

No. 18-7547

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OCTOBER TERM, 2018

**IN THE SUPREME COURT OF THE UNITED STATES**

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MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

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*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

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**PETITIONER’S REPLY TO RESPONDENT’S BRIEF IN  
OPPOSITION**

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**CAPITAL CASE**

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mr. Mulder should be categorically excluded from the death penalty because he is functionally intellectually disabled and does not remember the crime for which he is being punished. Under these circumstances, subjecting Mr. Mulder to a death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment because there is a national consensus against executing those who are functionally intellectually disabled and because no legitimate penological purpose is served by his execution.

**A. The Eighth Amendment categorically excludes from the death penalty a functionally intellectually disabled individual who has no memory of his crime regardless of the cause of the mental disability.**

The State places significant emphasis on the fact that Mr. Mulder's functional intellectual disability was caused by his own actions as opposed to those who are born with an intellectual disability. But, in determining whether an individual should be excluded from the death penalty under the Eighth Amendment, the relevant inquiry is *whether* the individual suffers from a condition that renders him ineligible for execution, not *why* the individual suffers from that condition.

As this Court recently determined in *Madison v. Alabama*, No. 17-7505, 2019 WL 938522 (U.S. Feb. 27, 2019), the Eighth Amendment prohibits the execution of someone who lacks a rational understanding of the State's desire to execute him,

regardless of what causes that inability to understand.<sup>1</sup> This Court noted that when considering an individual’s eligibility for the death penalty under the Eighth Amendment, the question of what causes the mental disability is irrelevant. *Id.* at \*7. Once it has been determined that a particular mental disability precludes a death sentence from serving a retributive purpose or offends the “evolving standards of decency,” there is no reason to consider the cause of that disability. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *see, e.g., Madison*, 2019 WL 938522, at \*7 (noting that the lack of rational understanding standard under *Panetti v. Quarterman*, 551 U.S. 930 (2007) “has no interest in establishing any precise *cause* . . . so long as they produce the requisite lack of comprehension”).

This Court emphasized that when determining whether executing an individual with a mental disability violates the Eighth Amendment, the “standard focuses on whether a mental disorder has a particular *effect* . . . .” *Madison*, 2019 WL 938522, at \*7. The “standard has no interest in establishing any precise *cause* . . . so long as [the mental disorder] produce[s] the requisite lack of comprehension.” *Id.* “[I]f and when that failure of understanding is present, the rationales kick in—irrespective of whether one disease or another . . . is to blame.” *Id.*

Here, the cause of Mr. Mulder’s functional intellectual disability is entirely irrelevant when that particular disability renders the execution void of any proper

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<sup>1</sup> Although *Madison* dealt with competence to be executed and this case deals with categorical exclusion from the death penalty, the same reasoning applied in *Madison* should apply here.

penological purpose. The State appears to argue that this Court should ignore the effect of Mr. Mulder's mental disorder because, unlike those who suffer from an intellectual disability, Mr. Mulder's drug use caused the stroke that led to his dementia and functional intellectual disability. *See* Respondent's Brief in Opposition at 6–7. But regardless of whether Mr. Mulder was born intellectually disabled or whether he engaged in behavior that led to his intellectual disability, the question of whether a death sentence is cruel and unusual under the Eighth Amendment does not change.

When a death sentence fails to serve any legitimate penological purpose, its application violates the Eighth Amendment. This Court in *Madison* re-emphasized the importance of considering the “key justifications” for barring an execution under the Eighth Amendment, particularly when evaluating the propriety of executing an individual with certain mental illnesses. *See Madison*, 2019 WL 938522, at \*7. Specifically, this Court emphasized that permitting executions under certain circumstances related to an individual's mental disabilities fails to provide any “retributive purpose” and, in general, “offends morality.” *Id.*

In this case, Mr. Mulder should be categorically excluded from the death penalty because executing an individual who is functionally intellectually disabled and who does not remember his crime—regardless of what caused these disabilities—fails to serve any legitimate penological purpose. Just as this Court re-emphasized that executing someone who lacks a rational understanding for why the State has chosen to punish him “offends morality”, so too does executing someone

who, like Mr. Mulder, functions emotionally and intellectually at a second grade level. *See* 2App.0401. Further, executing an individual who, in addition to being functionally intellectually disabled, also suffers from dementia such that he cannot remember the crime he committed, “presents no example to others and thus has no deterrence value.”<sup>2</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986). Executing an individual who suffers from these unique and specific cognitive deficits will have very little, if any, deterrent value. Accordingly, this Court should grant certiorari review and officially recognize a categorical exclusion from the death penalty for those who are functionally intellectually disabled with no memory of their crime.

**B. There is a national consensus against executing individuals who are functionally disabled and who have no memory of the crime they committed.**

As this Court noted in *Hall v. Florida*, 572 U.S. 701 (2014) “whether a punishment is ‘cruel and unusual’ depends on currently prevailing societal norms,” and in evaluating societal norms, the Court must determine “whether a challenged practice contravene[s] a clear national consensus.” *Id.* at 726 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). As discussed in the Petition for Writ of Certiorari, in looking at societal norms—including state legislation, professional

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<sup>2</sup> While this Court determined that dementia and memory loss alone do not eliminate the retributive value from a death sentence, it recognized that memory loss can play an important factor in determining whether a death sentence comports with the Eighth Amendment. *Madison*, 2019 WL 938522, at \*6. Specifically, this Court reasoned that “[i]f that loss combines and interacts with other mental shortfalls . . .,” the resulting cognitive deficit could render the suffering individual ineligible for the death penalty. *Id.* In this case, Mr. Mulder’s memory loss is also tied to his functional intellectual disability. These disabilities combined render him ineligible to be executed under the Eighth Amendment.

organizations, and the medical community—it is clear there is a national consensus against executing individuals who, because of dementia or a traumatic brain injury, are rendered functionally intellectually disabled. *See Atkins*, 536 U.S. at 312 (noting that “the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” (quoting *Penry*, 492 U.S. at 331)). This prohibition exists and is recognized specifically for those who have been rendered intellectually disabled, even after the age of eighteen.

Despite this national consensus, the State argues that executing Mr. Mulder is constitutional because the age of onset requirement specifically precludes a finding of intellectual disability. *See* Respondent’s Brief in Opposition at 4. But concluding that Mr. Mulder should not be categorically excluded from the death penalty because he fails to satisfy the age of onset requirement is just as arbitrary as finding that an individual is eligible to be executed because, although he lacks a rational understanding of why he is being executed under *Panetti*, the cause of that failure to understand is due to dementia, instead of psychosis. *See Madison*, 2019 WL 938522, at \*7 (“The *Panetti* standard concerns, once again, not the diagnosis of such illness, but a consequence—to wit, the prisoner’s inability to rationally understand his punishment.”). This Court clearly determined in *Madison* that when the “key justifications” against executing an individual exist, the causes leading to those rationales are irrelevant. *See id.* The key justifications against execution clearly exist in Mr. Mulder’s case, and thus the age of onset element should not be

the singular factor that allows an execution that has no proper penological purpose to stand.

Similarly, the reasoning behind the prohibition of “rigid rules” by this Court in *Hall* should also undermine the rigid commitment to the age of onset requirement in people who are functionally intellectually disabled. As this Court in *Hall* noted, when courts apply rigid rules that prevent a court from considering whether an execution offends “the evolving standards of decency that mark the progress of a maturing society,” it “creates an unacceptable risk” of an unconstitutional execution. *Hall*, 572 U.S. at 704. This Court should not leave unprotected an entire class of individuals whose execution will serve no penological purpose simply because their cognitive deficits arose after the age of eighteen.

**C. Mr. Mulder’s claim is not procedurally defaulted because the Nevada Supreme Court’s order is intertwined with the federal issue addressed within.**

The State argues that Mr. Mulder’s claim is procedurally defaulted because “it is clear from the [Nevada Supreme Court’s] Order . . . that no federal question was ever decided.” Respondent’s Brief in Opposition at 10. But the Nevada Supreme Court’s Order denying Mr. Mulder relief is clearly intertwined with the merits of the federal constitutional issue in this case.

In determining that *Hall* did not constitute intervening authority to provide good cause to overcome a procedural default, the Nevada Supreme Court concluded that *Hall*’s proscription against “rigid rules” did not affect the age of onset analysis. 4App.0761. Additionally, the Nevada Supreme Court clearly relied on federal

constitutional law in determining that *Hall* did not create a new consensus analysis for purposes of determining whether execution of a class of individuals violates the Eighth Amendment. 4App.0762–63. In fact, the Nevada Supreme Court specifically cited both *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304, in refusing to recognize *Hall's* application to Mr. Mulder's case. *Id.* Because the Nevada Supreme Court's application of the procedural default bars is not independent of federal law, this Court can consider the merits of Mr. Mulder's claims. *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam); *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016).

### CONCLUSION

For the foregoing reasons, Mr. Mulder respectfully requests this Court grant his petition for a writ of certiorari and vacate the decision of the Nevada Supreme Court.

DATED this 8th day of March, 2019.

Respectfully submitted,

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