CAPITAL CASE; EXECUTION DATE APRIL 19, 2000 -- 1:00 a.m.

No. 99-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ROBERT GLEN COE,

Petitioner

v.

RICKY BELL,

Respondent

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

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CAPITAL CASE: Questions Presented

1. a. Does *Ford* v. *Wainwright*, 477 U.S. 399 (1986) require a determination of a petitioner's competency at the time of execution?

   b. Is a state scheme for determining competency for execution constitutional when it only permits a determination of "present competency" months before execution and precludes any further consideration of lack of competency at or near the actual time of execution?

2. a. How are the lower federal courts to apply the provisions of new 28 U.S.C. §2254(d) when assessing a state court decision on a claim of federal constitutional error?

   b. Has Petitioner been denied federal review of his *Ford* claims through application of new 28 U.S.C. §2254(d) which the Sixth Circuit has interpreted as permitting federal habeas relief only if the decision of a state court 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."

3. What is the standard for determining a petitioner's competency to be executed under the Eighth Amendment and *Ford v. Wainwright*, 477 U.S. 399 (1986)?

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The United States District Court denied relief and dismissed Robert Coe's petition for writ of habeas corpus on March 29, 2000. Coe v. Bell, No. 00-0239 (M.D.Tenn. Mar. 29, 2000). The United States Court of Appeals for the Sixth Circuit denied relief on April 11, 2000 Coe v. Bell, No. 00-5419 (6th Cir. Apr. 11, 2000). The Sixth Circuit denied rehearing and rehearing *en banc* on April 17, 2000 (6th Cir. Apr. 17, 2000).

JURISDICTION

Jurisdiction lies under 28 U.S.C. § 1254. The judgment of the Sixth Circuit was rendered on April 11, 2000, and rehearing was denied on April 17, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.Const. Amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S.Cont. Amend. XIV provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. §2254(d)(1996) provides in pertinent part:

> An application for a writ of habeas corpus 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.

First Claim for Relief

17. Plaintiff incorporates by reference herein the contents of paragraphs 1-16 above.

18. Section 102 of Chapter 14 of Title 29 of the Tennessee Code provides:

> (a) Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.
>
> (b) No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.
>
> (c) The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Tenn. Code Ann. §29-14-102 (1980).

19. Section 103 of Chapter 14 of Title 29 of the Tennessee Code provides:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Tenn. Code Ann. §29-14-103 (1980).

20. Section 113 of Chapter 14 of Title 29 of the Tennessee Code provides:

> This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

Tenn. Code Ann. §29-14-113 (1980).

21. Plaintiff is entitled to a judicial declaration from this Court that his execution by lethal injection violates well-settled Tennessee law because:

A. The procedure for performing lethal injection have not be adopted in compliance with the Tennessee Uniform Administrative Procedures Act;

B. The use of any licensed healthcare facility or [illegible]

II.

Despite the fact that, in state court, Robert Coe raised the issue of his incompetency and presented evidence that he was not competent at the time of execution, the state trial court never determined whether Robert Coe was "competent to be executed." Rather, the state trial court merely determined that he was "presently competent." The significance of this conclusion is not clear, as Dr. Kenner found Robert Coe incompetent on December 29, 1999 and January 11, 2000, the state court hearing was held at the end of January, 2000, and the trial court ruled in early February, 2000.

On appeal, Robert Coe again made clear that he was entitled to relief because of his lack of competence upon execution: "Given all the proof at the hearing, under Ford . . . Robert Coe is not competent to be executed on" the day of the scheduled execution. Brief Of Appellant, p. 49. He further emphasized in his reply brief that the evidence overwhelmingly established that he was not competent to be executed at the time of execution, given that he dissociates when faced with an impending threat to his life. Appellant's Reply Brief, p. 1. As did the trial court, the Tennessee Supreme Court overlooked his constitutional *Ford* assertions about competency at the time of execution, failing to resolve them by instead asserting that before them was merely an issue of "present competency" at the time of the state proceedings. See Coe v. State, slip op. at p. 47 n.15. In denying relief the Tennessee Supreme Court stated that a determination of "present competency" months before an execution was sufficient, because Robert Coe could return later with evidence from a mental health professional at or around the time of execution. Id. Thus, although Robert Coe squarely presented the *Ford* claim of "incompetency to be executed" before the state courts, he was denied any review of that claim, but instead was merely given a determination of "present competency" months ago.

Relying on the Tennessee Supreme Court's "assurance" that he could present evidence from a mental health professional concerning his mental state at or near the time of execution, Robert Coe then approached the Tennessee Supreme Court to do what the Tennessee Supreme Court said he could do: have a trained mental health professional evaluate Robert Coe as execution drew near. The Tennessee Supreme Court has now turned the tables on Robert Coe, holding that Robert Coe cannot be evaluated by a mental health professional. See Coe v. State, Apr. 3, 2000 (Order disallowing access of mental health professional)(Order and Justice Birch's dissenting opinion).

III.

Following the denial of relief in the Tennessee state courts, Robert Coe filed a petition for writ of habeas corpus in the United States District Court, alleging that he has been denied his Eighth Amendment rights under Ford v. Wainwright, 477 U.S. 399 (1986). The District Court denied relief. On appeal, Robert Coe noted that he had presented compelling evidence of his mental illness and essentially unrebutted proof of his incompetence *at the time of execution* but has never received a ruling by any court on that issue -- the issue presented by *Ford* -- which required habeas corpus relief. The Sixth Circuit brushed aside Robert Coe's claims by asserting: "We do not believe that the Supreme Court in *Ford* meant to require a state to determine a prisoner's competency at the exact time of his execution." slip op., p. 14. The Sixth Circuit also rejected Robert Coe's assertions that the Tennessee courts' determination of competency -- which requires mere awareness of the fact of execution and the reason for it -- understates the standard for competency under the Eighth Amendment. Further, the court rejected the contention that the burden of proof ought to lie with the state, given the petitioner's interest in his life and the state's lack of any interest in executing the insane. The Sixth Circuit denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Though Robert Coe has presented compelling testimony that he is not competent to be executed, *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*, the Sixth Circuit has rejected Robert Coe's claims of "incompetence to be executed" by asserting: "We do not believe that the Supreme Court in *Ford* meant to require a state to determine a prisoner's competency at the exact time of his execution." slip op., p. 14. Because *Ford* did hold that a state may not execute a person who at the time of execution is incompetent, the Sixth Circuit's decision clearly misapprehends the scope and meaning of *Ford*, placing the Sixth Circuit's decision squarely at odds with this Court's opinion in *Ford*. Further, as a result of the Sixth Circuit's misunderstanding of *Ford* and its application of a draconian standard of habeas review, Robert Coe has effectively been denied *any* federal review of his *Ford* claims. Consequently, this Court should grant the petition for writ of certiorari and reverse the judgment of the court of appeals for these reasons and all the reasons presented in this petition.

1. *FORD* AND THE EIGHTH AMENDMENT REQUIRE A DETERMINATION OF COMPETENCY AT THE TIME OF EXECUTION AND ROBERT COE HAS BEEN DENIED ANY *FORD* DETERMINATION

The very question posed and answered by this Court in *Ford v. Wainwright*, 477 U.S. 399 (1986) was whether it is 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, this 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 presented, this Court was "compelled to 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 main opinion 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, even the Sixth Circuit below recognized that, as explicated 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." slip op., p. 14, citing Ford, 477 U.S. at 429 (O'Connor, J., concurring and dissenting).[3]

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[3] 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 (continued...)

Clear from this Court's decision in *Ford*, therefore, is that the question of competency involves competency at the time of execution. Indeed, this Court's competency jurisprudence makes clear that if a person is incompetent *at any stage of the proceedings*, no further proceedings may occur. Indeed, the common law precluded any proceedings against the insane, no matter what the stage of the proceedings – whether arraignment, trial, judgment, or execution:

> [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

4 W. Blackstone, Commentaries *24-*25, quoted in Ford, 477 U.S. at 406-407, 106 S.Ct. at 2600; 1 Hawkins, Pleas of the Crown 2 (1716). As Hale explains:

> [I]f such person after his plea, and before his trial become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared.

1 Hale, The History Of Pleas Of The Crown 34-35 (1736). See also Godinez v. Moran, 509 U.S. 389, 406, 113 S.Ct. 2680, 2690 (1993)(Kennedy, J., concurring)(single standard of competency applies at any point in the proceedings against an individual). See also Youtsey v. United States, 97 F. 937,

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[1](...continued)

Testimony of Dr. Kenner, *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*.

940-946 (6th Cir. 1899).

The Sixth Circuit, however, has either rewritten (or ignored) hundreds of years of law by holding that *Ford* doesn't mean what it says, and that the Eighth Amendment and the common law permit the execution of a person who is incompetent at the time of execution: "We do not believe that the Supreme Court in *Ford* meant to require a state to determine a prisoner's competency at the exact time of his execution." slip op., p. 14. The Sixth Circuit cites no authority for this proposition, for there is none to support this conclusion. In essence, the Sixth Circuit has concluded that because determination of competency at the time of execution may be difficult, the Eighth Amendment does not require such a determination. Nothing in *Ford* or in the common law requires the perverse result reached by the Sixth Circuit. In fact, *Ford* and the common law affirmatively demand what Robert Coe has sought -- a determination of his competency at the time of execution.[4] For if he is not competent at that time, he may not be executed. Rather than resolving the question whether Robert Coe's mental illness (dissociative identity disorder) renders him incompetent to be executed, the Sixth Circuit 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.[5] This is patently

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[4] 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, was echoed in the court of appeals, and, like the dissent, is contrary to *Ford*.

[5] The Sixth Circuit has contended that the Tennessee courts' determination of Robert Coe's "present competency" in January, 2000 "did not constitute a misunderstanding of the proper issue under *Ford*. . . ." slip op., p. 15. *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. (continued...)

wrong.

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, in this case, that evidence has simply been ignored by the courts.[6]

Significantly, the Sixth Circuit has been misled by the Tennessee courts themselves to deny habeas relief. The Sixth Circuit (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." slip op., p. 15, citing Van Tran v. State, 6 S.W.3d at 272. What the Sixth Circuit 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. The Tennessee Supreme Court fully intends to execute Robert Coe without ever allowing *any* resolution of the question of his competency at the time of execution, as is required by *Ford*.

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[5](...continued)
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.*

[6] 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.

Indeed, 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 as execution drew near, to provide an affidavit concerning his then-present mental state. 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). Without an examination, a mental health professional cannot provide the requisite affidavit. 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. Kenner 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. Kenner 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.[7] Yet the Sixth Circuit decision, if left undisturbed, would countenance such a bizarre, and deadly, Catch-22.

As a result, the process which Robert Coe has received for a determination of his competency

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[7] 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).

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 at execution – which is the question to be resolved under *Ford*. Petition For Writ Of Habeas Corpus, pp. 2-16. He expressly implored 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 judgment below 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 common law and the Eighth Amendment.

This case presents issues concerning the meaning and applicability of *Ford* which are compelling and recurring, and which were resolved by the Sixth Circuit in a manner which is wholly inconsistent not only with *Ford*, but with centuries of jurisprudence incorporated by the Eighth Amendment. As a result, this Court should grant certiorari and reverse the judgment below. U.S.S.Ct.R. 10.

II. ROBERT COE HAS BEEN DENIED FEDERAL REVIEW OF HIS *FORD* CLAIMS THROUGH THE SIXTH CIRCUIT'S APPLICATION OF AN ERRONEOUS STANDARD OF HABEAS REVIEW

The Sixth Circuit's ruling also highlights the ongoing debate about the proper meaning and application of the new standard of review provision of the AEDPA (28 U.S.C. §2254(d)), which is currently before this Court in Williams v. Taylor, U.S.No. 98-8384 (cert. granted)(assessing the meaning of the standard of review provisions in new 28 U.S.C. §2254(d)). This Court should grant Robert Coe's petition and/or grant the petition and remand the case for further consideration in light of the upcoming decision in Williams.

A. 28 U.S.C. §2254(d) Does Not Apply Because There Has Been No Adjudication On The Merits Of Robert Coe's *Ford* Claims

New 28 U.S.C. §2254(d) applies only 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.

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.

B. Even Under §2254(d), Robert Coe Is Entitled To Habeas Corpus Relief, Because The State Courts' Resolution Of His *Ford* Claims Is "Contrary To" Or "An Unreasonable Application" of *Ford*

The Sixth Circuit has stated that Robert Coe is not entitled to relief because, under new 28 U.S.C. §2254(d), the Tennessee courts' so-called resolution of Robert Coe's *Ford* claims was not "an unreasonable application of Supreme Court precedent." slip op., p. 1. In reaching this conclusion, the Sixth Circuit has applied a standard of review derived from a decision in Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999). Under *Nevers*, a petitioner is entitled to 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." slip op., pp. 13-16; Nevers, 169 F.3d at 362. This is analogous to the Fifth Circuit's standard of review in Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996) and, like the standard in Drinkard, represents an unduly restrictive interpretation of new §2254(d).[6]

When §2254(d) applies, 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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[6] In Nevers, the Sixth Circuit 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 application" standards apply to any such question, and require a sequential analysis. See O'Brien, 145 F.3d 21, 24 (1st Cir. 1998); Stringer v. Black, 503 U.S. 222 (1992). 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.

> 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.

A useful analogy in interpreting and applying new §2254(d) is this Court's decision in Stringer v. Black, 503 U.S. 222 (1992), in which this Court acknowledged that there was no specific rule governing the petitioner's claims (because this 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, in Stringer, this Court did not find the state court's decision "contrary to" any specific Supreme Court case (because there was no such case on point), but rather concluded that the Mississippi Supreme Court's ruling was an unreasonable application of the principles derived from various Supreme Court cases which were relevant and applicable.

Contrary to the Sixth Circuit's conclusion, therefore, 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.[9]

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[9] And for the same reasons that the state court decision is "contrary to" *Ford*, the Tennessee (continued...)

In fact, the Tennessee courts failed to apply the correct legal standards required by *Ford* in not one, but two, critical respects, thereby making the decision "contrary to" *Ford*:

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 (*See infra*), 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. See pp. 16-17, *infra*. Rather than applying the proper 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

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[9](...continued)
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 derogates the rights established by the Eighth Amendment.

Ford.[10]

Because the Sixth Circuit has misapprehended the meaning and applicability of §2254(d) under the circumstances, because this Court is presently considering the applicability and meaning of the "contrary to" and "unreasonable application" standards of new 28 U.S.C. §2254(d)(See Williams v. Taylor, U.S.No. 98-8384 (cert. granted)(assessing the meaning of the standard of review provisions in new 28 U.S.C. §2254(d)), and because any uncorrected misapplication of §2254(d) will cost a mentally incompetent man his life, this Court should grant certiorari and reverse the judgment below. See Taylor v. Cain, U.S.No. 99-6035 (cert. pending), stay granted 120 S.Ct. 31 (1999).

III. THIS COURT SHOULD GRANT CERTIORARI TO DISCUSS THE PROPER STANDARD FOR DETERMINING COMPETENCY AT THE TIME OF EXECUTION

In *Ford*, this Court established that the Eighth Amendment precludes the execution of one who is incompetent and established that the proper standard for determining competency is the standard for competency as it existed at common law. Justice Kennedy has acknowledged that, at common law, there was a uniform standard for determining competency at any stage of the proceedings: "At common law . . . no attempt was made to apply different competency standards to different stages of criminal proceedings." Godinez v. Moran, 509 U.S. at 406, 113 S.Ct. at 2690

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[10] 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. See Issue III, *infra*.

(Kennedy, J., concurring). "[A] single standard was applied to assess competency at the time of arraignment, the time of pleading and throughout the course of trial." Id., 509 U.S. at 405, 113 S.Ct. at 2689.

That universal standard for competency is derived from the common law and is the standard for competency to stand trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975)(noting 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). It is that same standard which governs competency to plead guilty as well. Godinez v. Moran, supra (Dusky competency to stand trial standard also governs competency to plead guilty). And it governs the issue of competency to be executed, the issue presented here.

The standard of competency requires four (4) components: "[1] sufficient present ability to consult with his lawyer [2] with a reasonable degree of rational understanding – and whether he has [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). Accord Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975)(standard for competency to stand trial:"A person whose mental condition is such that he lacks the capacity *to understand the nature and object of the proceedings* against him, to consult with counsel, and to assist in preparing his defense.")(emphasis supplied). As Justice Frankfurter explained the test of sanity at the point of execution:

> After sentence of death, the test of insanity is whether the petitioner has not 'from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.'

Solesbee v. Balkcom, 339 U.S. 9, 20 n.3, 70 S.Ct. 457, 462 n.3 (1950)(Frankfurter, J., dissenting).

The standard applied by the Tennessee courts to Robert Coe's constitutional Eighth Amendment claim falls far short of this standard, the proper common-law standard of competency. The state trial court only required component [4] of Dusky to be established, viz. that Robert Coe had a *factual* understanding of the existence of execution and the reason for it. This is apparent from the trial court's statements that Robert was competent because the Robert Coe "*knows* he is facing execution for the murder of a young girl," "*realizes* he is facing execution, and that he *knows* it is because he has been convicted of murdering a little girl." Trial Court Order, pp. 26, 27. But such a minimalist standard does not comport with the common law standard which governs here under the Eighth Amendment.

The trial court found him "competent" despite failing to give any consideration to components [3], [2], and [1] of the competency standard. Vitally, the Tennessee courts did not require that Robert Coe have a "rational understanding" of the execution of sentence. This is equivalent to comprehension of "the nature" of what is to transpire or its implications. And indeed, a person can have a "factual understanding" of something without a "rational understanding" of it, or an understanding of its nature. A person can know that something exists or will occur without understanding its "nature" (using a term from Ford) or consequences. A child can *know* that shooting a gun can kill some one (be able to say shooting can kill), while lacking any understanding of what killing some one actually means (be unable to understand what killing entails). And in Ford itself, the plurality stated that it is "comprehension" (another term for "understanding") that is required, not simple factual knowledge. Ford, 477 U.S. at 417, 106 S.Ct. at 2605 ("the prisoner's

ability to comprehend the nature of the penalty.")[11]

Indeed, the precise point made by Dr. Merikangas in his testimony about Robert Coe's mental state is that Robert Coe is so mentally disturbed that he lacks "rational understanding." Though he might have "awareness" or "knowledge" of the existence of an execution, he does not have a "rational understanding" of the nature of the penalty as a result of his mental illness. As Dr. Merikangas explained:

> I agree that he is *aware* of an execution. My point is he does not have the mental capacity to *understand.*

State Proceedings, Vol. VIII, p. 207. He continued: "The way to find if someone *understands* something is to have them explain it back to you. And when Mr. Coe explains back what death is, it's very clear he doesn't *understand* it." Vol. VIII, p. 210. Robert Coe's lack of rational understanding is evidenced by the following observations made by Dr. Merikangas:

> He also has the delusional belief that if he is executed, he will just simply be in another place in the same body, will visit his ex-wife and child. He will maybe temporarily be one of these balls of fire that speaks to people. (Vol. VII, p. 117).
>
> His view of it [death] is a little bit idiosyncratic that he will suddenly be alive as Robert Coe outside of prison with his ex-wife and daughter. (Vol. VIII, p. 190).

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[11] Furthermore, the Tennessee courts erroneously failed to require components [1] and [2] of the universal competency inquiry, viz. "[1] sufficient present ability to consult with his lawyer [2] with a reasonable degree of rational understanding." Dusky, supra. United States Supreme Court Justice Marshall and Tennessee Supreme Court Justice Birch have made eminently clear that this "assistance of counsel" prong is constitutionally required as well, given its requirement at common law. Rector v. Bryant, 501 U.S. 1239, 111 S.Ct. 2872 (1991)(Marshall, J., dissenting); Van Tran, 6 S.W.3d at 275 (Birch, J., dissenting)("[T]he common law rule would additionally require that the prisoner be able to consult with and assist his or her lawyer.") As intimated by Justices Kennedy and Scalia in Godinez, Justice Birch has himself aptly noted that the standards for competency to stand trial, plead guilty, and be executed are to be the same: "By analogy to the test now applied to determine competence to stand trial or to plead guilty, I would include the 'assistance prong' as part of the criteria to determine if a prisoner is competent to be executed in Tennessee." Van Tran, 6 S.W.3d at 275 (Birch, J., dissenting).

> He lacks the mental capacity to *understand* why he is being put to death. To him it is not punishment. To him it is a relief that he seeks from his suffering. *** And his *understanding* of what will happen when he is given the needle, the intravenous drug that will kill him, is that he will then be out of prison and he will be walking around. And I don't know of any religion where that is part of the dogma. (Vol. VIII, pp. 243-44).

Dr. Merikangas summarized: "In my opinion, Mr. Coe is *aware* of his impending execution and the reasons for it. . . . Now to say that a delusional, hallucinating, psychotic, person who decompensates and dissociates under stress and who's delusional belief is that his death is to prevent the truth from coming out and that the consequence of the execution is that he will return to earth in this body and go live with his separated wife and child, his now grown daughter, as a delusion, does not indicate that he has an *understanding* either of the consequences of being executed or the reason for it." Vol. VII, pp. 162-163 (Dr. Merikangas). Similarly, Dr. Kanner noted that, given his dissociation under imminent threat of his life, Robert lacks the capacity to either know or comprehend the nature of execution. Vol. IX, pp. 340-342.

The Tennessee courts, therefore, simply applied an incorrect standard of proof, having failed to apply the standard of proof required at common law, and required for the determination of competency at all other stages of proceedings—the proper standard required by *Ford* and the Eighth Amendment. Having applied a more bare bones "knowledge" or "awareness" test, the Tennessee courts did not afford Robert Coe a full and fair hearing under a proper standard of review which requires the four prongs elucidated in Dusky. As a consequence of the state courts' failure to apply a proper legal standard to Robert Coe's claims, Robert Coe's petition for habeas corpus has been evaluated under an inappropriate standard of review, and this Court should grant the petition for writ of certiorari, articulate the proper standard of review, and/or remand the matter for further

proceedings under a proper standard of review.

CONCLUSION

This Court should grant the petition for writ of certiorari and/or grant the petition and remand to the lower courts for proper application of the proper standard of review.

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