WHEN TO RAISE A *FORD* CLAIM
March 1, 2009

I. UNITED STATES SUPREME COURT

***Panetti v. Quarterman*,**
551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007)

AEDPA's restrictions on second or successive habeas petitions do not apply to Panetti's incompetency-to-be-executed claim asserted for the first time in his second habeas petition. Petitioners are not "obliged to file unripe (and in many cases meritless) *Ford* claims" in a first petition. The court has never defined "second or successive" habeas petitions to mean "all §2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior" application. Congress "did not intend" AEDPA's provisions addressing second or successive to govern "the unusual posture presented here:" a habeas petition "raising a *Ford*-based incompetency claim filed as soon as that claim is ripe." Requiring petitioners file "unripe *Ford* claims" is an "empty formality" that "neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies."

***Stewart v. Martinez-Villareal*,**
523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)

The restrictions which AEDPA places on second or successive habeas petitions do not apply to a *Ford* claim which was raised in a previous habeas petition but dismissed as premature because the petitioner was not then facing execution. An application for habeas relief containing only a *Ford* claim previously dismissed as premature is not a "'second or successive' application" within the meaning of 28 U.S.C. § 2244(b). In order to avoid the "seemingly perverse" result of barring any federal habeas adjudication of such a *Ford* claim, the later petition "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." By raising his *Ford* claim in a habeas petition once a death warrant was issued, Martinez-Villareal "brought his claim in a timely fashion." The claim "ha[d] not been ripe for resolution until" his execution was imminent. Since this was his first opportunity to obtain federal habeas review of his competency for execution, "Martinez-Villareal's *Ford* claim was not a 'second or successive' petition under § 2244(b), [and] . . . the Court of Appeals was correct in deciding that [Martinez-Villareal] was entitled to a hearing on his *Ford* claim in the District Court."

II. U.S. COURTS OF APPEALS

***Nooner v. Norris*,**
499 F.3d 831 (8th Cir. 2007)

The holdings of *Martinez-Villareal* and *Panetti* that the second and successor bar in § 2244(b)(2) does not apply to *Ford*-based incompetency claims "filed *after* the state has obtained an execution warrant" should be extended to "*Ford*-based incompetency and *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]-based mental retardation claims filed *before* the state has obtained an execution warrant." The circuit court reversed the district court's decision dismissing Nooner's second habeas application requesting access to Nooner to conduct a mental health evaluation, and remanded for further proceeding in the district court.

III. STATE CASES

***People v. Leonard*,**
157 P.3d 973 (Cal. 2006)

"[T]the question whether a defendant is mentally competent to be executed is not determined until the defendant's execution date has been set. (§ 3700.5.) No date has been set for defendant's execution. Thus, his claim that he cannot be executed because he is insane is rejected as premature."

***People v. Lawley*,**
38 P.3d 461 (Cal. 2002)

On direct appeal from capital conviction and death sentence, it would be premature to adjudicate a *Ford* claim.

Note: See also *In re Scott*, S122167 (Cal. Minute Order June 9, 2004), finding *Ford* claim raised in state habeas proceedings to be premature because no execution date had been set.

***Van Tran v. Tennessee*,**
6 S.W. 3d 257 (Tenn. 1999); *see also Coe v. Tennessee*, 17 S.W. 3d 193 (Tenn. 2000)(affirming denial of relief under *Van Tran* procedure)

Competency to be executed is a ripe issue only when defendant has pursued all federal and state post-conviction relief; court establishes procedure for raising *Ford* claims, including necessity for prima facie showing, provision for experts and a hearing, and procedure for appeal.

***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.

***Colburn v. State*,**
966 S.W.2d 511 (Tex.Crim.App. 1998)

Claim that Eighth Amendment prohibits Colburn's death sentence was prematurely raised on direct appeal. *Ford* prohibits the execution of someone who is insane, not the imposition of a death sentence. Noting that the "psychiatric evaluations and other information necessary" to determine sanity at the time of execution "will not necessarily be found in the record from trial," the court stated Colburn's argument should be raised in a state habeas petition.

***Lockett v. State*,**
614 So.2d 888 (Miss. 1993), *cert. denied*, 510 U.S. 1040 (1994)

Although denying Lockett's request for funds for an additional mental health evaluation that Lockett contended would establish his incompetence to be executed, the court states that "[c]ertainly Lockett would be entitled to a hearing on the issue of his sanity prior to execution" in that he is an epileptic who suffers blackouts, seizures and convulsions and has attempted suicide on two occasions.