DEATH PENALTY CASE
EXECUTION DATE AUGUST 5, 2025
Case No. M2000-00641-SC-DPE-CD

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON BLACK,
Appellant,

v.

STATE OF TENNESSEE,
Appellee.

Competency to be Executed Claim
Pursuant to *Van Tran v. State*
Davidson County Criminal Court Case No. 88-S-1479

ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED

1. Did the trial court err in concluding that it was without jurisdiction to decide Mr. Black's claim that he is incompetent to be executed under the common law "idiocy" standard recognized in *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) and *Van Tran v. State*, 6 S.W.3d 257, 262 (Tenn. 1999)?

2. Under the Eighth Amendment to the United States Constitution, *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), is a prisoner incompetent to be executed if his execution would have been barred at common law at the time of the Founding?

JURISDICTIONAL STATEMENT

Pursuant to Tennessee Rule of Appellate Procedure 27(a)(3), this Court has jurisdiction to review the decision of the trial court under its own inherent authority and the procedures adopted in *Van Tran v. State*, 6 S.W.3d 257, 271–72 (Tenn. 1999).

STATEMENT OF THE CASE

After the jury retired to consider whether to sentence him to death, Byron Black leaned over to his lawyer and asked, "Do I get to testify now?" TR 579 (Alderman Decl.). Mr. Black's impairments were manifest long before trial, however: as a child, he was held back in the second grade and was incapable of understanding simple rules of normal childhood games like a Tisket-a-Tasket or Red Light, Green Light. TR 535 (Martell 2020). Unsurprisingly, a half dozen experts have diagnosed him with an intellectual disability. TR 520–44 (Martell 2020); TR 428–39 (Martell 2021); TR 56–68 (Martell 2025), TR 100–12 (Baecht 2025); TR 440–59 (Greenspan); TR 460–74 (Tasse 2008), TR 475–500 (Grant 2001); TR 501–08 (Globus 2001); TR 509–11 (Globus 2004); *see also* TR 557–563 (Vaught 2022). At his most recent evaluation, Mr. Black could not accurately make change for a five-dollar bill. TR 61 (Martell 2025). Even though he married and fathered a child, Mr. Black lived with his parents until his arrest at 32. TR 539 (Martell 2020). Testing shows that 99 out of 100 men Mr. Black's age and education have a better memory. TR 64 (Martell 2025). Fewer than 1 in 10,000 individuals' brains are as impaired as Mr. Black's. *Id.* Structurally, Mr. Black's brain volume is three and a half standard deviations below the mean; some regions of his brain have atrophied, and their volume is more than four standard deviations below the norm. TR 94 (Gur 2025). His symptoms intensify by the day, as his dementia and brain atrophy worsen. TR 98 (Gur 2025); TR 66 (Martell 2025).

In *Van Tran*, this Court developed the procedure "that a prisoner sentenced to death must follow in order to assert his or her *common law* and constitutional rights to challenge competency to be executed." *Van Tran*, 6 S.W.3d at 260–61 (emphasis added). On March 3, 2025, this Court remanded Mr. Black's case to the trial court for competency proceedings to "be held in accordance with the timelines and procedures established in *Van Tran*." *State v. Black*, No. M2000-00641-SC-DPE-CD (Tenn. Mar. 3, 2025) (Order). Despite this Court's instruction that "common law" rights—if raised—are to be determined in a *Van Tran* proceeding, the trial court found it did not have jurisdiction to consider Mr. Black's claim of common-law-incompetency.

The trial court misread *Ford* and *Van Tran*, concluded it lacked the jurisdiction to consider Mr. Black's claim, and "decline[d] to wade into the asserted common law claim of 'idiocy.'" TR 781 (Memorandum Opinion and Order at n.5). The trial court's failure to understand that *Ford* and *Van Tran* each recognize that the common law standard for eligibility to be executed is incorporated into the Eighth Amendment resulted in the trial court characterizing Mr. Black's claims as "novel" and "outside the scope of [this] Court's remand order." TR 777 (Memorandum Opinion and Order). Not so. Because *Van Tran*—which Mr. Black invoked in his Response to the State's Motion to Set Execution Date—clearly anticipates both constitutional and common law challenges to competence, the trial court erred in that determination.

This case simply asks this Court to "recognize[] in our law a principle that has long resided there." *Ford v. Wainwright*, 477 U.S. 399,

417 (1986). At common law, an "idiot" was incompetent to be executed, which exempts Mr. Black.[1] *Id.* at 406–07 (citing William Blackstone, 4 *Commentaries on the Laws of England* 24 (1769)).

As the Supreme Court recognized in *Ford*, if the execution of an individual would have been barred by common law at the time of the Founding, that execution is unconstitutional under the Eighth Amendment. As *Ford* states "[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405. The Eighth Amendment thus, requires that a prisoner must be granted the opportunity to show that the common law would bar execution.

Existing precedents regarding competency to be executed do not fully address the question presented here. The trilogy of Supreme Court competency cases—*Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007); and *Madison v. Alabama*, 586 U.S. 265 (2019)—recognized that common law must be respected but do not answer the question of how a claim under the common law protection for idiots should be adjudicated. *Ford* and *Panetti* both addressed the

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[1] As Mr. Black stated below, to our modern ears, describing an individual with an intellectual disability as an "idiot" is cruel and offensive. This pleading utilizes the common law terms and definitions because, for the purposes of this proceeding, they constitute the operative law. Because "idiot" and "idiocy" have specific definitions at common law, which are different from modern concepts of intellectual disability, this pleading utilizes those terms. Counsel means no disrespect to Mr. Black or those individuals living with an intellectual disability.

execution of individuals with profound mental illness. *Madison* addressed solely whether "evolving standards of decency" prohibit executing an individual who suffers from vascular dementia and could not recall the circumstances of the crime of conviction. *Madison v. Alabama*, 17-7505, at iii (U.S. Jan. 18, 2018) (Petition for Certiorari). Although these cases ground their holdings in the common law prohibition on executing the incompetent, none of them provide an operative standard for when a prisoner asserts a common law claim, particularly when that is a claim of incompetency from low intellectual functioning, rather than mental illness. The same is true of *Van Tran*. Although *Van Tran* contemplates the assertion of common law rights, it does not expound on the constitutional standard for assessing such a claim. Because recent Supreme Court caselaw holds that constitutional standards must adhere to the history and traditions in place at the Founding, this case asks the Court to apply the common law prohibitions against executing "idiots," which were clearly established at the Founding.

At the Founding, the defining characteristics of an "idiot" were low intellectual functioning, the existence of "unsound memory," the inability to manage one's own affairs, and "gross malformation of the brain." *Wharton and Stille's Medical Jurisprudence* 859 (1905); George D. Collinson, *Treatise on the Law concerning Idiots, Lunatics, and Other Person Non Compotes Mentis* 58 (1812); William Blackstone, 1 *Commentaries on the Laws of England* 304 (1778); Matthew Hale, 1 *History of Pleas of the Crown* 30 (1736); Edward Coke, 1 *Institutes of the*

Laws of England 247 (1633). Byron Black exhibits life-long deficits in intellectual functioning: every psychometrically valid IQ test ever administered to him places his intellectual functioning in the intellectually disabled range. Since his incarceration on death row, Mr. Black has developed dementia, which further impedes his daily functioning. His ability to manage his own affairs—even in prison—is extremely compromised, as he exhibits "marked global impairment in skills essential for independent living." TR 62 (Martell 2025). Finally, his brain tissue is literally eroding; congenital brain damage compounded by traumatic brain injury now manifests as dementia. Accordingly, Mr. Black meets the legal criteria for "idiocy" at common law and his execution is barred by these deeply engrained legal principles. Mr. Black, accordingly, asks this Court to remand this matter for the trial court to conduct a hearing on Mr. Black's incompetence to be executed under the common law standards.

STATEMENT OF THE FACTS

I. Mr. Black's brain and functioning are severely impaired.

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

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

Dr. Dan Martell diagnosed Mr. Black with moderate dementia with severe impairment of executive function. TR 63 (Martell 2025). He did so because of Mr. Black's dismal performance on the Dementia Rating

Scale-2, a test "that measures multiple cognitive functions associated with dementia." *Id.* Those standardized scores place Mr. Black's functionality in the bottom 3–5% of others his age and, notably, show that he has deficits that "affect his functional independence and decision-making capacity." *Id.*

Mr. Black's neurocognitive deficits also result in "a substantial loss in his ability to find words to express himself." *Id.* at 64. In 2019, when Dr. Martell first assessed Mr. Black, "he was severely impaired in this area" and fewer than one in 1,000 individuals performed worse. *Id.*, *see also* TR 532 (Martell 2020). Currently, Mr. Black's expressive language capabilities are "profoundly disabled" and fewer than one in 10,000 individuals performed worse than Mr. Black. *Id.* Further, Mr. Black's "higher order cognitive abilities required for reasoning, problem solving, and abstract thinking have also diminished significantly." *Id.* Mr. Black's dementia is progressive, causing significant impairments in memory, verbal fluency, and executive functioning. TR 63 (Martell 2025); TR 528–29 (Martell 2020). Dr. Martell's neuropsychological testing is confirmed by his clinical assessment and that of Dr. Lea Ann Baecht. TR 111–12 (Baecht 2025) (diagnosing Major Neurocognitive Disorder).

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

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

marked volumetric changes." *Id.* at 96. Between 2001 and 2022, several regions of Mr. Black's brain declined in volume and exhibit "measurable regional atrophy." *Id.* The imaging also showed a "structural expansion in fluid-filled and periventricular regions, as when tissue dies, it is replaced by fluid." *Id.* In other words, the existence of more fluid in Mr. Black's brain is the result of the death of brain tissue.

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

Dr. Gur's conclusions are confirmed by Dr. Martell's neurocognitive testing, which also shows a "very significant neurocognitive decline" since Dr. Martell's previous evaluation in 2019. TR 63 (Martell 2025). In the areas of memory and attention, Mr. Black's "scores have fallen significantly" and memory testing now indicates that he is in the bottom first percentile. *Id.* at 64. In other words, "99 out of 100 men of his age and education can remember more . . . ." *Id.*

Mr. Black's brain sustained numerous, significant insults at an early age that likely compromised his neurocognitive functioning. Mr. Black "was exposed to neurotoxins *in utero* and as a small child." TR 267 (Gur 2001). Dr. Gur concluded that "[e]xposure to these toxins causes structural damage to the brain, including orbital frontal and temporal lobes that contribute to attention disorder and motor impairment." *Id.* at 268. Both of these exposures have significant neurocognitive effects and may account for his deteriorating functioning.[2] *See, e.g.*, *Id.*; TR 400 (Family Interview Memos); TR 425 (Finas Black Test.).

Dr. Gur noted that Mr. Black was "an avid football player at varsity level and has suffered several head injuries." TR 268 (Gur 2001); *see also* TR 374-395 (VUMC childhood medical records) (documenting head injury). Based upon the brain imaging studies in 2022, Dr. Gur stated

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

that "[t]raumatic brain injury is also consistent with several findings of structural and functional abnormalities, such as decreased metabolism in the cingulate gyrus and signs of diffuse axonal injury." TR 98 (Gur 2025). Repeated blows to the head, as Mr. Black sustained, likely play a role in his neurocognitive decline.

While it is difficult to identify with precision all the sources of Mr. Black's numerous neurocognitive problems, his history contains ample evidence of multiple injuries and exposures that are capable of causing his deficits.

C. Mr. Black suffers an intellectual disability.

As the State stipulated in 2022, Mr. Black is intellectually disabled. "Because these experts have concluded Petitioner does, in fact, meet the criteria for a diagnosis of intellectual disability, the State stipulates that Petitioner would be found intellectually disabled were a hearing conducted." TR 517 (State's Response).[3] The record supports the State's stipulation. Numerous experts have concluded that he meets the criteria for the diagnosis. TR 520–44 (Martell 2020); TR 428–39 (Martell 2021); TR 56–68 (Martell 2025); TR 110–112 (Baecht 2025); TR 440–59 (Greenspan 2008); TR 460–74 (Tasse 2008); TR 475–500 (Grant 2001); TR 501–08 (Globus 2001); TR 509–11 (Globus 2004). It is notable that the

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[3] Precedent is clear that such a factual stipulation is binding on the parties. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 677 (2010) (A party is "bound by the factual stipulations it submits."). The doctrine of judicial estoppel prohibits the State from now disputing Mr. Black's intellectual disability. *Sibley v. McCord*, 173 S.W.3d 416, 419 (Tenn. Ct. App. 2004) ("The doctrine of judicial estoppel prevents a litigant who has taken a position in one judicial proceeding from taking a contradictory position in another.").

State's expert who previously testified that Mr. Black was not intellectually disabled revisited her opinion and subsequently concluded that under current legal and diagnostic criteria, Mr. Black is intellectually disabled. TR 557–563 (Vaught 2022).

1. Evidence of sub-average intellectual functioning

Mr. Black exhibits significantly subaverage intellectual functioning. Throughout his life, intelligence testing has consistently shown Mr. Black's intelligence to be in the intellectually disabled range. Below are the results of all individually administered, psychometrically valid IQ tests that Mr. Black has taken. *See e.g.,* TR 564–65 (Blair 1993); TR 566–70 (van Eys 2001); TR 428–39 (Martell 2021). The chart below also includes adjusted scores based on the standard error of measurement and the Flynn Effect, as required by prevailing standards. *Hall v. Florida*, 572 U.S. 701, 723 (2014) (instructing courts to take into consideration the standard error of measurement in evaluating intellectual disabilities); *Coleman v. State*, 341 S.W.3d 221, 242 n.55

(Tenn. 2011) (applying the Flynn Effect and holding "scores must be correspondingly adjusted downward" due to test obsolescence).[4]

Year (expert)	Test	Full Scale IQ	SEM (Score range)	Flynn Adjusted IQ
1993 (Blair)	WAIS-R	73	+/- 5	67
1997 (Auble)	WAIS-R	76	+/- 5	70
2001 (Grant)	Stanford-Binet-4th ed.	57	+/- 2.5	52
2001 (Van Eys)	WAIS-III	69	+/- 3	67
2021 (Martell)	WAIS-IV	67	+/- 3	63

Mr. Black's IQ test scores have consistently demonstrated that his intelligence is in the intellectually disabled range. In fact, the scores show remarkable congruence over time and exhibit significantly subaverage intellectual functioning. All the scores above indicate an IQ at least two

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

standard deviations below the mean and, as such, satisfy prong one of an intellectual disability diagnosis.

2. Evidence of Adaptive Deficits

Mr. Black exhibits deficits in adaptive functioning in multiple domains. In the conceptual domain, which includes skills such as language, math, money, and self-direction, Mr. Black exhibits marked deficits. TR 534–44 (Martell 2020). Academically, Mr. Black was held back and required to repeat the second grade.[5] TR 571–72 (School Records). Neuropsychological testing indicates that Mr. Black's abilities in math fall in the 2nd percentile and his reading abilities in the 4th percentile. TR 527 (Martell 2020). Put differently, 98% of the population exhibits stronger performance in math and 96% of the population exhibits better reading skills. *Id.*

Early indications of Mr. Black's deficits in the conceptual domain are confirmed by individuals that knew him as a child. For example, Rossi Turner grew up with Mr. Black, attended the same school, and lived on the same street. TR 573–576 (Turner Decl.). Turner recounts that when neighborhood children played simple games, Mr. Black struggled to understand how to play the game and consistently was the first child to lose because he could not grasp the concept of the game or

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

its rules. *Id.* at 575 (Turner Decl.); TR 537–38 (Martell 2020). Dr. Martell's recent testing confirms that Mr. Black has "severe impairment in applying reasoning and decision-making to real-world situations." TR 62 (Martell 2025). These deficits make him "[u]nable to make sound, independent decisions." *Id.*

Across the decades of evaluations, neuropsychological testing consistently shows sharp deficits in memory, word finding, verbal expression, and attention. TR 56–68 (Martell 2025); TR 520–44 (Martell 2020); TR 475–500 (Grant 2001); TR 577–78 (Auble 2008). Dr. Martell's recent assessment shows that these deficits have only worsened with time and age. TR 63–65 (Martell 2025).

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

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

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

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

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

In 2008, Dr. Stephen Greenspan, a widely respected expert on intellectual disability, administered the Vineland-2 retrospectively by interviewing Mr. Black's sisters Melba Black Corley and Freda Black Whitney, as well as his friend Rossi Turner, and his football coach Al Harris. TR 440–59 (Greenspan 2008). The Vineland-2 is "the most widely-used and respected adaptive behavior rating instrument." *Id.* at 457. The informants showed remarkable consistency and revealed Mr. Black's adaptive functioning measured more than two standard deviations below the mean. *Id.* at 457-59.

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

3. Evidence of onset during the developmental period

Mr. Black's intellectual disability manifested during the developmental period. Mr. Black's academic difficulties were evident as early as the second grade when he was held back due to poor performance. TR 453 (Greenspan 2008). As discussed above, his friends and family attest to early, indicative difficulties such as Mr. Black's inability to grasp simple childhood games and his inability to recall and perform his chores. TR 575 (Turner Decl.). His high school football coach recounts that although Mr. Black exhibited athletic ability, he was unable to understand and execute offensive plays and required a simplified playbook if he was to play at all. TR 456–57 (Greenspan 2008) (documenting interview of Al Harris, Football Coach). Mr. Black was more capable of grasping defense, where the task at hand was simpler: to run and tackle the ball carrier. *Id.* The reports of Drs. Martell, Greenspan, Tasse, Grant, and Vaught (State's expert) all support the conclusion that Mr. Black's impairments manifested during the developmental period. TR 520–44 (Martell 2020); TR 440–59 (Greenspan 2008); TR 460–74 (Tasse 2008); TR 475–500 (Grant 2001).

SUMMARY OF THE ARGUMENT

The argument presented in this case is simple. While *Ford*, *Panetti*, and *Madison* incorporate the common law's protection of "lunatics," into the Eighth Amendment, it is unambiguous that the common law also prohibited the execution of "idiots." *Ford*, 477 U.S. at 417; *Panetti v. Quarterman*, 551 U.S. 930, 954–55 (2007); *Madison v. Alabama*, 586 U.S. 265, 279 (2019). It is also clear that, at a minimum, the Eighth Amendment forbids the execution of those whose execution was outlawed at the time of the Founding. *Ford*, 477 U.S. at 406. Because Mr. Black meets the criteria for "idiocy" at common law, his execution would violate the Eighth Amendment's ban on cruel and unusual punishment.

This Court remanded Mr. Black's case to the trial court for adjudication of his incompetence to be executed claim. *State v. Black,* No. M2000-00641-SC-DPE-CD (Tenn. Mar. 3, 2025) (Order). In so doing, this Court instructed the trial court to adjudicate Mr. Black's claim in accordance with *Van Tran*, which necessarily includes claims under the common law: "Accordingly, we exercise our inherent supervisory authority and herein 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 rights to challenge competency to be executed." *Van Tran*, 6 S.W.3d at 260–61 (emphasis added).

The trial court concluded—contrary to *Ford* and *Van Tran*—that it lacked jurisdiction to adjudicate a common law claim of incompetency. Because that decision is contrary to the governing law, the trial court's opinion should be vacated and the case remanded for an evidentiary

hearing with instruction to the trial court to adjudicate Mr. Black's claim under the proper standard.

ARGUMENT

I. Standard of Review

Questions of law are reviewed de novo with no presumption of correctness. *State v. Irick*, 320 S.W.3d 284, 292 (Tenn. 2010); *Van Tran*, 6 S.W.3d at 272. The trial court's finding on the issue of competency is reviewed as a finding of fact and is presumed correct unless the record preponderates against those findings.[6] *Id.*

II. The trial court erred in concluding it was without jurisdiction to adjudicate Mr. Black's claim.

The trial court erroneously concluded that a claim based in common law was not cognizable in a *Van Tran* proceeding. However, in *Van Tran* this Court contemplated a prisoner doing just that. As this Court set out, the *Van Tran* procedure allows "a prisoner sentenced to death . . . to assert his or her *common law* and constitutional rights to challenge competency to be executed." *Van Tran*, 6 S.W.3d at 260–61 (emphasis added). Quite simply, a remand from this Court for the trial court to consider a competency claim under *Van Tran* necessarily provides a forum to vindicate common law rights.

Ford—which *Van Tran* cites more than 30 times—observes that the "ancestral legacy" of the common law "has not outlived its time." *Ford*, 477 U.S. at 408. In fact, the common law reasons for prohibiting the

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[6] Because the trial court "decline[d] to wade into the asserted common law claim of 'idiocy,'" the trial court did not enter findings of fact regarding Mr. Black's "idiocy" claim. TR 781 (Memorandum Opinion and Order at n.5).

execution of the non compos mentis have "no less logical, moral, and practical force than they did when first voiced." *Id.* at 409. The prohibition on the execution of the insane stems from guarantees, unique to the Anglo-American legal tradition, that continue to control competency to be executed proceedings. "These were not hollow guarantees." *Solem v. Helm*, 463 U.S. 277, 285 (1983).

Although there is a lively debate regarding what, if any, role "evolving standards of decency" should play in Eighth Amendment jurisprudence, this case does not rely on any such principle. *See, e.g.*, *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 561 (2024) ("Modern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause—or any provision of the Constitution for that matter.") (Thomas, J., concurring)). Rather, Mr. Black's claim relies on the uncontested view, that "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405. Because "idiots" could not be executed at common law, that prohibition necessarily is encompassed in the Eighth Amendment.

Contrary to the view of the trial court, the common law is not a distant cousin of the operative law. Rather, in the realm of the Eighth Amendment, the common law unambiguously *is* the law. *Ford*, 477 U.S. at 405–06; *Van Tran*, 6 S.W.3d at 265. In case after case, the Supreme Court has reiterated that history and tradition play a crucial role in understanding constitutional text and animating its meaning . *See, e.g.*,

United States v. Rahimi, 602 U.S. 680, 691 (2024) ("A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, apply[ing] faithfully the balance struck by the founding generation to modern circumstances.") (cleaned up); *Erlinger v. United States*, 602 U.S. 821, 843 (2024) (relying on the "carefully studied . . . original meaning of the Fifth and Sixth Amendments"); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 433 (2024) (examining the "even deeper roots, tracing far back into the common law") (Gorsuch, J., concurring); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 22 (2022) (holding that Second Amendment constitutional inquiries are "centered on constitutional text and history."); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239 (2022) ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of . . . 'liberty[.]'"); *Lange v. California*, 594 U.S. 295, 309 (2021) (The common law is "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020) ("[W]hether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict."); *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (relying on a "review of founding-era sources" to determine the scope of the Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The founding generation's immediate source of the concept, however, was the common law."). The trial court's refusal to heed these binding precedents

and its unwillingness to engage with "this historical inquiry," which is "a commonplace task for any lawyer or judge" was reversible error and must be remedied. *Bruen*, 597 U.S. at 28.

III. Common law prohibited the execution of "idiots."

At the time of the nation's Founding, and long before in English common law, the law prohibited "executing a prison who has lost his sanity" because "the practice consistently has been branded 'savage and inhuman'" *Ford*, 477 U.S. at 406 (quoting William Blackston, 4 Commentaries on the Laws of England 24 (1769)). A frequent application of this principle has served as a prohibition on executing the extremely mentally ill. *See, e.g.*, *Panetti* 551 U.S. at 954–55 (setting out the standard for incompetence to be executed in the context of mental illness). The common law prohibition upon executing certain individuals, however, is not limited to individuals with serious mental illness.

Without doubt, the common law extensively documents that "lunatics" were categorically exempt from execution. William Blackstone, 4 *Commentaries on the Laws of England* 24 (1769). Mr. Black's claim focuses on an equally recognized provision of the common law: that there is a categorical exemption of the execution of those referred to as "idiots." *Ford*, 477 U.S. at 406 ("[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself."); *Penry v. Lynaugh*, 492 U.S. 302, 331–33 (1989) (noting that "lunatics" and "idiots" were exempt from execution at common law); *see also* Hale, *supra*, at 29–30. ("The laws absolving idiots of guilt in capital crimes can be traced directly to English statute."); Parnel

Wickham, *Concepts of Idiocy in Colonial Massachusetts* 35 J. Soc. Hist. 935, 939 (2002).

A. Common law doctrines of "idiocy" and "lunacy"

As recounted in *Ford*, the common law prohibited the execution of the non compos mentis, which included both the "insane" and "idiots." *Ford*, 477 U.S. at 406. Under the common law—and thus the law in place at the Founding—being non compos mentis was a broad concept that encompassed a variety of conditions and included individuals who, for a variety of reasons, were not considered to be of sound mind. *See, e.g.*, Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).[7]

The most discussed and defined of these debilitating conditions at common law was the notion of a "lunatic." "Lunatics" were individuals who "had understanding, but by disease, grief, or other accident, has lost the use of his reason." Anthony Highmore, *Treatise on the Law of Idiocy and Lunacy* 2 (1822) (citing William Blackstone, 1 *Commentaries on the*

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[7] It is important to note that at common law, being classified as a "lunatic" or an "idiot" was not only a bar to being executed. *Bevereley's Case*, (1598) 76 E.R. 1118, 1120 (K.B.). Rather, a judicial finding of "lunacy" or "idiocy" constituted a broad form of legal incompetency by which an afflicted individual was incompetent to contract, wed, devise or bequeath property, be convicted of a crime, or be executed. *See, e.g.*, *Carr v. Holliday*, 21 N.C. 344, 345 (N.C. 1836) ("A lunatic has no legal capacity to contract."); *Wightman v. Wightman*, 4 Johns. Ch. 343, 345, 1820 WL 1618, at *2 (N.Y. Ch. 1820) ("It is too plain a proposition to be questioned, that idiots and lunatics are incapable of entering into the matrimonial contract."); *Jenkins v. Jenkins' Heirs*, 32 Ky. 102, 103 (Ky. 1834) ("A person of unsound mind can not be married."); *Stewart's Ex'rs v. Lispenard*, 26 Wend. 255, 297, 1841 WL 3916, at *23 (N.Y. 1841) ("[A]ll persons except idiots, persons of unsound mind, married women and infants, may devise their real estate by their last will and testament duly executed."); *Mitchell v. State*, 16 Tenn. 514, 524 (Tenn. 1835) ("Ignorance, or weakness of mind, does not excuse an agent of his crime. It requires insanity, idiocy."); *Bonds v. State*, 8 Tenn. 143, 144 (Tenn. 1827) (holding lunacy is a bar to execution).

Laws of England 304 (1826)). Lunacy was not a static condition. *Id.* at 3. The common law recognized that individuals' level of competency varied with the vicissitudes of mental illness. *See, e.g.*, *Person v. Warren*, 14 Barb. 488, 494, 1852 WL 4762, at **5 (N.Y. Sup. Ct. 1852) (noting that lunatics had "lucid intervals"); *In re Hanks*, 3 Johns. Ch. 567, 568, 1818 WL 1768, at **1 (N.Y. Ch. 1818) (outlining the process for reevaluating lunacy).[8] There is, of course, a direct line from this common law tradition to the *Ford* case, which involved an inmate with significant mental illness.

Often discussed alongside lunatics were "idiots." At common law, an "idiot" was an individual lacking intellectual capacity. One treatise stated that an "idiot" "is a legal term, signifying a person who had been without understanding from his nativity, and whom the law therefore presumes never likely to attain any." Leonard Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots and Persons of Unsound Mind* 2 (1833). Unlike "lunacy," "idiocy" was considered a static condition that was unchanging and permanent.[9] "Idiocy" was also a condition that originated early in life. Highmore, *supra*, at 1. "Idiots" were "'[t]hose who cannot distinguish, compare, and abstract, would hardly be able to understand and make use of language, or judge, or reason to any

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

[9] The common law also recognized *dementia accidentalis vel adventitia*, discussed *infra*, which involved the onset of "idiocy" later in life as a result of accident, disease, or old age. Hale, *supra*, at 30.

tolerable degree; but only a little and imperfectly about things present, and very familiar to their senses.'" Shelford, *supra*, at 5 (quoting John Locke, *Essay on Human Understanding* 120 (1824)). It is this feature of the common law that is most applicable to Mr. Black.

B. Characteristics of "idiocy" at common law

The defining characteristic of "idiocy" at common law was a significant deficit of intellectual capacity. "By the very nature of these cases, the intelligence is involved." Wharton, et al., *supra*, at 859. "Idiots" are "persons who by nature are deficient in mind, memory, and morals." *Id.* at 865. Historians have summarized the state of the law by stating "the idiot arrived at the beginning of the eighteenth century, characterized in law and through the processes of the Court of Wards and then Chancery as a 'solitaire': a person unable to understand money, numbers or social relationships and lacking self-awareness and memory." Simon Jarrett, *'Belief,' 'opinion,' and 'knowledge': the idiot in law in the long eighteenth century*, in INTELLECTUAL DISABILITY: A CONCEPTUAL HISTORY, 1200–1900 163 (Timothy Stainton, et al., eds., 2018).

By the time of the Founding, the defining characteristic of individuals who were non compos mentis was their inability to manage

their own affairs.[10] William Blackstone, 1 *Commentaries on the Laws of England* 304 (1826); George D. Collinson, *Treatise on the Law concerning idiots, Lunatics, and Other Person Nonn Compotes Mentis* 58 (1812); Edward Coke, 1 *Institutes of the Laws of England* 247 (1633); *see also* Simon Jarrett, *Those They Called Idiots* 25 (2020). Founding era common law cases often focused on whether an individual was capable of "government of himself, and of the management of his goods and chattels, lands, and affairs." *In re Mason*, 1 Barb. 436, 437, 1847 WL 4122, at **1 (N.Y. Sup. Ct. 1847); *L'Amoureux v. Crosby*, 2 Paige Ch. 422, 427, 1831 WL 2894, at **3 (N.Y. Ch. 1831) ("[T]he jury must find distinctly that he is of unsound mind, and mentally incapable of governing himself or of managing his affairs.").

Another defining characteristic of "idiocy" at common law was the presence of "unsound memory." Thomas W. Powell, *Analysis of American Law* 550 (1878) (defining "idiots" as "those who are person of unsound memory and understanding from their nativity, or such as become so by the visitation of God, as by sickness or accident"); *Millison v. Nicholson*, 1 N.C. 612, 616 (N.C. Super. L. & Eq. 1804) ("[H]e who is of unsound

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[10] This standard is identical to the one used by this Court in other contexts regarding competency. *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 489 (Tenn. 2013) (holding that the then correct inquiry regarding a prisoner's competency to forego post-conviction proceedings was "whether the petitioner is able to manage his personal affairs and understand his legal rights and liabilities."); *State v. Nix*, 40 S.W.3d 459, 463 (Tenn. 2001) (applying the standard to due process tolling); *Porter v. Porter*, 22 Tenn. 586, 589 (Tenn. 1842) (applying such a rule to testamentary capacity at common law); *see also* Tenn. Sup. Ct. R. 28, § 11(B) (adopting an alternate formulation of the rule).

memory hath not any manner of discretion."); *Bevereley's Case*, (1598) 76 E.R. 1118, 1122 (K.B.). One influential common law medical treatise stated that "[f]rom the defective condition or dimension of the brain of an idiot, his powers of attention are so small that he cannot even correctly perceive or acquire a new idea, and consequently his memory of it will be comparatively defective." Joseph Chitty, *A Practical Treatise on Medical Jurisprudence* 327 (1835).

Common law assessments of unsound memory, like the overall assessment of non compos mentis, examined an individual's capacity to manage his or her own affairs. For example, the Alabama Supreme Court held that an individual must have "memory enough to understand the business in which he is engaged." *Stubbs v. Houston*, 33 Ala. 555, 567 (Ala. 1859); *accord In re Lindsley*, 10 A. 549, 549 (N.J. Ch. 1887) ("The unsoundness of mind, then, from whatever cause it arises, must be such as to deprive the person, concerning whom the inquiry is made, of ability to manage his estate and himself."). Many cases recognized that individuals may become of unsound memory due to aging or what in modern terms is referred to as dementia. *See, e.g.*, *In re Barker*, 2 Johns Ch. 232, 234, 1816 WL 1112, at *1 (N.Y. Ch. 1816) (noting that one may be rendered incompetent by "the imbecility of extreme old age"). Accordingly, the existence of significant deficits of memory that impaired an individual's ability to manage his own affairs were prima facie evidence of being non compos mentis. Hale, *supra*, at 30.

Although "idiocy" at common law focused on individuals' intellectual deficits, it did not require that an individual exhibit no

abilities or strengths. Common law sources recognized that "idiots" were not devoid of reason or intellect and, in fact, exhibited skills that "manifested in more or less perfection." Issac Ray, *Treatise on the Medical Jurisprudence of Insanity* 88 (1838). Issac Ray recounted an individual "who learned names, dates, numbers, history, and repeated them all mechanically, but was destitute of all power of combining and comparing his ideas and was incapable of being engaged in employment." *Id.* Furthermore, "these defective beings are not beyond the reach of education." *Id.* Ray likewise noted that "idiots" often had the capacity for a degree of interpersonal reciprocity and religious observance. "Among the moral sentiments, it is not uncommon to find self-esteem, love of approbation, religious veneration, and benevolence, bearing a prominent part, if not constituting their entire character, and thus producing a slight approximation of humanity." *Id.*

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

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

Wharton, et al., *supra*, at 858. Wharton's observations are significant on a few levels. First, he noted that the level of brain malformation in "idiots" varied widely, ranging from slight defects to almost complete absence of the organ altogether. This again emphasizes that, while profoundly disabled individuals were certainly "idiots" at common law, a severe level of disability was not required to be considered afflicted with the condition. Furthermore, Wharton's analysis reflects the common law understanding of brain disorders and understanding that observable defects often resulted in "idiocy." While not present in all cases of "idiocy," brain defects, according to Wharton, were strong evidence of "idiocy."

Although some efforts at identifying "idiocy" were medical in nature, the common law also focused on everyday deficits that afflicted "idiots." For example, courts defined "idiocy" as an individual's susceptibility to being influenced by others or signs of gullibility. *See, e.g.*, *Woodbury v. Obear*, 73 Mass. 467, 472 (Mass. 1856) ("Such feebleness of mind, or incipient idiocy, is the condition most likely to be unduly influenced by another."). In *Ridgeway v. Darwin*, (1802) 32 E.R. 275, 276 (Ch.), the court held that a finding of "idiocy" was appropriate when "it is made out, that the party is unable to act with proper and provident management; liable to be robbed by any one; under that imbecility of mind not strictly insanity; but as to the mischief calling for as much protection as actual insanity." Accordingly, common law cases not only examined an individual's capacity for managing his or her own affairs but also questioned whether, by reason of imbecility, an individual might be exploited in their affairs.

In summary, at the time of the Founding, the primary assessment conducted by courts to determine if an individual was non compos mentis was whether an individual had the ability to manage his own affairs. With respect to "idiocy," intellectual capacity was key. Unsound memory was a clear indicator of being non compos mentis, and often unsound memory was used interchangeably with "idiocy." Chitty, *supra*, at 329 ("So essential is the power of memory to the perfect mind, that in some of our older statutes the expression '*unsound memory*' or 'non-sane memory' was used to denote as well an idiot and lunatic as every person incapable of managing his own affairs."). The common law understood that "idiocy" did not mean that an individual was wholly without skills or ability and that "idiots" were capable of employment and learning certain, limited skills. Evidence of individuals' deficits was both medical and anecdotal. Evidence of medical conditions, such as those discussed by Wharton above, were conclusive evidence of "idiocy." But courts also examined decidedly non-medical evidence, such as individuals' management of their financial affairs, their gullibility, or their behavior.

C. At common law, categorical exemptions to the execution of the non compos mentis were not limited to profoundly disabled individuals.

One of the most persistent myths in modern caselaw—embraced by the State and trial court[11]—regarding the execution of "idiots" is that this prohibition only protected the profoundly intellectually disabled from executions. This myth appears to have originated in *Penry*, 492 U.S. at

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[11] *See* TR 781 (Memorandum and Order at n.5); TR 726 (State's Response at n.1).

331–33, and was resurrected in Justice Scalia's dissent in *Atkins*. There, Justice Scalia argued that the common law prohibition upon executing "idiots" was limited to profoundly intellectually disabled individuals and that "idiots generally had an IQ of 25 or below."[12] *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting). Justice Scalia's conclusion was historically inaccurate and relied on a flawed and incomplete review of historical sources.

In support of this proposition, Justice Scalia cited Anthony Fitzherbert's La Novelle Natura Brevium: "An idiot is 'such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss.'" *Id.* at 340 (quoting Anthony Fitzherbert, *La Novelle Natura Brevium* 519 (1534)). Justice Scalia omitted Fitzherbert's next sentence, which demonstrates that the definition of idiocy is broader: "But if he have such understanding that he know and understand letters, and to reade by

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[12] It is perplexing how Justice Scalia could define idiocy at common law using an IQ score. The first standardized IQ test was the Binet-Simon Intelligence Test developed in 1905. Serge Nicolas, et al., *Sick? Or Slow? On the origins of intelligence as a psychological object* 41 Intelligence 699, 700–01 (2013). Common law caselaw, unsurprisingly, has no reference to standardized testing as a means to determine "idiocy." Similarly, it is difficult to see how an individual with an IQ of 25 would even be capable of murder except in the most obscure and unusual circumstances. As Dr. Martell's report on the subject recounts, an individual with an IQ of 25 is profoundly disabled and requires near constant care from others in order to survive. Such an individual would "function at the level of a toddler or infant." TR 67 (Martell 2025). The idea that at common law such individuals committed crimes in sufficient numbers to warrant an entire developed legal doctrine prohibiting their execution is farcical. Moreover, a cursory read of common law cases reveals that the subject of those cases was not limited to individuals with profound limitations.

teaching or information of another man, then it seemth he is not a Sot, nor natural Idiot." Anthony Fitzherbert, *La Novelle Natura Brevium* 519 (1534).

The importance of the omitted sentence is consistently recognized by commentators: "From the second portion of his definition, however, it seems clear that Fitzherbert, like his predecessors and successors, did not intend his definition to be categorically exclusive of any other means of determining a defendant's idiocy." S. Sheldon Glueck, *Mental Disorder and the Criminal Law* 128 (1925). While the first sentence delineates one extreme (an individual who cannot count to twenty or name his parents), the second sentence points to the opposite extreme, suggesting that those that can learn to read *seem* to not be "idiots." Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 YALE L.J. 2746, 2768–69 (2015). Fitzherbert's twenty pence test was "merely . . . one of the convenient methods known to his day." Glueck, *supra*, at 128. After all, "[t]here is certainly a wide gap between the mental condition of an idiot who can not 'number twenty pence' or 'tell who his father or mother' and of one who can not acquire the much more intricate accomplishment of understanding 'his letters,' and reading." *Id.* at 128–29.

Contrary to Justice Scalia's contentions, Fitzherbert's twenty-pence test was repudiated long before the Founding. Francis Wharton, the widely regarded 19th century scholar of medical jurisprudence, reported: "[T]o confine idiocy and imbecility within such a rule is simply to revert to the crude test promulgated by Fitzherbert, which the Chief Lord Hale,

as we have seen, condemned more than two centuries ago." Wharton, et al., *supra*, at 868–69. Leonard Shelford's 1833 treatise concluded that the Fitzherbert standard was illogical because it "was contrary to common sense, for, as to repeating the letters of the alphabet, or reading what is set before him, a child of three years old may do that." Shelford, *supra*, at 2. Matthew Hale, for example, stated in reference to the twenty pence test: "These, though they may be evidences, yet they are too narrow, and conclude not always, for *ideocy* [sic] or *not* is a question of fact triable by jury, and sometimes by inspection." Hale, *supra*, 29.

Accordingly, the historical record indicates that the twenty-pence test was not regarded as the operative test of "idiocy" at the time of the Founding.

D. Common law after the 1500s adopted the Affairs Test.

Even if we presume Fitzherbert's test was once a correct articulation of the common law, that conclusion only remains valid if one omits any analysis of common law developments after the 1530s. This conclusion is bolstered by an examination of the common law case law and treatises.

Strong historical evidence indicates that as early as the 17th and certainly by the early 18th century, the common law had rejected the notion that "idiots" were limited to those who met Fitzherbert's twenty pence test. In *In re Mason*, 1 Barb. 436, 440, 1847 WL 4122, at *3 (N.Y. Sup. Ct. 1847), for example, the court discussed how some earlier case law hewed closely to the Fitzherbert's test, but subsequent case law settled that the prohibition had a more "extended jurisdiction." *Id.*;

accord Person v. Warren, 14 Barb. 488, 495, 1852 WL 4762, at **5 (N.Y. Sup. Ct. 1852) ("Latterly a different doctrine has prevailed."); *Roberts v. State*, 3 Ga. 310, 329 (1847) ("The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation, have relaxed the cruel severity of the earlier doctrines."); *In re Barker*, 2 Johns. Ch. 232, 233, 1816 WL 1112, at *1 (N.Y. Ch. 1816) ("Mere imbecility of mind, not amounting to idiocy or lunacy, has not, until very lately, been considered in the English Court of Chancery, as sufficient to interfere with the liberty of the subject over his person and property.").

In his seminal Institutes of the Laws of England, Lord Coke defined four categories of individuals who the law considered to be non compos mentis: 1) "ideota which from his nativity, by a perpetual infirmity is non compos mentis"; 2) "Hee that by sicknesse, griefe, or other accident wholly loseth his memorie and understanding"; 3) "Lunatique that hath sometime his understanding and sometime not"; 4) "he that by his owne vicious act for a time depriveth himself of his memory and understanding, as he is drunken."[13] Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).

The jurisprudence of Lord Coke is widely regarded as having expanded the definition of what constituted non compos mentis to a fifth category that included individuals who could not manage their own

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[13] As Lord Coke went on to explain, the first three categories were incompetent to be executed but those individual's whose insanity was the result of their own acts were not. Coke, *supra*, at 247.

affairs. By 1812, George D. Collinson's comprehensive treatise attributed following rule directly to Lord Coke: "Non compotes mentis comprehend, not only idiots and lunatics, but all other persons, who from natural imbecility, disease, old age, or any such causes, are incapable of managing their own affairs." Collinson, *supra*, at 58.

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

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

Simon Jarrett, *Those They Called Idiots* 25 (2020).[14]

Although treatises ascribe to Lord Coke the rule that *non compos mentis* includes those individuals who could not manage their own affairs, unquestionably by 1765, when William Blackstone wrote, the definition included such persons:

> A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is indeed properly one that hath had lucid intervals: sometimes enjoying his senses, and

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[14] By 1891, the first edition of Black's Law Dictionary defined those of unsound mind to include "imbeciles." Henry Campbell Black, *Dictionary of Law* 1203 (1891).

> sometimes, not and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name) are comprised not only lunatic, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short as *are judged by the court of the chancery incapable of conducting their own affairs.*

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

An early legal treatise recounts this change in the law:

> Non compos mentis was much more restricted in its signification, in the time of Lord Hardwicke [1690–1764], than is the case at present, excluding person incapable of managing their own affairs through mere weakness of understanding; to who the court have been subsequently induced, upon mature reflection, and after considerable hesitation, to extend the same relief as to lunatics.

Collinson, *supra*, at 59; *see also* Anthony Highmore, *Treatise of the Law of Idiocy and Lunacy* 3 (1822) (noting Lord Coke defined individuals as non compos mentis when they were "incapable of conducting their own affairs").

Founding era Anglo-American common law cases reflect this evolution and expressly adopted a standard that included an assessment

of an individuals' capacity for managing their own affairs into the definition of being non compos mentis.

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

In re Mason, 1 Barb. at 440, 1847 WL 4122, at *3 (emphasis original); *see also Pennsylvania v. Schneider*, 59 Pa. 328, 331 (Pa. 1915) (holding it was error for the trial court to require the jury find the individual's "mind is entirely blotted out"); *In re Emswiler*, 8 Ohio N.P. 132 (Ohio Prob. 1900) ("It is not to be presumed, in view of the general policy of the state towards these unfortunates, that a person, though apparently an imbecile to such a degree that he cannot apply the faculties of his mind to his business, and take care of and preserve his property, must be shown to be a complete idiot, or that he is a gibbering, slobbering, lemon-headed wild man, before a guardian for his property can be appointed."); *Penington v. Thompson*, 5 Del. Ch. 328, 363 (Del. Ch. 1880) (noting the change in the common law doctrine and holding "where the party was not absolutely insane, but was unable to act with any proper and provident management" it was proper to find the party non compos mentis); *Foster v. Means*, 17 S.C. Eq. 569, 571 (S.C. App. Eq. 1844) (holding an individual "a degree removed from idiocy" lacked legal capacity); *In re Morgan*, 7

Paige Ch. 236, 237, 1838 WL 2811, at *1 (N.Y. Ch. 1838) ("It was formerly doubted whether the court could proceed upon a commission which did not find the party to be either a lunatic or an idiot. But at a more recent period, in England it was held that the court had jurisdiction in cases where the mind had become unsound from old age or infirmity, or any other cause of a permanent nature."); *L'Amoureux v. Crosby*, 2 Paige Ch. 422, 427 n.1, 1831 WL 2894, at *3 n.1 (N.Y. Ch. 1831) ("The jurisdiction of the court over the person and property of persons of unsound mind is not restricted to cases of idiocy or lunacy, strictly speaking; it extends also to cases of every person who, in consequence of old age, disease, or any other cause, is in such a state of mental imbecility as to be incapable of conducting his affairs with common prudence, and leaves him liable to become the victim of his own folly, or the fraud of others; but the jurisdiction should be assumed and exercised with great caution, and the case should be clear.").

Reflecting on these changes, Wharton observed:

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

Wharton, et al., *supra*, 858. The notion that "idiocy" and "imbecility" merge is born out in case law. *See, e.g.*, *Fisher v. Brown*, 1 Tyl. 387, 404, 1802 WL 745, at *10 (Vt. 1802) ("If they have not arrived at years of

discretion, or if of adult age they are incapacitated by reason of idiocy, insanity, total imbecility, or other dispensation of Divine Providence, the law will avoid their contract, and has provided guardians to contract for them.").

In *Leutz v. Earnhart*, 59 Tenn. 711, 712 (Tenn. 1874), this Court held that a land transaction was "palpably fraudulent" because the individual in question was "of a very low order of intellect, not an idiot, but removed only a few degrees above idiocy, having but little idea of the value of property, and relying mainly on his wife in business transactions."

Similarly, in *State v. Crow* the court noted that all of the definitions of "idiocy:"

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

1853 WL 3649, at *2 (Ohio Com. Pl. Mar. 1853) (emphasis original); *Roberts v. State*, 3 Ga. 310, 327 (1847) ("It would certainly be wrong to hold every poor idiot, lunatic, or insane person, responsible, who has even a glimmering of reason. That proposition would be inhuman, and is unsustained by authority.").

These cases and sources make clear that early American interpretations of "idiocy" no longer were restricted to the Fitzherbert's twenty pence test; rather these American common law courts examined an individual's functional level of intelligence and did not hesitate to

conclude that an individual who did not constitute an "idiot" under Fizherbert's cramped definition could nonetheless be found to lack legal capacity and thus be barred from execution, as well as numerous other legal rights. The suggestion of the State and trial court to the contrary is plainly contradicted by the existing historical evidence.

E. *Panetti*'s Cognitive Test is inapplicable to Mr. Black's claim: Rather, the appropriate standard is the Affairs Test used at the time of the Founding.

The cognitive test the United States Supreme Court applied to a claim of insanity in *Panetti* does not ensure that those deemed ineligible for execution by reason of "idiocy" at the time of the Founding will not be subject to execution. *See Reid ex rel. Martiniano*, 396 S.W.3d at 478 n.66 (discussing *Panetti*'s test as the "cognitive test"). This is because the cognitive test is fundamentally an inquiry into whether the prisoner understands his imminent punishment and its purpose, free from delusion. *Panetti*, 551 U.S. at 960. An "idiot," who the common law recognized was capable of "remember[ing] simple events," can be "taught to repeat certain passages," and is "capable of repeating what they have frequently heard," may satisfy the cognitive test. Ray, *supra*, at 88–89. But the common law, nonetheless, protects such an individual from execution because, in spite of these recitations, he would be "destitute of all power of combining and comparing ideas." *Id* at 88. Though Mr. Black can recite his execution date and that he was convicted of murder, because of his low intellectual functioning, brain damage, and dementia, he has "scarcely any conception of the purposes" of his execution—which, at the Founding, would have excluded him from execution. *Id.*

Although *Panetti* and *Madison* apply to cases in which insanity is raised, their approach is insufficient to protect the full scope of constitutional rights when a claim involves "idiocy." *Panetti* did "not attempt to set down a rule governing all competency determinations." *Panetti*, 551 U.S. at 960–61. The Supreme Court's history and traditions jurisprudence holds that the Bill of Rights "codified . . . *pre-existing* right[s]" and that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted." *Heller*, 554 U.S. at 592, 634. No legislature or court may diminish constitutional protections below the minimum established at the Founding. When, as here, a litigant shows that Founding era constitutional protections would protect them to a greater extent than existing law, the more robust constitutional protection must apply. *Ford*, 477 U.S. at 405; *Crawford*, 541 U.S. at 61 (overruling the "reliable hearsay" standard because it was "fundamentally at odds with the right of confrontation" understood at the Founding).

This case bears obvious parallels to the Supreme Court's recent Second Amendment cases, in which litigants have challenged various firearms regulations. The Supreme Court has repeatedly emphasized that to analyze such a claim one must analyze the history and tradition of the country—including the common law at the Founding—in order to "identify a well-established and representative historical analogue" to the regulation. *Bruen*, 597 U.S. at 30. If a firearms regulation is inconsistent with the history and tradition of the country, it cannot pass constitutional muster. *Id.* Here, Mr. Black has shown that the law at the

time of the Founding prohibits his execution. In light of that, the Supreme Court's history and tradition jurisprudence does not permit constitutional protections to fall below that which was required at the Founding.

IV. At common law, Mr. Black is exempt from execution.

It is unmistakable that individuals who were categorically exempt from execution at common law remain exempt under the Eighth Amendment today. *Ford*, 477 U.S. at 405. Even before *Ford*, the Supreme Court recognized that:

> Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

Helm, 463 U.S. at 286.

As discussed above, the common law defined an idiot as a person of low intellectual functioning, who had "unsound memory," could not manage his own affairs, and exhibited "malformations" of the brain. Although the common law lacked much of the precise measurement of these conditions that we possess today, it is clear that these early cases referred to individuals who were outliers, whose deficits resulted in significant impairments. As such, applying gradation to these elements of incompetency is necessary.

In the context of intellectual disability determinations under the Eighth Amendment, the Supreme Court has opted to utilize a standard that defines "subaverage" as those individuals' whose abilities are more

than two standard deviations below the mean. *Atkins*, 536 U.S. at 318; *see also Moore*, 581 U.S. at 8 ("Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories" of adaptive behavior.) (emphasis in original); *Hall*, 572 U.S. at 711. A person whose performance is two standard deviations below the norm means that over 95 percent of the population performs better on the measurement. *See* Douglas G Altman & J Martin Bland, *Standard deviations and standard errors*, 331 BRITISH MED. J. 903 (Oct. 15, 2005) ("For data with a normal distribution, about 95% of individuals will have values within 2 standard deviations of the mean, the other 5% being equally scattered above and below these limits."), available at https://doi.org/10.1136/bmj.331.7521.903 (last visited June 20, 2025).

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

A. Mr. Black has limited intellectual capacity.

A central feature of "idiocy" at common law was the presence of low intellectual functioning. As Francis Wharton explained, intellectual functioning was the most basic trait of "idiocy."

> By the very nature of these cases, the intelligence is involved. The fact is implied in the very idea of idiocy. This defect is

> seen in many grades, from complete obliteration of his faculty, as in microcephales, up to a slight weakness in high-grade imbeciles. Not a few idiots, therefore, can be educated to some extent.

Wharton et al., *supra*, at 860. Wharton's explication of the nature of "idiocy" at common law stresses that it was a condition that existed on a spectrum but at base it was a condition involving significant limitations in intellectual functioning.

Whether expressed through the modern lens of psychometrically valid IQ tests or less scientific means such as his inability to play childhood games, Mr. Black is an individual with significantly limited intellectual abilities. Despite prior rulings, controlling precedent now fully supports a diagnosis of intellectual disability. Each of the individually administered IQ tests places Mr. Black in the range of intellectual disability.[15] A raft of experts have concluded that he suffers from adaptive deficits and that this condition emerged in the development period. TR 56–68 (Martell 2025); TR 460–74 (Tasse 2008); TR 440–59 (Greenspan 2008); TR 475–500 (Grant 2001); and TR 557–563 (Vaught 2022). Dr. Martell specifically recently noted that "Mr. Black

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[15] Tennessee courts relied on group-administered IQ tests from Mr. Black's childhood, in direct violation of clinical standards and constitutional norms. *Compare Black*, 2005 WL 2662577, at *13 (citing the Lorge Thorndyke and Otis Beta screening instruments) with DSM-V-TR at 38 ("Invalid test scores may result from the use of brief intelligence screening tests or group tests."). These glaring deficits and deviations from clinical practice "should spark skepticism." *Moore*, 581 U.S. at 18. The State has disavowed reliance on such instruments in other litigation. *See, e.g.*, *Porterfield v. State*, No. W2012-00753-CCA-R3PD, 2013 WL 3193420, at *14 (Tenn. Crim. App. June 20, 2013).

met all the criteria for diagnosis on Intellectual Disability . . . He remains Intellectually Disabled." TR 65 (Martell 2025).

Even if Mr. Black did not meet the clinical definition of intellectual disability for the reasons set forth by courts in earlier decisions, Mr. Black now meets the criteria for being non compos mentis at common law. Notably, common law definitions of non compos mentis include what Lord Hale characterized as *dementia accidentalis vel adventitia.* Hale, *supra,* at 30; Ellis Lewis, *An Abridgement of the Criminal Law of the United States* 601 (1847) ("A person made *non compos mentis* by sickness, or, as it been expressed, a person afflicted with *dementia accidentalis vel advenitia,* is excused in criminal cases from such as are committed while under the influence of this disorder."). This category of non compos mentis includes individuals "not born without reason; but, who has lost it from sickness, grief, or other accident." *Ex Parte Cramner,* (1806) 33 E.R. 168, 170 (Ch.). In other words, courts' prior findings regarding the age of onset of Mr. Black's intellectual disability are in no way inconsistent with a finding that he is non compos mentis under the common law because of recent neurocognitive declines.

B. Mr. Black is not competent to manage his own affairs.

Another central feature of "idiocy" at common law was an inability to manage one's affairs, particularly in financial matters. In the Massachusetts Bay Colony, for example, the 1693 statute "An Act for Relief of Ideots and Distracted Persons" defined an "idiot" as "any person to be naturally wanting of understanding, so as to be incapable to provide for him or herself." Wickham, *supra,* at 940.

Mr. Black is incapable of managing his own affairs or of living independently. Dr. Martell administered the Independent Living Skills (ILS), which is "a standardized, performance-based assessment designed to evaluate an individual's functional competence and capacity to live independently." TR 73 (Martell 2025). Overall, Mr. Black's ability to live independently measured as "extremely low." *Id.* at 62.

Prior to being incarcerated at the age of 32, Mr. Black did not have a checking account and was unable to be responsible for financially supporting himself. TR 539 (Martell 2020). Mr. Black's mathematic skills are limited and standardized testing scores indicate that 98% of the population has superior abilities to his. *Id.* at 527. Mr. Black's reading ability are likewise limited. *Id.* Although he married and fathered a child, he continued to live with his parents. TR 539–41 (Martell 2020). Mr. Black never learned to cook or to do laundry. *Id.* at 540–42.

Dr. Martell concludes that Mr. Black's independent living test scores "reflect broad and significant impairment in his adaptive functioning." TR 62 (Martell 2025). "His scores reflect an inconsistent ability to manage daily routines, environmental safety, and personal health needs, indicating that he would be at high risk if left unsupervised." *Id.* Notably, his "Problem-Solving Index score is also severely deficient." *Id.* This reflects "poor practical reasoning, diminished judgment, and difficulty adapting to new or unstructured challenges, a key marker of functional incompetence." *Id.*

In sum, over the course of his life, Mr. Black has not been capable of managing his own affairs. Mr. Black exhibits "marked global

impairment" in his ability to live independently and to manage his own affairs as a result of his intellectual disability and worsening neurocognitive decline. Mr. Black's inability to manage his own affairs typifies "idiocy" and, at common law, renders him incompetent to be executed.

C. Mr. Black's memory is impaired by a neurocognitive disorder and dementia.

As discussed above, unsound memory is a defining characteristic of being non compos mentis at common law. Mr. Black suffers from profound deficits in memory and recall. Dr. Martell and Dr. Baecht have recently concluded that Mr. Black suffers from dementia and that he exhibits significant impairments with respect to memory. TR 63–64 (Martell 2025); TR 108–109 (Baecht 2025). His memory is worse that 99% of the men of his age and education. TR 64 (Martell 2025). Mr. Black's neurocognitive deficits are, moreover, worsening. In the six years since Dr. Martell's previous evaluation, Mr. Black's cognitive functioning has declined in nearly all respects across a range of test areas. Dr. Martell summarizes his findings by stating:

> Mr. Black has experienced additional significant declines in his memory, verbal fluency, and executive functioning with many of his current test scores placing him in the very bottom percentiles of the population in these areas. . . . His neurocognitive functioning is following a deteriorating course.

Id. at 66. Mr. Black frequently confabulates significant events in his life and frequently "go[es] into random tangential details and tell[s] stories unrelated to the topic at hand." *Id.* at 59; TR 532 (Martell 2020); TR 102

(Baecht 2025) ("Although he generally answered questions relevantly, on occasion, his responses were irrelevant to the query posed to him.").

In light of these worsening conditions, Mr. Black is undoubtedly of "unsound memory" and meets the definition of being non compos mentis at common law.

D. Mr. Black's brain is structurally and functionally damaged and continues to deteriorate.

Dr. Gur's analysis objectively demonstrates that Mr. Black's brain is structurally damaged and has deteriorated during the past two decades. Dr. Gur notes that Mr. Black's "total cortical volume that is 3.49 standard deviations below normal." TR 94 (Gur 2025). Some parts of Mr. Black's brain, most notably the hippocampal volume, "is profoundly reduced" and is more than four standard deviations below the mean. *Id.* These deficits "impair Mr. Black's ability to regulate behavior, integrate emotional and cognitive input, and reason effectively." *Id.* As Dr. Globus reflected, "[Byron Black] is in fact more impaired than most people who suffer from schizophrenia." TR 509 (Globus 2004).

Not only is the structure of Mr. Black's brain damaged, its ability to function is also impaired. As Dr. Gur relates, "both qualitative and quantitative examination of this FDG-PET brain imaging study demonstrate abnormally depressed glucose metabolism in the cingulate gyrus. Quantitative analysis reveals hypometabolism of the bilateral caudate." TR 96 (Gur 2025). Dr. Gur reveals that this sort of hypometabolism "has been observed in the setting of traumatic brain injury." *Id.* Dr. Gur explains that such injury is usually caused by a rapid decelerating injury such as during automobile accidents and was first

identified in boxers. *Id.* Dr. Gur adds that while the evidence is not conclusive, "several findings may also suggest a neurodegenerative process such as Alzheimer's disease or Parkinson's disease." *Id.* at 98.

Francis Wharton reports that at common law the presence of brain damage, atrophy, and significantly smaller brain volumes serve as objective evidence of "idiocy." Wharton et al., *supra*, at 858. As Dr. Gur states, the brain dysmorphology, that would be deemed a "malformation" in the parlance of the common law, has a significant impact upon Mr. Black's intelligence, reasoning, and decision-making. TR 98 (Gur 2025). As such, the deficits are strong evidence of Mr. Black's "idiocy" at common law.

The real-world implications of these deficits also demonstrate that Mr. Black is non compos mentis. As Dr. Gur notes, Mr. Black's brain damage creates "memory impairment, difficulty with orientation, and compromised ability to learn from prior experience." TR 94 (Gur 2025). Dr. Gur also concluded that Mr. Black's deficits contribute to confusion, suggestibility, and confabulation. *Id.* The functional consequences of Mr. Black's brain damage impair functioning across "cognitive, emotional, and social domains." *Id.*

The quantitative analysis provided by Dr. Gur shows significant malformation in Mr. Black's brain. The existence of this brain damage, particularly "widespread volume loss," is conclusive evidence of "idiocy." *Id.*; Wharton et al., *supra*, at 858 ("It follows that idiocy is sometimes associated with gross malformations of the brain.").

CONCLUSION

The trilogy of Supreme Court cases regarding competency—*Ford*, *Panetti*, and *Madison*—do not directly answer the question present in this case and are limited to the issues before the Court at each juncture. The *Ford* Court was presented with and held that it was unconstitutional to execute the "insane" and largely left it to the states to define sanity. *Ford*, 477 U.S. at 401, 416–17; *id.* at 427 (Powell, J., concurring). *Panetti* refined this rule and held that a prisoner's mere awareness of his or her impending execution was not sufficient to demonstrate competency and that a prisoner must have a rational—as opposed to delusional—understanding of the reasons for execution. *Panetti*, 551 U.S. at 958. *Madison* only further refined *Panetti*'s rule and holds that regardless of etiology, courts must examine the "downstream consequence" of any condition that prevents a petitioner from rationally understanding the reasons for his impending execution. *Madison*, 586 U.S. at 279. Each case nonetheless reinforced the understanding that the "we keep faith with our common-law heritage" in interpreting and applying the Eighth Amendment. *Ford*, 477 U.S. at 401.

None of these decisions addressed the role intellectual functioning plays in competency. *Ford* states that "idiots" were considered incompetent at common law but offers little guidance about the scope of such a rule. *Ford*, 477 U.S. at 406. This is no doubt because Alvin Ford was afflicted with mental illness, not low intellectual functioning. *Id.* at 402–04. The same goes for Scott Panetti. *Panetti*, 551 U.S. at 936–37. Vernon Madison's case comes closer dealing with intellectual functioning,

as he suffered from vascular dementia, but neither the parties nor the Court addressed common law protections. Instead, the question presented in *Madison* focused exclusively on the interplay between evolving standards of decency and how "memory loss may factor into a rational understanding." *Madison*, 586 U.S. at 270–71, 277.

A scrupulous analysis of the history and traditions surrounding "idiocy" resoundingly shows that the common law held that an individual with low intellectual functioning, who could not manage their own affairs, had "unsound memory," and suffered from "malformations" of the brain, was incompetent. Byron Black meets each of these criteria.

The "impressive historical credentials" of Mr. Black's claims requires that this Court give meaning to these rules. *Ford*, 477 U.S. at 406. These rules are not "trapped in amber" but "require[] judges to apply faithfully the balance struck by the founding generation to modern circumstances." *Rahimi*, 602 U.S. at 691; *Bruen*, 597 U.S. at 29. Mr. Black asks no more than an opportunity to prove that he meets these demanding criteria and to have an adjudication consistent with the history and traditions of the Eighth Amendment.

PRAYER FOR RELIEF

1. Grant an oral argument.

The issues presented by this case involve questions of law not expounded upon in this Court's precedents. While *Van Tran* indicates that in the normal course, no oral argument will be granted for appeals from a trial court's denial of a competency petition, argument is needed in this instance. The trial court's failure to apprehend that Mr. Black's claim fits squarely within *Van Tran*—and its failure to recognize the

interplay between *Ford* and *Van Tran*, all speak to both the need for fulsome briefing and argument and to the need for heightened clarity in this Court's remand order.

2. Grant a stay of execution.

The standard for a stay of execution under this Court's Rules requires Mr. Black to show a likelihood of success on the merits of his claim. Tenn. Sup. Ct. R. 12(4)(E). Here, Mr. Black has shown that he meets each of the common law predicates to a determination that he is non compos mentis. Accordingly, he has a likelihood of prevailing on his claim that he is exempt from execution under the common law in place at the time of the Founding. Mr. Black moves this Court for a stay of execution such that further briefing and argument may proceed on a non-expedited schedule without the pressure of an imminent execution date. Further, even if this Court remands without further briefing or argument, Mr. Black has met the standard for a stay and one should be granted such that the trial court may hold a hearing on these matters without needless exigency.

3. Remand this case for a hearing before the trial court with instruction to evaluate Mr. Black's claim under the controlling common law doctrines.

Because Mr. Black's claims are squarely within the common law at the time of the Founding and this Court has recognized in *Van Tran*—as the Supreme Court of the United States did in *Ford*—that *at a minimum* the state and federal constitutions enshrine the protections already in place at the time of the Founding, this matter must be remanded to the trial court. The trial court's determination that it lacked jurisdiction to

hold a hearing at which Mr. Black could establish his ineligibility for execution under the common law was clear error.

Respectfully submitted this the 23rd day of June, 2025.

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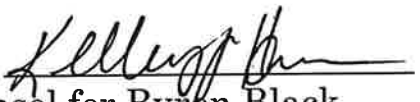
BY: 
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CERTIFICATE OF COMPLIANCE

I certify that this Brief contains 13,882 words as determined by the word processing program used to prepare this document. This is under the 15,000 word limit set forth in Tenn. R. App. P. 30(e).

BY: 
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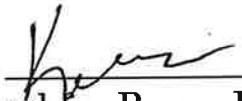
CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on June 23, 2025, a true and correct copy of the foregoing was served via email and United States Mail to opposing counsel, Raymond Lepone, Alan Grove, G. Kirby May, and Sarah Stone, Asst. Attorney Generals, P.O. Box 20207, Nashville, Tennessee 37202.

BY: 
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