At common law, the protection of idiots was not confined to solely profoundly disabled individuals.

Though the Supreme Court has not defined how incompetence to be executed due to common law "idiocy" is to be determined, in dissent in *Atkins*, Justice Scalia noted, incorrectly, that "idiots generally had an IQ of 25 or below." 536 U.S. at 340 (Scalia, J., dissenting). It is perplexing how Justice Scalia could define idiocy at common law using an IQ score. The first standardized IQ test was the Binet-Simon Intelligence Test developed in 1905. Serge Nicolas, et al., Sick? Or Slow? On the origins of intelligence as a psychological object 41 Intelligence 699, 700–01 (2013). Common law caselaw, unsurprisingly, has no reference to standardized testing as a means to determine "idiocy."[14] In support of this proposition, Justice Scalia cited Anthony Fitzherbert's *La Novelle Natura Brevium*:

> An idiot is "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor

[14] Similarly, it is difficult to see how an individual with an IQ of 25 would even be capable of murder except in the most obscure and unusual circumstances. As Dr. Martell's report on the subject recounts, an individual with an IQ of 25 is profoundly disabled and requires near constant care from others in order to survive. Such an individual would "function at the level of a toddler or infant." TR 67 (Martell 2025). The idea that at common law such individuals committed crimes in sufficient numbers to warrant an entire developed legal doctrine prohibiting their execution is dubious. Moreover, a cursory read of common law cases reveals that the subject of those cases was not limited to individuals with profound limitations.

> how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss."

Id. at 340 (quoting Anthony Fitzherbert, *La Novelle Natura Brevium* 519 (1534)). Justice Scalia's reliance on Fitzherbert for his definition of "idiots" suffers from two fundamental problems: he quotes Fitzherbert accurately but not completely thereby distorting Fitzherbert's meaning and to the extent that Fitzherbert's rule operated historically, it was no longer in effect at the time of the Founding.

First, Justice Scalia omitted Fitzherbert's next sentence from his citation which clarifies that Justice Scalia's reading of Fitzherbert is not correct. Fitzherbert's next sentence demonstrates that his early definition of idiocy was broader than Justice Scalia's quotation indicates: " . . . But if he have such understanding that he know and understand letters, and to reade by teaching or information of another man, then it seemth he is not a Sot, nor natural Idiot." Fitzherbert, *supra*, at 519. The importance of the omitted sentence is consistently recognized by commentators: "From the second portion of his definition, however, it seems clear that Fitzherbert, like his predecessors and successors, *did not intend his definition to be categorically exclusive of any other means*

of determining a defendant's idiocy." S. Sheldon Glueck, *Mental Disorder and the Criminal Law* 128 (1925) (emphasis added). While the first sentence delineates one extreme (an individual who cannot count to twenty or name his parents), the second sentence points to the opposite extreme, suggesting that those that can learn to read seem to not be "idiots"—but may, in fact, be. Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 YALE L.J. 2746, 2768–69 (2015). Fitzherbert's twenty pence test was "merely . . . one of the convenient methods known to his day." Glueck, *supra*, at 128. After all, "[t]here is certainly a wide gap between the mental condition of an idiot who can not 'number twenty pence' or 'tell who his father or mother' and of one who can not acquire the much more intricate accomplishment of understanding 'his letters,' and reading." *Id.* at 128–29. Thus, contrary to Justice Scalia's contentions, Fitzherbert's twenty-pence test was not a definitive test nor did Fitzherbert intend it to be so.

Second, strong historical evidence indicates that as early as the 17th and certainly by the early 18th century, the common law had rejected the notion that "idiots" were limited to those who met Fitzherbert's twenty pence test. Francis Wharton reported: "[T]o confine

idiocy and imbecility within such a rule is simply to revert to the crude test promulgated by Fitzherbert, which the Chief Lord Hale, as we have seen, condemned more than two centuries ago." Wharton, et al., *supra*, at 868–69.

In *In re Mason*, the court discussed how some earlier case law hewed closely to the Fitzherbert's test, but subsequent case law settled that the prohibition had a more "extended jurisdiction." *In re Mason*, 1 Barb. at 440, 1847 WL 4122, at *3; *e.g.*, *Person,* 14 Barb. at 495, 1852 WL 4762, at **5 ("Latterly a different doctrine has prevailed."); *Roberts v. State*, 3 Ga. 310, 329 (1847) ("The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation, have relaxed the cruel severity of the earlier doctrines."); *In re Barker*, 2 Johns. Ch. at 233, 1816 WL 1112, at *1 ("Mere imbecility of mind, not amounting to idiocy or lunacy, has not, until very lately, been considered in the English Court of Chancery, as sufficient to interfere with the liberty of the subject over his person and property."); *see also Pennsylvania v. Schneider*, 59 Pa. 328, 331 (Pa. 1915) (holding it was error for the trial court to require the jury find the individual's "mind is entirely blotted out"); *In re Emswiler*, 11 Ohio Dec. 10, *13, 1900 WL

1262, at **3 (Ohio Prob. 1900) ("It is not to be presumed, in view of the general policy of the state towards these unfortunates, that a person, though apparently an imbecile to such a degree that he cannot apply the faculties of his mind to his business, and take care of and preserve his property, must be shown to be a complete idiot, or that he is a gibbering, slobbering, lemon-headed wild man, before a guardian for his property can be appointed.").

Although "idiocy" at common law focused on individuals' intellectual deficits, it did not require that an individual exhibit no abilities or strengths. Common law sources recognized that "idiots" were not devoid of reason or intellect and, in fact, exhibited skills that "manifested in more or less perfection." Issac Ray, *Treatise on the Medical Jurisprudence of Insanity* 88 (1838). Issac Ray recounted an individual "who learned names, dates, numbers, history, and repeated them all mechanically, but was destitute of all power of combining and comparing his ideas and was incapable of being engaged in employment." *Id.* Furthermore, "these defective beings are not beyond the reach of education." *Id.* Ray likewise noted that "idiots" often had the capacity for a degree of interpersonal reciprocity and religious observance. "Among

the moral sentiments, it is not uncommon to find self-esteem, love of approbation, religious veneration, and benevolence, bearing a prominent part, if not constituting their entire character, and thus producing a slight approximation of humanity." *Id.*

Accordingly, the historical record indicates that the twenty-pence test was not regarded as the operative test of "idiocy" at the time of the Founding. As demonstrated above, the "idiocy" inquiry had drastically shifted and by the time of the Founding an individual who was incapable of managing his own affairs was incompetent. Although low intellectual functioning continued to be at the core of "idiocy," a profound intellectual disability was not required.

The definitions provided in *Penry* and Justice Scalia's dissent in *Atkins* are historically inaccurate and did not attempt the type of comprehensive historical analysis the Supreme Court's jurisprudence requires. They are also dicta. As our understanding of the law in place at the time of the Founding improves, our fidelity to that tradition must keep pace. *See Franklin v. New York*, 145 S. Ct. 831, 831 (2025) (Alito, J., dissenting from the denial of certiorari) ("Historical research now calls

into question *Crawford*'s understanding of the relevant common law rules at the time of the adoption of the Sixth Amendment[.]").

B. Mr. Black meets the criteria for "idiocy" at common law.

In the context of intellectual disability determinations under the Eighth Amendment, the Supreme Court has opted to utilize a standard that defines "subaverage" as those individuals whose abilities are more than two standard deviations below the mean. *Atkins*, 536 U.S. at 318; *see also Moore*, 581 U.S. at 8 ("Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories" of adaptive behavior.) (emphasis in original); *Hall*, 572 U.S. at 711. A person whose performance is two standard deviations below the norm means that over 95 percent of the population performs better on the measurement. *See* Douglas G Altman & J Martin Bland, *Standard deviations and standard errors*, 331 BRITISH MED. J. 903, 903 (Oct. 15, 2005) ("For data with a normal distribution, about 95% of individuals will have values within 2 standard deviations of the mean, the other 5% being equally scattered above and below these limits."), *available at* https://doi.org/10.1136/bmj.331.7521.903 (last visited July 18, 2025).

A similar standard can be applied to each of the characteristics of "idiocy" discussed above. In each of these categories, Mr. Black functions at least two standard deviations below the mean and in certain categories is more than four times below the mean. Such a standard is faithful both to the Supreme Court's precedents and to the common law, which fundamentally attempted to identify individuals whose functioning was such an outlier that his execution "can be no example to others." *Ford*, 477 U.S. at 407 (quoting Matthew Hale, 3 *History of Pleas of the Crown* 6 (1644)).

As discussed above, the central characteristic of "idiocy" is a deficit in intellectual capacity. Every empirically valid IQ tested administered to Mr. Black places his IQ in the intellectually disabled range. TR at 536 (Martell 2020); TR at 105–108 (Baecht 2025) (compiling data); TR at 452–54 (Greenspan 2008) (same); TR at 469–73 (Tasse 2008) (same); TR at 478–80 (Grant 2001) (same); TR at 559 (Vaught 2022) (same). Numerous experts have diagnosed him with an intellectual disability. Mr. Black's deficits in intellectual capacity are also demonstrated by informants from Mr. Black's childhood who recollect that he was unable

to grasp the rules of simple childhood games. He was held back in second grade and his reading and math abilities are in the bottom percentiles.

Mr. Black has always been incapable of managing his own affairs. Prior to his incarceration at age 32, Mr. Black never lived independently, did not know how to perform basic functions like doing laundry or cooking, and did not have a checking account. TR at 456 (Greenspan 2008). At present, Mr. Black's ability to manage his own affairs has deteriorated significantly. TR at 62 (Martell 2025). Even in the prison, he is assigned an inmate helper to assist him with tasks like laundry, using the microwave, and cleaning his cell. Objective neuropsychological testing shows that Mr. Black cannot safely take care of himself and exhibits severe deficits in the areas of health, safety, money management, and problem solving. He has "marked global impairment in skills necessary for independent living." TR at 62 (Martell 2025).

Mr. Black's ability to care for himself and navigate in his limited world is further compromised by the debilitating effects of progressive dementia. As a result, 99 out of 100 individuals his age and education have a better memory. TR 64 (Martell 2025). He struggles to express himself and less than one in 10,000 individuals have deficits in verbal

fluency as bad as his. *Id.* His higher order executive functioning and problem-solving abilities are extremely limited and have deteriorated significantly in recent years. *Id.*

Finally, brain imaging studies show that Mr. Black's total brain volume is three and half standard deviations below the mean. Appx. At 031a. Some parts of Mr. Black's brain exhibit volumes more than four standard deviations below the mean. *Id.* Imaging shows large deposits of fluid inside of his skull, an indication that his brain tissue has died and been eroded. *Id.*

The historical review above shows that the existence of brain malformation, low intellectual functioning, an inability to manage one's own affairs, and unsound memory were conclusive proof of "idiocy" at common law. Mr. Black exhibits deficits in all four areas. These deficits are extreme and in each category Mr. Black's functioning is more compromised than at least 95% of the population.

Accordingly, Mr. Black meets the criteria for "idiocy" at common law and is incompetent to be executed.

IX. CONCLUSION

Mr. Black has demonstrated that he meets the common law "idiocy" standard and is therefore incompetent to be executed.

For the foregoing reasons we pray the Court will grant the following relief:

1. Declare that Mr. Black is presently incompetent to be executed.

2. Issue a stay of execution.

3. Order Respondent to file the record of state court proceedings with this Court.

4. Order an evidentiary hearing.

5. Any other relief as law and justice require.

Respectfully submitted,

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VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kelley J. Henry

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been served on counsel for Respondent, Assistant Attorneys General Sarah Stone and Nicholas Bolduc, through the electronic CM/ECF filing system on this 18th day of July, 2025.

/s/ Kelley J. Henry
Date of Service: July 18, 2025