UNSUCCESSFUL *FORD* CLAIMS

Updated March 1, 2009

I. U.S. COURTS OF APPEALS

***Martinez v. Quarterman*,**
2009 WL 211489 (5th Cir. Jan. 28, 2009) (unpublished)

Affirming denial of stay of execution to death row inmate who admitted he could not make a substantial threshold showing of insanity, but who argued he had made a colorable showing of incompetency to be executed thereby requiring a stay so that counsel could be appointed to assist in raising a *Ford* claim. "Assuming that *Ford* and *Panetti* apply to the present situation-and that there is a presumably-lower threshold showing required to garner such "pre- Panetti " relief-the district court correctly concluded that Petitioner's evidence of incompetency was insufficient. Volunteer counsel, in a brief span of time, was able to develop an extensive history of mental health that still falls short of any threshold showing of incompetency to be executed."

***Walton v. Johnson*,**
440 F.3d 160 (4th Cir.) (en banc), *cert. denied*, 547 U.S. 1189 (2006)

Following a district court hearing on competency to be executed where "vastly conflicting testimony was presented," and district court's appointment of "neutral" expert who opined that Walton understands "he is in prison for killing three people" and "he will be executed as punishment for these crimes," circuit court affirmed district court's conclusion that Walton is competent because he understands he is to be executed and that his execution is punishment for murder. Neither *Ford* nor the 8th Amendment require petitioner be able to assist his counsel in the competency determination, or be capable of preparing himself mentally and spiritually for his death.

***Centobe v. Campbell*,**
407 F.3d 1149 (11th Cir. 2005)

In denying a certificate of appealability and stay of execution, the court finds that even if attorney had "next friend" standing to litigate on Petitioner's behalf in post- conviction proceedings, attorney "has not made a substantial showing" that Petitioner "is in fact incompetent" to be executed. The evidence is "speculative and inconclusive, and completely at odds with the conclusions of mental health professionals who have observed [Petitioner]," including during a competency evaluation prior to trial. All "reliable evidence leads to a conclusion that [Petitioner] understands his legal options but has rationally chosen to accept execution."

***Staley v. Dretke*,**
2005 WL 673503 (5th Cir. 2005) (unreported)

Court of appeals vacated federal district court stay where state court, without requiring a threshold showing of incompetence, allowed *Ford* examinations by experts for petitioner and the State and both experts found Petitioner competent to be executed. (Petitioner's expert did conclude, however, that it was "probable" Petitioner "will become more psychotic in the week remaining before his execution," and therefore, there was no assurance Petitioner would be competent at the time of his actual execution.) Finding, based on affidavits and reports, that the evidence showed Petitioner understood he was to be executed, the reasons for his execution, and that his execution was imminent, the state court concluded Petitioner had not made a "substantial showing" of incompetence. Although the federal appeals court found that Petitioner diligently pursued his *Ford* claim, the experts' completed examinations and reports "demonstrate" Petitioner is competent to be executed under *Ford*: he understands he is to be executed, and the reasons for his execution. Appeals court also denied Petitioner's request to stay the execution until it decided in the then-pending case of *Panetti* whether a death row inmate "must have a rational, as well as a factual understanding of the reason for his execution." Looking to the record in Petitioner's case, the appeals court found no facts supports a claim that Petitioner "lacks a rational understanding of his reason for his execution."

***Patterson v. Dretke*,**
370 F.3d 480 (5th Cir.), *cert. denied*, 541 U.S. 1058 (2004)

State court's finding that petitioner had not raised a substantial doubt as to his competency to be executed was not an unreasonable determination of the facts in light of the evidence presented to it. The record showed that while petitioner was mentally ill and expressed the delusional belief that he'd been given amnesty, his writings also repeatedly requested a stay of execution. Although a mental health expert expressed doubt about petitioner's rational and factual understanding of the impending execution, that expert failed to address petitioner's requests that his execution be halted. Even assuming petitioner was correct in his assertion that the state court decision was not a pure factual finding, petitioner failed to show that the decision was contrary to, or involved an unreasonable application of *Ford*.

***Singleton v. Norris*,**
319 F.3d 1018 (8th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 832 (2003)

A state does not violate the Eighth Amendment or due process by executing an inmate who has regained competency through forced medication that is part of appropriate medical care.

***Delk v. Cockrell*,**
2002 WL 32598585 (5th Cir. 2002) (unpublished)
Where petitioner raised a *Ford* claim in his first federal petition, which was denied based on petitioner's failure to rebut the state court's finding that petitioner was competent to be executed, he could not raise the claim again in a second petition. See 28 U.S.C. § 2244(b)(1). This was true despite the fact that during the initial federal habeas proceedings, the petitioner had asked the district court not to reach the merits of the *Ford* claim until his execution was imminent. The appeals court rejected petitioner's argument that a *Ford* claim cannot be ruled on until an execution is imminent, and, therefore, the first state court ruling carried no weight and was entitled to no deference. In the alternative, the appeals court concluded that petitioner could not satisfy the standards for filing a successive petition, "much less succeed on it under the exacting standards of 28 U.S.C. § 2244(b)(2)." Finally, the court held that even if the petition could be considered as non-successive, petitioner could not prevail under § 2254(d), "especially in light of the deference to be accorded the state court's two rulings on the *Ford* claim."

Note: Some aspects of this decision are no longer good law under *Panetti.*

***Colburn v. Cockrell*,**
2002 WL 31718026 (5th Cir. 2002) (unpublished), cert. denied, 537 U.S. 1166 (2003)

Petitioner who failed to raise a *Ford* claim in his initial federal habeas petition, and whose second *Ford*-based petition was rejected on jurisdictional grounds by the district court because the court found it to be successive, was not entitled to a COA on the question of whether the lower court had jurisdiction to address the claim. The appeals court was unpersuaded by the petitioner's argument that he was precluded from including the *Ford* claim in his initial federal petition because it would have rendered his federal petition "mixed" – i.e., containing both exhausted and unexhausted claims -- and subject to dismissal under *Rose v. Lundy*. This argument was premised on the initial refusal of the state appellate court to adjudicate the *Ford* claim because the state court had concluded that the claim was not yet ripe since petitioner's execution was not imminent. This, according to petitioner, rendered the claim unexhausted. The appeals court disagreed, noting that the exhaustion doctrine required only that the petitioner provide the state court with the opportunity to rule on the claim. The court also found an absence of evidence in the record indicating petitioner was presently incompetent. To the extent petitioner's motions raised an argument that the state court's procedures were unconstitutional because they failed to permit petitioner to be evaluated by its own expert, the appeals court had previously rejected such an argument in *Caldwell v. Johnson*.

Note: Some aspects of this decision are no longer good law under *Panetti.*

***Caldwell v. Johnson*,**
226 F.3d 367 (5th Cir.), *cert. denied*, 530 U.S. 1298 (2000)

The court denied a certificate of appealability and stay of execution in this second habeas proceeding. After the state court scheduled Petitioner's execution, the state requested a determination of his competency to be executed "as a precautionary measure." The state court appointed two experts with whom Petitioner refused to cooperate. Petitioner then filed a petition contending he was not competent to be executed and requesting funds for experts. The state court denied relief, finding Petitioner had not made a substantial showing of incompetency. Petitioner then filed a petition in the state appellate court requesting, inter alia, funds for experts. The appellate court construed the petition as invoking the state's competency to be executed statute. Under that statute, the appellate court said it had no authority to appoint experts and no jurisdiction to review a trial court's finding regarding a substantial showing of incompetency or a trial court's finding that a defendant was competent. The appellate court could only review a trial court's finding of incompetency. Petitioner challenged these procedures in his federal petition. The court found the petition was not successive and addressed Petitioner's contentions under sections 2254(d), 2254(e)(1) and 2253(c)(2) of the AEDPA. The court found no authority to support Petitioner's contention that he was entitled to appellate review in state court of the trial court's determination that he was competent. Even if the right to appeal a conviction and sentence could be extended to a determination of competency, that extension could not be made in a habeas case. Petitioner relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), to argue his entitlement to expert assistance, but the court found that right did not extend to a determination of competency to be executed. Under *Teague v. Lane*, 489 U.S. 288 (1989), *Ake* cannot be extended to *Ford* proceedings in a federal habeas case.

Note: The state court appellate decision in this case is *Ex parte Caldwell*, 2000 WL 1228848 (Tex. Crim. App. 2000) (unpublished).

***Coe v. Bell*,**
209 F.3d 815 (6th Cir.), *cert. denied*, 529 U.S. 1084 (2000)

"[T]he Tennessee courts' placement of the burden of proof on Coe to establish his lack of competency to be executed comports with the procedural protections of the Due Process Clause and is not an unreasonable application of Supreme Court precedent." As for other challenges to the procedures utilized by the state court in determining that Coe was competent to be executed, the appeals court stated: "we must give the Tennessee courts substantial discretion in fashioning the procedures employed in Coe's competency proceedings. Where Coe was given an extensive hearing over several days and was given the opportunity to present evidence and to cross-examine the state's mental health experts, it is not our role to second guess all of the procedural decisions made by the Tennessee courts." The court further rejected an argument that the state court's finding of

competence to be executed was flawed because it dealt with present competence, rather than competence at the time of execution. A competency determination made less than two months before the scheduled execution was made when the execution was "imminent." State procedures for permitting reassertion of a *Ford* claim based on changed circumstances comported with notions of basic fairness. The state court "properly followed Justice Powell's competency standard . . . and determined that Coe is aware of his imminent execution and the reason for it, showing that Coe has made the requisite connection between his crime and his punishment." A prisoner's ability to assist in his defense is not a necessary element in the determination of competency to be executed. The Tennessee Supreme Court's adoption of Justice Powell's standard "satisfies due process and is not an unreasonable interpretation of Supreme Court precedent."

***Cox v. Norris*,**
167 F.3d 1211 (8th Cir. 1999)

Taking a median position between the Supreme Court's holding in *Martinez-Villareal*, and the rules of three other circuits in *Nguyen*, *Davis*, and *Medina*, the court held that a petitioner who had never before raised an issue regarding his competency could raise a *Ford* claim in an application for permission to file a successive federal habeas petition. The court applied Justice Powell's concurring opinion in Ford to determine whether the petitioner would be permitted to file a successive application for habeas relief under AEDPA's amendments to 28 U.S.C. § 2244(b). Justice Powell had stated that a person whose competency had been established at the time of trial and sentencing was presumed sane at the time of execution. A federal habeas petitioner would therefore have to make a "substantial threshold showing of insanity" at the time of execution in order to trigger his due process right to an evidentiary hearing on his competency for execution. Here, the court held that a petitioner seeking to raise a *Ford* claim in a successive application for habeas relief would have to make the same "substantial threshold showing of insanity" to obtain permission to file a successive petition. Permission was ultimately denied in this case because petitioner's affidavits relating his "mostly idiosyncratic behavior" failed to meet the threshold necessary for overcoming the presumption of sanity.

Note: The issue on whether a *Ford* claim can be raised for the first time in a successor petition was resolved by the Supreme Court in *Panetti*.

***In re Provenzano*,**
215 F.3d 1233 (11th Cir.), *cert. denied*, 530 U.S. 1256 (2000)

Incompetency to be executed claim is not cognizable under 28 U.S.C Section 2244 (b)(3)(A), particularly when the defendant did not raise the claim in an initial habeas petition; court finds that *Stewart v. Martinez-Villareal* decision did not address the issue of a defendant raising a *Ford* claim for the first time in a successive posture

Note: This is no longer good law after *Panetti*.

***Schneider v. Bowersox*,**
106 F.3d 804 (8th Cir. 1997)(per curiam)

Petitioner's emergency motion for a stay of his execution scheduled for the next day is denied. Petitioner's motion does not show that he has exhausted state remedies. Nor has he demonstrated that he is unaware of the punishment he is about to suffer and why he is to suffer it. The expert affidavit submitted by petitioner speaks to a possible defense of diminished capacity and says nothing about his present understanding of what is in store for him. An affidavit by a former attorney alleging that petitioner lacks an understanding of what is about to happen to him is not persuasive in light of the fact that petitioner has recently prepared extensive pro se pleadings without the assistance of other inmates.

***Fearance v. Scott*,**
56 F.3d 633 (5th Cir.), *cert. denied*, 515 U.S. 1153 (1995)

The court suggests, but does not decide, that because *Ford* claims pertain to petitioner's immediate mental state, they are not subject to the abuse of the writ doctrine. The federal district court was not required to hold a hearing since the state court's recent competency finding was entitled to a presumption of correctness. Furthermore, when mental capacity was not an issue at trial, federal courts need not grant a hearing on a *Ford* claim unless the petitioner makes a substantial threshold showing of insanity. That threshold was not reached by testimony that petitioner suffered from paranoid schizophrenia. Petitioner satisfied the standard of competency set out in Justice Powell's concurrence in *Ford*: he knew the fact of his impeding execution and the reason for it. Petitioner's claim that his constitutional rights were violated by forcible medication to render him fit for execution could have been presented in an earlier petition and was properly dismissed as an abuse of the writ.

***Weeks v. Jones*,**
52 F.3d 1559 (11th Cir.), *cert. denied*, 514 U.S. 1104 (1995)

Although the state trial judge engaged in an unsworn exchange with petitioner and did not allow counsel to ask responsive questions, the state court hearing was full and fair and the finding of competency to be executed was entitled to a presumption of correctness, where the court allowed petitioner to present all of his evidence and where petitioner has not suggested what questions his counsel might have asked.

***Gacy v. Page*,**
24 F.3d 887 (7th Cir. 1994)

Habeas counsel failed to present sufficient evidence to support a claim that petitioner is

insane and incompetent to be executed where counsel did not offer any medical or psychological evidence of insanity and instead relied entirely on their own assessment of petitioner's mental state.

***Barnard v. Collins*,**
13 F.3d 871 (5th Cir.), *cert. denied*, 510 U.S. 1102 (1994)

The state court finding of competency to be executed was entitled to a presumption of correctness though it rested on the testimony of one court-appointed expert who disagreed with the findings of several defense experts. Although the court-appointed expert agreed that petitioner suffered serious delusions of persecution by minorities, he found that petitioner understood the fact of his impeding execution and the reason for it.

***Whitmore v. Lockhart*,**
8 F.3d 614 (8th Cir. 1993)

Having considered the testimony of two doctors appointed expressly to consider petitioner's competency, the district court was not clearly erroneous in finding that petitioner understood that he was to be executed and why.

***Shaw v. Delo*,**
971 F.2d 181 (8th Cir. 1992), *cert. denied*, 507 U.S. 927 (1993)

Even though petitioner's *Ford* claim is framed in part as an attack on a finding of competency by a previous federal habeas court, the thrust of his claim is his present incompetency. Thus it was error for the district court to dismiss the claim as abusive. The circuit court goes on, however, to dismiss the claim so that petitioner can exhaust state remedies.

***Garrett v. Collins*,**
951 F.2d 57 (5th Cir. 1992) (per curiam)

Petitioner's belief that his dead aunt will protect him from the agents used during lethal injection does not render him unfit to be executed, where the state habeas court, after an evidentiary hearing, found that petitioner was aware that he was to be executed and why and where petitioner's own expert testified that while petitioner was buffered by his belief in his aunt's intervention, he was also aware that he might die.

***Cuevas v. Collins*,**
932 F.2d 1078 (5th Cir. 1991)

"A habeas petitioner must make a substantial showing that he is so deranged that he is unaware that he is about to be put to death before due process requires that he be afforded

a hearing on the issue of insanity"; state court correctly found that petitioner was not unaware of impending execution or reason for death sentence.

***Rector v. Clark*,**
923 F.2d 570 (8th Cir. 1991), *cert. denied*, 501 U.S. 1239 (1991)

To be competent to be executed, petitioner need not have the "ability to inform counsel or the court of any fact which might exist which would make the punishment unjust or unlawful," as suggested by the ABA Criminal Justice Mental Health Standards. Although doctors appointed by the district court found that petitioner, who suffered from a self-inflicted head injury, could not consult with his lawyers or recognize facts that might make his sentence unjust, the district court did not err in finding that petitioner met the less stringent *Ford* test -- he understood (1) that he is to be punished by execution and (2) why he is being punished.

***Hamilton v. Collins*,**
905 F.2d 825 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990)

The district court properly dismissed Hamilton's next-friend petition after finding that her son was competent to waive his appeals and was competent to be executed under *Ford*.

***Shaw v. Armontrout*,**
900 F.2d 123 (8th Cir. 1990)

Though petitioner suffered from brain damage, a limited intellect and situational depression, the state court's finding of competency was entitled to a presumption of correctness, where prosecution and defense experts who testified at a state-court hearing agreed that petitioner was capable of understanding the nature and purpose of his punishment.

***Granviel v. Lynaugh*,**
881 F.2d 185 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990)

Although petitioner refused to respond to questions posed by a court-appointed psychiatrist, the state court hearing comported with due process, since petitioner had counsel, presented witnesses and conducted cross-examination and since the court-appointed psychiatrist was able to reach his conclusions by observation alone. Petitioner's rights were further protected when the district court conducted a hearing on his present sanity.

***In re Lindsey*,**
875 F.2d 1502 (11th Cir. 1989)

Petitioner is not entitled under 21 U.S.C. § 848(q) nor 18 U.S.C. § 3006A to the appointment of an attorney and a mental health expert to help him exhaust his *Ford* claim in state proceedings. However, under *Ford*, "the failure of state courts to provide such assistance sometimes would deprive their findings of the deference they would otherwise be due from federal courts in subsequent habeas proceedings."

***Smith v. Armontrout*,**
857 F.2d 1228 (8th Cir. 1988)

There was no need to remand for a hearing on competency to be executed, though two years had passed since petitioner's last competency determination. The controlling force of that determination was not overcome by the facts that petitioner (1) had dropped his appeals, changed his mind and then dropped them again and (2) recently married someone who later encouraged him to drop his appeals.

***Graham v. Lynaugh*,**
854 F.2d 715 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 915 (1989)

The state court's finding that petitioner was competent to be executed was entitled to presumption of correctness, where the state court relied on (1) the finding by two psychiatrists that petitioner was competent at the time of his trial, (2) the finding of a psychiatrist that he was competent to participate in state habeas proceedings and where the state court reasonably concluded that recent reports that petitioner suffered from mild brain damage, low intelligence and bipolar disorder did not mean that he was unable to understand the nature and purpose of his punishment.

***Lowenfield v. Butler*,**
843 F.2d 183 (5th Cir.), *cert. denied*, 485 U.S. 1014 (1988)

The state court and the district court properly relied on pre-trial evaluations in finding that petitioner was presently competent to be executed. Petitioner's evidence -- the affidavit of a psychologist stating that petitioner was a paranoid schizophrenic and unable to understand the death penalty -- was not sufficient to require a hearing since it did not put into doubt that petitioner understood that he was to be executed as a result of his conviction for murder.

***Johnson v. Cabana*,**
818 F.2d 333 (5th Cir.), *cert. denied*. 481 U.S. 1061 (1987)

Where the state supreme court considered the materials submitted by petitioner concerning his successive petition for post-conviction relief, due process was satisfied and a presumption of correctness attached to the state supreme court’s finding that petitioner had failed to reach the statutory threshold for raising a claim of incompetence

to be executed. Further, "the merits of this threshold determination" was more than authenticated when the counter-affidavits and information supplied by the state, but not considered by the Mississippi Supreme Court, were reviewed by the court of appeals.

***Evans v. McCotter*,**
805 F.2d 1210 (5th Cir. 1986)

District court properly denied a hearing and gave a presumption of correctness to the state court's finding that petitioner was competent to be executed, where the state court gave credence to the state's affidavits, from prison employees and a psychologist, and discounted the affidavit of petitioner's sister which was general and conclusory.

II. UNITED STATES DISTRICT COURTS

***Walton v. Johnson*,**
306 F.Supp.2d 597 (W.D. Va. 2004), *aff'd*, 440 F.3d 160 (4th Cir. 2006) (en banc)

Following two evidentiary hearings on the issue of competence to be executed, which involved testimony from numerous lay and expert witnesses, the district court accepts the findings of Dr. Mark Mills who opined that Walton suffers from a psychotic disorder, but nevertheless understands that he is in prison, that he received a death sentence for murdering three individuals, and that to be executed means that he will die.

***Thompson v. Bell*,**
2006 WL 1195892 (E.D. Tenn. May 4, 2006)(unpublished)

Based on reports from Petitioner's three experts who found Thompson suffered from schizophrenia, but did not "present facts indicating Thompson is unaware of his impending execution and the reason for it," the state court denied a hearing because Thompson "failed to establish a genuine issue" regarding his competency to be executed. The federal court denied Petitioner's request for discovery from state actors regarding Petitioner's mental state, and a hearing because "Thompson's experts do not establish that he is unaware of the fact of or the reason for his impending execution." Also, a "thorough review of the state court record reflects Thompson has not demonstrated that the state court's decision was based upon an unreasonable determination of the facts in light of the evidence before it," and the state court's adjudication" of Thompson's *Ford* claim was not "contrary to, or involved an unreasonable application of, clearly established federal law."

***Kemp v. Cockrell*,**
2003 WL 21448584 (N.D. Tex. 2003), *COA denied*, 86 Fed.Appx. 680 (5th Cir. 2004)

Claim that it was unconstitutional to forcibly medicate petitioner in order to render him

competent to be executed was procedurally barred where it was raised for the first time in a second state habeas petition which was denied as an abuse of the writ. Given the long history of medicating petitioner, the factual basis for the claim was reasonably available to petitioner at the time he filed his first state habeas petition, which resulted in a finding of incompetence to be executed, and so petitioner could not established "cause" to overcome the default. Constitutional challenge to state court's denial of funds to obtain a mental health expert on the issue of competency to be executed was barred by Teague. Incompetence to be executed claim is dismissed as premature given that execution is not imminent.

***Jacobs v. Cockrell*,**
2002 WL 172629 (N.D. Tex.), *aff'd*, 54 Fed.Appx. 406 (5th Cir. 2002), *cert. denied*, 538 U.S. 949 (2003)

Where record in state court established that petitioner understood that he was to be executed and the reason for it, the state habeas court's conclusion that petitioner is currently competent to be executed was not an unreasonable application of federal law. Although petitioner advocated adoption of a competency standard that includes a prong for being able to assist in habeas proceedings, the district court found itself bound by Fifth Circuit precedent utilizing the standard outlined by Justice Powell in his concurrence in *Ford*. The procedure used by the state court in adjudicating petitioner's *Ford* claim addressed all the concerns voiced by the Supreme Court in *Ford*: a hearing was held before a neutral judge; petitioner was represented by counsel; he was examined by two mental health experts appointed by the court, as well as one hired by his counsel; petitioner was allowed to present evidence and argument; and each of the experts indicated a familiarity with the applicable standard for assessing competence.

***Coe v. Bell*,**
89 F.Supp.2d 962 (M.D.Tenn.), *aff'd*, 209 F.3d 815 (6th Cir.), *cert. denied*, 529 U.S. 1084 (2000)

Neither petitioner's counsel nor a mental health professional must be present at the execution with access to a telephone in order to ensure that petitioner can reraise his *Ford* claim should his mental condition deteriorate because such a claim cannot be raised in the hour before the execution. Tennessee's procedures, which allow revisiting the issue of competency to be executed when there is competent evidence of a "substantial change in the prisoner's mental health" and the issue is presented a reasonable time before the execution, "comport with due process, the Eighth Amendment, and common sense." The district court notes, among other things, that the determination of Coe's competency to be executed was made when execution was "imminent" and took into account testimony that Coe would decompensate as the execution drew closer.

***Whitmore v. Lockhart*,**
834 F.Supp. 1105 (E.D. Ark. 1992), *aff'd.* 8 F.3d 614 (8th Cir. 1993)

Rejecting claim that petitioner is incompetent to executed where several experts concluded petitioner knew he was to be executed and the reason for his execution. Although petitioner presented an expert who opined that petitioner did not know that he was to be executed, that same expert was unable to point to any lack of mental awareness on petitioner's part and he acknowledged that petitioner realized the "possibility" that he would be executed. The court concluded: "Nothing in the record reveals any neuropsychological impairments that would interfere with petitioner's ability to understand the nature and purpose for the punishment that is about to be imposed upon him."

***Rector v. Lockhart*,**
783 F.Supp. 398 (E.D.Ark.), *aff'd*, 971 F.2d 751 (8th Cir.), *cert. denied*, 502 U.S. 1068 (1992)

In earlier proceedings, the federal district court ordered a psychiatric evaluation, conducted a hearing and found petitioner to be competent to be executed, notwithstanding a head injury that had the same effect as a frontal lobotomy. Subsequently, at petitioner's request, the state department of corrections ordered a state hospital to conduct a competency evaluation. Petitioner was found to be competent. In this successor petition, petitioner challenged the constitutionality of the state statute according to which the evaluation was conducted. The court finds that petitioner could have challenged the statute in his earlier petition; even if the challenge were not an abuse of the writ, however, petitioner does not provide evidence of prejudice -- namely, that a new evaluation would result in a different conclusion. Petitioner's related challenge -- that his evaluation was not conducted in accordance with the state statute -- is either without merit or does not raise a federal question.

***Shaw v. Delo*,**
762 F.Supp. 853 (E.D.Mo. 1991), *aff'd*, 971 F.2d 181 (8th Cir. 1992), *cert. denied*, 507 U.S. 927 (1993)

A new hearing is not required on Shaw's claim that he is incompetent to be executed, inasmuch as the evidence of organic brain damage, low mentality and head trauma was presented at his last competency hearing before a state court in 1987 and Shaw has not made a substantial showing that his condition has worsened since then. Moreover, the Eighth Circuit earlier ruled, in *Shaw v. Armontrout*, 900 F.2d 123 (8th Cir. 1990), that the state-court competency hearing comported with due process and resulted in findings that were supported by the record. The present court also denies Shaw's request for funding for psychiatric experts, arguing that the information sought by Shaw might elucidate the causes of his condition, but would not be determinative of his competency.

***Rector v. Lockhart*,**
727 F.Supp. 1285 (E.D.Ark. 1990), *aff'd*, 923 F.2d 570 (8th Cir.), *cert. denied*, 501 U.S. 1239 (1991)

The district court, relying almost exclusively on evaluations by experts it had recently appointed, found that petitioner -- who had extensive brain damage -- had a rational understanding that he was to be executed as a consequence of his conviction of capital murder. The court discounted the testimony of experts who had last examined petitioner some six years before.

***Johnson v. Cabana*,**
661 F.Supp. 356 (S.D.Miss.), *aff'd*, 818 F.2d 333 (5th Cir.), *cert. denied*. 481 U.S. 1061 (1987)

The state supreme court found defendant competent to be executed after examining affidavits from defense experts diagnosing petitioner with organic brain damage as well as counter-affidavits from state experts. The district court upholds this finding on two alternative grounds: (1) the state court's conclusion is supported by the evidence and (2) the state court accorded all of the process that was due and therefore its conclusions are entitled to a presumption of correctness.

III. STATE COURTS

***Wood v. State*.**
2008 WL 3855534 (Tex.Crim.App. Aug. 19, 2008) (unpublished)

Where trial court denied petitioner's motion for appointment of counsel and funds for assistance in preparing a motion raising incompetence to be executed, the appellate court found that it could not review a ruling made pursuant to the state statute governing incompetency to be executed proceedings because petitioner's motion was filed too late under that statute. To the extent petitioner's motion filed in the trial court was meant to be a general due process request for the tools necessary to meet the dictates of the incompetency to be executed statute, and not an actual motion requesting a finding on petitioner's competency under the statute, there was no provision for an appeal on a ruling on such a motion. Therefore, petitioner's appeal was dismissed and his motion for stay of execution denied.

***Baird v. State*,**
833 N.E.2d 28 (Ind. 2005), *cert. denied*., 546 U.S. 924 (2005)
Denying authorization to file successor petition that alleged that petitioner is incompetent for execution and was supported by affidavits from two attorneys, and two mental health professionals, one who recently examined petitioner, and one who examined him ten

years ago. The materials did not establish petitioner is *Ford* insane, but rather the opposite. Petitioner knows he is sentenced to die for killing his wife and parents because he has been told so. It is irrelevant that petitioner believes "God will turn back the clock to before the killings" because of his good behavior in prison, or that Petitioner is preoccupied with matters that would occur after his anticipated execution. As for the mental health experts, one did not opine that Petitioner is unaware of his impending execution or why he is to be executed. The other expert opined Petitioner has fixed delusional and dissociative disorders, and is not malingering, but he, too, did not opine that Petitioner is unaware of the punishment he is to suffer and why he is to suffer it. Instead, the expert's report shows Petitioner knows "he is to be executed because he murdered." Petitioner failed to meet his burden to authorize filing of a second petition or for a stay of execution.

***Thompson v. State*,**
134 S.W.3d 168 (Tenn. 2004)

Trial court did not err in finding that Thompson had failed to make a threshold showing sufficient to warrant a hearing on his *Ford* claim. Although Thompson presented, among other things, three expert affidavits opining that Thompson was incompetent to be executed, review of the record indicated that Thompson was aware of his impending execution and the reason for it. That Thompson, who suffers from schizophrenia, harbored certain delusional or unorthodox beliefs about himself, the State's ability to carry out the execution, and what would happen to him upon execution, was irrelevant to the question of competency to be executed.

***State v. Scott*,**
748 N.E.2d 11 (Ohio), *cert. denied*, 532 U.S. 1034 (2001)

There is no requirement that a trial court hold a hearing to determine whether there is probable cause to believe that an inmate is insane. Here, the trial court's detailed findings of fact supported its determination that there was no probable cause to believe that Scott, who suffered from chronic undifferentiated schizophrenia, was incompetent to be executed. Ohio's competency standard, modeled after Justice Powell's concurrence in *Ford* does not need to be revised. Placing the burden of proof on the inmate to prove probable cause or to prove by a preponderance of the evidence that he is incompetent to be executed does not violate the inmate's constitutional rights.

***Commonwealth v. Bronshtein*,**
729 A.2d 1102 (Pa. 1999)

Appeal by family members of a prisoner who waived his right to pursue postconviction relief is rejected. The family had argued the prisoner was not competent to be executed and had presented evidence from several mental health experts who opined that the

prisoner suffered from mental illness and recommended further evaluation. This evidence was found insufficient by the court because it failed to show that the prisoner did not understand the punishment and the reason for it, and did not demonstrate a change of circumstances since the PCRA court determined that the prisoner was competent to waive his appellate rights.

***In re Heidnik*,**
720 A.2d 1016 (Pa. 1998)

For purposes of Pennsylvania law, the standards for establishing next friend standing are relaxed in cases raising a *Ford* claim in order to make sure those claims are raised and properly litigated. Here, attorneys from a capital post-conviction defense organization had standing to raise *Ford* claim on behalf of Heidnik, whom they had not been appointed to represent, based on their observations of him. Having already ordered an evidentiary hearing in this case, the court went on to affirm the hearing court's conclusion that Heidnik was competent for execution.

***In re Benn*,**
952 P.2d 116 (Wash. 1998)

Statement by mental health expert that, based on prison records, defendant is suffering from a significant mental disorder and receiving psychotropic medication, was not enough to establish incompetency for execution. But, "[n]o constitutional violation can be shown unless the prisoner is currently insane; while he is sane, the issue is premature. Should the defendant's condition at some point deteriorate, he or his representatives can bring an appropriate action to prevent him from being executed while insane. This is simply not the kind of issue which can be waived by failure to raise it in the first petition for post-conviction relief," or which can be barred by the statute of limitations.

***Commonwealth v. Jermyn*,**
709 A.2d 849 (Pa. 1998)

After an evidentiary hearing of his second state court *Ford* petition, Jermyn challenged the sufficiency of the evidence on which the trial court found him competent for execution. Noting that two of the three experts who testified found Jermyn competent for execution, the court rejected Jermyn's argument. Next, the court rejected Jermyn's argument that the trial court committed reversible error by refusing to order a contemporaneous evaluation by the defense's expert, after the expert's attorney advised her not to evaluate him, and she refused to do so. Finding that her opinion, and department of corrections medical records that Jermyn was not able to introduce at the hearing, would not have added any new facts to the record, but only restated opinions offered by the experts, the court held that if there was error, it was harmless. Finally, the court, without reaching the merits of the claim, rejected Jermyn's argument that requiring

him to prove his incompetence by clear and convincing evidence violates due process under *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

***Medina v. State*,**
690 So.2d 1255 (Fla.), *cert. denied*, 520 U.S. 1151 (1997)

After remand for evidentiary hearing on inmate's competency to be executed, court affirms finding competent substantial evidence in record to support trial court's ruling that inmate failed to prove by clear and convincing evidence that he was not fit for execution.

***Magwood v. State*,**
1996 WL 240370 (Ala.Crim.App. 1996), *cert. denied*, 522 U.S. 836 (1997)

The court declines to review Magwood's claim that he is incompetent to be executed because the Eleventh Circuit, in *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986), had previously upheld the finding of a federal district court that Magwood was competent.

Billiot v. State,
655 So.2d 1 (Miss. 1995), cert. denied, 516 U.S. 1097 (1996)

In *Billiot v. State*, 515 So.2d 1234 (Miss. 1987), the Mississippi Supreme Court remanded to trial court for a competency hearing. Trial court's finding of competency, following a hearing on the issue, was not an abuse of discretion, though the trial court relied on the testimony of experts who had examined Billiot eight months prior to the hearing and discounted the testimony of an expert who had examined Billiot more recently and more thoroughly.

***Commonwealth v. Jermyn*,**
539 Pa. 371 (Pa.), *cert. denied*, 515 U.S. 1126 (1995)

There is sufficient evidence to support the trial court's finding that "Appellant comprehends the reasons for the death penalty and its implications." The trial court properly declined to apply the standard of competency contained in a state statute pertaining to competency to stand trial.

***Singleton v. Endell*,**
870 S.W.2d 742 (Ark.), *cert. denied*, 513 U.S. 960 (1994)

Appellant's due process rights were not violated when the Director of the Department of Corrections determined that there was insufficient evidence to justify the convening of a sanity commission and when the trial court, in post-conviction proceedings, failed to conduct a hearing.

***Rector v. Clinton*,**
823 S.W.2d 829 (Ark. 1992)

Lower court lacked jurisdiction to examine defendant's claim that he is incompetent to be executed; under state law that function belongs to the executive branch. In any event, in finding that Rector, who had sustained a head injury that was tantamount to a frontal lobotomy, was competent, the lower court correctly concluded that Arkansas' statutory standard of competency is no more stringent than that enunciated in *Ford v. Wainwright*.

***Ex parte Garrett*,**
831 S.W.2d 304 (Tex.Crim.App. 1991), cert. denied, 502 U.S. 1083 (1992)

The en banc court dismissed Garrett's petition without an opinion. Two dissenting judges argued that the court should have addressed Garrett's claim that he was incompetent to be executed, noting that a psychiatrist had testified at a hearing that Garrett was aware of the proceedings and knew that the state was seeking to have him lethally injected but also that he exhibited the "probably psychotic belief that his dead aunt will protect him from the effects of the sedative and toxic agents used."

***State v. Harris*,**
789 P.2d 60 (Wash. 1990)

Although denying relief to Harris, the court clarifies that to be competent for execution, defendant must not only understand the nature of the punishment, but must also be able to communicate rationally with counsel.

***Caldwell v. State*,**
1990 WL 29290 (Tenn.Crim.App. 1990) (unpublished)

Petitioner is not entitled to a evaluation, where the only evidence he has presented regarding his fitness to be executed are (1) medical records that characterize him as alert, oriented and cooperative and (2) unsupported allegations by post-conviction counsel that petitioner's behavior is bizarre.

***State ex rel. Eaton v. Butler*,**
547 So.2d 364 (La. 1989)

Petitioner, though diagnosed as "extremely disturbed, with both schizoid and paranoid features," was presumed to be competent to be executed, inasmuch as the trial court had found him competent to be sentenced following a suicide attempt and petitioner presented no evidence that his condition had changed since that time.

***State v. Rice*,**
757 P.2d 889 (Wash. 1988)

The proper test for competence to be executed is "whether one is capable of properly appreciating his peril and of rationally assisting in his own defense." Rice is presumptively competent since the evidence of mental illness that he has produced was already considered by the trial court that found him competent to be sentenced.

***Martin v. State*,**
515 So.2d 189 (Fla. 1987)

The trial court did not err in giving only two days notice for a hearing on appellant's competency to be executed, where appellant did not show that the witnesses he desired to call could have added anything new to the papers already before the court and where the court was prepared to declare appellant competent solely on the basis of those papers.