No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MOBILE COUNTY CIRCUIT COURT

PETITION FOR A WRIT OF CERTIORARI

BRYAN A. STEVENSON
COUNSEL OF RECORD
RANDALL S. SUSSKIND
ANGELA L. SETZER
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
bstevenson@eji.org
rsusskind@eji.org
asetzer@eji.org

Counsel for Petitioner

January 18, 2018

CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR JANUARY 25, 2018

CAPITAL CASE

QUESTION PRESENTED

On **January 25, 2018**, the State seeks for the second time to execute Vernon Madison, a 67-year-old man who has been on Alabama's death row for over 30 years. Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last two years, and no longer has a memory of the commission of the crime for which he is to be executed. His mind and body are failing: he suffers from encephalomacia (dead brain tissue), small vessel ischemia, speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain.

The first time Mr. Madison was scheduled to be executed by the State of Alabama, in May, 2016, he challenged his competency in the state circuit court pursuant to the Alabama statute governing competency-to-be-executed claims. After the circuit court denied his claim, Alabama law prohibited any appeal in state court, and Mr. Madison challenged his claim in federal court. In granting habeas corpus relief, the Eleventh Circuit majority found that the evidence undisputably established that Mr. Madison had no memory of the offense, and all three judges, including the dissenting judge, agreed that he was incompetent

to be executed.[1]

This Court reversed the Eleventh Circuit's grant of habeas corpus relief and explicitly declined to address the "merits of the underlying question outside of the AEDPA context," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as that question was not "[a]ppropriately presented." Id. (Ginsburg, J., concurring).

With this Court's opinion in hand, the State sought an expedited execution date, and Mr. Madison's execution was scheduled for January 25, 2018. Mr. Madison once again petitioned the Mobile County Circuit Court for relief under the same statutory provision, this time with new evidence that the court-appointed expert, Dr. Karl Kirkland, whose report the circuit court and this Court had previously relied on in denying Mr. Madison's claim, had been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal pills (including one incident occurring just 4 days after Mr. Madison's 2016 competency hearing) and eventually into drug rehab. Though the State never disclosed these facts to any court – the circuit court, the Alabama Supreme Court[2] or this Court – while at the same time arguing for

[1] See Madison v. Comm'r, Ala. Dep't Of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017) ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

[2] See, e.g., State of Alabama's Expedited Motion to Set an Execution Date at 2, Ex parte Madison (In re Madison v. State), No. 1961635 (Ala. Nov. 8, 2017).

reliance on Dr. Kirkland to deny Mr. Madison's claim, the circuit court again denied relief after a brief hearing and finding that Mr. Madison was competent to be executed. See Appendix A.

With no available appeal in the Alabama state courts, Mr. Madison is again before this Court, this time "outside of the AEDPA context," requesting that his execution be stayed and certiorari be granted to address the following two substantial questions:

1. Consistent with the Eighth Amendment, and 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? See Dunn v. Madison, 138 S. Ct. 9, 12 (Nov. 6, 2017) (Ginsburg, J., with Breyer, J., and Sotomayor, J., concurring).

2. 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 strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

("there are no further impediments to the execution of Madison's lawful sentence").

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INTRODUCTION

On **January 25, 2018**, the State seeks for the second time to execute Vernon Madison, a 67-year-old man who has been on Alabama's death row for over 30 years. Prior to his scheduled execution date in May, 2016, Vernon Madison presented evidence to the Mobile County Circuit Court establishing that in January, 2016, he suffered a thalamic stroke, which, along with several previous severe strokes, led to significant decline in his cognitive and bodily functioning. He now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia. It is undisputed that as a result of this debilitating condition, Mr. Madison has no memory of the capital offense for which he is to be executed.

In the nineteen months since that evidence was presented, Mr. Madison has continued to suffer from vascular dementia, a degenerative disease which is both irreversible and progressive, as well as physical and cognitive decline. And, evidence has emerged that the court-appointed psychologist who determined Mr. Madison to be competent and on whom both the circuit court and this Court relied was suffering from a substance addiction disorder at the time of his evaluation of Mr. Madison, which ultimately led to four (4) felony charges related to illegally obtaining controlled substances and suspension from

the practice of psychology.

On this basis, Mr. Madison again requested that the Mobile County Circuit Court find him incompetent to be executed and stay the execution scheduled for **January 25, 2018**. After a brief hearing, Mr. Madison's petition was denied on January 16, 2018. Alabama law does not allow for an appeal.

The evidence presented to the court below about Mr. Madison's mental condition is not in dispute: Mr. Madison suffers from vascular dementia as a result of multiple, severe strokes and has no memory of the offense for which the State seeks to execute him. Nor is there much dispute about the fact that the only expert to find him competent has now been rendered not credible by virtue of his substance abuse addiction, felony charges, license suspension and entry into rehab. Given the undisputed nature of the evidence, this case presents this Court with the appropriate vehicle to consider the substantial question of whether the execution of a prisoner with no memory of the underlying offense is consistent with the evolving standards of decency inherent in this Court's Eighth Amendment jurisprudence.

STATEMENT OF JURISDICTION

On January 16, 2018, the Mobile County Circuit Court denied Mr. Madison's petition to suspend his execution because he is incompetent to be executed, filed pursuant to Alabama Code § 15-16-23. (Order of Mobile County Circuit Court dated January 16, 2018, attached as Appendix A). Section 15-16-23

provides that the trial court's decision "shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge." See also Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (dismissing appeal of competency-to-be-executed determination because "[t]he statute clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court"); Magwood v. State, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984) ("The trial court's entered order was conclusive. Neither our court nor the Supreme Court has jurisdiction over this matter."); Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1183 n.8 (11th Cir. 2017) ("Section 15-16-23 . . . explicitly precludes review by any other judge or court."). The Mobile County Circuit Court is the "highest court of [Alabama] in which a decision could be had," and jurisdiction is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Vernon Madison was indicted on two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court in Mobile, Alabama. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr. Madison's conviction and sentence after concluding that the Mobile County District Attorney's Office had engaged in racially discriminatory jury selection when it struck all seven qualified African American veniremembers, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison v. State, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987).

At the second trial, Mr. Madison did not deny shooting the victim; rather, his primary defense was that he was not guilty by reason of mental disease or defect. Madison, 620 So. 2d at 65. On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of

death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had engaged in prosecutorial misconduct when it elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At the guilt phase of trial, Mr. Madison again did not deny that he shot the victim, but claimed that he did so in self-defense. Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997). On April 21, 1994, the jury found Mr. Madison guilty of capital murder. It was undisputed at the penalty phase of trial that Mr. Madison suffered from a mental illness marked by paranoid delusions. This mitigating circumstance was established primarily through the testimony of defense expert Dr. Barry C. Amyx. (Pet. Ex. 5 at 714-55.) Dr. Amyx testified that Mr. Madison suffered from a delusional disorder; had experienced persecution delusions since he was a teenager; was out of touch with reality and unable to gather his thoughts; and could not appreciate fully the criminality of his conduct. (Pet. Ex. 5 at 718, 720, 724, 727, 736, 754.) Dr. Amyx explained that Mr. Madison's struggles with mental illness had been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. (Pet. Ex. 5 at 718.) To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications.

(Pet. Ex. 5 at 721.)

Although the State called psychiatric expert Dr. Claude Brown to contest the *severity* of Mr. Madison's impairment, Dr. Brown agreed that Mr. Madison suffered from a mental illness "of a paranoid type." (Pet. Ex. 6 at 767, 770.) Dr. Brown did not refute the defense evidence that Mr. Madison had been diagnosed as mentally ill years earlier by prison psychiatrists in Mississippi or that he was required to take numerous psychotropic medications. (Pet. Ex. 6 at 767-770.)

After hearing this significant evidence concerning Mr. Madison's profound history of mental illness, the same death-qualified jury voted to sentence Mr. Madison to life imprisonment without parole. On July 7, 1994, Judge Ferrill McRae[3] overrode the jury's verdict and sentenced Mr. Madison to death. Mr. Madison's case was affirmed on appeal, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997), aff'd, Ex parte Madison, 718 So. 2d 104 (Ala. 1998), and this Court denied certiorari review, Madison v. Alabama, 525 U.S. 1006 (1998).

Mr. Madison subsequently filed a petition for post-conviction relief

[3] In his time on the bench, Judge McRae overrode six life verdicts, more than any other judge in the state of Alabama. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had 'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,' and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment." (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf).

pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed the dismissal of that petition without a hearing, Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison timely filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court denied relief, but the United States Court of Appeals for the Eleventh Circuit reversed the district court's denial in part on April 27, 2012, and remanded the case with instructions for the district court to conduct a Batson hearing. Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012). The State appealed that remand order to this Court, and the Court denied the State's Petition for Writ of Certiorari on November 13, 2012. Thomas v. Madison, 568 U.S. 1019 (2012). On April 25, 2013, the district court again denied Mr. Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed that denial on August 4, 2014. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014). This Court denied certiorari review on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015). This Court denied Mr. Madison's petition for rehearing on May 18, 2015. Madison v. Thomas, 135 S. Ct. 2346 (2015).

B. Facts Pertinent to Mr. Madison's Competency to Be Executed and How the Federal Question was Addressed Below.

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. On February 12, 2016, before the Alabama Supreme Court scheduled the execution, Mr. Madison's counsel filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, moving the trial court to stay Mr. Madison's execution because, as a result of severe multiple strokes in May 2015 and January 2016, Mr. Madison suffered significant physical and cognitive decline and had no memory of the commission of the capital offense for which he was scheduled to be executed.

On February 15, 2016, Mr. Madison's counsel moved the Alabama Supreme Court to delay setting an execution date until after Mr. Madison's competency claim had been adjudicated. Nevertheless, on March 3, 2016, the Supreme Court of Alabama ordered that Thursday, May 12, 2016, be set as the date for Mr. Madison's execution.

On March 15, 2016, the Mobile County Circuit Court judge determined that Mr. Madison had made a preliminary showing of incompetency, ordered that he be evaluated by a court-appointed expert, Dr. Karl Kirkland,[4] and scheduled a hearing on Mr. Madison's petition, which occurred on April 14,

[4] At the time of the hearing, Dr. Karl Kirkland had a long-standing contract with the State of Alabama. (Hr'g R. 13.)

2016.[5]

At the hearing, the unrebutted evidence established that Mr. Madison suffers from a major vascular neurological disorder, see Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"), or vascular dementia, which was caused in part by a thalamic stroke he suffered in January 2016. (Hr'g R. 46-47, 52 .) Dr. John Goff, a licensed neuropsychologist who, at Mr. Madison's request, conducted extensive neuropsychological testing and evaluated Mr. Madison's competence to be executed, determined that Mr. Madison's cognitive and bodily functioning has declined significantly as a result of several strokes he has suffered over the past couple of years, as well as other medical conditions with which he is afflicted. (Hr'g R. 50, 53-54; Pet. Ex. 2 at 8.)

On January 4, 2016, Mr. Madison was found unresponsive in his prison cell and fecally incontinent after suffering a thalamic stroke,[6] which necessitated transfer from Holman Prison and outside hospitalization. (Pet. Ex. 7, Vol. 5, at 24; Pet. Ex. 10 at 12.) This thalamic stroke is particularly relevant to Mr.

[5] The record of this first competency proceeding, including all evidence submitted and considered by the circuit court, see Madison v. State, No. CC-1985-1385.80 (Mobile Cnty. Cir. Ct.) was specifically incorporated into the current record. See Petition Pursuant to Alabama Code §15-16-23 to Suspend the Execution of Vernon Madison Scheduled for January 25, 2018 Because He Is Incompetent to Be Executed, at 9. (Mobile Cnty. Cir. Ct., Dec. 18, 2017).

[6] MRI imaging on January 4, 2016, confirmed this thalamic stroke. (Pet. Ex. 10 at 12; Hr'g R. 51-52.)

Madison's competency because it resulted in significant memory loss. (Pet. Ex. 2 at 8; Hr'g R. 46-49.) The thalamus is a "connection organ" that links the limbic system in the lower area of the brain to the frontal lobes, (Hr'g R. 46-47), and when the thalamus is damaged, "the most common thing" that results is memory loss. (Hr'g R. 47; see also Pet. Ex. 2 at 8.)

Consistent with that pattern, Mr. Madison suffers from vascular dementia and resulting retrograde amnesia. (Pet. Ex. 2 at 8; Hr'g R. 47, 52.) Clinical features of vascular dementia, or vascular neurological disorder, include the onset of cognitive deficits, like memory loss, that are temporally related to a cerebrovascular event, such as a stroke. DSM-5 at 621; (Hr'g R. 52-53.) In this case, Mr. Madison's retrograde amnesia has meant that his episodic memory – memory related to events that happened to him in the past – has significantly declined. (Pet. Ex. 2 at 8.)

Consequently, Mr. Madison cannot remember numerous events that have occurred over the past 30 years. (Pet. Ex. 2 at 8.) Critically, he cannot independently recall the facts of the offense for which he was convicted or the previous legal proceedings in his case. (Pet. Ex. 2 at 8; Hr'g R. 55.) Dr. Goff's examination revealed that Mr. Madison was unable to recollect the sequence of events from the offense to his arrest or to his trial, and could not recall the name of the victim. (Pet. Ex. 2 at 7-8.) Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current

proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Pet. Ex. 2 at 8-9; Hr'g R. 55, 64-65.)

Dr. Goff's neuropsychological testing revealed that Mr. Madison has an IQ score of 72, which places him in the borderline range of intelligence and is a significant decline from his previous scores, (Pet. Ex. 2 at 6, 9; Hr'g R. 42), and that he has a Working Memory Score of 58, demonstrating severe memory deficits,[7] (Pet. Ex. 2 at 6; Hr'g R. 42-43.) Dr. Goff's testing revealed additional evidence of Mr. Madison's memory impairments: Mr. Madison could not recall any of the 25 elements in a brief story vignette Dr. Goff read him, could not remember the alphabet past the letter G, could not perform serial three additions, could not remember the name of the previous United States President, named Guy Hunt as the governor of Alabama, and could not remember the name of the Warden at Holman Correctional Facility, where he has been incarcerated for over 30 years.[8] (Pet. Ex. 2 at 5.) There is also evidence Mr. Madison has

[7] The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Hr'g R. 43.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's" thereby placing him "within the borderline to intellectually disabled range" (Pet. Ex. 2 at 8); akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment, see Atkins v. Virginia, 536 U.S. 304 (2002).

[8] Dr. Kirkland testified that Mr. Madison was only *partially* oriented to time and place. (Hr'g R. 19-20; Ct. Ex. at 9.)

difficulty processing information. During the examination, Dr. Goff noted that Mr. Madison was unable to rephrase simple sentences and was unable to perform simple mathematical calculations. (Pet. Ex. 2 at 7.) Dr. Goff concluded that these deficits likely resulted, at least in part, from the January stroke. (Pet. Ex. 2 at 8.)

Prior to this January stroke, Mr. Madison had suffered other strokes that have contributed to his cognitive decline. (Hr'g R. 19-20, 49-52.) These strokes include a basilar artery occlusion, causing bilateral cerebral and occipital infarctions, in May 2015[9] that resulted in increased brain pressure, white matter attenuation, and possible temporal lobe damage, which can cause memory difficulties.[10] (Pet. Ex. 2 at 2; Hr'g R. 49-50.) In the aftermath of the stroke, Mr. Madison was in an "altered mental status," (Pet. Ex. 2 at 2; Pet. Ex. 7, Vol. 4 at 305), and deemed to have a diminished ability to comprehend, (Pet. Ex. 7, Vol. 4 at 406). He was also unaware of where he was or why he was there and appeared confused. (Pet. Ex. 7, Vol. 4 at 424, 428, 449, 453.) His speech was slurred, he exhibited signs of an impaired memory, and he could not remember the officers who were guarding him, whom he had known for years. (Pet. Ex. 7,

[9] Records indicate that Mr. Madison suffered strokes prior to the May 2015 incident which negatively impacted his cognitive and bodily functioning. (Pet. Ex.2 at 8; Hr'g R. 49.)

[10] As a result, Mr. Madison was taken to the ICU and a neurosurgeon was placed on standby due to a high risk of fatal brain herniation. (Pet. Ex. 7, Vol. 4 at 308.)

Vol. 4 at 428, 431; see also Pet. Ex. 2 at 5, 8.)

As a result of these multiple strokes, Mr. Madison also suffers from encephalomalacia, (Pet. Ex. 10 at 40, 48, 140; Hr'g R. 51), which means that there are areas of his brain where the tissue is dead. (Hr'g R. 51-52.) MRI imaging in January 2016 depicted encephalomalicia in the occipital lobes and cerebellar hemispheres. (Pet. Ex. 10 at 12; Hr'g R. 51-52.)

In addition to the strokes, Mr. Madison suffers from multiple medical conditions that, over the years, have led to worsening cognitive capacity, including Type 2 Diabetes, chronic hypertension, and chronic small vessel ischemia.[11] (Pet. Ex. 2 at 8; Hr'g R. 18-19, 50-51.) Mr. Madison also suffers from occipital angioma – an abnormal collection of blood vessels – which likely contributed to his strokes and debilitating headaches. (Pet. Ex. 7, Vol. 4 at17.) Furthermore, Mr. Madison now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. (Pet. Ex. 7, Vol. 5 at 167; Hr'g R. 18-19, 37-38, 49-50.)

At the April 2016 hearing in the state trial court, Mr. Madison appeared in a wheelchair as a "physically ill individual" and it was not clear that he was

[11] This type of ischemia, also known as "cerebral small vessel disease," is a "leading cause of cognitive decline." John G. Baker et al., Cerebral Small Vessel Disease: Cognition, Mood, Daily Functioning, and Imaging Findings from a Small Pilot Sample, 2.1 Dementia & Geriatric Cognitive Disorders 169 (2012), available at http:// www.ncbi.nlm.nih.gov/pmc/articles/PMC3347879/#.

able to follow anything that occurred at the hearing. Order, at 9, Madison v. State, No. CC-1985-1385.80 (Mobile Cnty. Cir. Ct. April 29, 2016).

On April 29, 2016, this Court denied Mr. Madison's §15-16-23 petition, specifically accepting on Dr. Kirkland's testimony as to "the understanding Madison has concerning the situation," and refusing to credit the opinion of Dr. John Goff. Id. at 10. Pursuant to Section 15-16-23, appellate review of that decision in the Alabama state courts was unavailable. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995).

On May 4, 2016, Mr. Madison filed a petition for habeas corpus and a motion for a stay of execution in the United States District Court for the Southern District of Alabama. Petition for Writ of Habeas Corpus, Madison v. Dunn, No. 1:16-cv-00191-KD-M (S.D. Ala. May 4, 2016). On May 10, 2016, the district court denied Mr. Madison's habeas petition and motion for a stay. Order, Madison v. Dunn, No. 16-00191-KD-M, 2016 WL 2732193 (S.D. Ala. May 10, 2016). On May 12, 2016, the Eleventh Circuit Court of Appeals granted Mr. Madison's motion for a certificate of appealability, stayed the execution, and ordered expedited briefing and oral argument in the case. Order, Madison v. Dunn, No. 16-12279 (11th Cir. May 12, 2016).

After full merits briefing and oral argument, the Eleventh Circuit Court granted habeas corpus relief, finding that by virtue of his vascular dementia and related medical impediments, Mr. Madison was not competent to be executed.

Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017). Notably, based on the evidence presented, all three judges agreed that Mr. Madison did not have a rational understanding of the link between the crime and his scheduled execution, and was therefore incompetent to be executed. Id. at 1189-90; 1190 (Jordan, J., dissenting) ("After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time . . . .").

After this Court issued its per curiam opinion reversing the Eleventh Circuit's grant of habeas corpus relief while expressing "no view on the merits of the underlying question," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as it was not "appropriately presented," id. (Ginsburg, J., concurring), the State of Alabama immediately sought and obtained an expedited execution date for Mr. Madison of **January 25, 2018**.

True to Dr. Goff's prediction and consistent with medical literature, in the nineteen months since his previous competency determination, Mr. Madison has continued to suffer both physical and cognitive decline. In light of the irreversible and progressive nature of his condition, Mr. Madison once again challenged his competency to be executed by filing a petition pursuant to Alabama Code Section 15-16-23 in the Mobile County Circuit Court. Mr. Madison asserted that the circuit court was required to reassess Mr. Madison's competency to be executed given the degenerative nature of Mr. Madison's

dementia as well as the emergence of new facts that at the time of the evaluation in this case, the court-appointed expert, Dr. Kirkland, on whom the circuit court and this Court relied in finding Mr. Madison competent, was suffering from a substance abuse disorder, using forged prescriptions to obtain controlled substances just four days after the hearing in this case and was ultimately charged with four felonies and suspended from the practice of psychology.

At a scheduled hearing on Mr. Madison's petition, the State did not contradict the allegations regarding Dr. Kirkland or that Mr. Madison's condition was irreversible and progressive, but the circuit court nevertheless denied relief, deeming Mr. Madison competent to be executed. See Appendix A.

REASONS FOR GRANTING THE WRIT

Competency to be executed claims are generally not ripe for review until condemned prisoners have exhausted their appeals and face imminent execution. See Panetti v. Quarterman, 551 U.S. 930, 947 (2007) ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."); Burton v. Stewart, 549 U.S. 147, 154-55 (2007) (competency-to-be-executed claim "necessarily unripe until the State issued a warrant for his execution."). As a result, this Court has less frequently had the opportunity to address the Eighth Amendment's requirements for when a prisoner is incompetent to be executed than most substantive and procedural questions that emerge in the death penalty context. This case presents an important opportunity to address an

urgent and compelling question about whether the Eighth Amendment permits the execution of someone with dementia and acute cognitive decline which will not be resolved without this Court's intervention.

This Court's jurisprudence relating to competency-to-be-executed claims is encompassed by two opinions. In Ford v. Wainwright, this Court held that the Eighth Amendment prohibits states from executing those who are mentally incompetent. 477 U.S. 399, 409-10 (1986). Subsequently, in Panetti v. Quarterman, this Court reaffirmed the basic premise of Ford, noting that "today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." 551 U.S. at 957 (quoting Ford, 477 U.S. at 409-410). Recognizing that the retributive purpose of capital punishment is called into question where an individual's mental state is so distorted "that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole," this Court clarified that a "prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." Id. at 959.

Since Ford and Panetti, scientific and medical advancements have led to a greater understanding of how neurocognitive disorders manifest in individuals who suffer from cognitive decline due to formerly undefined reasons. Vernon Madison is one of these individuals.

It is undisputed that as a consequence of a thalamic stroke, along with several other severe strokes, he has been diagnosed with vascular dementia. He has suffered cognitive decline and is unable to recollect the sequence of events from the offense, to his arrest, to his trial and can no longer connect the underlying offense to his punishment. Because his disability renders him unable to remember the underlying offense for which he is to be punished, his execution does not comport with the evolving standards of decency required by this Court's Eighth Amendment jurisprudence.

A. This Court's Jurisprudence Recognizes that Medical and Scientific Advancements Inform an Eighth Amendment Analysis.

Following the "impressive historical credentials" on the bar to executing the incompetent, Ford, 477 U.S. at 406, this Court has never sought to constrain the world of maladies that can give rise to a finding that a prisoner is incompetent to be executed. In Ford, this Court was unconcerned with giving name to the source of a person's (or "mad man's") "mental condition," "sanity," "diagnoses," "nonsane memory," "mental awareness," or "capacity," but sought only to mark the line where a lack of rational understanding would separate those whom society could execute from those for whom death would be cruel and unusual. Id. And in Panetti, this Court reflected that Ford's "four-Justice plurality discussed the substantive standard at a high level of generality." 551 U.S. at 957. As such, the Panetti opinion likewise speaks variously of "mental

state," "mental illness," "mental disorder," and "psychological dysfunction," fully rejecting any call to "to amplify [the Court's] conclusions or to make them **more precise**."[12] Id. at 961. Panetti presents the only occasion on which this Court has ever commented on what affliction might meet the standard for incompetence, but it only did so to prevent narrowing of the inquiry.

In part, this Court's reluctance to precisely demarcate the world of afflictions that could give rise to incompetence is emblematic of it's recognition that medical, technological, and social science advancements inform Eighth Amendment categorical protections. See, e.g., Moore v. Texas, 137 S. Ct. 1039, 1052-53 (2017) ("The medical community's current standards supply one constraint on States' leeway [to determine intellectual disability]. Reflecting improved understanding over time, [the DSM-V and American Association on Intellectual and Developmental Disabilities Manual] offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" (citations omitted)); Miller v. Alabama, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense . . . but on science and social science as well."); id. at 472 n.5 ("[T]he science and social science

[12] All relevant opinions decided prior to Ford concerned only procedural questions presented under the Fourteenth Amendment. 477 U.S. at 405 (distinguishing prior cases on "adequacy of procedures" from the "substantive restriction" held to apply). Ford itself, in erecting the Eighth Amendment bar, offered no guidance on what evidence, i.e., what diagnoses, test results, brain scans, or behavior, is required to meet the standard for incompetence.

supporting Roper[v. Simmons, 543 U.S. 551 (2005)]'s and Graham [v. Florida, 560 U.S. 48 (2010)]'s conclusions have become even stronger.").

This recognition is apparent in Panetti, where this Court eschewed a "strict test" for competency and admonished the Fifth Circuit for restricting and disregarding "evidence of psychological dysfunction," emphasizing the need for the "conclusions of physicians, psychiatrists, and other experts in the field" to inform analysis under the rational understanding standard. 551 U.S. at 960, 962.

Over the past several decades, scientific and medical advances have allowed for a deeper understanding of the manifestations and effects of dementia. Technological advances in brain imaging such as magnetic resonance imaging (MRI), the supplementation of brain volumetrics with new technology, and resulting improvements in brain mapping have revolutionized the medical community's ability to diagnose neurocognitive disorders in general. John Morihisa, Advances in Brain Imaging, 25-27 (2008); Mark S. Forman, et. al., Neurodegenerative Diseases: A Decade of Discoveries Paves The Way For Therapeutic Breakthroughs, 10 Nature Medicine 1055 (2004), see also Major Milestones in Alzheimer's and Brain Research, Alzheimer's Association, https://www.alz.org/research/science/major_milestones_in_alzheimers.asp (last visited Jan. 18, 2018).

For physicians dealing with memory-disordered patients, these advances

mean that lesions on the brain can now be more readily detected, "allowing for links to be drawn between the presence of lesions and the pattern and severity of memory disorder." Narinder Kapur and Michael Kopelman, Advanced Brain Imaging Procedures and Humam Memory Disorder, 65(1) British Medical Bulletin 61 (2003) ("The ability to form three-dimensional images of lesions . . . and to visualize their location in relation to key anatomical structures and in relation to critical white matter tracts, may provide the physician and the neurosurgeon with a clearer idea of the size of a lesion and of its location vis-à-vis critical anatomical regions that have a role in memory functioning.") Indeed, these technological advancements have been so significant as to necessitate the emergence of cognitive neuroscience as an entirely new field of research. See Morihisa, Advances in Brain Imaging, at 25.

The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders reflects these advances in neuroscience by including expanded criteria for the diagnosis of dementia, now referred to as "major neurocognitive disorder." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"). In addition to the core diagnostic criteria, which requires significant cognitive decline that interferes with independence in at least one cognitive domain, the DSM-5 now provides for ten different etiological subtypes of major neurocognitive disorder, with separate criteria for each. Darrel Regier, et. al., The DSM-5: Classification and Criteria

Changes, 12(2) World Psychiatry 92 (2013). This expansion encapsulates the medical community's wider understanding of the manifestation of neurocognitive disorders in patients who suffer from cognitive decline due to formerly undefined reasons.

B. The Penological Objectives of the Eighth Amendment Cannot be Squared with the Execution of a Prisoner Whose Vascular Dementia and Associated Cognitive Decline Renders Him Unable to Remember the Commission of the Crime for Which He is to be Executed.

This Court held in Ford, and reiterated in Panetti, that the execution of those who are incompetent does not serve the penological justifications for imposing the death penalty. Likewise, imposing death on a prisoner, who, like Mr. Madison, suffers from substantial memory deficits by virtue of multiple strokes and resulting vascular dementia serves no retributive or deterrent purpose, but exhibits an abhorrent infliction of the ultimate punishment on someone without "capacity to come to grips with his own conscience or deity." Ford, 477 U.S. at 409.

First, executing an individual with no memory of the underlying offense serves no retributive purpose. Retribution is served where an offense is offset by a punishment expressing society's "moral outrage," see Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), but where the person being punished has no memory of the commission of the offense for which he is to be executed, the "moral quality" of that punishment is

lessened and unable to match outrage over the offense, Ford, 477 U.S. at 407-08. As this Court explained in Panetti, retribution is not achieved where "a prisoner's recognition of the severity of the offense" does not match "the objective of community vindication." 551 U.S. at 958. For purposes of retribution, there is no moral difference where as a result of delusion a person cannot "recognize . . . the severity of the offense" and where a person as a result of dementia, cognitive decline, and memory deficits is likewise unable to do so.[13]

Nor can executing Mr. Madison cannot be justified on grounds of deterrence. Ford made plain: the execution of an incompetent person "presents no example to others and thus has no deterrence value." 477 U.S. at 399; Panetti, 551 U.S. at 958 (same). Whether it is by delusion or memory deficits, a lack of rational understanding undermines the deterrence objective of capital punishment. Most obvious, with incapacity by virtue of dementia, specific

[13]This lack of moral difference is all the more clear considering the positions expressed by the American Bar Association, American Psychiatric Association, American Psychological Association, and the National Alliance of the Mentally Ill support a bar on imposing the death penalty on those with dementia. See Am. Bar Ass'n, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities (2006), reprinted in 30 Mental & Physical Disability L. Rep. 668, 668 (2006). These groups have recognized that age of onset is the only difference between an individual who is intellectually disabled, and therefore ineligible for the death penalty, Atkins v. Virginia, 536 U.S. 304 (2002), and an individual who suffers from dementia. Am. Bar Ass'n, Severe Mental Illness and the Death Penalty 7 (2016) https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf. This is consistent with evidence that Mr. Madison has an unrebutted IQ of 72 as a result of his stroke and cognitive decline. (Pet. Ex. 2 at 6.)

deterrence is already achieved. Panetti, 477 U.S. at 958.

Finally, executing Mr. Madison would implicate society's, and by extension the Eighth Amendment's, aversion to grotesque and obscene punishments. In failing to find retributive and deterrent justifications for executing an incompetent person, this Court recognized the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." Ford, 477 U.S. at 409-10. The ban on cruel and unusual punishment, in curbing punishments lacking in penological justification, serves to uphold the "standards of decency" that define "progress of [our] maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance," Justice Marshall wrote for a majority of this Court, the Eighth Amendment bars executing someone lacking "capacity" and "understanding," regardless of whether the deficiency is due to delusion or dementia, like Mr. Madison. Ford, 477 U.S. at 410.

Punishment without penological justification, as here, "risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

C. Mr. Madison's Severe Memory Impairments as a Result of Vascular Dementia Render him Incompetent to be Executed Under the Eighth Amendment.

In Panetti, this Court reviewed the lower court's test for evaluating a prisoner's competency to be executed – first, that the prisoner is aware that he committed the murders; second, that the prisoner is aware that he will be executed; and third, that the prisoner is aware that the reason that the State seeks to execute him is his commission of the murders – and determined that it was too restrictive under the Eighth Amendment. 551 U.S. at 956. This Court found that a prisoner may be incompetent even though he "can identify the stated reason for his execution," and explained that for purposes of determining competency to be executed, a prisoner's "awareness of the crime and punishment" is not merely a "prisoner's awareness of the State's rationale for an execution," but rather encompasses, at a minimum, "a rational understanding of it." Id. at 959.

Consistent with Panetti's holding, courts have recognized dementia and attendant cognitive decline and memory impairment as a basis for a finding of incompetency to be executed. See, e.g., Stanley v. Chappell, No. 3:07-CV-04727-EMC, 2013 WL 3811205, at *1 (N.D. Cal. July 16, 2013) (finding death-row prisoner incompetent to be executed due to dementia caused, at least in part, by encephalomalacia); Mays v. State, 476 S.W. 3d 454, 462 (Tex. Ct. App. 2015) (holding that death row prisoner made substantial showing of

incompetence to be executed in part because of dementia and impaired memory).[14]

The evidence and testimony in this case clearly establish that Mr. Madison is not competent to be executed because his memory deficits prevent him from having a rational understanding of the reason for his execution. Dr. Goff determined that as a result of a thalamic stroke, Mr. Madison suffers from vascular dementia, which has resulted in a decline in cognitive functioning and significant memory impairment. Consequently, Mr. Madison cannot remember numerous events that have occurred over the past thirty years or more. (Pet. Ex. 2 at 8.) Dr. Goff's examination revealed that Mr. Madison cannot independently recall the facts of the offense, the sequence of events from the offense, to his arrest, to his trial or previous legal proceedings in his case and he could not

[14] Courts have also recognized that memory impairments may render a defendant incompetent to stand trial. See United States v. Andrews, 469 F. 3d 1113, 1119 (7th Cir. 2006) ("a defendant's lack of memory could lead a district court to find a defendant incompetent to stand trial"); United States v. Rinchack, 820 F.2d 1557, 1569 (11th Cir. 1987) (affirming case-by-case examination of whether memory deficits render defendant incompetent to stand trial); Wilson v. United States, 391 F.2d 460, 463 (D.C. Cir. 1968) (rejecting contention that memory deficits can never provide grounds for incompetence to stand trial, favoring case-by-case approach); People v. Palmer, 31 P.3d 863, 870 (Colo. 2001) (en banc) ("[I]f a defendant's amnesia renders him unable to understand the proceedings against him or to assist in his own defense then he must be found incompetent."); State v. Garcia, 998 P.2d 186, 189-191 (N.M. Ct. App. 2000) (affirming finding of incompetence to stand trial of defendant with "dementia, secondary to diabetes" and "mild to moderate mental retardation, which was likely connected to his dementia").

recall the name of the victim. (Pet. Ex. 2 at 8; Hr'g R. 46, 52, 55, 64-65.)[15] Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Pet. Ex. 2 at 8-0; Hr'g R. 55, 64-65.) In response to direct questioning by the state trial judge at the hearing, Dr. Goff testified that while Mr. Madison may understand that the State is seeking retribution, he does not "understand[] the act that he's being – that he's being punished for." (Hr'g R. 65.) See Panetti, 551 U.S. at 957 (determination of competency requires inquiry into "prisoner's ability to 'comprehen[d] the reasons' for his punishment" or "a determination into whether he is 'unaware of . . . why [he is] to suffer it'") (quoting Ford, 477 U.S. at 417 and id. at 422 (Powell, J., concurring)).

CONCLUSION

Vernon Madison suffers from vascular dementia and as a result of bodily and cognitive decline, has no memory of the commission of the offense for which the State seeks to execute him on January 25, 2018. This Court should grant

[15] Dr. Goff's neuropsychological testing established that Mr. Madison has significant memory deficits. (Pet. Ex. 2 at 5-6; Hr'g R. 41-45.) Specifically, Dr. Goff's testing established that Mr. Madison has a Working Memory Score of 58. (Pet. Ex. 2 at 6; Hr'g R. 43.) The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Hr'g R. 43.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's. (Pet. Ex. 2 at 8.)

certiorari to resolve the critically important question of whether the Eighth Amendment prohibits the execution of a prisoner who has suffered severe cognitive decline as a result of dementia and acute medical conditions that prevent him from remembering the offense or understanding the circumstances of a scheduled execution.

Respectfully Submitted,

/S/ BRYAN A. STEVENSON
BRYAN A. STEVENSON
COUNSEL OF RECORD
RANDALL S. SUSSKIND
ANGELA L. SETZER
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
bstevenson@eji.org
rsusskind@eji.org
asetzer@eji.org

Counsel for Petitioner