No. 17-7505
CAPITAL CASE

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**In the SUPREME COURT of the UNITED STATES**

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VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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On Petition for a Writ of Certiorari to the
Circuit Court of Mobile County, Alabama (02-CC-85-1385.80)

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# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Rules**

## STATEMENT OF THE CASE

In April 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her eleven-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, crept behind the police car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses watched Madison murder Officer Schulte and attempt to murder his girlfriend. *Id.*

### Procedural History

Madison's petition for writ of certiorari seeks review of the order of the Circuit Court of Mobile County, Alabama, denying his petition for a stay of execution, which sought a stay on competency grounds. This was Madison's second unsuccessful attempt to obtain a stay on this ground, and he relied on the same facts established at the hearing on his previous petition. The only additional evidentiary basis he alleged in the petition was the existence of drug-related charges against the court-appointed psychiatrist who conducted his competency examination in 2016.

### 1. Trial, Direct Appeal, and Collateral Attacks.

Madison was charged with capital murder because he murdered an on-duty police officer. *See* ALA. CODE § 13A–5–40(a)(5) (1975). He was tried and convicted three times because of errors in his first and second trials. *See Madison v. State*, 545 So. 2d 94, 99 (Ala. Crim. App. 1987); *Madison v. State*, 620 So. 2d 62, 63 (Ala. Crim. App. 1992); *Madison v. State*, 718 So. 2d 90 (Ala. Crim. App. 1997). Madison denied committing the murder before his first two trials and claimed self-defense at his third. After each trial, Madison was sentenced to death in the light of his history of violent crime. His third conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *Madison*, 718 So. 2d at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So. 2d 104, 108 (Ala. 1998).

Thereafter, Madison filed a state post-conviction petition in the Mobile County Circuit Court. The circuit court determined that his claims were procedurally barred, precluded from review, or meritless, and it summarily dismissed Madison's petition pursuant to Rule 32.7(d) of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed in a published opinion. *Madison v. State*, 999 So. 2d 561 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari.

Following the state court proceedings, Madison filed a habeas petition in the United States District Court for the Southern District of Alabama. The district court denied the petition, but on appeal the Eleventh Circuit reversed

the denial of relief as to a *Batson* claim, and remanded the case for an evidentiary hearing in the district court. *Madison v. Comm'r, Ala. Dep't of Corrs.*, 677 F.3d 1377 (11th Cir. 2012). After an evidentiary hearing, the district court denied Madison's *Batson* claim, and the denial of habeas relief was affirmed by the Eleventh Circuit. *Madison v. Comm'r, Ala. Dep't of Corrs.*, 761 F.3d 1240 (11th Cir. 2014). This Court declined certiorari review. *Madison v. Thomas*, 135 S. Ct. 1562 (2015) (mem.).

**2. Madison's Previous Challenge as to His Competency to be Executed.**

After the Alabama Supreme Court ordered the execution of Madison's sentence in 2016, Madison filed a state-court petition claiming he was incompetent to be executed because he could not remember murdering Officer Schulte. The Mobile County Circuit Court conducted a hearing to evaluate Madison's claim of incompetence and gave him the opportunity to submit evidence, including evidence from his own psychological expert. Before the hearing, Madison was evaluated by Dr. John Goff (a neuropsychologist retained by Madison) and Dr. Karl Kirkland (a court-appointed psychologist). At the hearing, the court admitted Dr. Goff's report, Dr. Kirkland's report, and Madison's medical records. The court also heard testimony from Dr. Goff, Dr. Kirkland, and the warden of the prison where Madison was housed. After considering this evidence and testimony, the circuit court denied Madison's petition for a stay of execution.

Because Alabama law does not provide a right to appeal a circuit court's sanity determination, in the competency-to-be-executed context, by way of the state's appellate system, *see* Code of Alabama, section 15-16-23 (1975), Madison elected to file a habeas petition in federal court challenging the state court's judgment. The district court denied Madison's petition, finding that the state court's decision did not involve an unreasonable application of the law or facts.

On the morning of his scheduled execution, however, the Eleventh Circuit granted Madison a stay and a certificate of appealability. The State petitioned this Court to vacate the stay. Four Justices—the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito—voted to vacate the stay. There were only eight Justices serving on the Court at that time, and the Eleventh Circuit's stay of execution was undisturbed.

A divided panel of the Eleventh Circuit reversed the district court and granted Madison's petition for writ of habeas corpus. This Court granted the State's petition for writ of certiorari and reversed the Eleventh Circuit's grant of habeas relief. *Dunn v. Madison*, 138 S. Ct. 9 (2017).

**3. Madison's Most Recent Competency Proceedings.**

After this Court reversed the Eleventh Circuit's grant of habeas relief, the Alabama Supreme Court set a new date for the execution of Madison's sentence. On December 18, 2017, Madison filed a second petition in the circuit court seeking a stay of execution on insanity grounds. He included no new

documents, affidavits, or other evidence pertaining to his medical or mental health, relying instead on the testimony and evidence presented during his previous competency hearing. The sole additional fact he asserted was that felony drug charges had been brought against the court-appointed expert from the previous proceeding.

The State moved to dismiss the petition on multiple grounds. The circuit court held a hearing on the State's motion and, after argument, it dismissed Madison's petition for a stay. Because no state appeal is permitted from petitions alleging insanity as a ground of incompetency to be executed, Madison has elected to petition this Court for certiorari review.

## REASONS FOR DENYING THE PETITION

The questions Madison presents for review are not squarely presented on the procedural posture of this case. For example, the "law of the case" doctrine and considerations related to issue preclusion should remove the underlying proceedings from the new legal theory Madison advances. Of equal concern, the doctrine of "invited error" weighs heavily against granting the petition. Also, the applicable abuse-of-discretion standard of review governing the circuit court's finding that Madison failed to meet a threshold showing of incompetency makes it nearly impossible to squarely address the questions presented. Finally, Madison's proposed expansion of the Court's Eighth Amendment jurisprudence, if adopted, would wreak havoc on other aspects of criminal procedure.

Madison's attack on the court-appointed expert adds nothing to his petition, serving only as a red herring. Madison retained his own expert to assist with the presentation of evidence at the 2016 competency hearing. As this Court noted when it reversed the Eleventh Circuit's grant of habeas relief on this evidence, "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Madison*, 138 S. Ct. at 12. Not only did Madison's expert's testimony support the trial court's decision, but his expert also did not find any fault or errors with the court-appointed expert's

methodology or employment of generally accepted psychiatric practices and principles.

## I. Review of the questions presented by Madison should be foreclosed under the "law of the case" doctrine and considerations related to issue preclusion.

Madison's latest petition for a stay was based on the evidence presented to the circuit court during the 2016 competency hearing. At a hearing on January 16, 2018, counsel for Madison explicitly conceded to the circuit court that no additional affidavits, medical records, or other evidence – aside from the alleged extrinsic evidence of pending criminal charges against the court-appointed expert – supported his request for stay based on insanity. Thus, when the circuit court was presented with what was essentially a successive petition for a stay, there was no reason for that court to depart from its earlier ruling.

As most commonly defined, the "law of the case" doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Id.* at 619 (quoting *Montana v. United States*, 440

U.S. 147, 153 (1979)). Application of this doctrine, and the attendant advancement of its stated aims, is warranted in this case.

Following his unsuccessful bid to obtain a stay of execution on competency grounds in 2016, Madison elected to seek habeas relief rather than pursue certiorari review in this Court. Madison's claim received a full round of federal review, including the issuance of a stay of execution by the Eleventh Circuit, oral argument in that court, and a grant of relief. It is undisputed that Madison received a full and fair opportunity to litigate his competency claim in 2016, including full federal review of the state court's decision.

Additional expenditure of judicial resources is not warranted to review a legal decision based on facts that have not changed, especially in the light of the expense and vexation that would be imposed on the State of Alabama, not the least of which would be a further delay in having Madison's sentence carried out. And while the doctrine does not present an absolute bar to review in this Court, the critical issue here is whether it applied in the circuit court. After all, once the state court's prior ruling was left intact after a full round of federal review, why would the trial court believe a different legal standard should be applied to a successive competency petition? This is especially true in the light of the fact that the state statue under which Madison sought relief is limited to allegations of insanity. ALA. CODE § 15-16-23 (1975).

Similar to the "law of the case" doctrine, the claim-preclusion doctrine "instructs that a final judgment on the merits 'foreclose[es] successive

litigation of the very same claim.'" *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "The allied doctrine of issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment." *Id*. at 538 (citing Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4416, p. 386 (2d ed. 2002)). Both doctrines weight against granting the petition in this case.

It is undisputed that the parties to the proceedings below are identical to the parties in the 2016 proceeding to determine Madison's competency. And while a person's competency is subject to change – a factor that could negate these preclusion considerations in appropriate cases – Madison explicitly informed the state court that he was relying on the evidence presented during the 2016 competency hearing. Under such circumstances, nothing can be said to have occurred that would diminish the "underlying confidence that the result achieved in the initial litigation was substantially correct." *Bravo-Fernandez*, 137 S. Ct. at 538 (quoting *Standefer v. United States*, 447 U.S. 10, 23 n.18 (1980). For this reason, the state court's determination that Madison did not make the substantial threshold showing necessary to warrant further inquiry into his competency weighs heavily in favor of denying the writ.

As discussed in ground two, below, Madison did aver in his latest petition that since the 2016 competency hearing he "has continued to suffer

from vascular dementia, a degenerative disease which is both irreversible and progressive, as well as physical and cognitive decline" and "[t]rue to Dr. Goff's predication 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." (Pet. 1, 15.) Yet Madison offered no evidence in support of this allegation in the state court, conceding to the circuit court that Dr. Goff had made no additional evaluations or findings as to his physical or cognitive condition. Had Madison made a substantial threshold showing of changed circumstances, application of any grounds of preclusion might be unwarranted or inequitable. Because he did not, this Court should deny the petition.

Finally, the same considerations of comity and federalism that supported this Court's reversal of the Eleventh Circuit last year apply with equal force to this petition. Madison had the opportunity to seek certiorari review outside the context of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) following the denial of his 2016 petition, when the state trial court applied the facts upon which Madison relies in this petition to the requirements of *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Madison chose, instead, to pursue relief by way of a petition for writ of habeas corpus. Having failed to obtain relief through that avenue, Madison now attempts his second bite at the apple. To permit such an end-run of AEDPA's constraints on review of a state court

decision, when no factual circumstances have changed, would make a mockery of its aims of promoting comity and federalism. *Cf. Panetti*, 551 U.S. at 947 ("The [AEDPA] statutory ban on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed *when the claim is first ripe*.") (emphasis added).

## II. The invited-error doctrine should prevent review of the questions presented for review.

Madison petitioned the circuit court for relief pursuant to section 15-16-23 of the Code of Alabama, which is entitled, in relevant part, "suspending execution of death sentence of insane convict." That statute provides, "If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court *that the convict is then insane*, such trial court shall forthwith enter an order" suspending the execution of the sentence. *Id*. (emphasis added). The statute is clearly worded in terms of an inmate's sanity, thus the applicability of *Ford* and *Panetti* to petitions brought pursuant to this statute.

Madison does not argue that he is insane. Instead, he argues that he suffers from dementia, that he does not remember committing the murder for which he was convicted and sentenced to death, and that his execution should be barred on Eighth Amendment grounds by way of an expansion of the holdings in *Ford* and *Panetti*. In other words, Madison alleges that "[t]he constitution of the United States" requires "other relief," or that "[t]he sentence imposed. . . is otherwise not authorized by law." Ala. R. Crim. P. 32.1(a), (c).

Even though Madison's claim is not predicated upon his insanity, he proceeded in the state trial court under a statute that applies only to cases of insanity, foregoing Alabama's mandatory post-conviction remedy for all other non-insanity forms of relief. *See* Ala. R. Crim. P. 32.4.

Madison is not insane. Even if this Court were to expand its holdings in *Panetti* and *Ford* in the manner he advocates, this would not require a state court to consider such a claim under a statutory procedure that is specifically designed to address questions of sanity. Accordingly, the trial court properly denied Madison's petition as brought under section 15-16-23, as the statute is limited to the suspension of death sentences for insane prisoners.

Had Madison wished to have his non-insanity Eighth Amendment claim considered outside of the sanity-insanity context, he should have filed a petition for post-conviction relief in the trial court. He did not. By choosing to proceed under a statute that applies exclusively to capital inmates alleging insanity, Madison invited any "error" in the trial court's ruling. That is, the sole question to be answered under the state statute was whether Madison was insane, not whether he suffered from dementia such that his execution would be cruel and unusual under a yet-unannounced expansion of *Ford* and *Panetti* having little support in existing precedent.[1]

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[1] As noted in the State's petition for certiorari in Dunn v. Madison, the Eleventh Circuit's grant of habeas relief was the sole instance of a court accepting the rule Madison proposes. After this Court reversed that decision, there is no split in authority, and the weight of existing precedent is squarely against Madison's petition. Pet. for Cert. at 12-18, Dunn v. Madison, No. 17-193 (Aug. 2, 2017).

To address the issue of whether the trial court erred by not adopting Madison's argument – that his alleged inability to recall a crime is a sufficient basis to forbid an execution on Eighth Amendment grounds – would be patently unfair when the statute under which Madison sought relief was limited by its plain language to the question of his sanity. As with his prior decision to pursue federal relief, Madison was the architect of his latest effort to escape execution of his sentence. He elected to proceed under a state statute requiring the presence of insanity in order to obtain relief. To the extent that Madison suggests that the trial court erred by not expanding *Ford* and *Panetti* to situations beyond the issue of sanity, he invited that error by placing the trial court in a position where his sanity was the only question of consequence. For this reason, his petition should be denied.

## III. The abuse-of-discretion standard of review, and the circuit court's finding that Madison failed to make a threshold showing sufficient to warrant further proceedings bar consideration of the questions Madison presents for review.

Alabama's statutory provision pertaining to stays of execution based on allegations of an inmate's lack of sanity was designed to avoid allowing a person awaiting execution to "file an application every time the last one was denied, *ad infinitum*, thereby defeating the intent of the law and the will of the legislature." *Magwood v. State*, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984). Movants seeking such a stay are required to establish to the satisfaction of the trial court that the inmate is insane. This is consistent with *Panetti*'s recognition that a prisoner must make "the requisite preliminary showing"

prior to being entitled to an adjudication. 551 U.S. at 934-35; *see also id.* at 949 (recognizing the controlling holding in *Ford* is that a prisoner must make "a substantial threshold showing of insanity"). As noted above, Madison does not allege that he is insane and he did not offer any new evidence in support of his latest petition for a stay.

Thus, even if the Court were to ignore the statute's limited application to cases of insanity, a hearing is not required absent some evidence that the inmate may be incompetent to be executed. At the hearing on January 16, 2018, Madison informed the trial court that he was relying solely on the evidence presented during the 2016 competency hearing. Absent additional evidence sufficient to establish changed circumstances, the circuit court did not abuse its discretion by refusing further proceedings. Madison's petition does not provide any basis for a finding that the trial court abused its discretion by failing to conduct any further proceeding, once it was determined that no new facts supported a preliminary showing of incompetency.

## IV. The questions presented for review are not worthy of certiorari, especially on the facts as already stated by this Court.

As noted in the State's petition for writ of certiorari last year, the courts of appeals and state high courts to have consider this issue have resolved it in a manner contrary to the position advanced by Madison. Pet. for Cert. at 12-18, Dunn v. Madison, No. 17-193 (Aug. 2, 2017). This Court's reversal of the Eleventh Circuit's grant of relief removed the sole split of authority. This fact should be of great significance because Madison invokes the "evolving

standards of decency" in his petition. Unlike *Ford*, where "no State in the Union permit[ted] the execution of the insane," 477 U.S. at 408, no such clarity exists as to the rule Madison proposes.

But even if this were not the case, the questions he presents are not worthy of certiorari review, considering the facts as previously stated by this Court. Dr. Goff, Madison's own expert, "found that Madison is 'able to understand the nature of the pending proceeding and he has an understanding of what he was tried for'; that he knows he is 'in prison . . . because of 'murder"; that he 'understands that . . . [Alabama is] seeking retribution' for that crime; and that he 'understands the sentence, specifically the meaning of a death sentence.'" *Madison*, 138 S. Ct. at 10. This is the essence of a "rational understanding."

The idea that the inability to recall an event precludes a rational understanding of that event, or its consequences, is absurd. Madison's argument that a person who does not remember an event *a fortiori* cannot have a rational understanding of its consequences is a logical fallacy of the highest order. The ability to form a rational understanding of an event has very limited relation to whether a person remembers that event.

For example, consider an individual who is sexually assaulted or abused after being surreptitiously administered a date-rape drug. The person regains consciousness and is informed that they were subjected to rape, non-consensual sodomy, or other sexual abuse. It would defy all existing legal and

moral understanding to argue that such an individual would be unable to rationally understand the despicable crime committed against their person. Additionally, it would be cruel to suggest that such a person would be unable to appreciate the consequences (or potential consequences) that such non-consensual sexual contact could mean for their health and well-being, or that they would not be subject to many of the same post-traumatic stresses suffered by those who are sexually assaulted while conscious.

Here, while Madison claims to have no memory of Officer Schulte's murder,[2] his own expert agreed that he understands he was tried for that offense, that he is in prison and will be executed because of that offense, and the finality of death if his sentence is carried out. Madison's claimed inability to remember his offense has no bearing on his rational understanding of his present circumstances. Under these facts, nothing in *Ford* or *Panetti* would support the expansion of this Court's Eighth Amendment jurisprudence in the manner Madison requests.

## V. Madison's attack on the court-appointed expert's credibility is a red-herring, bearing no materiality or relevance to the questions presented.

The only new factual averments contained in Madison's most recent petition for a stay of execution involved the arrest of the court-appointed

[2] The fact that the expansion of the holdings in *Ford* and *Panetti* that Madison advocates would be highly susceptible to malingering – something the medical and mental health profession is no better suited to address than a judge or jury – is another reason that the questions presented are not worthy of certiorari review.

psychiatric expert on drug-related charges.[3] These factual averments have no bearing on the question of whether the holdings in *Panetti* and *Ford* should be expanded to those who claim to have no memory of their crimes. Additionally, these allegations were irrelevant to the extent that "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Madison*, 138 S. Ct. at 12.

Additionally, the fact that Madison had the services of Dr. Goff, a retained expert, mitigated the concerns that might have otherwise attended the allegations against the court-appointed expert. Rather than disagree with Dr. Kirkland, Dr. Goff *agreed* with the court-appointed expert on matters large and small. Additionally, Dr. Goff did not identify any errors or deficiencies in Dr. Kirkland's methodology, report, or testimony. Madison cannot point to any error or deficiency in the court-appointed expert's professional services in this case.

Had any professional or scientific errors been committed by the court-appointed expert, it should be assumed that Madison's own expert would have identified and exploited them. After all, *Panetti* and *Ford* specifically identified the availability of a defense expert as a critical part of ensuring a fair hearing.

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[3] Madison's brief in opposition to this Court referred to Dr. Kirkland as "a since-discredited state court-appointed psychologist" and referenced his arrest on drug-possession charges. Br. in Opp. at 1, 9 n.3, Dunn v. Madison, No. 17-193 (Sept. 5, 2017).

*Panetti*, 551 U.S. at 949 (recognizing the protection against arbitrariness and error provided by a prisoner's independent expert); *cf. Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (noting the threat to fair criminal trials posed by prosecution experts is minimized when the defense retains a competent expert).

Further, because Dr. Kirkland has not been found guilty of any charged offenses, Rule 609 of the Alabama Rules of Evidence permitted no negative inference as to his trustworthiness. That rule certainly did not provide such grounds at the time of the 2016 competency hearing. Because Madison's own expert found no professional errors in the court-appointed expert's report and testimony, and because his expert agreed with the court-appointed expert's findings on controlling issues, the trial court did not abuse its discretion in finding the criminal charges brought against Dr. Kirkland after the 2016 competency hearing did not warrant a different outcome.

## CONCLUSION

For the above-mentioned reasons, this Court should deny Madison's petition for writ of certiorari.

Respectfully submitted,

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