IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE

Petitioner-Appellant

v.

RICKY BELL

Respondent-Appellee

No. 00-5419

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

EXECUTION DATE: APRIL 19, 2000 1:00 a.m.

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REQUIRED STATEMENTS FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

The panel acknowledged that this Court has never before applied *Ford v. Wainwright*, 477 U.S. 399 (1986). Petitioner suggests that the *en banc* court ought to address various issues of first impression under *Ford*, including:

1. Whether *Ford v. Wainwright*, requires a determination of a petitioner's competency at the time of execution?

2. Whether a state scheme for determining competency for executing is constitutional when it allows a conclusion of "present competency" months before execution and precludes any further consideration of lack of competency at or near the actual time of execution?

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

1. Ford v. Wainwright, 477 U.S. 399 (1986):
   The Eighth Amendment precludes the execution of a person who is not competent at the time of execution

2. Bowling v. Parker, [illegible]
   Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999):
   A state court decision is "contrary to" existing precedent if the state courts have failed to apply the correct legal standards to the petitioner's federal constitutional claims

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INTRODUCTION

Though Robert Coe has presented compelling testimony that he is not competent to be executed,[1] *no court* (state or federal) has addressed his claims that his mental illness renders him incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Contrary to *Ford*, a panel of this Court has brushed aside Robert Coe's claims of "incompetence to be executed" by asserting: "We do not believe that the Supreme Court in *Ford* means to require a state to determine a prisoner's competency at the exact time of his execution." Panel Opinion, p. 14. Because *Ford* did hold that a state may not execute a person who at the time of execution is incompetent, the panel is in error.[2]

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[1] Dr. William Davis Kenner, III, M.D. has, within a reasonable degree of medical certainty, diagnosed Robert Coe as suffering from dissociative identity disorder (DID). Vol. IX, p. 341. In fact, Dr. Kenner – a board certified psychiatrist with some 27 years experience – actually observed Robert Coe in a dissociative state on January 11, 2000. This disorder, which has resulted from Robert Coe's horribly abusive childhood, causes Robert Coe to dissociate (or psychologically disappear) under imminent threat to his life, such that he is incompetent at the time of execution. See Vol. VIII, pp. 273-312; Vol. IX, pp. 319-345. Dr. Kenner has testified to a reasonable degree of medical certainty that Robert Coe is not competent at the time of execution. See e.g., Vol. IX, p. 341-343. Dr. James Merikangas, M.D., of the faculty of Yale Medical School, has established that Robert Coe suffers congenital defects and organic brain damage (Vol. VII, pp. 88-108), has been treated with dozens of psychotropic medications (Id., pp. 84-86), is delusional and schizophrenic (Id., pp. 111-117), dissociative (Id., pp. 118-119) and, as a result, is not competent at the time of execution (Id., pp. 123, 162-163) (blatantly and clearly incompetent at time of execution).

[2] In the face of Tennessee's clamor to kill Robert Coe (setting execution date after execution date) this Court has been confronted with resolving complex issues of first impression in just days. Amidst this "time[] of commotion" which creates the unwinding opportunity for establishing "dangerous precedents . . . in dangerous times," Byrd v. Collins, ___ F.3d ___ (6th Cir. 2000) (Jones, J., dissenting), Robert Coe is entitled to the fair application of the Eighth Amendment as stated in *Ford*. He has been denied this right, in part, because the panel has stated that applying *Ford* would be quite difficult near an execution. Slip op., p. 14. Concerns that "it would be impossible" to resolve claims or do so "in a meaningful way in the moments before execution" do not change the meaning of *Ford* or the Eighth Amendment. And, as noted *infra*, p. 5, such concerns have already been rejected in *Ford* itself, and only garnered two dissenting (continued...)

As a result of the panel's misinterpretation of *Ford*, Robert Coe has effectively been denied any federal review of his *Ford* claims. In this case involving issues of first impression in this Circuit which have been dismissed without full briefing or argument, *en banc* review is warranted to ensure faithful adherence to the dictates of *Ford* and to ensure that an insane man is not executed without any proper determination of his competency for execution.

I. Contrary To The Panel Decision, *Ford* Requires A Determination Of Competency At The Time Of Execution, And Robert Coe Has Been Denied Any Determination Of That Issue.

A. *Ford* Requires a Determination of Competency at the Time of Execution.

The very question posed and answered by the Supreme Court in *Ford v. Wainwright* was whether it was unconstitutional to execute a person *who is incompetent at the time of the execution*. In fact, the specific question presented in *Ford* was:

> Whether the Eighth Amendment forbids the execution of a condemned person who is *incompetent at the time of execution*?

Brief Of Petitioner, *Ford v. Wainwright*, U.S.No. 85-5542 (O.T. 1985), p. 1 (emphasis supplied)(Available on Lexis).

In answering whether a person could be executed at a time when he is incompetent, the Supreme Court held that any such execution would violate the Eighth Amendment. The main opinion in *Ford* thus acknowledged that the question before it was "the question *of executing the insane*" and the state's "power to take the life of an insane prisoner." Ford, 477 U.S. at 405, 106 S.Ct. at 2599. In resolving the question posed by the Petitioner, the court was "compelled to

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[3](...continued)
were

conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Id., 477 U.S. at 409-410, 106 S.Ct. at 2602. The court restated its conclusion:

> The Eighth Amendment prohibits the State from inflicting the penalty of death upon *a prisoner who is insane*.

Id., 477 U.S. at 410, 106 S.Ct. at 2602 (emphasis supplied).

Justice Powell also recognized that the question before the court was the constitutionality of the "executions of the insane." Id., 477 U.S. at 421, 106 S.Ct. at 2607 (Powell, J., concurring). Similarly, as Justices O'Connor and White noted, the question before the Court was whether the Eighth Amendment creates a right "not to be executed *while insane*." Id., 477 U.S. at 427, 106 S.Ct. at 2611 (O'Connor, J., concurring). In fact, the panel here even recognized that, as explained by Justice O'Connor, "the nature of a competency-to-be-executed claim" is that it cannot be resolved "until the very moment of execution." Panel Opinion, p. 14, citing Ford, 477 U.S. at 429 (O'Connor, J., concurring and dissenting).

The panel essentially holds that *Ford* doesn't mean what it says. Because resolution of a *Ford* claim near the hour of execution may be difficult, the panel concludes that it is not constitutionally required. Panel Opinion, pp. 14-15. Rather than resolving the question whether Robert Coe's mental illness renders him incompetent to be executed, the panel has concluded that a determination of his "present competency" months ago is sufficient to resolve his *Ford* claims of incompetence at the time of execution.[4]

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[4] The panel contends that the Tennessee courts' determination of Robert Coe's "present competency" in January, 2000 "did not constitute a misunderstanding of the proper issue under (continued...)

To be sure, the nature of the *Ford* inquiry may make difficult the judicial resolution of a *Ford* claim. This is especially true where (as here) the petitioner suffers from a type of mental illness in which his mental state fluctuates between periods of competence and incompetence. See Testimony of Dr. Kenner, cited in n. 1, *supra*; Compare Perry v. Louisiana, U.S.No. 89-5120, Petitioner's Brief On The Merits, 1989 U.S.Briefs 5120 (Available On Lexis)(noting that Perry decompensates and that his competence fluctuates over time). The plain fact, however, is that *Ford* requires a determination of the petitioner's competency to be executed at the time of execution – that was the question posed in *Ford* and answered in *Ford*.[4]

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[3](...continued)
Ford. . . ." Panel Opinion, p. 13. The panel misapprehends the nature of the *Ford* claim. *Nowhere* does *Ford* talk about "present competency." It only talks about "competency to be executed," which requires a determination of competency at the point of execution. When baldly claiming that the issue before the state courts was "present competency to be executed," the Tennessee Supreme Court cited no authority, and notably failed to cite *Ford* itself. *Ford* says nothing about "present competency." Coe, slip op. at p. 47 n. 15. *It is clear that a determination of "present competency" months before an execution does not resolve the operative question required to be addressed by Ford.*

[4] A possible analytical difficulty in addressing a *Ford* claim arises mainly in the circumstance (presented here) where the petitioner's mental state fluctuates over time. If the petitioner is in a stable state of incompetence, a pre-execution determination of competency made months before an execution is sufficient to resolve the *Ford* claim. This was the situation in *Ford* itself.

When the petitioner's mental state fluctuates, such a determination of a petitioner's then-current mental state (made months pre-execution as it was here) cannot possibly satisfy the dictates of *Ford* – unless it is also accompanied by a reasonable predictive judgment about future competency at the time of execution. Here, the state courts only answered a now-outdated and irrelevant question (competency months ago) and refused to make any such predictive judgment, though such a judgment was possible. They refused to answer the 'competency at time of execution" question posed by Robert Coe and supported by the testimony of Drs. Kenner and Merikangas. As a result, under these circumstances, Robert Coe has received no determination of his *Ford* claims. Compare United States v. Ives, 574 F.2d 1003 (9th Cir. 1978)(where defendant's mental state fluctuated, violation of due process to fail to rely on past determination of mental (continued...)

Any concern that the Eighth Amendment ought not allow a determination of competence up until the point of execution was rejected by the *Ford* court. Two dissenting Justices in *Ford* complained the rule announced by the majority would require further determinations of competency up until execution. *Ford*, 477 U.S. at 435, 106 S.Ct. at 2615 (Rehnquist, J., dissenting). This complaint, in dissent, is echoed in the panel decision here, and, like the dissent, is contrary to *Ford*.

B. Tennessee Will Not Allow a Determination of Execution Incompetency.

Significantly, the panel has been misled by the Tennessee courts themselves to deny habeas relief. The panel (and earlier the District Court) believed that a determination of "present competency" months before an execution is adequate, because Robert Coe could supposedly later return to the courts with "an affidavit from a mental health professional" establishing "a substantial question about the prisoner's competency to be executed." Panel Opinion, p. 13, citing Van Tran v. State, 6 S.W.3d 272. What the panel did not know is that the "assurance" made by the Tennessee Supreme Court in Van Tran is, in Robert Coe's case, an empty promise, if not an outright falsehood. The Tennessee Supreme Court fully intends to execute Robert Coe without ever allowing any resolution of the question of his competency at (or near) the time of execution.

Robert Coe recently approached the Tennessee Supreme Court to do exactly what Van Tran provides: to have a trained mental health professional evaluate Robert Coe at execution

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[4](...continued)
state for purposes of assessing competency at actual time of trial); Rees v. United States, 513 F.2d 1251, 1256 n. 5 (8th Cir. 1975)(determinations of competency not binding over time because mental state may fluctuate drastically over course of months); Lovedahl v. State of North Carolina, 356 F.2d 772 (4th Cir. 1966)(where criminal defendant was alternately sane and insane, matter remanded to district court to monitor the current mental state)

drew near. The Tennessee Supreme Court, however, has slammed the Van Tran door in Robert Coe's face. Now, the Tennessee Supreme Court is preventing Robert Coe from complying with its Van Tran "rule" by refusing to allow a mental health professional to examine him. See Coe v. State, Apr. 3, 2000 (Order disallowing access of mental health professional)(Order and Justice Birch's dissenting opinion).[5] As a result, Robert Coe will just simply be executed because he was determined "presently competent" at some point in January (at what point it is unclear, because he was determined incompetent by Dr. Kramer twice on December 29, 1999 and on January 11, 2000), unless this Court intervenes. He will be executed without any determination whether he has dissociated to the point of incompetence, as Dr. Kramer clearly stated shall occur. No jurisprudence concerning competency has ever required such a perverse result – refusing to address the constitutional question, but then requiring a mentally ill person to present evidence from a mental health professional, but preventing a mental health professional from conducting an evaluation." Yet the panel decision, if left undisturbed, would countenance such a bizarre, and

[5] The Clerk's Office has informed counsel that these April 3, 2000 orders have already been received by the court and need not be attached to this petition. That order was issued *after* Robert Coe filed his memorandum in support of his appeal, after being given mere hours to do so. Robert Coe then respectfully requested that he be allowed to file an opening brief, in which he sought to include that critical information and to fully argue his case. *The panel, however, denied briefing and argument, and apparently never considered the Tennessee Supreme Court's April 3 order, which renders the panel's decision fatally flawed and establishes the inadequacy of the Tennessee courts' process.*

[6] The Tennessee Supreme Court has pulled the bait and-switch on Robert Coe. As Justice Birch indicates, Robert Coe "seeks merely to adduce evidence of incompetence by the method the majority ordained in Van Tran – an affidavit of a mental health professional showing a substantial change in the prisoner's mental health since the previous determination of competence sufficient to raise a substantial question about the prisoner's competence to be executed." Coe v. State, April 3, 2000 (Order)(Birch, J., dissenting).

deadly, Catch-22.

C. En Banc Review is Warranted.

The process which Robert Coe has received for a determination of his competency to be executed claim under *Ford* has been woefully inadequate. In state court, Coe presented substantial evidence that, given his documented history of physical and sexual abuse as a child and resulting severe mental disturbance, he suffers from dissociative identity disorder which renders him incompetent to execution – which is the question to be resolved under *Ford*. See n. 1, *supra*; "Petition For Writ Of Habeas Corpus," pp. 3-4. Repeatedly, Coe urged the state courts to resolve his competency at execution, but the state courts steadfastly refused to do so. Instead, they ignored his evidence and only ruled that a determination that he was "presently competent" months ago decides the *Ford* issue. The state courts have further made it impossible for him to present any evidence from a mental health professional concerning his mental state in support of a claim that he is not competent at the time of execution. To date, the federal courts have done nothing to intervene.

Is Robert Coe "competent to be executed"? *No court has ever made that determination, and given the Tennessee Supreme Court's hollow promise in Van Tran, no court ever will.* Thus, if the panel opinion stands, despite Robert Coe's substantial constitutional claims, he will be executed on the basis of an irrelevant "present competency" determination made months ago, as every court has ignored his proof of dissociation and incompetence *at the time* of execution, and the Tennessee Supreme Court bars him from even getting into the courthouse. This is a gross

distortion of *Ford* and in no way comports with the dictates of the Eighth Amendment.[7]

II. The Panel Has Effectively Denied Any Meaningful Federal Review Of Robert Coe's *Ford* Claims By Applying And Misapplying The Provisions of The AEDPA.

The panel has stated that Robert Coe is not entitled to relief because, under new 28 U.S.C §2254(d),[8] the Tennessee courts' so-called resolution of Robert Coe's *Ford* claims was not "an unreasonable application of Supreme Court precedent." Coe, slip op., p. 1. In reaching this conclusion, the panel has applied a standard of review derived from a panel decision in *Nowaczyk v. Killinger*, 169 F.3d 352 (6th Cir. 1999), which allows habeas relief only in the rare situation where a state court judgment is not 'debatable among jurists' or is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." Coe v. Bell, slip op., pp. 13-16. The panel's conclusion misapprehends §2254(d).

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[7] Robert Coe does not contend that the determination of competency *must* be made in the last chaotic moments before execution. In the majority of cases, careful evaluation of the condemned can be done in the weeks or days before execution, so long as resolution of *Ford* claims would include careful consideration of the petitioner's actual mental illness and the mental deterioration inherent in such circumstances—which has never occurred here. Rather, that evidence has simply been ignored by the courts. One also cannot exclude the possibility that there could be a rapid deterioration immediately prior to execution. Nor can one say that, under such circumstances, resolution of such claims would be "easy." The execution of a mentally ill person should not be expected to be easy. Nevertheless it is the duty of the judiciary to carefully resolve such difficult questions, not to denigrate the Constitution because of the difficulty of resolving the issues presented.

[8] AEDPA's amended 28 U.S.C. §2254(d) provides that a federal habeas corpus petition "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) 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; or

(2) 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."

New 28 U.S.C. §2254(d) applies if certain prerequisites are met. First, the claim must have been "adjudicated on the merits" in the state courts. If a claim was raised in state court, but either not "adjudicated" or not addressed "on the merits," §2254(d) does not even apply. Rather, under such circumstances, the federal courts are obligated to address the claim *de novo* in the first instance, applying governing federal law. See e.g., Weeks v. Angelone, 176 F.3d 249, 258 (4th Cir. 1999); Jones v. Jones, 163 F.3d 285, 299-300 (5th Cir. 1998). Second, and related, is the requirement that the "adjudication" have resulted in a "decision" of the claim by the state courts. To the extent that the state courts did not render any "decision" on an issue, §2254(d) does not apply.[9]

If these prerequisites are met, then the court must undertake a two-step analysis of the state court decision and governing federal law, which includes analysis under both the "contrary to" and "unreasonable application" prongs of §2254(d). As the First Circuit has explained:

A federal habeas court charged to weigh a state court decision must undertake an

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[9] Further, the AEDPA also cannot apply to bar relief where the petitioner has not received a full and fair hearing on his claims of constitutional deprivation in the state courts. Miller v. Champion, 161 F.3d 1249, 1254 (10th Cir. 1998). Rather, the prerequisite to application of new §2254(d) is an "adjudication" of a claim on the merits which requires a "full and fair adjudication" of the claim. Compare Moore v. Johnson, 101 F.3d 1069, 1075 (5th Cir. 1996) *vacated on other grounds* 117 S.Ct. 2054 (1997). (§2254(d) applicable but only because "there is no question that [the claims] received a full and fair adjudication on the merits by the state trial court.") Certainly, Congress did not intend that a state court could fail to consider all of the relevant evidence, and act with unfair procedures, to then *reach* a conclusion which would then carry any weight in a federal court considering a federal constitutional claim. Rather, new §2254(d) prevents federal relief only where the state court determination of facts was "reasonable" in both a procedural and substantive sense. This standard is "substantially the same" as the pre-AEDPA inquiry about whether the state courts conducted a full and fair hearing on the petitioner's federal constitutional claims. Liebman & Hertz, Federal Habeas Corpus Practice & Procedure (3d ed. 1998) p. 753. The federal court must ask whether the state court "engaged in a procedurally 'reasonable determination' of the facts" during state court proceedings. Id. If there was no such fair process, §2254(d)(2) would apply and relief would be required. Here, there was a denial of such fair process for all the reasons stated in Robert Coe's motion for evidentiary hearing.

> independent two-step analysis of that decision. First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the court gauges whether the state court decision is 'contrary to' the governing rule. In the absence of a governing rule, the 'contrary to' clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use (or failure to use) existing law in deciding the petitioner's claim involved an 'unreasonable application' of Supreme Court precedent [citation omitted]

O'Brien v. DuBois, 145 F.3d 16, 24 (1st Cir. 1998). This framework which "yields a comfortable fit with both the statutory language and the legislative history, and minimizes constitutional concerns." Id.[10]

At a minimum, the "contrary to" standard requires habeas corpus relief when "the state courts failed to apply the correct legal standards." Tucker v. Prelesnick, 181 F.3d 747, 752 (6th Cir. 1999). Further, it appears that the "contrary to" standard requires relief as well when there is a Supreme Court case on point (in this case *Ford*, which precludes execution of the incompetent and requires application of the common law standards for competency) and the state courts have misapplied that precedent to reach an erroneous conclusion when applying that law to the facts at hand.[11]

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[10] A useful analogy is found in the Supreme Court's decision in Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992), in which the Supreme Court acknowledged that there was no specific rule governing the petitioner's claims (because the Supreme Court had left the question open), but still ruled in the petitioner's favor because, based upon existing constitutional principles, he was entitled to relief. In essence, the Supreme Court did not find the state court's decision "contrary to" any specific Supreme Court case, but an unreasonable application of the principles derived from various such cases.

[11] In Nevers, this Court indicated that the "unreasonable application" standard applies to mixed questions of law and fact. This interpretation of the AEDPA is incorrect for at least two reasons. First, there is nothing in the AEDPA which allows mixed questions to be resolved solely under the "unreasonable application" standard. Rather, both the "contrary to" and "unreasonable (continued...)

Contrary to the panel's conclusion, Robert Coe is entitled to federal habeas corpus relief, because not only does §2254(d) fail to apply under the circumstances, but even were it to apply, the Tennessee state courts' decision is both "contrary to" *Ford*, and represents an unreasonable application of *Ford* as well.

Here, §2254(d) does not even apply, because the Tennessee courts never adjudicated Robert Coe's *Ford* claims nor rendered a decision on that claim. As noted *supra*, the Tennessee courts never addressed the operative question posed by Robert Coe's *Ford* claims: whether he is competent at the time of execution. As such, new §2254(d) does not even apply, and the matter must be remanded to the District Court for a full and fair consideration of his *Ford* claims, which has yet to occur. Indeed, the District Court denied relief by applying *Nevers*, but since §2254(d) does not apply, neither does *Nevers*, and the District Court's decision denying relief under *Nevers* must therefore be reversed.

Even were §2254(d) to apply, Robert Coe is still entitled to habeas corpus relief. Relief under the "contrary to" clause of §2254(d) is required because "the state courts failed to apply the correct legal standards" to his Eighth Amendment competency claims. Tucker v. Prelesnick, 181 F.3d at 752. In fact, the Tennessee courts failed to apply the correct legal standards required by *Ford* in not one, but two, critical respects.

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[11](...continued)
application' standards apply to any such question, and require a sequential analysis. See O'Brien, 145 F.3d at 24. Second, the *Nevers* interpretation of the "unreasonable application" standard (if taken at face value) is overly restrictive, and would therefore essentially preclude any federal habeas review of claims reviewed under that standard. Nevertheless, it is sufficient to note that any dispute over *Nevers* is immaterial to Robert Coe's argument, as he is entitled to relief under any interpretation of the AEDPA.

First, the Tennessee courts never answered the correct legal question, viz. whether Robert Coe is competent at the time of execution, which is the question required to be answered by *Ford*. Consequently, the Tennessee courts ruled in a manner which is clearly "contrary to" *Ford v. Wainwright*. The state courts never made the *Ford* inquiry or applied the standard of *Ford* to the facts at hand.

Second, even as the Tennessee courts answered the wrong question, they applied an incorrect standard of review to Robert Coe's *Ford* claims. As Robert Coe has noted, the operative standard for determining competency is the universal common law standard enunciated in Dusky v. United States and applicable here, because the *Ford* inquiry is governed by the standards existing at common law.[12] Rather than applying the proper

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[12] In *Ford*, the court noted that "There 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 v. Wainwright, 477 U.S. 399, 405, 106 S.Ct. 2595, 2599 (1986). At common law, there was a categorical prohibition barring any proceedings against the insane, no matter what the stage of the proceedings – whether arraignment, trial, judgment, or execution. 4 W. Blackstone, Commentaries *24-*25, quoted in Ford, 477 U.S. at 405-406, 106 S.Ct. at 2600; 1 Hale, The History Of Pleas Of The Crown 34-35 (1736). See also 1 Hawkins, Pleas of the Crown 2 (1716)("And it seems agreed at this Day, That if one who has committed a capital Offence, becomes *Non Compos* before Conviction, he shall not be arraigned; and if after Conviction, that he shall not be executed.") As Justice Kennedy recognized: "At common law . . . no attempt was made to apply different competency standards to different stages of criminal proceedings." Godinez v. Moran, 509 U.S. 389, 406, 113 S.Ct. 2680, 2690 (1993)(Kennedy, J., concurring). See also Youtsey v. United States, 97 F. 937, 940-946 (6th Cir. 1899). In sum, therefore, at common law, the standard for insanity was uniform.

That universal standard for competency – which governs the issue of competency for execution here – has been articulated by the Supreme Court as the standard for competency to stand trial, as well as the standard for competency to plead guilty. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975)(setting common law roots of standard for competency to stand trial); Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960)(competency to stand trial); Godinez v. Moran, supra (Dusky competency to stand trial standard also governs competency to (continued...)

common law standard, the Tennessee courts instead applied the "factual knowledge" component of the Dusky standard, and wholly failed to apply the "rational understanding" prong, as well as the two prongs requiring the ability to assist counsel. Consequently, in this respect, the Tennessee courts' decision once again was "contrary to" *Ford*, because the Tennessee courts never applied the common law standard incorporated by *Ford*.[13]

And for the same reasons that the state court decision is "contrary to" *Ford*, the Tennessee courts' decision also represents an unreasonable application of *Ford* under the circumstances. It is not reasonable for a state court to fail to address the constitutional issue presented by the petitioner and to apply an improper standard of review, when that standard inappropriately

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[12](...continued)
plead guilty). This standard requires four (4) components: "[1] sufficient present ability to consult with his lawyer; [2] with a reasonable degree of rational understanding . . . ; [3] a rational as well as; [4] factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960)(per curiam). In Ford, therefore, the main opinion acknowledged that a person must comprehend (1) the nature of the death sentence and its implications: We may not "exact as penance the life of one whose mental illness prevents him from *comprehending the reasons for the penalty or its implications*." Ford, 477 U.S. at 417, 106 S.Ct. at 2606 (emphasis supplied).

[13] In addition, as Robert Coe noted in the District Court, there is no bar to relief erected by Teague v. Lane, 489 U.S. 288 (1989). First, Robert Coe is not asking for application of any new rule of law, because Robert Coe is merely asking for application of the standard enunciated in Ford, which was delineated as the common law standard, even if not expressly discussed in Ford itself. Second, in any event, the state has no legitimate interest in executing the insane, and therefore Robert Coe must be provided the standard required by the Constitution. As such, even were an alleged new rule involved, Robert Coe is entitled to its application under the direct authority of Penry v. Lynaugh, 492 U.S. 302, 329-330, 109 S.Ct. 2934, 2952-2953 (1989) which holds that application of the law of *Ford* falls within the first Teague exception. Thus, Robert Coe is entitled to the proper application of the Eighth Amendment standard of insanity, which requires application of the four prong Dusky test. With the state courts having failed to apply the proper standard, the federal courts must do so and accord Robert Coe relief.