No.

IN THE
Supreme Court of the United States

BYRON LEWIS BLACK,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI
EXECUTION SCHEDULED FOR AUGUST 5, 2025, AT 10:00 AM.

OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DIST. OF TENNESSEE
CAPITAL HABEAS UNIT

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CAPITAL CASE

QUESTION PRESENTED

At the time of the Founding, the common law prohibited the execution of "idiots." *Ford v. Wainwright*, 477 U.S. 399, 417 (1986). In *Ford*, this Court made clear 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. Relying on these fundamental principles, Mr. Black in the lower courts sought the opportunity to demonstrate that the Eighth Amendment prohibits his execution. The Tennessee Supreme Court "declined" to recognize this common-law prohibition on his execution or permit Mr. Black to prove that he qualifies for such protection. It held that competency to be executed proceedings are limited to "*Ford*-based claims of incompetency grounded in insanity[,]" thus eliminating consideration of any common law claim other than one based upon significant mental illness. *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 Tenn. LEXIS 279, at *24 (Tenn. July 8, 2025). Given this, the question presented is:

> Whether a state may refuse to provide a process by which a state inmate may prove that he is not competent to be executed because he meets the common law standard for the protection of "idiots"?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, petitioner-appellant below, is Byron Black.

Respondent, respondent-appellee below, is the State of Tennessee.

LIST OF PROCEEDINGS

1. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (direct appeal).

2. *Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8, 1999), *cert denied Black v. Tennessee*, 528 U.S. 1192 (2000) (post-conviction).

3. *Black v. State*, No. M2004-01345-CCA-R3PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *cert. denied Black v. Tennessee*, 549 U.S. 852 (2006) (motion to reopen post-conviction/intellectual disability).

4. *Black v. Bell*, 181 F. Supp. 2d 832 (M.D. Tenn. 2001) (habeas corpus).

5. *Black v. Bell*, No. 02-5032, 2007 U.S. App. LEXIS 30798 (6th Cir. May 30, 2007) (remanding *Atkins* claim).

6. *Black v. Bell*, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908 (M.D. Tenn. Apr. 24, 2008) (*Atkins* claim).

7. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (remanding *Atkins* claim).

8. *Black v. Colson*, No. 3:00-0764, 2013 WL 230664 (M.D. Tenn. Jan. 22, 2013) (reconsideration of *Atkins* claim).

9. *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), *cert. denied Black v. Mays*, 584 U.S. 1015 (2018) (affirming the denial of the *Atkins* claim).

10. *Black v. State*, No. M202200423CCAR3PD, 2023 WL 3843397 (Tenn. Crim. App. June 6, 2023) (intellectual disability).

11. *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 Tenn. LEXIS 279, (Tenn. July 8, 2025) (proceeding below)

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INTRODUCTION

History is clear that at common law, an "idiot" could not be executed for a crime.[1] Edward Coke, *Reports of Sir Edward Coke in Thirteen Parts* 571 (1826). Throughout these proceedings, Mr. Black has asserted that because of brain damage, low IQ, inability to manage his affairs, and dementia he meets the common law definition of an "idiot" and consequently may not be lawfully executed. In denying relief to Mr. Black, the Tennessee courts steadfastly resisted conducting *any* historical analysis of the common law at the time of the Founding. In doing so, the court below held that, under Tennessee state law, competency claims were "limited to adjudicating *Ford*-based claims of incompetency grounded in insanity." (App. at 11a). By its holding, the Tennessee Supreme Court has written out of existence the common law competency claim based upon "idiocy," even though such a claim was well recognized at the time of the Founding. Because the Tennessee Supreme Court resolved an important constitutional issue without conducting and applying the essential historical analysis, certiorari is necessary.

OPINIONS AND ORDERS BELOW

The order of the Tennessee Supreme Court is published and is available at *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 Tenn. LEXIS 279 (Tenn. July 8, 2025), and it is attached in the appendix at App. 001a-13a. The opinion of the trial court is also unpublished and attached at App. 014a-30a. *State v. Black*, No. 88-S-1479 (Davidson Cnty Crim. Ct. June 5, 2025) (Memorandum and Order).

JURISDICTION

The order of the Tennessee Supreme Court denying relief to Mr. Black is a final, appealable order. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

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[1] As Mr. Black stated in the proceedings below, to our modern ears, describing any person as an "idiot" is cruel and offensive. This pleading utilizes the common law terms and definitions because they constitute the operative law. Counsel means no disrespect to Mr. Black or those individuals living with any of the conditions discussed herein.

CONSTITUTIONAL PROVISIONS INVOLVED

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

[N]or shall any State deprive any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Mr. Black's overall brain volume is three and half standard deviations below the mean; some regions are four and half standard deviations below the mean. App. at 031a. His cranium is filled with large pockets of fluid, indicative of wide-scale death of brain tissue. *Id*. At his most recent neuropsychological evaluation, he could not make change for a five-dollar bill and had "marked global impairment in skills essential for independent living." App. at 43a. He has dementia and 99 out of a 100 men his age and education level have a better memory. App. at 070.

While his brain is progressively eroding and dementia now compounds his impairments, Mr. Black's impaired functioning is hardly new. His childhood friend recounts that Mr. Black could not grasp the rules of simple juvenile games like a Tisket-a-Tasket or Red Light, Green Light. App. at 166a. While attending underperforming, segregated schools in Nashville, Tennessee, he was so slow relative to his peers that he was held back in the second grade. App. at 118a. Mr. Black's high school football coach recounts that although Mr. Black had good physical ability, "in over 30 years as a coach, [Mr. Black] stood out as especially slow." App. at 116a. Mr. Black was unable to understand and execute offensive plays, such that his coach had to create "a highly simplified playbook" for him. *Id*. Mr. Black was more capable of grasping defense, where the task at hand was simpler: to run and tackle the ball carrier. *Id*.

Mr. Black's trial counsel recounted that after the jury retired to consider whether Mr. Black would receive the death penalty, Mr. Black leaned over and asked "Do I get to testify now?" App. at 168a. In an understatement, "[i]t was clear to" trial counsel "that Byron had not understood what had occurred in the proceedings." *Id.*

A half dozen experts have diagnosed Mr. Black with an intellectual disability. App. at 061a; App. at 068a; App. at 083a; App. at 095a; App. at 119a; App. at 134a; App. at 142a; App. at 153a. The State's expert that concluded that Mr. Black was not intellectually disabled at the original *Atkins* proceeding later reevaluated the scientific data and found that Mr. Black meets the criteria for intellectual disability. App. at 162a. In earlier proceedings, the State of Tennessee stipulated that Mr. Black is intellectually disabled, but Tennessee courts denied relief on procedural grounds. *Black v. State*, No. M2022-00423-CCA-R3PD, 2023 WL 3843397, at *1, *9 (Tenn. Crim. App. June 6, 2023).

As is evident from this brief recitation, Mr. Black suffers from numerous conditions including significant brain damage, dementia, and intellectual disability. These conditions manifest in Mr. Black as profound deficits in memory and verbal fluency. Mr. Black is, moreover, incapable of managing his own affairs or living independently, even in the restrictive environment of prison.

Pursuant to the procedures outlined in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), Mr. Black's case was remanded to the convicting court for competency proceedings. *State v. Black*, No. M2000-00641-SC-DPE-CD (Tenn. Mar. 3, 2025) (Order). Relying upon the Tennessee Supreme Court's instruction that such proceedings were a forum "to assert [an inmate's] *common law* and constitutional right to challenge competency to be executed,"[2] Mr. Black filed a petition and supporting materials demonstrating that he meets the common law criteria for "idiocy," which like "lunacy," precludes his execution. The trial court "decline[d] to wade into the asserted common law claim of 'idiocy.'" App. at 027a; *State v. Black*,

[2] *Van Tran*, 6 S.W.3d at 265 (emphasis added).

No. 88-S-1479, at 14 n.5 (Davidson Cnty Crim. Ct. June 5, 2025) (Memorandum and Order). The trial court concluded that Mr. Black failed to make the threshold showing for incompetency because he did not meet the criteria outlined in *Panetti v. Quarterman*, 551 U.S. 930, 954–55 (2007). App. at 028a.

On appeal, the Tennessee Supreme Court affirmed the trial court, holding that the procedures under *Van Tran* are "limited to adjudicating *Ford*-based claims of incompetency grounded in insanity." App. at 011a; *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 Tenn. LEXIS 279, at *24 (Tenn. July 8, 2025) (Order). As such, the court "respectfully declined" to adjudicate the case based upon the common law prohibition on the execution of "idiots" and saw "no compelling reason for us to adopt a standard that differs from" existing precedent. App. at 012a; *Black* 2025 LEXIS 279, at *25.

REASONS FOR GRANTING THE WRIT

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. *Id.* at 406–07 (citing William Blackstone, 4 *Commentaries on the Laws of England* 24 (1769)); *see also* Matthew Hale, 1 *History of Pleas of the Crown* 29–30 (1736) ("The laws absolving idiots of guilt in capital crimes can be traced directly to English statute."). On at least two occasions this Court has been explicit that such protection exists. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *Ford*, 477 U.S. at 406. Despite that clarity, this Court's jurisprudence has not expounded upon the meaning or scope of that protection. Nonetheless, this Court recognized in *Ford*, "There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405. *Ford*'s recognition that the Eighth Amendment protects, at a minimum, that which was prohibited by the common law at the time of the Founding was hardly new. *See, e.g.*, *Solem v. Helm*, 463 U.S. 277,

286 (1983) ("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."). While there may be a robust debate about what, if any, role that evolving standards of decency should have in Eighth Amendment jurisprudence, neither side of that debate doubts the basic tenet that if a punishment was barred at the Founding, the Eighth Amendment incorporated that prohibition. On this point, strict Originalists and Living Constitutionalists surely agree.

The Tennessee Supreme Court mischaracterized Mr. Black's argument as attempting to create a "new categorical exclusion from execution." App. at 012a. The basis for Mr. Black's competency claim, however, predates the Founding. As early as the 1500s, the common law recognized that "idiots" were incompetent to be executed. Anthony Fitzherbert, *La Novelle Natura Brevium* 519 (1534). There is nothing new about Mr. Black's claim. As detailed below, the definition of "idiocy" evolved over centuries and was inherited by the United States when it adopted the Eighth Amendment, which, at a minimum, codified the then-existing common law rules against the execution of the non compos mentis.

I. CERTIORARI IS WARRANTED BECAUSE TENNESSEE'S HIGHEST COURT RESOLVED AN IMPORTANT ISSUE OF CONSTITUTIONAL INTERPRETATION THAT THIS COURT HAS NOT FULLY ADDRESSED AND DID SO IN A WAY THAT CONFLICTS WITH THIS COURT'S JURISPRUDENCE.

Under Supreme Court Rule 10(c), certiorari is appropriate when a state court "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). Here, the Tennessee Supreme Court held that Tennessee law only permits "adjudicating *Ford*-based claims of incompetency grounded in insanity." App. at 011a. The Tennessee Supreme Court then paradoxically held that "[c]ompetency is the only claim he is entitled to assert in this proceeding." *Id*. Accordingly, the Tennessee Supreme Court has decided that a common law competency claim based upon any other condition besides "insanity" is

not cognizable under Tennessee procedure and does not warrant due process as required by *Madison*, *Panetti*, and *Ford*. Tennessee now holds that regardless of common law doctrines, an inmate is barred from asserting a common law claim that was recognized at the Founding. Certiorari is warranted in this case: Tennessee has improperly resolved an important issue of constitutional law that requires this Court's plenary review.

The Tennessee courts' resolution of this claim is incompatible with this Court's existing competency jurisprudence. *Ford* expressly observes that "idiots"—along with "lunatics"—may not be executed. *Ford*, 477 U.S. at 406. *Ford* is clear, moreover, that common law prohibitions on the execution of incompetents were incorporated into the Eighth Amendment at the time of the Founding. *Id.* at 405. This Court's application of common law in this context is hardly novel, as this Court repeatedly has held that the proper constitutional inquiry must investigate whether a right is "'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022) (quoting *Timbs v. Indiana*, 586 U.S. 146, 149 (2019)).

The Tennessee courts' refusal to apply these well-established principles is inconsistent with this Court's jurisprudence. The Tennessee courts resisted conducting *any* historical analysis of the common law or the prohibitions upon executing the non compos mentis that existed at the time of the Founding. The Tennessee courts' failure to heed this Court's direction to analyze history and tradition to determine the scope of constitutional rights portends a dangerous precedent where courts pick and choose when to apply such a methodology. Courts may not—as the lower court did here—"respectfully decline" to conduct this kind of historical analysis because this "commonplace task for any lawyer or judge" is the core of competent constitutional analysis. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022).

It is widely understood that the Eighth Amendment "codified a *pre-existing* right." *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis original); *Ford*, 477 U.S. at 405; *Helm*, 463 U.S. at 286. "The Amendment 'was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors.'" *See Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 599); *Helm*, 463 U.S. at 286; *Ford*, 477 U.S. at 405. As such, this Court's caselaw "require[s] courts to consult history to determine the scope of that right." *Bruen*, 597 U.S. at 25.

This Court's jurisprudence holds that to animate the text of the Eighth Amendment, courts and litigants must examine the common law at the time of the Founding and other relevant historical materials such as legal treatises, commentary, and state practices. *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020) (resolving the question of jury unanimity with reference to the common law, state practices in the founding era, and opinions and treatises written soon afterward). This is because "the Framers' view provides a baseline for our own day: The Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'" *Lange v. California*, 594 U.S. 295, 309 (2021) (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis original)).

These precedents "were not meant to suggest a law trapped in amber." *United States v. Rahimi*, 602 U.S. 680, 691 (2024). Rather, the relevant inquiry is whether Mr. Black's claim is whether his execution is one "that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* at 692 (*quoting Bruen*, 597 U.S. at 29 & n.7). "Idiocy" at common law is a "well-established and representative historical analogue" that this Court's jurisprudence holds must be respected and embraced by modern constitutional law. *Bruen*, 597 U.S. at 30.

In *Panetti*, this Court explicated stated that it did "not attempt to set down a rule governing all competency determinations." *Panetti*, 551 U.S. at 960–61. This Court developed *Panetti*'s rationality test in the context of a case where the inmate

suffered from "gross delusions." *Id.* at 960. *Panetti*'s rule had its origin in the common law prohibition on the execution of "lunatics," and is ill-suited to a common law claim of "idiocy," which has never historically inquired into an inmate's rationality.[3] This is of little surprise as the characteristics of "idiocy" predominantly focus on an individual's intellectual capacity and consequent deficits rather than the fixed delusions that characterize many forms of mental illness. *Panetti*'s acknowledgment that the rationality standard did not and could not govern all competency determinations is a recognition that differing circumstances and constitutional claims are not addressed by the rule in *Panetti*. While *Ford*, *Panetti*, and *Madison* all derive from the common law, none of the inmates in those cases asserted a common law claim and this Court's decision in each relied upon evolving standards of decency, not the common law at the time of the Founding.[4] As such, this case presents the opportunity for this Court to instruct in how the common law is to be interpreted in idiocy cases.

The prohibition at issue in this case has "no less logical, moral, and practical force at present" than it did at the time of the Founding. *Ford*, 477 U.S. at 409.

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[3] "An idiot may in general be clearly identified by . . . an absence of all expression, and a vague and unmeaning look; or by endless repetition of short sentences . . .In fact there many ways that idiotcy [sic] is manifested, as by neglect of ordinary decencies of life, frequently by foolish laughter, by general vacancy of aspect." Charles Palmer Phillips, *The Law of Lunatics, Idiots, and Persons of Unsound Mind* 5 (1858). In contrast, "the state of mind of the lunatic or person of unsound mind is marked by delusion or by inconsecutive and incoherent trains of thought." *Id.*

[4] Justice Marshall wrote "the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789." *Ford*, 477 U.S. at 406. The dissenters in *Panetti* criticized the decision as another foray into evolving standards of decency that did not address the constitutional underpinnings of the Eighth Amendment at the time of the Founding. *Panetti*, 551 U.S. at 980 (Thomas, J., dissenting). Similarly, *Madison* expressly considered whether executing an individual with vascular dementia violated the Eighth Amendment's evolving standards of decency. *Madison v. Alabama*, 586 U.S. 265, 287 (2019) (Alito, J., dissenting). Thus, each of the cases in this Court's trio of competency cases expressly relied on evolving standards of decency and this Court has never addressed how common law standards should be applied in these cases.

"Whether the aim is to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.* at 410. The common law treated the executed of an incompetent individual as a "'miserable spectacle'" *Id.* at 407 (quoting Edward Coke, 3 *Institutes of Laws of England* 6 (1680)). To give meaning to these deeply engrained prohibitions, this Court must grant certiorari and provide interpretative guidance to the lower courts.

II. MR. BLACK IS ENTITLED TO THE COMMON LAW PROTECTION OF IDIOTS.

As explained in *Ford*, the common law prohibits the execution of the non compos mentis, which includes both the "insane" and "idiots." *Ford*, 477 U.S. at 406. Under the common law—and thus the law in place at the Founding—being non compos mentis is a broad concept that encompasses a variety of conditions that cause individuals to be considered not of sound mind. *See, e.g.*, Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).[5]

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

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

Blackstone, 1 *Commentaries on the Laws of England* 304 (1826)). Lunacy was not a static condition. *Id.* at 3. The common law recognized that individuals' level of competency varied with the vicissitudes of mental illness. *See, e.g.*, *Person v. Warren*, 14 Barb. 488, 494, 1852 WL 4762, at **5 (N.Y. 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).[6] There is, of course, a direct line from this common law tradition to *Ford* and *Panetti*, each of which involved an inmate with significant mental illness.

Often discussed alongside lunatics were "idiots." At common law, an "idiot" was an individual lacking intellectual capacity. Highmore, *supra*, at 1. "Idiots" were "'[t]hose who cannot distinguish, compare, and abstract, would hardly be able to understand and make use of language, or judge, or reason to any tolerable degree; but only a little and imperfectly about things present, and very familiar to their senses.'" Shelford, *supra*, at 5 (quoting John Locke, *Essay on Human Understanding* 120 (1824)). It is this feature of the common law that is applicable to Mr. Black.

A. CHARACTERISTICS OF "IDIOCY" AT COMMON LAW

The defining characteristic of "idiocy" at common law was a significant deficit of intellectual capacity. An "idiot" "is one that hath had no understanding from his nativity; and there is by law presumed never likely to attain any." William Blackstone, 1 *Commentaries on the Laws of England* 302 (1826). One early American treatise defined an idiot as "one without the power of reason." Anthony Highmore, *Treatise of the Law of Idiocy and Lunacy* 2 (1822). "By the very nature of these cases, the intelligence is involved." Francis Wharton & Moreton Stille, *Wharton and Stille's Medical Jurisprudence* 859 (1905). Although low intellectual functioning was at the core of idiocy, three other characteristics were commonly described as associated with

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

"idiocy": an inability to manage one's affairs, the existence of "unsound memory," and the presence of brain "malformations."

1. AN INABILITY TO MANAGE ONE'S OWN AFFAIRS

By the time of the Founding, the defining characteristic of individuals who were non compos mentis, which included both "idiocy" and "lunatics," was their inability to manage their own affairs. William Blackstone, 1 *Commentaries on the Laws of England* 304 (1826); George D. Collinson, *Treatise on the Law Concerning Idiots, Lunatics, and Other Person 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. S. Ct. 1847); *L'Amoureux v. Crosby*, 2 Paige Ch. 422, 427, 1831 WL 2894, at **3 (N.Y. Ch. 1831) ("[T]he jury must find distinctly that he is of unsound mind, and mentally incapable of governing himself or of managing his affairs.").

In his seminal *Institutes of the Laws of England*, Lord Coke originally defined three categories of individuals who the law considered to be non compos mentis and thereby incompetent to be executed: 1) "ideota which from his nativity, by a perpetual infirmity is non compos mentis"; 2) "Lunatique that hath sometime his understanding and sometime not;" and 3) Hee that by sicknesse, griefe, or other accident wholly loseth his memorie and understanding." Edward Coke, 1 *Institutes of the Laws of England* 247 (1633).[7] By the third category, Lord Coke refers to dementia *accidentalis vel adventitia*. Matthew Hale, 1 *History of Pleas of the Crown* 29–30 (1736). This category of incompetency includes individuals "not born without reason; but, who has lost it from sickness, grief, or other accident." *Ex Parte Cramner*, (1806) 33 E.R. 168,

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

170 (Ch.). Individuals in each of these three categories of idiocy were incompetent to be executed. 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.").

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

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

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

Simon Jarrett, *Those They Called Idiots* 25 (2020). Although treatises ascribe to Lord Coke the rule that *non compos mentis* includes those individuals who could not manage their own affairs, unquestionably by 1765, when William Blackstone wrote, the definition included such persons:

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

> *born* so; or such, in short as *are judged by the court of the chancery incapable of conducting their own affairs.*

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

An early legal treatise recounts this change in the law:

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

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

Founding era Anglo-American common law cases reflect this evolution and expressly adopted a standard that included an assessment of an 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*, 11 Ohio Dec. 10, *13, 1900 WL 1262, at **3 (Ohio Prob. 1900) ("It is not to be presumed, in view of the general policy of the state towards these unfortunates,

that a person, though apparently an imbecile to such a degree that he cannot apply the faculties of his mind to his business, and take care of and preserve his property, must be shown to be a complete idiot, or that he is a gibbering, slobbering, lemon-headed wild man, before a guardian for his property can be appointed."); *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. at 427 n.1, 1831 WL 2894, at *427 n.1 ("The jurisdiction of the court over the person and property of persons of unsound mind is not restricted to cases of idiocy or lunacy, strictly speaking; it extends also to cases of every person who, in consequence of old age, disease, or any other cause, is in such a state of mental imbecility as to be incapable of conducting his affairs with common prudence, and leaves him liable to become the victim of his own folly, or the fraud of others; but the jurisdiction should be assumed and exercised with great caution, and the case should be clear.").

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

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

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

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

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

2. UNSOUND MEMORY

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

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

Common law assessments of unsound memory, like the overall assessment of non compos mentis, examined an individual's capacity to manage his or her own affairs. For example, the Alabama Supreme Court held that an individual must have "memory enough to understand the business in which he is engaged." *Stubbs v. Houston*, 33 Ala. 555, 567 (Ala. 1859); *accord In re Lindsley*, 10 A. 549, 549 (N.J. Ch. 1887) ("The unsoundness of mind, then, from whatever cause it arises, must be such as to deprive the person, concerning whom the inquiry is made, of ability to manage his estate and himself."). Many cases recognized that individuals may become of unsound memory due to aging or what in modern terms is referred to as dementia. *See, e.g.*, *In re Barker*, 2 Johns Ch. 232, 234, 1816 WL 1112, at **1 (N.Y. Ch. 1816) (noting that one may be rendered incompetent by "the imbecility of extreme old age"). Unsound memory was understood as a constituent part of "idiocy" and was often used interchangeably with "idiocy." *See, e.g.*, Chitty, *supra*, at 329 ("So essential is the power of memory to the perfect mind, that in some of our older statutes the expression '*unsound memory*' or 'non-sane memory' was used to denote as well an idiot and lunatic as every person incapable of managing his own affairs."). Accordingly, the existence of significant deficits of memory that impaired an individual's ability to manage his own affairs were prima facie evidence of being non compos mentis. Hale, *supra*, at 30.

3. BRAIN MALFORMATION

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

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

Wharton, et al., *supra*, at 858. Earlier treatises concur: "In cases of congenital idiotcy [sic] there will not be much difficulty in pronouncing judgment, for as it arises from malformation of the cerebral organ, the diagnosis must be adverse to every hope of recovery." J.A. Paris & J.S.M. Fonblanque, *Medical Jurisprudence* 308 (1823); *see also* Chitty, *supra*, at 270 ("Idiotism is generally the result of an original malformation of the cranium, sometimes in respect of a subsequent thickening, but more frequently in respect to shape; both of which diminish the internal cavity and consequently lessen the volume or capacity of the brain.").

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

B. AT COMMON LAW, THE PROTECTION OF IDIOTS WAS NOT CONFINED TO SOLELY PROFOUNDLY DISABLED INDIVIDUALS.

Though this Court has not defined how incompetence to be executed due to common law idiocy is to be determined, in dissent in *Atkins v. Virginia*, Justice Scalia noted, incorrectly, that "idiots generally had an IQ of 25 or below." 536 U.S. 304, 340 (2002) (Scalia, J., dissenting). 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 Fitzherbert, *supra*, 519. Justice Scalia's reliance on Fitzherbert for his definition of idiots suffers from two fundamental problems: he quotes Fitzherbert accurately but not completely thereby distorting Fitzherbert's meaning and to the extent that Fitzherbert's rule operated historically, it was no longer in effect at the time of the Founding.[8]

First, Justice Scalia omitted Fitzherbert's next sentence from his citation which clarifies that Justice Scalia's reading of Fitzherbert is not correct. Fitzherbert's next sentence demonstrates that his early definition of idiocy was broader than Justice Scalia's quotation indicates: " . . . But if he have such understanding that he know and understand letters, and to reade by teaching or information of another man, then it seemth he is not a Sot, nor natural Idiot." Fitzherbert, *supra*, at 519. The importance of the omitted sentence is consistently recognized by commentators: "From the second portion of his definition, however, it seems clear that Fitzherbert, like his predecessors and successors, *did not intend his definition to be categorically exclusive of any other means of determining a defendant's idiocy*." S. Sheldon Glueck, *Mental Disorder and the Criminal Law* 128 (1925) (emphasis added). While the first sentence delineates one extreme (an individual who cannot count to twenty or name

[8] 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." App. at 085. The idea that at common law such individuals committed crimes in sufficient numbers to warrant an entire developed legal doctrine prohibiting their execution is dubious. Moreover, a cursory read of common law cases reveals that the subject of those cases was not limited to individuals with profound limitations.

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

Second, strong historical evidence indicates that as early as the 17th and certainly by the early 18th century, the common law had rejected the notion that "idiots" were limited to those who met Fitzherbert's twenty pence test. Francis Wharton reported: "[T]o confine idiocy and imbecility within such a rule is simply to revert to the crude test promulgated by Fitzherbert, which the Chief Lord Hale, as we have seen, condemned more than two centuries ago." Wharton, et al., *supra*, at 868–69. In *In re Mason*, the court discussed how some earlier case law hewed closely to the Fitzherbert's test, but subsequent case law settled that the prohibition had a more "extended jurisdiction." *In re Mason*, 1 Barb. at 440, 1847 WL 4122, at *3; *accord Person*, 14 Barb. at 495, 1852 WL 4762, at **5 ("Latterly a different doctrine has prevailed."); *Roberts v. State*, 3 Ga. 310, 329 (1847) ("The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation, have relaxed the cruel severity of the earlier doctrines."); *In re Barker*, 2 Johns. Ch. at 233, 1816 WL 1112, at *1 ("Mere imbecility of mind, not amounting to idiocy or lunacy, has not, until very lately, been considered in the English Court of Chancery, as sufficient to interfere with the liberty of the subject over his person and property.").

Although "idiocy" at common law focused on individuals' intellectual deficits, it did not require that an individual exhibit no abilities or strengths. Common law sources recognized that "idiots" were not devoid of reason or intellect and, in fact, exhibited skills that "manifested in more or less perfection." Issac Ray, *Treatise on the Medical Jurisprudence of Insanity* 88 (1838). Issac Ray recounted an individual "who learned names, dates, numbers, history, and repeated them all mechanically, but was destitute of all power of combining and comparing his ideas and was incapable of being engaged in employment." *Id.* Furthermore, "these defective beings are not beyond the reach of education." *Id.* Ray likewise noted that "idiots" often had the capacity for a degree of interpersonal reciprocity and religious observance. "Among the moral sentiments, it is not uncommon to find self-esteem, love of approbation, religious veneration, and benevolence, bearing a prominent part, if not constituting their entire character, and thus producing a slight approximation of humanity." *Id.*

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

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

understanding of the relevant common law rules at the time of the adoption of the Sixth Amendment[.]").

C. MR. BLACK MEETS THE CRITERIA FOR "IDIOCY" AT COMMON LAW.

In the context of intellectual disability determinations under the Eighth Amendment, this Court has opted to utilize a standard that defines "subaverage" as those individuals whose abilities are more than two standard deviations below the mean. *Atkins*, 536 U.S. at 318; *see also Moore*, 581 U.S. at 8 ("Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories" of adaptive behavior.) (emphasis in original); *Hall*, 572 U.S. at 711. A person whose performance is two standard deviations below the norm means that over 95 percent of the population performs better on the measurement. *See* Douglas G Altman & J Martin Bland, *Standard deviations and standard errors,* 331 British Med. J. 903, 903 (Oct. 15, 2005) ("For data with a normal distribution, about 95% of individuals will have values within 2 standard deviations of the mean, the other 5% being equally scattered above and below these limits."), available at https://doi.org/ 10.1136/bmj.331. 7521.903 (last visited July 11, 2025).

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

As discussed above, the central characteristic of "idiocy" is a deficit in intellectual capacity. Every empirically valid IQ tested administered to Mr. Black places his IQ in the intellectually disabled range. App. at 043a; 092a-095a (compiling data); 112a-14 (same); 129a-33a (same); 138a-40a (same); 159a (same). Numerous

experts have diagnosed him with an intellectual disability. Mr. Black's deficits in intellectual capacity are also demonstrated by informants from Mr. Black's childhood who recollect that he was unable to grasp the rules of simple childhood games. He was held back in second grade and his reading and math abilities are in the bottom percentiles.

Mr. Black has always been incapable of managing his own affairs. Prior to his incarceration at age 32, Mr. Black never lived independently, did not know how to perform basic functions like doing laundry or cooking, and did not have a checking account. App. at 116a. At present, Mr. Black's ability to manage his own affairs has deteriorated significantly. App. at 080a. Even in the prison, he is assigned an inmate helper to assist him with tasks like laundry, using the microwave, and cleaning his cell. Objective neuropsychological testing shows that Mr. Black cannot safely take care of himself and exhibits severe deficits in the areas of health, safety, money management, and problem solving. He has "marked global impairment in skills necessary for independent living." App. at 080a.

Mr. Black's ability to care for himself and navigate in his limited world is further compromised by the debilitating effects of progressive dementia. As a result, 99 out of 100 individuals his age and education have a better memory. App. at 082a. He struggles to express himself and less than one in 10,000 individuals have deficits in verbal fluency as bad as his. *Id*. His higher order executive functioning and problem-solving abilities are extremely limited and have deteriorated significantly in recent years. *Id*.

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

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

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

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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