IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: GREGORY THOMPSON	)	COFFEE COUNTY
	)	ORIGINAL APPEAL NO.
	)	M1987-00067-SC-DPE-DD
		Filed September 29, 2005

MOTION FOR STAY OF EXECUTION,
PETITION FOR RECONSIDERATION OF THE ORDER SCHEDULING AN EXECUTION DATE,
NOTICE OF CHANGE IN MENTAL HEALTH STATUS , INSANITY AND INCOMPETENCY TO BE EXECUTED
AND
REQUEST FOR CERTIFICATE OF COMMUTATION

HEARING REQUESTED

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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: GREGORY THOMPSON	)	COFFEE COUNTY
	)	ORIGINAL APPEAL NO.
	)	M1987-00027-SC-MWR-DD

MOTION FOR STAY OF EXECUTION,
PETITION FOR RECONSIDERATION OF THE ORDER SCHEDULING AN EXECUTION DATE,
NOTICE OF CHANGE IN MENTAL HEALTH STATUS , INSANITY AND INCOMPETENCY TO BE EXECUTED
AND
REQUEST FOR CERTIFICATE OF COMMUTATION

HEARING REQUESTED

Comes now, Gregory Thompson, through undersigned counsel, pursuant to TENN.S.CT.R. 12.4(A), TENN.R.APP.P. 39, *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), and (1) moves this Court for a stay of the February 7, 2006, execution date, (2) respectfully petitions this Court to reconsider its order of September 27, 2005, which set Mr. Thompson's execution for February 7, 2006, (3) gives notice of Mr. Thompson's change in mental health status, insanity and incompetency to be executed, and (4) requests the Court to issue a certificate of commutation.

A stay of execution and reconsideration of the Court's September 27, 2005, order is appropriate because (1) the order relies upon matters of fact and law upon which Mr. Thompson has not been heard and that are open to reasonable dispute, (2) this case presents issues of first impression regarding the proper procedure governing the State's second request for the execution of a severely mentally ill man whose

competency to be executed is at issue and, accordingly, a stay of the execution should issue to allow sufficient time for these significant issues to be decided, (3) the execution date should be stayed and this Court's order of September 27, 2005, should be reconsidered because there has been a substantial change in Mr. Thompson's mental health and the issue of Mr. Thompson's insanity is not settled as a matter of state or federal law or as a matter of fact, and (4) a certificate of commutation should issue because Mr. Thompson is severely mentally ill and extenuating circumstances have impeded the judicial system's ability to remedy grave injustices in this case.

I. MR. THOMPSON WAS DENIED AN OPPORTUNITY TO RESPOND TO THE STATE'S MOTION BEFORE THIS COURT SCHEDULED AN EXECUTION DATE

On September 19, 2005, the State of Tennessee invoked TENN.S.CT.R. 12.4(A) and moved this Court to set an execution date for Mr. Thompson. The rules of court provide Mr. Thompson ten days to respond to the State's motion. TENN.S.CT.R. 12.4(A). In fact, counsel for Mr. Thompson was proceeding under RULE 12.4(A) and preparing a response on his behalf. This Court, however, granted the State's motion only eight days after it was filed – and two days before Mr. Thompson's response was due – and scheduled Mr. Thompson's execution for February 7, 2006. Although TENN.S.CT.R. 12.4(E) allows this Court to *sua sponte* set a new date of execution, this proceeding was initiated under Rule 12.4(A). Accordingly, pursuant to that Rule, Mr. Thompson should have been provided an opportunity to be heard on the State's motion.

The lack of established and adequate procedures has denied Mr. Thompson due

process. Although this Court has recognized that "it is particularly important that [] procedures be followed in death penalty competency claims," *Van Tran*, 6 S.W.3d at 274, it also acknowledged a dearth of established process, stating:

> Issues may, and no doubt, will, arise in competency proceedings which have not been addressed in this opinion. Such issues can and will be resolved on a case-by-case basis.

Id. This case presents such issues of first impression.

Neither the legislature nor this Court has set forth procedures governing subsequent claims under *Ford v. Wainwright*, *supra*, and *Van Tran*, *supra.* Guidance can only be gleaned from Rule 12.4 and a single sentence from this Court's opinion in *Van Tran* which states:

> ... subsequent Ford claims will be disallowed unless the prisoner, by way of a motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed.

Van Tran, 6 S.W.3d at 272. There are no provisions for the incompetent prisoner to obtain the means to establish the required showing of a "substantial change" which raises a "substantial question" about competency. No rules exist for funding the required mental health professional. Other than the ten-day response time contained in Rule 12.4(A), which time was not afforded Mr. Thompson, no rules exist to provide a reasonable amount of time to investigate a subsequent *Ford* litigant's current mental health status, including a reasonable amount of time to obtain a mental health

professional's opinion.[1] Indeed, this Court has seemingly indicated that neither expert funding nor an adequate opportunity to demonstrate a showing of incompetency to be executed is required in subsequent *Ford* proceedings.

In *Coe v. State*, 17 S.W.3d 193, 213-14 (Tenn. 2000), this Court rejected any right to expert funding under the Sixth Amendment to the federal constitution, *Ford v. Wainwright*, *supra*, *Ake v. Oklahoma*, 470 U.S. 68 (1985), and Tennessee statutes. It made clear

> that the only authorization to appoint state-funded mental health professionals ... to determine whether a prisoner is competent to be executed derives from [the] Court's opinion in *Van Tran*, 6 S.W.3d at 269.

Id. at 213. *Van Tran* provides expert assistance only for a first-time *Ford* litigant who "has satisfied the required threshold showing" for a competency hearing. *Van Tran*, 6 S.W.3d at 269. *Van Tran* does not provide expert assistance for a subsequent *Ford* litigant to satisfy the required showing of a "substantial change" which raises a "substantial question" about competency.

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[1]Out of an abundance of caution, this pleading has been submitted within the time-frame set out in Rule 12.4. However, the time-frame regarding subsequent *Ford* claims remains an open question. Counsel for Mr. Thompson has worked diligently to respond to the State's motion and to this Court's order. The requests for a stay and for the Court to withhold adjudication until counsel is able to supplement this pleading with current medical records and expert opinion are reasonable and necessary for a subsequent *Ford* petitioner to have an adequate opportunity to respond.

The ABA Guidelines for counsel appointed after conviction require undersigned counsel to conduct an "aggressive investigation of all aspects of the case" and to "continually monitor the client's mental, physical and emotional condition. Guideline 10. 15.1E.2 and 4. Further, according to the ABA Guidelines, counsel has an ethical obligation to investigate and preserve issues for subsequent review. Guideline 10.15.1C. The comments to the ABA Guidelines specifically discuss counsel's rigorous investigation of issues surrounding competency to be executed claims. Commentary to ABA Guideline 10.15.1 at n.340.

Although surprised by the timing of the State's motion (as explained below) and operating within this uncertain and undetermined area of Tennessee law, counsel for Mr. Thompson was in the process of responding to the State's motion when this Court entered its order and prematurely cut-off any opportunity to be heard. Counsel had:

• requested Mr. Thompson's current medical records from the prison;

• contacted the three mental health professionals familiar with Mr. Thompson's almost twenty-year documented history of severe mental illness, familiar with Mr. Thompson through conducting their own mental health examinations of Mr. Thompson and who independently, yet unanimously, arrived at the conclusion that Mr. Thompson was incompetent to be executed in 2004;

• determined the availability of the three mental health professionals to conduct a current mental health examination of Mr. Thompson;

• requested an affidavit from Dr. Sultan regarding Mr. Thompson's mental state in July 2005 (the date of her most recent evaluation of Mr. Thompson); and

• began researching and writing the response to the State's motion to show that an execution date should not have been scheduled at this juncture.

The results of counsel's beginning efforts to meet the standards set by this Court are reflected herein. However, after receiving Mr. Thompson's current prison records and the opinions of the other two mental health professionals, Mr. Thompson will have additional facts to support his *prima facie* showing.

II. IT WAS PREMATURE TO SET AN EXECUTION DATE

An execution date should not have been scheduled because Mr. Thompson's

federal court litigation is not completed. In its motion to re-set Mr. Thompson's execution, the State failed to inform this Court that Mr. Thompson's federal habeas litigation remains pending in the Sixth Circuit Court of Appeals.[2] Because Mr. Thompson's first federal habeas proceeding is ongoing, the State's motion was not reasonably anticipated.[3]

In 2004, after this Court scheduled the previous execution of Mr. Thompson, the Sixth Circuit Court of Appeals issued a unanimous decision that Mr. Thompson's ineffective assistance of counsel claim had merit because there was "proof that Mr. Thompson was suffering from a serious mental disease or defect at the time of the 1985 offense which would have substantially impaired his ability to conform his conduct to the requirements of the law." *Thompson v. Bell*, 373 F.3d 688, 691 (6th Cir. 2004) *overruled on procedural grounds, Bell v. Thompson*, 125 S.Ct. 2825 (2005). Subsequently, the United States Supreme Court reversed the Court of Appeals' decision by a 5-4 vote and denied Mr. Thompson's rehearing petition. *Bell v.*

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[2]Although the State suggested that the federal district court's order lifting the stay of execution signaled the propriety of its motion for an execution date, the State knew that the first federal habeas proceeding has not concluded, that the case is pending before the Sixth Circuit Court of Appeals, and that the federal mandate has not issued.

[3]Mr. Thompson's counsel would likewise have been surprised had the Court *sua sponte* re-set Mr. Thompson's execution pursuant to TENN.S.CT.R. 12.4(E). The current procedural posture of this case is unlike one in which a motion to schedule an execution under TENN.S.CT.R. 12.4(A) is filed upon the conclusion of federal proceedings. In the latter situation, counsel for incompetent clients can reasonably anticipate the orderly filing of the State's motion at the conclusion of the first federal habeas proceeding. Therefore, counsel can assemble evidence and prepare for the *Ford* proceeding in advance of the actual filing of the State's motion for an execution date. By contrast, here, the State's motion was not anticipated and therefore counsel could only begin gathering current information on Mr. Thompson's present insanity ten days ago, when the motion was filed.

Thompson, 2005 U.S. LEXIS 5333 (Aug. 22, 2005). Following the Supreme Court's reversal, Mr. Thompson filed a petition for panel rehearing and suggestion for rehearing *en banc* with the Sixth Circuit Court of Appeals. *Thompson v. Bell*, No.00-5516 (6th Cir.). This petition requests rehearing under the newly issued guiding principles and procedures contained in the Supreme Court's opinion. The petition remains pending.

Without a decision on the petition and issuance of the Court of Appeals' mandate the habeas proceeding is not completed. "The court of appeals retains jurisdiction over a case until [the mandate] issues...." *The Youghliogheny and Ohio Coal Company v. Miliken*, 200 F.3d 942, 951-52 (6th Cir. 1999).[4] At this juncture, it was premature to schedule Mr. Thompson's execution because Mr. Thompson's first habeas corpus proceeding is not completed. TENN.S.CT.R. 12.4(A) (the standard three-tier appeals process must be completed before an execution date may be set).

The last time this Court acceded to the State's request to schedule Mr. Thompson's execution before the federal mandate issued, the execution was stayed

[4] *See also Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and therefore, we may, at our discretion, 'amend what we previously decided ....'" (quoting *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977)); *United State v. Ross*, 654 F.2d 612 (9th Cir. 1981) ("Until the mandate is issued, a case is not closed."); *Sethy v. Alameda*, 602 F.,2d 894, 897 (9th Cir, 1979) (an appeal is still "pending" after the opinion is filed and is not final until the mandate issues); *Ostrer v. United States*, 574 F.2d 594, 598 (2d Cir. 1978)("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came. The practical effect of the mandate's issuance, at least with respect to appellants facing criminal sentences, is to authorize the executive branch to insure compliance with whatever sentence was imposed by the [trial] court.").

because of the pending federal proceedings.[5] Issuance of the federal court's mandate signals this Court that it would then be proper to entertain a motion to schedule an execution date. Until a mandate issues, the federal court of appeals' decision is "subject to further action on rehearing." *Forman v. United States*, 361 U.S. 416, 426 (1960). In accordance with these principles, this Court has recently declined to set an execution date while the federal court was still reviewing the case and future federal appeals were anticipated. *State v. Alley*, No.M1991-00019-SC-DPE-DD Order dated Jan. 6, 2005 (Tenn.)(Attachment A). Likewise, due to Mr. Thompson's pending federal litigation, "the interests of judicial economy and finality militate against setting an execution date at this time." *Id.*

III. MR. THOMPSON HAS EXPERIENCED A SUBSTANTIAL CHANGE IN HIS MENTAL HEALTH, HE IS INSANE AND HE IS INCOMPETENT TO BE EXECUTED

"A proceeding to determine competency to be executed may be initiated only after all other available federal and state remedies have been exhausted." *Coe*, 17 S.W.3d at 212 *quoting Van Tran*, 6 S.W.3d at 269 n.14. Because Mr. Thompson's federal court litigation has not been exhausted, the issue of competency to be executed cannot be raised at this time. Accordingly, because Mr. Thompson is prevented from litigating his current insanity, an execution date should not have been scheduled. A stay of execution is warranted.

Alternatively, pursuant to *Van Tran*, 6 S.W.3d at 272, it is requested that this

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[5]The same occurred in *Hutchison v. Bell*, No.M1991-00018-SC-DPE-DD, Order filed Sept. 30, 2003 (Tenn.), where, at the State's request, an execution date was scheduled despite pending federal litigation. The execution was subsequently stayed and Hutchison's federal litigation is still ongoing.

Court enter an order staying the execution of Mr. Thompson which is presently scheduled for February 7, 2006.[6] It is further requested that this Court order an evidentiary hearing on Mr. Thompson's competency to be executed.

This Court is aware of Mr. Thompson's long-standing history of severe mental illness marked by psychotic thought processes and delusions, the history of state-certified mental health emergencies declaring Mr. Thompson incompetent, the State of Tennessee's recognition of the length and severity of Mr. Thompson's mental illness, and the State of Tennessee's admission that Mr. Thompson is mentally disabled and its request for a conservatorship for Mr. Thompson. *See generally Thompson v. State*, 134 S.W.3d 168, 180 (Tenn. 2004). Since the Court's previous determination, there has been a substantial change in Mr. Thompson's mental health which raises a substantial issue as to his competency to be executed.

A. Expert Opinion

The attached affidavit of Faye Sultan, Ph.D., affirms that since this Court's opinion on May 12, 2004, there has been a change in Gregory Thompson's mental health (Attachment B). In Dr. Sultan's professional and expert opinion, Gregory Thompson currently lacks the mental capacity to understand the fact of the impending execution and the reason for it. Dr. Sultan further states that during her most recent evaluation of Mr. Thompson, "it was clear that his psychological condition had deteriorated. His delusional system regarding the impossibility of his execution has

[6] *Van Tran* directs that the vehicle through which a subsequent *Ford* claim is to be brought is a motion for stay of execution. Presuming the law does not require a litigant to request relief which is unavailable, it is fully contemplated that a stay of execution is appropriate at this time.

expanded to include a new set of irrational beliefs." Dr. Sultan states that Mr. Thompson's "mental health status has changed":

> He was louder and more expansive in his thoughts. His behavior was more erratic and impulsive. He reported experiencing some recent hallucinations and some severe suicidal thoughts. Mr. Thompson had recently requested additional medication to assist him in coping with these hallucinations and depressive thoughts. According to the medical records, additional medication had in fact been provided to Mr. Thompson in response to his request.

Dr. Sultan's opinion is that "Gregory Thompson is not competent to be executed at this time."

Two other mental health professionals who previously examined Mr. Thompson and found him incompetent to be executed have been contacted but are not available to examine Mr. Thompson within the short time frame imposed by TENN.S.CT.R. 12.4. George Woods, M.D., is available to examine Mr. Thompson in October. John Rabun, M.D., is available to examine Mr. Thomson in November. It is respectfully requested that the Court withhold its decision on Mr. Thompson's *prima facie* showing of insanity to allow adequate time and opportunity for the mental health professionals to examine Mr. Thompson and submit their findings to the Court.

B. Medical Records

Although copies of the most recent medical records on Mr. Thompson have been requested from the prison, they have not yet been produced. The most recent prison medical records available to counsel show an alteration in Mr. Thompson's mental state. In both June and July 2005, Mr. Thompson complained that the medications "aren't working any more." (Attachment C). Prison mental health staff noted Mr.

Thompson's complaints about the medicine not working, noted an alteration in his mental status and increased depression and referred him to the psychiatrist for re-evaluation. It is anticipated that the prison medical records from August and September 2005 will reflect this continuing change in Mr. Thompson's mental health. Therefore, it is requested the Court withhold its decision until the prison medical records are released to Mr. Thomson's counsel and a reasonable amount of time is provided to review the most current records and supplement the present *prima facie* showing of insanity.

C. Mr. Thompson Is Insane

The execution of Mr. Thompson would be unconstitutional because Mr. Thompson is insane. In *Ford v. Wainwright*, the United States Supreme Court held that it violates the Eighth Amendment to execute the insane. 477 U.S. 395 (1986).

"From medieval times the common law has recognized that the insane or mentally incompetent should not be executed." *Van Tran v. State*, 6 S.W.3d at 262. "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." *Ford v. Wainwright*, 477 U. S. at 417 (1986)(Marshall, J., joined by Brennan, Blackmun and Stevens, JJ.); *see also id.* at 421 (Powell, J., concurring) ("The more general concern of the common law – that executions of the insane are simply cruel – retains its vitality."). The prohibition on executing the insane was first recognized by Tennessee in 1910. *Jordan v. State*, 124 Tenn. 81, 87, 135 S.W. 327, 328 (Tenn.1910). Accordingly, if after judgment a prisoner becomes *non compos* "he

shall not be ordered for execution" and the judge "ought to reprieve him." *Van Tran*, 6 S.W.3d at 262 (finding "a madman is punished by his madness alone").

With the seminal decision of *Ford v. Wainwright*, *supra*, the United States Supreme Court concluded that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. The Court found that "[w]hether 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 410.

In *Van Tran v. State*, *supra,* this Court adopted a "cognitive test" for determining whether a prisoner is competent to be executed under Tennessee law. Under this test a prisoner "is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Van Tran*, 6 S.W.3d at 266. This standard contains a mental capacity component. *Id.* The basis for this standard was Justice Powell's opinion in *Ford* which concurred in the *Ford* judgment (comprised of four other justices) on more narrow grounds. *Id., see also Coe v. Bell*, 209 F.3d at 818 (explaining that Justice Powell's concurring opinion in *Ford* was on grounds more narrow than the position taken by the plurality opinion).

Importantly, Justice Powell's concurrence in *Ford* explained that a standard prohibiting execution of "those who do not have the mental capacity to understand the nature of the death penalty and why it was imposed on them" 477 U.S. at 421 (citations omitted), "appropriately defines the kind of mental deficiency that should trigger the

Eighth Amendment prohibition" *id.* at 422, because:

> It is true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose.
> ...
>
> 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.

Id. at 421, 422. Accordingly, Justice Powell, in concurrence, summarized the Eighth Amendment standard as forbidding the execution "of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.[7]

A prisoner must have the mental capacity to understand and have an actual understanding of the nature and purpose of the punishment if the punishment is to have moral purpose and retributive force. *See Ford*, 477 U.S. at 421. The understanding must be a rational understanding as well as a "factual" understanding. For example, the prisoner must understand that he will die in the near future (and what it means to die), and that the reason the State will kill him is to punish him for what he did. If, as in Mr. Thompson's case, the prisoner does not think he will die, he doesn't have a factual understanding of the nature of the punishment. If the prisoner, like Mr. Thompson, does not understand the State is executing him because of the murder (but because of

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[7]In *Ford*, a psychiatrist opined that Ford "does not know that he is to be executed, but rather believes that the death penalty has been invalidated." 477 U.S. at 422. The Court stated, "If this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted," *id.* at 422-423, and "has raised a viable claim under the Eighth Amendment." *Id.* at 427.

another reason) then the purpose of the punishment is extinguished.

The inquiry into whether a person has the mental capacity to understand the punishment he is about to suffer and why he is to suffer it requires more than a superficial examination.[8] First, being aware that one is sentenced to death is much different from being aware that one is about to be executed. *Coe*, 209 F.3d at 827 (the condemned must be "aware of his imminent execution"). Second, being aware that one is sentenced to death for a murder is much different from being aware that the State seeks to execute you on a specific date because of that murder. *Id.* (there must be a showing that the condemned "has made the requisite connection between his crime and his punishment."). Third, being aware, *i.e*., "having or showing realization, perception or knowledge",[9] is different from understanding, *i.e*., "to grasp the meaning of".[10] *Van Tran*, 6 S.W.3d at 266 (a prisoner "is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it."). Fourth, being aware of a fact is different from being aware of a concept and understanding a concept like death and punishment. *Ford*, 477 U.S. at 422 (prisoners should be considered insane for the purpose of execution if they "are unaware of the punishment they are about to suffer and why they are to suffer it.").

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[8]"Capacity" is defined as "mental ability to make a rational decision, which includes the ability to perceive and appreciate all relevant facts." *Barron's Law Dictionary*, 3d Ed. p.59 (1991). "Mental capacity" is defined as "such a measure of intelligence, understanding, memory, and judgment (relative to the particular transaction) as will enable the person to understand the nature of his act." *Black's Law Dictionary*, Rev. 4th Ed. p.1137 (1968).

[9]*Merriam-Webster Online Dictionary* located at http://www.merriam-webster.com.

[10]*Id.*

Evidence will demonstrate that Mr. Thompson's mental capacity, even when artificially enhanced, is severely impaired due to schizophrenia and delusional thoughts. In addition, Mr. Thompson's actual mental capacity, *i.e.*, without medication, is non-existent due to florid psychosis. Therefore, he is "insane or mentally incompetent" and should not be executed. *Van Tran*, 6 S.W.3d at 262.

In *Ford*, the United States Supreme Court set forth the constitutional standard for competency to be executed. In *Van Tran*, however, this Court recognized that, not only does the Constitution of the United States prohibit the execution of the insane, the execution of the insane is also prohibited under Tennessee common law. *Van Tran*, 6 S.W.3d at 266.

> 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.

Id. at 265 (emphasis supplied). The common law prevents an insane person from being punished if the insanity exists at the time punishment is to be implemented. *Jordan v. State*, 124 Tenn. at 90. "[T]o require one who has been disabled by the act of God" to submit to punishment, especially capital punishment, "would be inhuman". *Id.* at 87. In its plainest terms, the common law clearly speaks to the person's actual mental condition and not of any artificially induced chemical condition.

The common law standard is more rigorous than the constitutional standard delineated in *Ford*. A person must be "capable of understanding the nature and object of the proceedings going on against him" and "rightly comprehend[] his own condition in reference to such proceedings." *Jordan*, 124 Tenn. at 87-88. In *Van Tran* this Court

expounded on the additional requirement set forth in *Jordan* that the prisoner "can conduct his defense rationally":

> At common law a more rigorous standard was applied. In addition to requiring that the prisoner be aware of the penalty and its purpose, the prisoner must also have been able to assist in his or her own defense. *See* 4, Blackstone, *Commentaries* ("the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.")

Van Tran, 6 S.W.2d at 265, *but see Thompson v. State*, 134 S.W.3d 168, 184 (Tenn. 2004).

The required analysis includes not only application of the Eighth Amendment standard which the Constitution of the United States requires but also an inquiry into Mr. Thompson's competency under the common law as recognized in *Jordan* and *Van Tran*. Mr. Thompson has been "disabled" by mental illness and accordingly cannot understand "the nature and object of" the current execution proceedings going on against him, nor does he "rightly comprehend[] his own condition in reference to such proceedings." Counsel for Mr. Thompson can show he is incompetent to be executed under Tennessee common law.

D. It Is Unconstitutional To Execute The Chemically Competent

The practice of executing the insane "has been branded 'savage and inhuman.'" *Ford*, 477 U.S. at 407. It is also savage and inhuman to forcibly medicate a person into competency in order to execute him. Mr. Thompson is not competent to be executed. He cannot marginally meet the three prongs set forth in *Ford*. Nonetheless, should this Court disregard expert opinion and declare Mr. Thompson competent, this Court is constrained to acknowledge that any semblance of competency is achieved by the use

of powerful medication which was initiated against Mr. Thompson's will. (Attachment B) Any facade of competency Mr. Thompson possesses is an artificial, chemical competence. It violates the Eight Amendment to medicate Mr. Thompson into competency and then kill him. *Ford*, *supra*. It also shocks the conscience and is a violation of Mr. Thompson's substantive due process rights under the Fifth and Fourteenth Amendment to forcibly medicate him into competency for the purpose of execution. *See Washington v. Harper*, 494 U.S. 210 (1990) (discussing forced medication of an inmate in a noncapital setting).

Other states to specifically consider the issue have rejected medication to achieve competency for execution. *See Singleton v. State*, 437 S.E.2d 53 (S.C. 1993); *State v. Perry*, 610 So.2d 746 (La. 1992). In *Perry*, the court was particularly persuaded by the fact that the American Medical Association and the American Psychiatric Association opine that it is unethical to medicate a person into competency to be executed. *Perry*, 610 S.W.2d at 769.

Nor should this Court be persuaded by any ideas that Mr. Thompson's consumption of medicine is voluntary. The current regiment of medicine was achieved by a state-initiated conservatorship. (Attachment D). Mr. Thompson has attempted to stop taking the medicine but cannot because of the addictive nature of the medicine. (Attachment E) Further, in his unmedicated state, Mr. Thompson has been subject to physical abuse by prison guards[11]. (Attachment F) Under these circumstances, Mr. Thompson's ingestion of the medicine is not voluntary.

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[11]Mr. Thompson was unmedicated in 2000 and was attacked by Correctional Officer Troy Hardin.

Forcible medication also violates Mr. Thompson's right to privacy under the Tennessee Constitution. Tennessee Constitution, Declaration of Rights, Article I, Sections 3, 7, 8, 19, and 27. Tennessee courts have noted that Tennessee's right to privacy is broader than the right guaranteed in the federal constitution. *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996). The forcible introduction of powerful medication into Mr. Thompson's body, where that medicine alters the state of his mind and body, violates the right to privacy guaranteed in the Tennessee Constitution.

E. The Prior Competency Determination Does Not Settle The Issue Of Mr. Thompson's Present Insanity

In its previous review, this Court did not acknowledge that Mr. Thompson must be able to prepare himself for his passing. This Court must find evidence of all three prongs of the *Ford* test before Mr. Thompson may be deemed competent for execution. In determining Mr. Thompson's competency to be executed, this Court must consider the following: whether Mr. Thompson is aware of his execution, whether he is aware of the reason for it, and whether he can prepare himself for his death. In *Ford*, the United States Supreme Court emphasized the following:

> And only if the defendant is aware that his death is approaching can he prepare himself for his passing.

Ford, 477 U.S. at 422. Because the Court's prior determination did not account for the third prong of the *Ford* test, that prior determination affords no basis for the Court's present inquiry and no basis for presuming Mr. Thompson is competent.

In its previous review of Mr. Thompson's mental state, the Court erred by applying a presumption of competency. That was a significant analytical error.

Applying a presumption of competency was unconstitutional because (1) there was no pre-trial hearing on competency (2) there is a well-documented history of Mr. Thompson's severe mental illness which includes psychotic thoughts and delusions (3) prison mental health staff have, on at least two occasions, certified Mr. Thompson to be incompetent and initiated emergency mental health commitment procedures (4) the State obtained a court-ordered conservatorship in 2000 because

> ...Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication [sic] and have a conservator assigned to him.
>
> It is my opinion that Mr. Thompson lacks the insight into his illness to make decisions regarding mental health and medical treatment at this time. I believe that a conservator is necessary to make appropriate decisions regarding his care and without such conservatorship, harm is likely to come to Mr. Thompson or others as a result of his mental illness. Mr. Thompson's illness is chronic and fluctuating in nature, therefore extended periods of marked improvement are not expected.

Tennessee law generally places the burden of persuasion on competency to be executed upon the condemned inmate. "To prevail, the prisoner must overcome the presumption of competency by a preponderance of the evidence." *Van Tran*, 6 S.W.3d at 270. The court references Justice Powell's concurring opinion in *Ford* as support for this requirement. *Id.* However, this presumption of competency is based solely upon a fair determination of competency at trial and sentencing. *Ford*, 477 U.S. at 425. It is clear error to apply this standard to Mr. Thompson. In Mr. Thompson's case, there has never been a fair, adequate determination of competency at trial and sentencing and an extensive, documented history of incompetency rebuts any presumption. Application of

the presumption of competency in this situation violates the Eight Amendment and *Ford*. Because of this analytical error contained in the Court's previous decision, that prior decision should play no role in the Court's current inquiry.

Mr. Thompson's mental state is in flux. With respect to those who are seriously mentally disabled, the passage of time itself raises questions given the inquiry mandated by *Ford v. Wainwright*, *supra*. In *Van Tran*, this Court recognized the relevant query is "*present* incompetency." 6 S.W.3d at 269. In this case, the record indisputably shows Mr. Thompson's progressive mental deterioration. In light of the record evidence supporting progressive deterioration, discounting the passage of 18 months or the use of any standard that disregards such fact, is wholly arbitrary and incompatible with *Ford*. *See e.g., Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000) (holding that the federal district court erred by relying on a stale mental health evaluation when assessing competency).

IV. THE CASE FOR COMMUTATION

This case presents an issue of first impression with respect to this Court's issuance of a certificate of commutation. It involves a severely mentally ill prisoner sentenced to death and a breakdown in the judicial system which has prevented any trier of fact from considering his mental illness as a significant factor warranting a punishment less than death.

Here, throughout the state court proceedings, the State of Tennessee affirmatively misrepresented the state of Mr. Thompson's mental health. At trial and during post-conviction proceedings, the State asserted that Mr. Thompson was

malingering mental illness. This assertion carried forward to the federal district court proceeding where the State relied upon the court decisions which reflected the State's assertion that Mr. Thompson was not mentally ill, but was malingering. Not until Mr. Thompson's case was before the federal appellate court did the State concede that Mr. Thompson has suffered from a long history of severe mental illness. In a 180-degree-turn, the State then sought a court-ordered conservatorship for Mr. Thompson because of his debilitating mental illness.

The State of Tennessee filed a petition in the Tennessee state courts to have a conservator appointed for Mr. Thompson to control his medical treatment. In that petition (Attachment D) the State admitted that Mr. Thompson was not malingering at all, but actually suffered from a long-standing psychotic mental illness.

Mr. Thompson's mental illness at the time of the crime was never considered by a finder of fact. At trial, counsel did not present this evidence. During post-conviction proceedings, when the effectiveness of trial counsel's presentation of Mr. Thompson's mental illness was squarely at issue, the State again argued that Mr. Thompson was malingering. Counsel were denied funds to rebut the State's allegations and present evidence of Mr. Thompson's mental illness at the time of the crime. The federal district court denied Mr. Thompson an evidentiary hearing on this issue by granting summary judgment, not on the procedural grounds asserted by the State, but on the mistaken assessment that evidence of Mr. Thompson's mental illness at the time of the crime was not before it and that it could not consider any new evidence to this effect.[12]

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[12]Notably, the State, in urging summary judgment, did not contest the facts alleged by Mr. Thompson – including facts demonstrating he was mentally ill when the

Initially, the federal appeals court affirmed the district court's ruling. However, it later determined that its first decision was mistaken and unjust. The court of appeals determined there was evidence that Mr. Thompson was mentally ill at the time of the crime and that trial counsel's failure to present this evidence undermined confidence in the jury's sentencing determination. The United States Supreme Court, however, reversed the court of appeals for procedural reasons.

This is a case calling for commutation. The Tennessee Supreme Court is vested by statute with a vital role in recommending clemency in capital cases. Tennessee law provides, "[t]he governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted." TENN. CODE ANN. § 40-27-106. Though the Governor is charged with ultimate authority to decide whether a death sentence should be commuted, Tennessee law charges this Court with the responsibility of requesting a certificate of commutation in appropriate cases, where the death penalty is to be imposed–a duty the Court has not hesitated to discharge. *See Anderson v. State*, 215 Tenn. 83, 383 S.W.2d 763 (1964)(recommending that Governor commute defendant's death sentence because of his serious mental illness).

Gregory Thompson's case is unusual. Three federal court of appeals judges and four United States Supreme Court justices who considered the evidence of Mr. Thompson's impaired mental state at the time of the crime believe that sentencing relief

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crime was committed.

is warranted. However, this case contains a series of legal miscues and procedural technicalities that a bare majority of judges felt they could not look beyond. The jurists who reviewed the mental health evidence unsuccessfully fought to cure a serious injustice but the majority believed the courts were powerless to grant relief. This case presents precisely the sort of extenuating circumstances that warrant this Court recommending clemency to the Governor.

As this Court and everyone familiar with this case is aware, Gregory Thompson suffers from profound mental illness. Dr. Faye Sultan, an eminent psychologist who examined Mr. Thompson and his medical history, has concluded unequivocally that Mr. Thompson was mentally ill at the time of his offense and lacked the ability to conform his conduct with the law.[13] Yet a series of circumstances that are not only "extenuating," but potentially tragic, have prevented the courts from acting on this evidence. Clemency, which operates as a "fail safe" to address the "unalterable fact that our judicial system, like the human beings who administer it, is fallible," *Herrera v.*

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[13] *See* Report of Dr. Faye E. Sultan (July 22, 1999), wherein she concludes: "Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. *This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.* Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases. It is important to note that *all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial*. Emphasis supplied. Dr. Sultan's report is reproduced in *Bell v. Thompson,* 125 S. Ct. 2825, 2851 (2005).

Collins, 505 U.S. 390, 415 (1993), is thus called for.

In considering whether to recommend clemency to the Governor, this Court will consider "extenuating circumstances . . . based upon the facts in the record or a combination of record facts and new evidence that is uncontroverted." *Workman v. State,* 22 S.W.3d 807, 808 (2000). Here, the uncontroverted facts describe an extraordinary series of events which call into question the justice (if not the technical validity) of Mr. Thompson's death sentence:

1. Immediately after his arrest in 1985, Mr. Thompson confessed to murdering Brenda Lane, directed police to her body, and (in lucid moments) has shown remorse for her death.[14]

2. When he was tried for murder, the State argued and presented evidednce purporting to show that Mr. Thompson was malingering mental illness. Mr. Thompson's attorneys presented on the issue of Mr. Thompson's psychological condition the testimony only of a vocational psychologist, Dr. Copple, who stated that Mr. Thompson would be a good worker if given a prison sentence. Though he was unqualified to testify on Mr. Thompson's sanity, Dr. Copple volunteered on cross-examination that Mr. Thompson was not mentally ill. Attorneys for Mr. Thompson later admitted that they had not been able to hire an actual psychiatrist because the one they ordinarily used had moved out of state.[15]

3. Shortly after he was placed on death row, Mr. Thompson displayed such obvious signs of serious mental illness that he was prescribed powerful anti-psychotic medications.

4. Post-conviction counsel sought funds for mental health experts to demonstrate Mr. Thompson was severely mentally ill at the time of the crime. The trial court denied funding and at the post-conviction hearing the State argued that Mr. Thompson was not mentally ill. The Court of Criminal Appeals refused to review the denial of funding issue because

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[14] *State v. Thompson,* 768 S.W.2d 239, 243 (Tenn. 1989).

[15] *Thompson v. Bell*, 315 F.3d 566, 600 (6th Cir. 2003)(Clay, J., dissenting).

post-conviction counsel allegedly failed to preserve the issue for appeal.[16]

5. On July 22, 1999, in conjunction with his federal habeas corpus action, Dr. Faye E. Sultan prepared a report and gave a deposition in which she stated that at the time of the crime, Mr. Thompson had been unable to conform his conduct to the requirements of the law owing to his mental illness.[17]

6. In Mr. Thompson's federal habeas corpus action, the State urged summary dismissal for procedural reasons and argued that the district court could not consider evidence of Mr. Thompson's mental illness at the time of the crime. Dr. Sultan's deposition and affidavit were not introduced into the district court record. Based on the State's argument that it could not consider new evidence of Mr. Thompson's mental illness and the erroneous assessment that there was an absence of evidence on this point, the district court granted summary judgment for the State and denied Mr. Thompson's habeas corpus petition.[18]

7. In the appeal of the district court's grant of summary judgment to the United States Court of Appeals for the Sixth Circuit, a majority of the court (Judges Surheinrich and Moore) at first ruled against Mr. Thompson because they mistakenly found no evidence in the record that Mr. Thompson had been mentally ill at the time of his crime.[19] On appeal to the Supreme Court Mr. Thompson raised the issue regarding the improper grant of summary judgment. The Supreme Court denied certiorari review.[20]

8. After certiorari was denied, the two judges in the majority became aware of the report by Dr. Sultan (it had been attached to a filing in the Sixth Circuit). This information prompted these judges, *sua sponte,* to withdraw their previous ruling and (joined by formerly dissenting Judge Clay) to

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[16] *Thompson v. State*, 958 S.W.2d 156, 171 (Tenn. Crim. App. 1997).

[17] *Bell v. Thompson,* 125 S. Ct. 2825, 2851 (2005).

[18] *Thompson v. Bell,* 373 F.3d 688, 697-714 (6th Cir. 2004).

[19] *Id.* at 692. Judge Clay had dissented from the Sixth Circuit's first ruling against Mr. Thompson. He concluded that Mr. Thompson's trial counsel had acted unreasonably in hiring an industrial psychologist who was not qualified to provide the psychological assistance needed to defend Mr. Thompson. 315 F.3d at 595-610.

[20] *Thompson v. Bell*, 540 U.S. 1051 (2003).

unanimously vacate the judgment of the district court.[21]

9. The State appealed this judgment to the Supreme Court of the United States. The Supreme Court, in a 5-to-4 decision, ruled that assuming that the Sixth Circuit had authority to correct its ruling before the issuance of its mandate, the court had abused its discretion by reconsidering its ruling without giving notice to the parties that it was doing so, and by waiting more than five months after the Supreme Court had denied certiorari to issue its amended judgment.[22]

As this description of Mr. Thompson's circumstances indicate, his death sentence is the culmination of the State's affirmative misrepresentation of Mr. Thompson's mental condition and a series of defense mistakes and court errors that the courts have been powerless to correct, and which now can be remedied by clemency. At Mr. Thompson's trial, Judge Ewell approved expenses for a private psychiatric evaluation of Mr. Thompson. This end was frustrated when Mr. Thompson's trial attorneys instead hired an industrial psychologist who is most accurately described by Judge Clay in his original dissenting opinion:

> Dr. Copple did not have the requisite knowledge and training to provide the sort of expert assistance necessary to protect Thompson's constitutional rights. Simply put, Dr. Copple lacked the medical expertise to be a qualified witness in Thompson's behalf and to rebut the state's psychiatric evaluation performed by the team of forensic psychiatrists and psychologists at MTMHI. Specifically, as an industrial psychologist specializing in Social Security and vocational evaluations, Copple lacked the specialized knowledge, skill, experience, and training to function as a qualified witness in this capital case where a forensic psychologist or psychiatrist was needed to provide a psychological basis for Thompson's behavior in order to show that he was mentally impaired . . . .
>
> Dr. Copple had never testified in a capital case and had not testified in a criminal case in years. Moreover, Thompson's trial counsel admitted that Dr. Copple was not an expert in criminal behavior. . . .Indeed, what Thompson needed at the sentencing phase of the trial was not an industrial psychologist opining about

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[21] *Thompson v. Bell,* 373 F.3d 688 (6th Cir. 2004).

[22] *Bell v. Thompson,* 125 S. Ct. 2825 (2005).

> whether Thompson would "thrive" in prison, but a qualified expert who would help him escape the death penalty by giving testimony about his mental condition so as to convince the jury that the mitigating circumstances outweighed the aggravating factors.[23]

Because of the court's denial of expert funds and attorney error, the appropriate mitigating evidence described by Judge Clay as being needed also was not presented in post-conviction proceedings. *Thompson v. State*, 958 S.W.2d at 171.

The error of his trial counsel in failing to investigate Mr. Thompson's history and retain a qualified psychological expert to testify regarding Mr. Thompson's mental illness might have been rectified in a habeas corpus action, except for another series of irregularities. In Mr. Thompson's federal habeas action, his claim that his trial attorney's performance had been constitutionally inadequate was fatally undercut when (1) the State argued the district court could not consider new evidence of Mr. Thompson's mental health at the time of the crime and urged summary dismissal (2) the district court granted summary judgment on grounds not asserted by the State, and (3) the Report and Deposition of Dr. Faye E. Sultan that would have controverted the State's contention that Mr. Thompson was faking mental illness at the time of his trial was not placed in the record. Thus were the circumstances leading to the district court's erroneous decision.

In his appeal to the Sixth Circuit, the court initially ruled against Mr. Thompson based on a perceived lack of record evidence in the district court.[24] However, upon

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[23] *Thompson v. Bell*, 315 F.3d 566, 603-04 (6th Cir. 2003)(Clay, J., dissenting).

[24] *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003).

subsequent review, the panel became aware of the true facts in Mr. Thompson's case, and the court took the extraordinary step of admitting that its previous ruling had been incorrect and *sua sponte* reversing itself. As Judge Moore explained:

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to respondent as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.[25]

Indeed, Judge Suhrheinrich who had been the author of the original opinion for the court explained further why this unprecedented action was necessary:

> I then conducted my own review of the entire certified record, in addition to my prior review of the joint appendix. *As a result of my review of the entire certified record, I feel that it is incumbent upon me, as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling and issue this opinion.* Although I am now merely a concurring/dissenting judge in this matter, I wish it to be known that the initiative for this decision came from my chambers. The majority's ruling is based upon their review of my draft opinion, prepared after my discovery, and the hundreds of hours of work that followed, reviewing the entire record, researching the law, and drafting this opinion.[26]

However, these judges' commendable efforts to reach a just, proper result in Mr. Thompson's case were defeated because of what the Supreme Court eventually held was impropriety in the manner in which the Sixth Circuit had tried to correct its mistake. A sharply divided Supreme Court ruled that the Sixth Circuit had abused its discretion in

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[25] *Thompson v. Bell,* 373 F.3d 688, 691 (6th Cir. 2004).

[26] *Id.* at 692-93 (emphasis supplied).

correcting its ruling because it had not informed the parties that it was reconsidering its prior ruling and because it waited too long and thereby prejudiced the State's interest in finality.[27] Significantly, all nine justices commended the diligence of the Sixth Circuit panel for attempting to correct what it regarded as a mistaken judgment. Even the majority opinion noted that, "[h]ere a dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken."[28] However, for policy reasons (furthering the interests of finality of judgments), the majority decided that the decision of the Sixth Circuit amounted to an abuse of discretion. This ruling prompted a powerful dissent from Justice Breyer and three other Justices who eloquently decried the majority's decision to promote principles of finality at the expense of justice for Mr. Thompson:

> A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. *When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result.* The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.[29]

Thus, at every turn in Mr. Thompson's case, misrepresentations, errors and mistakes, prevented a just result from being achieved. At trial, a just result was

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[27] *Bell v. Thompson,* 125 S. Ct. 2825, 2833-36 (2005).

[28] *Id.* at 2836-37

[29] *Id.* at 2846 (emphasis added).

frustrated by the incompetence of counsel who squandered precious funds granted to hire a psychological expert by hiring an industrial psychologist who was unqualified to evaluate his mental condition. In post-conviction, a just result was prohibited by the State's misrepresentation that Mr. Thompson was malingering serious mental illness and the court's denial of expert funding and counsel's alleged failure to preserve the denial of expert services issue for review. In Mr. Thompson's federal habeas action, the misleading arguments of the State, the district court's decision not to consider new evidence and to grant the State's motion for summary judgment for reasons not actively asserted by the state and the omission of the Sultan report and deposition, resulted in a defective district court proceeding. In the Sixth Circuit, the panel's inability to correct its mistaken judgment in a timely manner again prevented a just result from being realized. At each stage where Mr. Thompson's death sentence could have and should have been corrected in the interests of justice, the fail safes built into the judicial system misfired.

Clemency now is the last "fail safe." It is designed to provide a final look at a case with a view to ensuring that a just result is reached. As one of our Constitution's framers, James Iredell, explained regarding why a federal clemency power was needed:

> [T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. *It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.* For this reason, such a

power ought to exist somewhere.[30]

Tennessee, like the federal system, vests this essential power in the executive. However, Tennessee law also asks this Court, with its unique expertise and familiarity with death penalty cases, to play an important role in recommending clemency where extenuating circumstances are truly present. Based on the extraordinary record in Gregory Thompson's case, including the State's eventual admission of Mr. Thompson's severe mental illness, and where a Sixth Circuit panel reversed itself *sua sponte* in an unsuccessful effort to do justice and four Supreme Court Justices agreed with the panel's efforts to obtain justice in this case, extenuating circumstances indisputably exist. Thus, Mr. Thompson respectfully requests that this Court exercise its authority under TENN. CODE ANN. § 40-27-106 and recommend that his death sentence be commuted by Governor Bredesen to life imprisonment.

WHEREFORE it is respectfully requested that the Court (1) enter an order staying the February 7, 2006, execution (2) reconsider its order scheduling the execution (3) provide Mr. Thompson's counsel an opportunity to amend his *prima facie* showing of incompetency to be executed and change in mental status with current medical records and expert opinion, (4) order an evidentiary hearing on Mr. Thompson's insanity and incompetency to be executed, and/or (5) issue a certificate of commutation.

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[30] *See* Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788) [hereinafter Iredell Address], *reprinted in* 4 THE FOUNDERS' CONSTITUTION 17-18 (P. Kurland & R. Lerner ed. 1987)(emphasis supplied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was forwarded by U. S. Mail, postage prepaid, to

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this ____ day of September, 2005.

The undersigned attorney prefers to be notified of any orders or opinions of the Court by email to passino@mpassino.com.

_____
Michael J. Passino