COMPETENCY, CULPABILITY, AND CAPITAL PUNISHMENT: EXECUTION AS RETRIBUTION OR A SMOKESCREEN FOR RACIAL POLITICS?

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INTRODUCTION

In May 1985, Vernon Madison was arrested for the murder of Officer Julius Schulte in Mobil County Alabama.[1] He was subsequently convicted and sentenced to death. Madison has been on death row awaiting execution for almost thirty years, and due to a number of recent strokes, now suffers from vascular dementia which has induced a severe cognitive decline.[2]

Since the 1992 verdict, Madison has filed petition after petition asking local, state, and Federal courts to stay his execution, arguing that his vascular dementia and cognitive decline renders him incompetent to be executed under the Eighth Amendment.[3] Unfortunately, court after court has been unwilling to release Madison from the sentence of death. Instead courts have consistently held in favor of the State of Alabama, which has expended significant amounts of time and judicial resources to thwart Madison's attempts to avoid death penalty. However, despite the State's objections to Madison's competency claim, he made his way to the United State Supreme Court asking the Court to decide whether consistent with the holdings in *Ford v. Wainright*,[4] and *Panetti v. Quarterman*[5], [hereinafter referred to as "*Ford*" and "*Panetti,*"] the State may execute a person whose cognitive decline renders him unable to understand the relationship between his crime and the punishment imposed. In

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[1] Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992).

[2] Brief for Respondent at 4, Madison v. Alabama, 132 Sup. Ct. 718 (2019) (No. 17-505).

[3] *See generally* Madison v. Alabama, 132 Sup. Ct. at 724-725.

[4] *See* Ford v. Wainwright, 477 U.S. 399 (1986).

[5] Panetti v. Quarterman, 551 U.S. 930, 936 (2007).

its 2019 ruling, *Madison v. Alabama*[6], the Supreme Court refused to answer and instead remanded the case to the Mobil County Circuit Court, thus, the decades long legal challenge continues.

Factual Background and Procedural Posture

After two failed trials[7], Madison found himself a third time in court on a charge of capital murder for the shooting of Officer Schulte. By this time, seven years had passed since his arrest, and Madison argued, inter alia, that he committed the act in self-defense.[8] The jury refused the defense and subsequently found him guilty of capital murder. However, at sentencing the jury found that Madison clearly suffered from a mental illness and sentenced him to life in prison without the possibility of parole. The judge overrode the jury's verdict and sentenced Madison to death.[9]

In January 2016, and following a number of judgments and appeals,[10] the State requested the Alabama Supreme Court to set an execution date for Madison. Madison then filed a petition in

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[6] Madison v. Alabama, 139 S. Ct. 718, 725 (2019).

[7] Madison v. State, 620 So. 2d at 62 (After Madison's first trial, the District Attorney's office was found to have engaged in racially discriminatory jury selection. Madison was granted a retrial.). *See* Madison v. State, 545 So. 2d 94, 99 (Ala. Crim. App. 1987); *See also* Batson v. Kentucky, 476 U.S. 79 (1986) (During his second trial, the court found that the State engaged in prosecutorial misconduct by producing expert testimony "based on facts not in evidence."). Madison v. State, 620 So. 2d 62, 63 (Ala. Crim. App. 1992) (Madison was once again granted a retrial.).

[8] Madison v. State*,* 718 So. 2d 90, 97 (Ala. Crim. App. 1997).

[9] *Id.*

[10] *See* Madison v. Alabama*,* 525 U.S. 1006 (1998) (Madison then filed a petition for certiorari review in the Supreme Court of Alabama. The petition was denied.); *see also* Madison v. State*,* 999 So. 2d 561 (Ala. Crim. App. 2006) (Madison petitioned in Alabama Court of Criminal Appeals for post-conviction relief, where the court affirmed the dismissal of the Supreme Court petition. In January 2009, Madison filed a petition for habeas corpus relief in the Mobil County Circuit Court which was denied. Madison then appealed in the United States Court of Appeals for the Eleventh Circuit, where the court reversed the denial in part and remanded case with instructions for the district court to conduct a Batson hearing); *see also* Madison v. Comm't, Ala. Dep't of Corrs.*,* 677 F.3d 1377 (11th Circ. 2012); s*ee also* Batson v. Kentucky*,* 476 U.S. 79, 109 (1986)" (The State subsequently filed a petition for a writ of certiorari on appeal to Mobil County court, which was denied); *see also* Thomas v. Madison, 568 U.S. 1019 (2012) (In 2013, the District court denied Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed); *see* Madison v. Comm'r Ala. Dep't of Corrs., 761 F. 3d 1240 (11th Cir. 2014) (Two years later, the Mobil County Court denied certiorari review and subsequently denied Madison's petition for a rehearing).

the Mobile County Circuit Court and the Alabama Supreme Court, requesting that the courts stay his execution. Madison argued that due to a number of severe strokes, he had suffered physical and cognitive impairments, and as a result, was unable to recall the commission of the crime for which he was to be executed.[11] The Supreme Court of Alabama denied the request and ordered that Madison's execution date be set for May 2016.[12]

In March of that year the Mobil County Circuit Court determined that Madison had successfully made a preliminary showing of incompetency.[13] The court ordered that Madison be evaluated by Dr. Karl Kirkland, a court-appointed expert, and a hearing was scheduled for the next month. In light of Dr. Kirkland's, and the defense's expert Dr. Goff's ', testimony, the court found in favor of the State.[14] The court noted that it accepted Dr. Kirkland's finding that Madison had a rational understanding of the link between the crime and his execution, and the court denied Madison's petition.[15]

In May 2016, Madison filed a petition for a writ of habeas corpus, and a motion for stay of execution in the United States District Court for the Southern District of Alabama; both were denied.[16] However, on appeal, the Eleventh Circuit Court of Appeals granted Madison's motion for a certificate of appealability and stayed the execution. After briefing and oral arguments the court granted the habeas corpus relief finding that Madison was not competent to be executed because he did not have a rational understanding of the link between the crime and his scheduled execution.[17]

The Unites States Supreme Court reversed the Eleventh Circuit Court's grant of habeas corpus relief, holding that the underlying question was not appropriately presented.[18] The State subsequently sought and received an expedited execution

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[11] Madison, 620 So. 2d at 65.

[12] *See,* Ivana Hrynkiw, *Execution date set for Alabama death inmate, convicted in 1985 Mobile Police officer's slaying*, AL.COM (Nov 22, 2017), https://www.al.com/news/mobile/2017/11/execution_date_set_for_death_r.html.

[13] Madison v. Alabama, 138 S. Ct. 943 (2018), *petition for cert. filed*, at 8 (S. Ct. Jan. 18, 2018) (No. 17-7505).

[14] *Id.* at ii.

[15] Madison, 138 S. Ct. at 943.

[16] *Petition for cert. filed*, supra note 13 at 14.

[17] Madison, "851 F. 3d at 1190.

[18] Dunn v. Madison*,* 138 S. Ct. 9, 12 (2017).

date for Madison. Madison was scheduled to be executed on January 25, 2018.[19]

Madison again challenged his competency by filing a petition pursuant to Alabama Code Section 15-16-23 in the Mobile County Circuit Court.[20] Madison argued that the circuit court was required to reassess Madison's competency claim considering the degenerative effects of Madison's vascular dementia.[21] Additionally, Madison presented a new fact, Dr. Kirkland, the expert whom the circuit court relied on for their determination that Madison was competent, was suspended from practicing psychology. Ultimately, that court found for the State, holding that Madison was competent to be executed.

In 2018 Madison petitioned the United State Supreme Court for a writ of certiorari. The Court granted the writ and considered the following questions:

> First, "Consistent with this Court's decisions in *Ford* and *Panetti*, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense?"; and second, "Do evolving standards of decency and the Eighth amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple stokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted to understanding the circumstances of his scheduled execution?"[22]

EIGHTH AMENDMENT JURISPRUDENCE

A. Policy Underpinnings of the Eighth Amendment

The Eighth Amendment requires that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] It is no secret that Eighth Amendment jurisprudence is muddied with differing views about the scope of constitutional protections against cruel and unusual punishment. In the landmark case, *Gregg v. Georgia*, the Court held that

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19 *Petition for cert. filed* supra note 13, at i.
20 Madison v. Dunn, 2016 U.S. Dist. LEXIS 61581 at 2–3 (S.D. Ala 2016).
21 *See id.*
22 Madison,139 S. Ct. at 721.
23 *See* U.S. CONST. amend. VIII.

punishment is cruel and unusual where it is "excessive."[24] Punishment is excessive, and thus a violation of the Eighth Amendment, where first, the punishment does not contribute to acceptable penal goals of punishment, and second, the punishment is disproportionate to the crime.[25] However, after *Gregg*, a number of Supreme Court Justices rejected this two-prong standard for one more general: punishment is cruel and unusual where, after an "objective examination," it is found to violate "evolving standards of decency."[26] Under this standard, courts are to consider societal principles and controlling precedents in order to determine whether the imposition of the death penalty comports with the Eighth Amendment protections. Currently, the constitutionality of the death penalty is not determined using one or the other standard, but by a consideration of both jointly.

The first principle under excessiveness, as articulated in *Gregg*, rests on the notion that there are acceptable policy goals that justify capital punishment.[27] These goals generally fall under two umbrella categories: utilitarian goals, which include deterrence, incapacitation and rehabilitation; and deontological goals, which include most notably, retribution. With respect to death penalty jurisprudence, deterrence and retribution are most commonly regarded as controlling goals,[28] so for the purposes of this paper, I focus only on those two.

Retribution relies on the backward-looking principle of moral desert[29] and focuses on the individual offender. As Dan Markel mentions, "deserved punishment lies at the center of virtually all theories of retribution."[30] The most notable of these retributive theories is desert-based retribution, and communicative retribution. Desert-based retributivists consider only whether a

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[24] Gregg v. Georgia, 428 U.S. 153, 158 (1976).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Kennedy v. Louisiana, 554 U.S. 407, 412 (2008).

[29] *See* Peter Arenella, *Convicting The Morally Blameless: Reassessing The Relationship Between Legal And Moral Accountability*., 39 UCLA L. REV. 1511, 1534 (1992) (Moral desert contemplates that punishment is just where it is based on what an individual offender deserves).

[30] Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 447 (2009).

person is deserving of punishment, and the quantum of punishment is set according to the person's culpability and the harm caused.[31] In contrast, communication-based retributivists argue that retribution is an "act of communicative behavior." [32] However, the *kind* of message that retribution is meant to communicate is largely confused in discourse. For Robert Nozick, the goal of the message "is to connect the wrongdoer with correct values, and the wrongdoer's acceptance of the message is unnecessary."[33] Markel, on the other hand, argues that capital punishment coveys three messages to the offender. First, the offender is morally responsible for his or her choice to engage in an unlawful act.[34] Second, the offense has violated the "norm of equal liberty," which protects the freedom of the people against such unlawful acts. Third, punishment "communicates to the offender 'the notion of democratic self-defense;' the offender has 'usurp[ed] the sovereign will of the people' by challenging their decision-making structure, and punishment communicates society's intention to protected itself against such rebellions.'" [35]

In an attempt to synthesize these principles, the Supreme Court has adopted a two-prong model of retribution.[36] The first prong, the "moral desert prong," requires that the offender be morally blameworthy.[37] This is a necessary, but insufficient condition to find the retributive goal of punishment is met. The second prong, the "the communicative prong," requires that the punishment send a message to the offender.[38] While unclear as to what the nature of the message is, the ban on executing the insane follows this model and provides some insight as to the nature of receipt of the message. The Court has held that "a death sentence serves a retributive end only when (a) the defendant merits to be punished by death, *and* (b) the defendant is capable of receiving the communication the punishment (death) is intended to send."[39] It is clear that communication prong is based on the principle that the offender is morally blameworthy,

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[31] Pamela A. Wilkins, *Competency for Execution: The Implications of A Communicative Model of Retribution*, 76 TENN. L. REV. 713, 748 (2009).
[32] *Id* at 749.
[33] *Id* at 750.
[34] *Id.*
[35] *Id.*
[36] *See id* at 752.
[37] *See id* at 753.
[38] *See id* at 755.
[39] See *id.*

and his or her act is punishable as such. This is distinct, however, from punishment as an end of community expression. As Emile Durkheim argues, "punishment expresses society's commitment to certain moral order that the crime violated."[40] Where the retributive goal communicates to the offender the shameful nature of his or her actions, for which he or she is responsible, "community expression" is founded in utilitarian grounds, where the message being communicated is one of public outrage at the offender's crime.[41] Likewise, community expression is a facet of evolving standards of decency, to be discussed later.

The second goal of general deterrence is based on utilitarian principles that consider the future benefits that punishment will have on the community.[42] Specifically, utilitarianism contemplates that punishment is beneficial to the public generally and contributes to social ends such as societal cohesion.[43]

Deterrence also encompasses theories of communication, albeit in a different way than retribution. Where retribution communicates to the offender that he or she is blameworthy and deserving of punishment, capital punishment realizes its deterrent goal when it communicates to the *public* that there are certain acts that are so heinous and wrong that any person who commits these acts will be punished to the fullest extent.[44] In this way, deterrence is communicative as an indirect reinforcement of social norms. Put differently, certain acts are so against morality and social values, that the administration of the death penalty is based on the community's condemnation of those acts.[45]

Under the standard in *Gregg*, the fact that capital punishment

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[40] *See id* at 751.

[41] *See* Robert Hoag, *Capital Punishment,* INTERNET ENCYCLOPEDIA OF PHILOSOPHY, (last visited March 22, 2020), https://www.iep.utm.edu/cap-puni/

[42] *See* Mark C. Stafford, *Deterrence Theory: Crime,* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (Second Edition), (last visited March 22, 2020) https://www.sciencedirect.com/topics/computer-science/deterrence-theory.

[43] *See id.*

[44] *See* Wilkins, *supra* note 31, at 748.

[45] *See* Samuel Donnelly, *Capital Punishment: A Critique of The Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L. J. 1, 18 (1992).

complies with these deterrence and retributivist goals is a necessary but an insufficient condition to find a punishment complies with Eighth Amendment's Cruel and Unusual Punishment Clause.[46] Under the *Gregg* standard, the punishment must also be proportionate to the crime. This requires "comparing the gravity of the offense . . . with the harshness of the penalty."[47] The test for proportionality requires a review of the circumstances surrounding a crime, public attitudes, state practices, legislative acts, and jury verdicts.[48]

Proportionality generally diverges into two categories: comparative and traditional. "Comparative proportionality" requires a determination as to whether a sentence is disproportionate compared to the penalty imposed in "similar cases."[49] In contrast, "traditional proportionality" has been "used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime."[50] This traditional approach is tautological in nature, as it refers us once again to the two-prong retributive theory: the approach "seeks to determine the intrinsic death-worthiness of a category of crimes or a class of defendants without regard to consistency or evenhandedness."[51]

As previously mentioned, the deterrent and retributive goals of capital punishment are not considered in isolation when the constitutionality of the imposition of the death penalty is being questioned. There are a number of considerations to be viewed objectively, including contemporary values, societal standards, and controlling precedents. Over the years the Court has been asked to determine whether the death penalty is appropriate in a number of different contexts. A review of those cases is necessary to understand the scope in which the Supreme Court is willing to impose the death penalty.

B. General Eighth Amendment Caselaw

The constitutionality of the death penalty was first considered

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[46] *See* Gregg v. Georgia, 428 U.S. 153, 158 (1976).

[47] Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey),* 64 ALB. L. REV. 1161, 1191 (2001).

[48] *See id* at 1191-92.

[49] Bruce Gilbert, *Comparative Proportionality Review: Will the Ends, Will The Means,* 18 SEATTLE U. L. REV. 593 (1995).

[50] *Id.*at 623

[51] *Id.*

by the United Stated Supreme Court in *Furman v. Georgia*.[52] Furman was charged with murder when the gun he was carrying accidently discharged, killing a resident of the home he was burglarizing.[53] He was subsequently convicted and sentenced to death. The Supreme Court was asked to decide whether the death penalty, imposed on a defendant who accidently committed murder, violated the Eighth Amendment's ban on cruel and usual punishment.[54] The court decided it did, holding that the death penalty had been imposed arbitrarily and discriminatorily, noting however, that the death penalty is not cruel and unusual, per se.[55]

Four years later, in *Gregg v. Georgia*, the Court was again asked to determine the constitutionality of the death penalty imposed on a defendant convicted of robbery and murder.[56] This time, the court held that the death penalty is not unconstitutional in extreme cases where a murder is committed under aggravating circumstances. Alternatively, the death penalty will violate the Eighth Amendment when is not proportional to the crime (i.e. where it is "excessive" in relation to the crime).[57] The decisions of *Furman* and *Gregg* set the groundwork for death penalty jurisprudence that centers around whether the imposition of the death penalty is proportional to the crime committed. These cases and the cases that followed set procedural safeguards in place for selecting who will be executed so that "executions are not handed out 'wantonly' or 'freakishly.'"[58]

Subsequent cases like *Woodson v. North Carolina*,[59] *Coker v. Georgia*,[60] and *Enmund v. Florida*,[61] expand on the principle of proportionality, and set the precedent for cases in which the death penalty is "categorically disproportionate to the crime."[62]

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52 *See* Furman v. Georgia, 408 U.S. 238, 239 (1972).
53 *See id.*
54 *See id.*
55 *See id.*
56 *See* Gregg v. Georgia, 428 U.S. 153, 161 (1976).
57 *See id* at 233.
58 Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFFALO L. REV. 329, 343–44 (1995).
59 *See* Woodson v. North Carolina, 428 U.S. 280, (1976).
60 *See* Coker v. Georgia, 433 U.S. 584 (1977).
61 *See* Woodson, 428 U.S. 280.
62 Vick, *supra* note 58, at 343.

The Court in *Woodson* held that imposing a *mandatory* death sentence for murder is a violation of the Eighth Amendment protection against cruel and unusual punishment.[63] The Court held that mandatory death sentences fail to take into account individual characteristics and specific circumstances which are a "constitutionality indispensable part of the process of imposing the ultimate punishment of death."[64]

In *Coker*, the defendant was convicted, inter alia, of rape and sentenced to death.[65] The Court found the death penalty disproportionate to the charge of rape,[66] and held that rape does not meet the same level of moral depravity as murder. In its discussion of evolving standards of decency, the Court considered the fact that Georgia was the only state that imposed the death penalty for rape and concluded that the attitudes of the Legislature reflected a turn away from the imposition of the death penalty for crimes other than murder.[67]

In *Enmund*, the Court was asked whether the death penalty violated the Eighth amendment when imposed on a defendant convicted of first-degree murder who did not take a life and did not attempt to or intend to take a life, but drove the get-away car following a murder.[68] Following the individualized approach in *Woodson*, the Court considered relevant facts relating to the defendant's culpability and the circumstances of the specific case, and held that under the circumstances the imposition of the death penalty was excessive and disproportionate to the crime.[69]

In subsequent cases, the Supreme Court continued to expand on appropriate impositions of the death penalty. Although the Court has been reluctant to offer explicit procedural safeguards for States employing the death penalty, relevant precedents have made it clear that the Eighth Amendment requires States to limit the pool of defendants eligible for the death penalty.[70] This is

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63 *See* Woodson, 428 U.S. at 305.

64 Evan Mandery, CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION, JONES & BARTLETT PUBLISHERS, 200 (Feb 28, 2011).

65 Coker, 433 U.S. at 586.

66 *See id* at 592.

67 *See id* at 592; *see also* Woodson, 428 U.S. 280; *see also* Enmund v. Florida, 458 U.S. 782 (1982).

68 *See* Enmund, 458 U.S. at 791–92.

69 *See* Vick, *supra* note 58, at 347.

70 *See* Thompson v. Oklahoma, 487 U.S. 815, 818 (1988) (where the court refined the pool of defendants eligible for the death penalty to those over the age of sixteen); *see also* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (where the court held that the execution of defendants with "mental retardation" was a violation

done by considering the principles of proportionality, the penological goals of punishment, the nature and circumstances of the crime, and most notably, the defendant's individual characteristics and mental state.

C. Caselaw Specific to the Application of the Death Penalty

It has clearly been established that the constitutionality of the death penalty requires the court to take into account a number of considerations specific to the individual offender. Most important in Madison's case is the defendant's mental state, and two key cases set the framework for dealing with individuals with diminished mental capacities.

i. Ford v. Wainwright

In *Ford v. Wainwright*, Alvin Ford was convicted of murder and sentenced to death.[71] Ford did not display signs of mental illness during the commission of the crime, during the trial, or at sentencing.[72] However, after a number of years Ford began exhibiting changes in behavior. He became obsessed with the Ku Klux Klan and claimed to be the target of a conspiracy designed to force him to commit suicide.[73] Ford also believed that there were a number of hostages being held in the prison and wrote to the Florida Attorney General assuming authority over the "hostage crisis," and claiming that he had fired prison staff and appointed nine new justices to the Florida Supreme Court.[74]

Ford subsequently petitioned the Governor, acting under the authority of Florida law, to conduct a competency hearing. Three psychiatrists where appointed to determine "whether Ford had the mental capacity to understand the nature of his death sentence and why it was imposed on him."[75] The panel interviewed Ford for 30 minutes before determining *inter alia* that he was both aware of the nature of his impending death, and

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of the Eighth Amendment because they are "categorically less culpable than the average criminal.").

71 *See* Ford v. Wainwright, 477 U.S. 399, 401 (1986).

72 *See id.*

73 *See id* at 402.

74 *See id* at 402.

75 *See id* at 412.

the reason for his sentence.[76] Based on psychiatrists' findings, the Governor signed a death warrant for Ford's execution.[77]

Ford later filed a writ of certiorari in the United States Supreme Court, [78] asking the Court to decide whether the execution of an insane person was prohibited by the Eighth Amendment and Due Process Clause, and whether the court erred when it declined to hear Ford's petition.[79] The Supreme Court answered "yes" to both questions; holding that the execution of an insane person is a violation of the Eight Amendment and Due Process Clause, and the lower court erred in declining to consider Ford's petition.[80] The case was reversed and remanded for further proceedings.

Justice Marshall, delivering the opinion of the Court, began by noting that the bar on a state's ability to execute an insane person finds authority in the Eighth Amendment's provision against cruel and unusual punishment, which aims to protect the principles of fundamental human dignity.[81] The Court then offered several justifications for the rule that the execution of an insane person is a violation of the Eighth Amendment and Due Process Clause.[82]

The Court first considered common law tradition and heritage, and found that the execution of an insane person has long been identified as "savage and inhumane,"[83] reasoning that an insane person, by virtue of his mental incapacity, cannot aid in his own defense which is an inherent requirement within the concept of due process.[84] Further, the Court emphasized that there is "virtually no authority condoning the execution of the insane at English common law."[85]

The ban on executing an insane person is further justified according to modern standards of decency, which consider

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76 *See id* at 404.

77 *See id.*

78 *See id* at 404 (Following a petition in the Federal District Court, which was denied, and the denial affirmed by the Court of Appeals.).

79 *See id.*

80 *See id.*

81 *See id.*

82 *See generally id* at 406–13.

83 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24–25 (1765-1769).

84 *Id.*

85 *See* ROGER J. R. LEVESQUE, THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES 623 (2006) (quoting Justice Rehnquist).'"

objective evidence of contemporary values.[86] The Court held that the restriction on states' power to execute an insane person is justified, *inter alia*, by an aim to protect the dignity of society from the "barbarity of exacting mindless vengeance."[87] Moreover, the fact that no state permits the execution of an insane person is evidence of a nation-wide disapproval of the practice.

Finally, the Court held that the penological justifications are not met when the death penalty is imposed on an insane prisoner. Capital punishment's retributive force "depends on the 'defendant's awareness of the penalty's existence and purpose,"[88] and the retributive goal is compromised where a person is unaware of the connection between his crime and the imposition of the death penalty.[89]

The holding in *Ford* established another pool of defendants who are ineligible for the death penalty– those who are so mentally impaired that they are unaware of the connection between the crime and the punishment imposed.[90] Should a person fall within this group, he or she will be deemed incompetent to be executed and execution with be barred under the Eighth Amendment.

ii. Panetti v. Quarterman

Years later, in *Panetti v. Quarterman*, the Supreme Court expounded the *Ford* standard when faced with a similar question, whether "the Eighth Amendment permit[s] the execution of an inmate who has a factual awareness of the State's stated reason for his execution, but who lacks, due to mental illness, a rational understanding of the State's justification."[91] The Court held that mere awareness of the link between the crime and punishment is not enough to establish competency under the *Ford* standard.[92] Rather, a person is competent to be executed when they have a *rational understanding* of the connection between the crime and

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86 *See* Ford, 477 U.S. at 404.
87 *See id* at. 410.
88 *See id* at 421.
89 *See id.*
90 *See id* at 426.
91 See 4 G. LARRY MAYS & L. THOMAS WINFREE, ESSENTIALS OF CORRECTIONS 319 (2008).
92 *See* Ford, 477 U.S. at 956.

punishment.[93]

In 1995, Scott Panetti was charged with murdering his wife's parents and sought to represent himself at trial.[94] The court ordered a psychiatric evaluation which found that he suffered from "fragmented personality, delusions, and hallucinations."[95] Panetti's wife also testified that on one occasion, he claimed that their home was being possessed by the devil and began engaging in rituals.[96] Despite the evidence, the Court found Panetti competent to stand trial where he was subsequently found guilty and sentenced to death.[97]

Panetti appealed to the District Court, arguing that the *Ford* competency standard requires that the defendant have a "rational understanding" of the reasons for his execution, and the link between the crime and punishment.[98] The court disagreed, holding "awareness," as used in *Ford*, is not synonymous with "rational understanding,"[99] and competency only requires that a prisoner "is *aware* that he [is] going to be executed, and why he [is] going to be executed."[100]

The Court of Appeals for the Fifth Circuit affirmed, holding that under Fifth Circuit precedent, Panetti was competent to be executed because he "knew the fact of his impending execution and the factual predicate for it."[101] It further held that evidence of psychological dysfunction is irrelevant to competency because whether or not that dysfunction results in petitioner's "fundamental failure to appreciate [the] connection between the petitioner's crime and his execution" is immaterial, and having a rational understanding of the logical connection between the two is unnecessary under the competency standard.[102]

Panetti subsequently petitioned the United States Supreme Court on a writ of certiorari to decide whether the lower court misapplied the competency standard and whether the Eighth Amendment permits the execution of a person "whose mental

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93 *See id.*

94 *See* ETHICAL CONSIDERATIONS AND THE INTERSECTION OF PSYCHIATRY AND RELIGION 235 (John R. Peteet et al. eds., 2018).

95 See Panetti 551 U.S. at 936.

96 *Id.*

97 Panetti v. State, Tex. Crim. App. Unpub. Lexis 1082 at 1 (Crim. App. 2014).

98 Panetti v. Dretke, 448 F.3d 815, 818 (5th Cir. 2006).

99 *Id* at 821.

100 *Panetti v. Quarterman,* 477 U.S. at 405 (emphasis added).

101 *See id* at 958.

102 *Id.*

illness deprives him of the capacity to understand that he is being executed as a punishment for a crime."[103] The Court held that although the competency standard set out in *Ford* did not explicitly require that the defendant have a "rational understanding" of the link between the crime and punishment, the standard employed by the lower court was unduly restrictive.[104] The decision was reversed and remanded, and it was held that requiring a mere awareness of the like between the crime and punishment improperly narrows the competency standard.[105]

In its decision, the Court reasoned that, in failing to consider evidence of Panetti's psychological disfunction, the lower court mischaracterized the competency standard under *Ford*. Under the correct *Ford* standard, evidence of psychological disfunctions is relevant because it speaks to whether a defendant has such an impaired perception of reality, such that he cannot reach a "rational understanding of the State's reason for his execution."[106] The Court concluded by asserting that it did not intend to set a rule governing all competency questions, rather, it only attempted to resolve issues of competency where an inmate's mental state is "so distorted that he does not have a rational understanding of the connection between his crime and the retributive reasons for the imposition of the death penalty."[107]

THE STRUCTURE OF THE PARTIES' ARGUMENTS BEFORE THE UNITED STATES SUPREME COURT

Following the Circuit Court's judgment, Madison petitioned the United States Supreme Court for a writ of certiorari. The petition was granted and Madison asked the Court to determine whether, consistent with the Eighth Amendment and the decisions in *Ford* and *Panetti*, "the State may execute a person whose mental state leaves him without memory of his crime."[108] Madison argued that the answer should be "no."

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[103] *Id* at 954.
[104] *Id* at 956.
[105] *Id* at 962.
[106] *Id.* at 957.
[107] *Id* at 959.
[108] *See* Brief for Petitioner" at iii, Madison v. Alabama 138 S. Ct. 943 (2018) (No. 17-7505).

A. Madison Brief:

Madison began by asserting the Eighth Amendment requires that the death penalty comport with the protections of fundamental human dignity, and should be limited to only those who possess the most extreme culpability.[109] Madison explained that it has been uniformly held that where an individual does not possess full culpability, the penological goals of the death penalty are not satisfied. Where the penological goals of capital punishment are not met, the death penalty must be barred under the Eighth Amendment protection against cruel and unusual punishment.[110]

Using the *Ford/Panetti* standard, Madison argued that his vascular dementia renders him unable to rationally understand the link between his crime and punishment, and because he cannot rationally understand the link between the crime and punishment, he lacks the requisite culpability to be eligible for the death penalty.[111] Madison argued that as a result, he falls into a category of people for whom execution should be barred because its imposition would not advance the deterrent or retributive goals of capital punishment.[112] Madison relied on the decision in *Ford* to further support his position, noting that the Court recognized that where a person is incompetent, his execution provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment.'" [113]

Madison concluded by detailing how scientific and technological advancements led to increased confidences in the diagnoses of mental disorders that merit protection under the Eighth Amendment. Whereas before, the Diagnostic and Statistical Manual of Mental Disorders[114] diagnosed vascular dementia based on observable cognitive deficits and lab evidence, the criteria is now based on "neuroimaging as a basis for researching a more conclusive diagnosis"[115] Further, technological advancements like magnetic resonance imaging have increased the validity of these diagnosis. Madison argued that these

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109 *See* Brief for Petitioner *supra* note 108, at"17.
110 *See id.*
111 *Id* at 25.
112 *Id* at "27.
113 *Id* at "28.
114 *Id* at 31.
115 *See id* at 31".

medical and technological advancements gave weight to Madison's claim that his vascular dementia impedes his ability to rationally understand the link between his crime and impending execution.[116]

B. Alabama's Brief:

The State responded by first arguing that the lower court's decision was, in fact, consistent with the holdings in *Ford* and *Panetti*, and Madison could not be found incompetent under the standard set out in these cases. The State asserted that a mere diagnosis of a mental disorder is insufficient to prove incompetency. Instead, it must be shown that the mental disorder "render[s] a subject's perception of reality so distorted that he should be deemed incompetent."[117] While the State conceded Madison has experienced a cognitive decline over the years, it was argued that he "has not experienced delusions, psychosis, or confusion about the meaning of the crime, punishment or death" and is thus able to rationally understand his [fate].[118] The State argued that Madison's brief assumed that because he has dementia, he is incompetent to be executed, and that formulation of the rule mischaracterizes the *Ford/Panetti* standard.[119] Instead, Madison was required to show that his dementia renders his perception of reality so distorted such that he does not have the mental capacity to understand his punishment. The State argued that the lower court correctly determined that Madison has a rational understanding *despite* his dementia, and the fact that his vascular dementia renders him unable to remember the crime is irrelevant to the competency question.[120]

Further, the State reasoned that the penological interests in executing murderers are furthered *even if* the person being executed cannot remember committing a crime.[121] The retributive goal is furthered because the backward-looking

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116 *Id.*

117 *See* Brief for Respondent at 19, Madison v. Alabama 138 S. Ct. 943 (2018) (No. 17-7505). '

118 *Id.*

119 *See id* at 21.

120 '*See id* at 23.

121 *See* Brief for Respondent *supra* note 117, at '34.

principle is concerned only with the offender's culpability at the time the crime was committed.[122] Since Madison was fully culpable at the time he committed the killing, the communicative function of retribution is furthered.[123] Moreover, just because Madison cannot remember the crime does not mean he is unable to recognize the severity of the offense and the gravity of the crime.[124]

The State further explains that the goal of deterrence is met in this case. The goal of deterrence is not met when a person's mental impairment impedes his ability to rationally understand because it sets no example for others, nor does it satisfy the goal of specific deterrence. "If anything," the State argued, "extending the doctrine of *Ford* and *Panetti* to Madison's amnesia claim would diminish the general deterrent value of capital punishment by interposing between conviction and execution a requirement that a prisoner independently; remember committing [a] crime."[125]

Finally, the State argued that Madison's proposed extension of *Ford* and *Panetti* would lead to false claims and abuse. The new standard would put unwarranted weight on medical diagnoses which are subject to different opinions and ever changing, noting that the "diagnosis of cognitive disorders is not nearly as straightforward as Madison claims."[126] Since vascular dementia exists on a spectrum, its effects vary and are difficult to validate. The new standard would also open the floodgates for false pleas of amnesia; by virtue of the fact that dementia is difficult to verify, it would become matter of belief between medical personnel and prisoners alleging they are incompetent to be executed.

C. Madison's Reply Brief:

In his reply, Madison insisted that the State misunderstood the arguments set out in the initial brief, and mistakenly characterized Madison's competency claim as one predicated on whether a prisoner who cannot remember his crime can be

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[122] *See id* at 35.'

[123] "'" *See id* at 36 ("*Panetti* suggests that retribution has a communicative function that is compromised when a prisoner's 'mental illness obstructs a rational understanding of the State's reason for his execution.")."

[124] '*See id* at 37.

[125] *See* id at '33.

[126] '*See id* at 42.

deemed competent to be executed.[127] Instead, the correct formulation of the question asks whether Madison can be found competent *based on* his verified case of vascular dementia.[128] Madison described that his vascular dementia "has been measured by every identifiable metric– physical, intellectual, and phycological"[129] and it renders him unable to understand or appreciate the circumstance of his execution. Further, this mental disability has left him "profound[ly] disoriented and confus[ed]."[130] These facts place him in a category of prisoners for whom execution would constitute a 'uniquely cruel punishment.'"[131]

Madison substantiated this claim by describing how this disorientation and confusion has manifested. Both the State's expert and Madison's expert concluded that Madison is only *partially* oriented to time and place and had some difficulty understanding the reason why he was being evaluated.[132] He is unable to rephrase simple sentences, to recite the alphabet past the letter G and to understand that his mother and brother have passed away, saying that he was going to live with his mother in Florida after he is released from prison.[133] Madison is also able to understand that he has a toilet in his cell but often urinates on himself, complaining that "no one will let me out to use the bathroom."[134] Madison argued the State overlooked the undisputed evidence regarding his physical and cognitive deficits, and merely suggested the fact that Madison cannot remember his crime is irrelevant to the competency question.

Madison continued on to address another claim made by the State adding, "individuals with vascular dementia in the class of people for whom execution would constitute cruel and unusual punishment does not alter the analysis established in *Ford* and *Panetti*."[135] Madison conceded that he was not requesting to be protected from execution based solely on a claim of amnesia.

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127 *See* Brief for Petitioner *supra* note 108, at 5.

128 *See id* at 8. '

129 *'See id* at 5.

130 *"See id* at 7.

131 *Id* at 5.

132 "*See id* at 6.

133 *"See id* at 7.

134 *See id* at 8. "

135 *"Id* at 9 (arguing that Madison does not have a rational understanding of his crime by virtue of his dementia).

Instead, the inquiry is whether he is incompetent under the *Ford* and *Panetti* standard considering he has a severe neurological disorder that renders him unable to rationally understand his current circumstances. Based on the expert testimony as well as medical and technological advancements, Madison argued that the effects of his vascular dementia are verifiable, legitimate, and render him unable to rationally understand his crime.[136]

Madison concluded that finding him incompetent would not infringe on the State's power to punish criminals, but instead "enforce[ ] the Community's understanding of human dignity in the context of punishment."[137] The State had put undue weight on the fact that Madison must be punished because the victim of his crime was a law enforcement official and he did not have a diminished capacity at the time he committed the crime. However, the question of whether Madison is competent to be executed had little to do with culpability. "Rather, this case has everything to do with how we treat individuals who have been rendered incapacitated by a mental disorder, development, or disability."[138] Similarly, the holding in *Ford* and *Panetti* did not turn on the nature of the crime, and the facts of the case were irrelevant to the inquiry of whether a person was competent for Eighth Amendment purposes.[139] Finally, Madison argued extending the holding of *Ford* and *Panetti* to those inmates with vascular dementia would not render the penological goals of the death penalty moot, nor would it add an extra step for the court to have to determine whether an inmate is incompetent for execution purposes because *Ford* and *Panetti* already required or "interposed" a requirement of competence.[140]

THE SUPREME COURT DECIDES . . . OR DOES IT?

Justice Kagan delivered the opinion of the Court and began by bringing attention to two issues relating to the application of *Panetti*. The first issue is whether *Panetti* "prohibits executing Madison merely because he cannot remember his crime."[141] Second, whether Madison can be executed because he suffers from dementia and not psychosis. Citing *Panettii*, the Court

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136 " *See id* at 11.
137 *Id* at 13."
138 *See id* at 15.
139 *"See id* at 15.
140 *See id* at 17."
141 Madison, 139 S. Ct. at 726 (2019).

framed the correct standard where a "'prisoner's mental state is so distorted by a mental illness' that he lacks a "'rational understanding of the State's rationale for execution,'"" execution is barred.[142]

Interestingly, both parties agreed that the standard itself answers both questions. A person merely lacking memory of his crime does not bar his execution because he may still be able to rationally understand why the State seeks to execute him.[143] The Court emphasized that what matters is whether a person has a *rational understanding*, and any illness that diminishes one's capacity to understand will fall within the standard.[144]

In its analysis, the Court considered the implications of imposing the death penalty on a person who suffers from memory loss but has an otherwise full cognitive function. The Court then considered imposing the death penalty on a person who has a mental disorder that renders them unable to rationally understand his crime. Without deference to the state court, the Court posited the question, "whether the failure to remember committing a crime alone is enough to prevent a State from executing a prisoner," to which the Court responded it is not. Using *Panetti*, the Court explained the standard requires a "rational understanding" and loss of memory about committing a crime does not, without more, meet the standard. The Court added, "but such memory loss may factor into the 'rational understanding.'" Instead, the analysis which *Panetti* demands is whether a person has a cognitive impairment that renders him or her *unable* to rationally understand the State's reasoning for execution.[145] Put differently, if the *reason* one has memory loss also prevents a person from a rational understanding, then the standard will be satisfied.

The Court then addressed the issue in a different way, whether dementia is the same as psychosis, or psychotic delusions, under *Ford* and *Panetti*. The established formulation of the rule the Court made clear, answers this question as well. The standard is satisfied when the *effects* of a mental disorder causes a person the inability to rationally understand why the state is seeking

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142 *Id* at 723.
143 *See id* at 721.
144 *Id* at 727–28.
145 *Id* at 726.

execution. The mere diagnosis of a particular illness is insufficient to satisfy the standard. It follows then that the Eighth Amendment justifications for execution are not furthered when a prisoner does not "comprehend why he has been singled out to die."[146] A judge must look beyond a particular diagnosis and understand the effects it has on a person. In effect, a person may be diagnosed with dementia, and if that dementia results in the inability to comprehend why the state seeks to execute him or her, that person is incompetent to be executed under the *Ford/Panetti* standard.

The Court held the only question left, and the question which it must decide, "is whether Madison's execution may go forward based on the state court's decision that Madison is competent to be executed because he does not fall within the meaning of the *Panetti* rule."[147] The Court explained that it has no option but to base its opinion on one sentence of explanation from the lower court, that Madison "did not provide a substantial threshold showing of insanity sufficient to convince this Court to stay the execution."[148] Admittedly, the Court was unsure about whether the state court relied on the correct view of the law. If, as the Court explains, the word "insanity" referred to a delusional disorder, then an error was made by the lower court. However, because the state court made no mention of what *kind* of insanity requires a stay of execution, the Court decided the question based on the likelihood that the state court committed this error.[149] It explained that the likelihood of this error is "heightened by the State's emphasis . . . that 'Madison was not delusional or psychotic' and that 'dementia' could not suffice to bar his execution."[150] The Court further held that the state court's previous decisions had also been unclear about whether the court "realized that persons suffering from dementia could satisfy the *Panetti* standard."[151]

The Court concluded by explicitly noting that it does not express any view with respect to the question of whether Madison can reach a "rational understanding" of why the State wants to execute him. "The state court . . . can evaluate such matters

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146 *See id* at 729.
147 *Id.*
148 *Id.*
149 *See id* at 729–30.
150 *Id.*
151 *Id* at 731.

better than we."[152] The only issue this Court addressed, is whether Madison's execution may go forward based on the state court's decision. Based on the lower court's limited explanation, and for the reasons set forth above, the Court vacated the judgment and remanded the case for further proceedings.[153]

Justice Alito, along with Justice Thomas, and Justice Gorsuch, disagreed and argued that the majority's decision "makes a mockery of our Rules."[154] The dissent contended that Madison's initial brief requested certiorari on the question of whether Madison is competent to be executed because he cannot remember his crime, and only when the court granted certiorari did Madison change the question to whether he may be executed because his dementia falls within the *Ford/Panetti* standard.[155] At no point, the dissent argued, did Madison's brief discuss the question now presented for review, and it violates the rule that "[only] the question set out in the petition, or fairly included therein, will be considered by the Court."[156] The dissent concluded, that "Petitioner has abandoned the question on which he succeeded in persuading the Court to grant review, and it is highly improper for the Court to grant him relief on a ground not even hinted at in his petition."[157]

WHAT THE COURT DID NOT SAY

This case is not just about the competency to be executed standard. Rather, embedded within it are strong undertones of race and mental illness. Troubling is the fact that neither the parties, nor the courts, have addressed these underlying issues that undoubtedly have a significant effect on the decisions in this case. Under the guise of a competency question, these proceedings illustrate the nonexistent rights of a black inmates, and specifically, how black men who shoot white police officers will be mercilessly prosecuted and publicly executed.

Despite the fact that Vernon Madison has suffered a number of severe strokes which both sides concede have left him with

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152 Madison, 139 S. Ct. at 731.
153 *Id.*
154 *Id* (Alito, J. dissenting).
155 *Id.*
156 *Id;. see also* U.S. Sup. Ct. R. 14.1(a).
157 Madison, 139 S. Ct. at 731–32 (Alito, J. dissenting).

severe cognitive disabilities, court after court has found Madison competent to be executed. In each case there is a brief discussion about the facts of the crime that seem to ripple throughout the entire opinion, that is, Vernon Madison is a black man who shot a white police officer who responded to a domestic violence call in 1985. In analyzing the competency question under *Ford* and *Panetti*, the Alabama State court addresses whether the deterrent and retributivist goals of capital punishment are furthered. Following the State's arguments, the courts have continuously been inclined to find the deterrent and retributivist goals of capital punishment are met in this case, considering the "grievous nature" of the crime committed "against one of the State's own agents." The connection between the penological value of capital punishment and the specific facts of the crime itself removes the analysis from one centered on the individual. The punishment is not about Vernon Madison and has little to do with his severe cognitive decline. Instead, the court has time and time again made it clear the nature of the crime has more bearing on the validity of the death penalty than Madison's cognitive decline does.

What if it were a black on black crime? What if it were not a police officer who was the victim? The answer to these questions would have undoubtedly had an effect on the outcome of the case. Perhaps if it were not one of the "state's own" who was killed, Alabama would not have exhausted its judicial resources to send an ill man to death when he is likely to die before the state can carry out his execution. This is a textbook case exemplifying how the death penalty is imposed inconsistently and with little regard for individual human dignity, despite the emphasis on evolving standards of decency.

The Eighth Amendment's protection against cruel and unusual punishment demands an analysis of contemporary standards of decency. The State has argued in all of its briefs that evolving standards of decency do not require the court to stay the execution of a man who cannot remember his crimes.[158] The emphasis on "not being able to remember his crime" rings throughout the State's arguments, despite Madison's attempt to reason with the State that evolving standards of decency analysis encompasses more than his inability to remember the crime.

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[158] *See* State's Reply to Madison's Response to Motion to Dismiss, Madison v. Alabama, 139 S. Ct. 718 (2019) (No. 17-7505); *see also* Brief for Respondent *supra* note 117.

Madison is now 69 years old, has been on death row for over 30 years, has had several severe strokes over the last six years. Madison struggles to orient himself as to time and place, does not have the cognitive ability to use the toilet in his cell (though he can articulate that he has one), and often calls for family members who have been dead for several decades. Still, court after court has found that executing Madison does not upset evolving standards of decency.

In its opinion, the Supreme Court gave a valiant effort in attempting to spoon-feed Alabama the information it needs to decide this case *justly*, without explicitly urging the State Court to find in favor of Madison.[159] In its reexamination of the *Ford/Panetti* standard, the Court gave a number of instances where mental shortfalls may deprive a person of the ability to comprehend why he or she is being executed. It takes up a number of pages to explain to the lower court the *Ford/Panetti* standards should be interpreted liberally, and not as narrowly as the courts before had continued to apply it.

With respect to mental illness, Alabama has continued to allude to the fact that because dementia does not manifest in the same way that psychosis does, dementia does not impede on standards of decency in the same way that psychosis does.[160] It is clear that Alabama and the courts that have found in its favor refuse to accept that *any* severe mental illness should warrant special Eighth Amendment protections. Alabama has been so concerned with executing a person who shot and killed a police officer but at no point have addressed Madison as an individual human being, who suffers from an individually specific mental illness. It's not about Vernon Madison the person, it's about Vernon Madison and the case of the murdered police officer.

This entire series of trials, convictions, appeals, reversals, judgments, and more appeals, has been exhausting but illustrates that Alabama will stop at nothing to get what it wants, to see Vernon Madison be put to death. It is clear that Alabama is only interested in using Madison as a communicative tool to send a message that no matter who you are, no matter what the circumstances, no mercy will be shown to a person who acts against the State, it's judiciary, or its state officers. Despite

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159 *See* Madison, 139 S. Ct. at 730–31.
160 *See id* at 724.

the Court's admirable attempt to give the State court the tools necessarily to justly decide this case, the last 30 years have made it clear that in this case, there is nothing that will persuade a court that Madison should not be executed.