

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

VERNON MADISON,)
)
) Petitioner,)
)
) v.) No. 17-7505
)
) STATE OF ALABAMA,)
)
) Respondent.)
)

Pages: 1 through 62

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VERNON MADISON,)
Petitioner,)
v.) No. 17-7505
STATE OF ALABAMA,)
Respondent.)
- - - - -

Washington, D.C.

Tuesday, October 2, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

BRYAN A. STEVENSON, ESQ., Montgomery, Alabama; on behalf of the Petitioner.

THOMAS R. GOVAN, JR., Alabama Deputy Attorney General, Montgomery, Alabama; on behalf of the Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 17-7505, Madison versus Alabama.

Mr. Stevenson.

ORAL ARGUMENT OF BRYAN A. STEVENSON
ON BEHALF OF THE PETITIONER

MR. STEVENSON: Mr. Chief Justice, may it please the Court:

It's undisputed that Vernon Madison now sits on Alabama's death row, unable to fully orient to time and place. As a result of several strokes, he suffers from acute vascular dementia, which has left his cognitive abilities greatly diminished. He now has intellectual functioning in the borderline range. He has a memory score of 58. And these severe disabilities have rendered him bewildered and confused most of the time.

CHIEF JUSTICE ROBERTS: Mr. Stevenson, I'm -- it's a question for both sides, but I'm having trouble with a firm grasp on exactly what issues are presented.

Now just tell me if I've got this

1 right: There are two. The first one, I would
2 say, is, does someone who doesn't remember the
3 details of their crime, can he satisfy Ford and
4 Panetti simply on that basis? He knows what
5 capital punishment is, he knows what's going to
6 happen; he just doesn't remember what -- what
7 he did.

8 And the second one is whether or not
9 vascular dementia can be a basis for a Ford
10 claim. In other words, he meets the Ford
11 standard, but it's not caused by insanity; it's
12 called by -- caused by dementia. Now am I
13 right that those are the two separate
14 questions?

15 MR. STEVENSON: I -- I -- I think
16 they're two related questions. And the only --
17 I think what we would argue is that that first
18 question is that, yes, memory loss, with some
19 -- something else can render someone
20 incompetent, and that something else may not be
21 dementia -- that is, someone who has a brain
22 injury and is now impaired in a way where they
23 have no memory of anything, it's not vascular
24 dementia -- could also be incompetent to be
25 executed, someone who is actually in a coma.

1 CHIEF JUSTICE ROBERTS: Right.

2 JUSTICE GINSBURG: Did you say must be
3 memory loss plus? And what would the plus be?

4 MR. STEVENSON: Well, the -- the
5 examples that come to mind would be the kind of
6 brain damage that is a result of an injury,
7 where the brain is injured and incapable of
8 actually producing memories or creating the
9 kind of rational understanding that this Court
10 has required.

11 A second example would be something
12 like a coma. We would argue that someone who
13 is in a coma is not competent to be executed
14 because their state of mind would not be
15 reconcilable to what this Court has held in
16 Ford and Panetti.

17 JUSTICE SOTOMAYOR: Mr. Stevenson,
18 part of the problem is the use of the word
19 "loss of memory." And I -- in your briefs, you
20 seem to go back and forth on this.

21 Are you conceding that amnesia about
22 the incident alone, where you can function in
23 every other way in society, would you be
24 incompetent then?

25 MR. STEVENSON: No.

1 JUSTICE SOTOMAYOR: To be executed?

2 MR. STEVENSON: Yes, that's right. We
3 -- we do not contend --

4 JUSTICE SOTOMAYOR: So your loss of
5 memory isn't even what the cause of the loss of
6 memory is. If this person who has amnesia can
7 no longer function because they can't even
8 remember how to eat or how to go to the
9 bathroom or how to think about a problem or et
10 cetera, you would say the cause is not what's
11 important; it's whether their cognitive
12 deficiencies cause what? Now fill in the
13 blank.

14 MR. STEVENSON: That -- that's right.
15 Would cause disorientation, cause an inability
16 to understand their circumstances, have the
17 kind of symptoms that we have here.
18 Mr. Madison can't tell you the season of the
19 year. He can't tell you the month of the year.
20 He can't tell you the day of the week. He
21 can't recite the alphabet past G. He can't --

22 CHIEF JUSTICE ROBERTS: What if he
23 can --

24 JUSTICE ALITO: I just want to
25 understand your -- your answer to the -- to

1 Justice Sotomayor's question. If a person --
2 if -- if a person simply is without memory of
3 his commission of the capital offense, does
4 that in itself render that person incompetent
5 to be executed?

6 MR. STEVENSON: I -- I think it could.
7 But I think the reason why I qualify it is
8 because there aren't circumstances that I
9 believe are consistent with what we've argued
10 here.

11 JUSTICE ALITO: No, I think that's a
12 -- a question that calls for a yes or no
13 answer. If the only thing that is lacking is
14 memory of the commission of the capital
15 offense, does that in itself render the person
16 incompetent to be executed?

17 MR. STEVENSON: I think it would
18 render someone incompetent if the basis for
19 that inability to remember is medical rather
20 than something else. And here what we've
21 argued is that we're --

22 JUSTICE KAGAN: In your original
23 question presented, you ask whether a person, a
24 prisoner whose mental disability leaves him
25 without memory --

1 MR. STEVENSON: That's correct.

2 JUSTICE KAGAN: -- of his commission
3 of the capital offense. So do I take you now
4 to be saying that if you are left without
5 memory of the commission of the capital offense
6 for some reason that doesn't have something to
7 do with mental disability, that's not enough?

8 MR. STEVENSON: I -- I'm just --

9 JUSTICE KAGAN: But if there's mental
10 disability that has given rise to this lack of
11 memory, then it is?

12 MR. STEVENSON: Well, I guess what I'm
13 conceding, Justice Kagan, is that we're arguing
14 that more is required than someone saying I
15 don't remember my crime, you can't execute me.
16 The state has an interest in being able to
17 impose punishment and to execute these kinds of
18 sentences with something more than "I don't
19 remember." We've never argued that.

20 JUSTICE ALITO: No, I don't understand
21 -- I don't understand your answer. I don't --
22 I can't think of a situation in which a person
23 would lack memory of the commission of the
24 offense without that being based on a mental
25 condition.

1 MR. STEVENSON: Well, that's correct.

2 That's --

3 JUSTICE ALITO: By definition, it's a
4 mental condition.

5 MR. STEVENSON: That -- well, that's
6 my point, Justice Alito. We're arguing that it
7 would have to be accompanied by some mental
8 disability. And here we argued that that
9 disability was dementia.

10 And the reason why I'm stressing that
11 is because you can't understand the nature of
12 that memory loss, you can't rely on it as a
13 credible basis for concluding that someone is
14 incompetent to be executed, until you
15 understand how that's possible.

16 And that's the only point I'm making,
17 is that without something to look to --

18 JUSTICE KAGAN: Right. I suppose what
19 people are thinking of, and I'm -- I'm not even
20 sure if this happens ever or whether there's
21 any sort of physiology behind this, but the
22 idea of a kind of fugue state or a blackout
23 that's unaccompanied by anything else, does
24 that count as the kind of mental disability
25 that you're talking about?

1 MR. STEVENSON: No, it is not. It
2 does not. We're not arguing that someone who
3 is competent to stand trial, who nonetheless at
4 trial maintains that they blacked out or don't
5 remember would, therefore, be incompetent to be
6 executed. What we're arguing is something
7 quite different.

8 Here, we know that Mr. Madison's brain
9 is damaged. We can see it on an MRI. We know
10 that his cognitive abilities have declined. We
11 know that he is not able to understand the
12 things going on around him.

13 And we argued that, because of that
14 dementia, which has very particular features,
15 he is incompetent to be executed. The trial
16 court found that because he's not insane and
17 because he's not psychotic, there is no remedy
18 in the law for him. It was on that basis that
19 the trial court ruled against us.

20 Now it's significant that in this
21 Court -- and the state argued below that
22 incompetency to be executed can only be
23 established where there's a showing of
24 insanity, delusion, or psychosis.

25 In this Court, the state has taken a

1 different position. They now concede that
2 dementia can be a basis on which --

3 CHIEF JUSTICE ROBERTS: Right. Right.
4 Yeah. And that's what's -- that's what strikes
5 -- why this case strikes me as unusual. There
6 are two questions. You concede on one, and the
7 state concedes on the other.

8 MR. STEVENSON: Well --

9 CHIEF JUSTICE ROBERTS: You -- you're
10 conceding that simply blacking out, you don't
11 remember the crime, I don't know -- I don't
12 know if that happens often or not, you remember
13 everything else, you know the days of the month
14 and all that --

15 MR. STEVENSON: Yes.

16 CHIEF JUSTICE ROBERTS: -- but you
17 just can't remember the crime. You know that
18 you're going to be executed because you
19 committed a crime, but you don't remember
20 anything about it. I understand you to be
21 saying that's not enough.

22 MR. STEVENSON: Yeah.

23 CHIEF JUSTICE ROBERTS: But then I
24 also understand the state, and we can ask them,
25 but I think it is in their brief, to say that

1 if, in fact, you meet the Ford standards, they
2 don't care how you got there; if you got there
3 because you have dementia, you still meet the
4 Ford standards.

5 MR. STEVENSON: Well, but that's a
6 very different position than what we argued
7 below, because that was our argument, is that
8 we can meet the Ford standards when you
9 consider dementia as a legitimate basis for
10 rendering someone incompetent. And none of the
11 fact-findings were made through that lens.

12 And I think on the first question,
13 what I'm arguing is that we recognize that it's
14 too easy for any offender to say "I don't
15 remember." Defendants at trial often use
16 defenses of "I don't remember." It doesn't
17 preclude the state from trying them, from
18 convicting them, from sentencing them. It
19 doesn't make them incompetent.

20 But, when you have the kind of
21 disorder that Mr. Madison has and he has no
22 ability to remember anything about the
23 circumstances of the offense, he cannot put
24 himself in that situation, then we argue that
25 there is a legitimate basis for arguing that

1 that person cannot rationally understand the
2 circumstances of their execution, and executing
3 them would be inhumane.

4 And the --

5 CHIEF JUSTICE ROBERTS: Now you don't
6 care -- you don't care how they get there. If
7 they get there because of insanity, fine. If
8 they get there because of dementia, fine. If
9 they get there because they were hit on the
10 head, fine. It's just look at the condition at
11 the -- at that time?

12 MR. STEVENSON: It's the severity of
13 the disability and the reliability of --

14 JUSTICE SOTOMAYOR: Mr. Stevenson,
15 that's the point. Now let's --

16 MR. STEVENSON: It's the severity --

17 JUSTICE SOTOMAYOR: -- let's take as
18 given for the moment that the other side has
19 conceded that severe dementia does qualify
20 under Ford and Panetti.

21 MR. STEVENSON: Yes.

22 JUSTICE SOTOMAYOR: And I do -- I'm
23 going to ask the other side where the Court
24 addressed that issue, because I don't see it.
25 They seem to be thinking that only delusions

1 could qualify, not incompetence. But putting
2 that aside for the moment, how would I define
3 severe dementia?

4 MR. STEVENSON: Yes.

5 JUSTICE SOTOMAYOR: What's the
6 difference between mild dementia, moderate, and
7 severe?

8 MR. STEVENSON: Yes.

9 JUSTICE SOTOMAYOR: And where would
10 the fact-finder settle in saying this person is
11 incompetent or not incompetent?

12 MR. STEVENSON: Yes. And that's where
13 the medical community has helped us a lot, that
14 science has -- has emerged and evolved quite a
15 bit. Under the DSM-5, there are requirements
16 for moving someone from possible dementia,
17 which we would argue would not be sufficient to
18 render someone incompetent to be executed, just
19 the allegation, some limited memory deficits.

20 Moving someone from possible dementia
21 to probable dementia requires four things.
22 There needs to be an MRI where you can actually
23 see damage to the brain. That's one of the
24 things that --

25 JUSTICE SOTOMAYOR: It's very -- it's

1 very easy -- it's very hard to be a lay person,
2 but I understand that won't show up for
3 Alzheimer's, for example.

4 MR. STEVENSON: Well, it --

5 JUSTICE SOTOMAYOR: Until someone's
6 died and they can open up the brain.

7 MR. STEVENSON: With -- with some
8 forms. But, for vascular dementia, what we
9 know is that you will see on an MRI iterative
10 --

11 JUSTICE SOTOMAYOR: I'm -- I'm less
12 worried about that because I am worried about
13 something like Alzheimer's.

14 MR. STEVENSON: Yeah.

15 JUSTICE SOTOMAYOR: Dementia's
16 dementia.

17 MR. STEVENSON: Yes. That's right.

18 JUSTICE SOTOMAYOR: So let's get to
19 the definition.

20 MR. STEVENSON: But I just -- I'm just
21 using the criteria that the medical community
22 gives to us. It has that. We -- we -- we have
23 to be able to assert and prove substantive --
24 substantial cognitive decline, which we could
25 here. His IQ has dropped dramatically. His

1 memory scores have dropped dramatically.

2 And what the DSM-5 requires is some
3 etiology, something that we can point to that
4 helps us understand the maturation of this
5 disease so that it's not early stage but late
6 stage.

7 And here, of course, you have two
8 life-threatening strokes where he almost died
9 and there were brain injuries. He now has
10 cerebrovascular disease that we can see.

11 So, under those circumstances -- and I
12 -- I concede that there are going to be harder
13 cases, there could be harder cases, but under
14 these circumstances, the evidence is quite
15 dramatic.

16 There was no dispute that Mr. Madison
17 suffers from severe vascular dementia using the
18 criteria that the medical community has given
19 to us about these kinds of diseases, which is
20 why the state's concession that dementia could
21 be a basis is so significant.

22 What we wanted to prove to the judge
23 below is that dementia, when it has these
24 features, renders someone incompetent. And the
25 perfect example comes from the record.

1 Mr. Madison can explain to you that he
2 has a toilet in his cell. It's a 5-by-8 cell.
3 He can explain to you that he can use that
4 toilet. But he routinely urinates on himself
5 and he gets frustrated because he's asking the
6 guards to take him to the toilet.

7 He's not able to hold that memory of
8 the location of the toilet next to his bed when
9 it's time for him to urinate, and so he
10 continues to soil himself.

11 JUSTICE ALITO: Well, Mr. Madison
12 obviously has serious problems, serious
13 physical problems and mental problems, but I'm
14 quite confused by the arguments that you're
15 making.

16 Isn't it the case that in his order of
17 April 29 Judge Smith found that Madison failed
18 to prove by a preponderance of the evidence
19 that he does not rationally understand the
20 punishment he is about to suffer and why he is
21 about to suffer it?

22 MR. STEVENSON: What --

23 JUSTICE ALITO: Did he not make that
24 finding and is that not supported by the
25 testimony of the defense expert, Dr. Goff?

1 MR. STEVENSON: I don't think he -- I
2 don't think he made that finding.

3 JUSTICE ALITO: That's a direct quote
4 from his order.

5 MR. STEVENSON: Yeah, what he did was
6 actually cite Dr. Kirkland's testimony about
7 that point. Dr. Koff said -- Goff said that
8 Mr. Madison can tell you what a murder is if
9 you tell him that. He can say -- he can tell
10 you what the death penalty is. He can tell you
11 -- if you tell him you were convicted of this
12 crime, he can repeat that back to you, but he
13 has no independent knowledge of that.

14 And Dr. Kirkland never testified that
15 he had independent knowledge. And what the
16 court found --

17 JUSTICE ALITO: Well, I don't think
18 you're accurately representing what Dr. Goff
19 testified, but I don't want to argue about what
20 the record shows and doesn't -- and doesn't
21 show.

22 MR. STEVENSON: Well, Dr. Goff was
23 very clear about the point that he did not
24 remember the crime. He did not remember the
25 victim.

1 JUSTICE ALITO: Yes, he did not -- he
2 did not remember the crime. He did not
3 remember the victim.

4 MR. STEVENSON: Which --

5 JUSTICE ALITO: But he said he
6 understands the sentence, specifically the
7 meaning of the death sentence. He understands
8 the meaning of execution, and many details
9 involved. He is able to understand the nature
10 of the proceedings. He thinks he understands
11 that what the state is seeking is retribution.
12 He feels his conviction was unjust. He never
13 went around killing folks.

14 MR. STEVENSON: Well, he didn't -- I
15 think what he said was "I don't have any" -- "I
16 don't think this applies to me. I never went
17 around killing people." He wasn't able to
18 actually make a judgment about his conviction
19 because that memory wasn't with him.

20 And that's just what this Court dealt
21 with in Panetti. In Panetti, you had the same
22 circumstance where you have someone who was a
23 delusional but could tell you what murder is,
24 could tell you --

25 JUSTICE ALITO: But this order was the

1 order that came before us when this case was
2 before us the last time, is that not right?

3 MR. STEVENSON: That's right.

4 JUSTICE ALITO: And that's what you're
5 now contesting. You're contesting the order
6 that was already before us that you chose not
7 to contest on appeal in the -- in the Alabama
8 courts.

9 MR. STEVENSON: Well, actually, the
10 order --

11 JUSTICE ALITO: And the only thing
12 that's happened since then, and what you've
13 cited, are the -- the events concerning
14 Kirkwood.

15 MR. STEVENSON: Well, that -- that --

16 JUSTICE ALITO: Is that right?

17 MR. STEVENSON: No, we've actually
18 contended that the court below should now
19 recognize what the Eleventh Circuit recognized,
20 which is that if you consider dementia, and you
21 apply what we know about dementia to this
22 circumstance, and to Ford and Panetti, you will
23 have to conclude that this man is not competent
24 to be executed.

25 And what the trial court did on the

1 argument of the state is say that we failed
2 because we did not make a threshold showing of
3 insanity. We did not show delusions. The
4 trial court's order in this case starts with
5 our failure to show that he is delusional, and
6 ends with our failure to show that he's
7 delusional.

8 We never suggested that we could prove
9 that he is delusional. What we argued is that
10 his dementia renders him incompetent in a way
11 that does not permit the state, consistent with
12 the Eighth Amendment, to carry out this
13 execution.

14 And because dementia changes the
15 interpretation of these facts, as I was -- as I
16 was arguing, you can tell Mr. Madison that he
17 was convicted in Mobile, that this was the
18 crime, this was the circumstance. He can hold
19 onto that. But the next day, the next week,
20 he's not going to have that memory. And that
21 deprives him of the kind of rational
22 understanding this Court talked about as being
23 critical in Ford and Panetti.

24 JUSTICE KAGAN: Can I ask -- can I
25 give you two versions of your argument and you

1 tell me which one you're arguing?

2 MR. STEVENSON: Sure.

3 JUSTICE KAGAN: Or maybe you can tell
4 me that there's no difference --

5 MR. STEVENSON: Sure.

6 JUSTICE KAGAN: -- between the two.

7 So one is just if you have severe dementia, you
8 are incompetent to be executed. That's simple.

9 The other is, if you have severe
10 dementia, you are likely also to have a lack of
11 rational understanding of the kind we talked
12 about in Panetti.

13 So, in other words, the dementia would
14 be the -- the -- the -- the physiological
15 reason, but the standard would still be the
16 Panetti standard.

17 MR. STEVENSON: I -- I -- I think it's
18 the latter, Justice Kagan. We're not -- we're
19 not arguing that just the mere proof of severe
20 dementia alone would satisfy the Eighth
21 Amendment because there are dementia sufferers
22 whose long-term memory is actually pretty
23 secured, pretty well intact.

24 They -- they -- they struggle mostly
25 with short-term memory. And the nature of that

1 struggle might allow them to hold onto these
2 long-term memories in a way that they would
3 have a rational understanding of these
4 circumstances.

5 I don't think this is an area where
6 there can be the kind of clarity of category or
7 offense that would allow this Court to say
8 those people are incompetent, these people are
9 not. And that's what this Court was dealing
10 with in Ford and Panetti.

11 JUSTICE BREYER: So what -- what then
12 -- as -- as probably you know, I think, that
13 there are many, many, many prisoners on death
14 row under threat of execution who are in their
15 40s, 50s, 60s, 70s, possibly 80s, who have been
16 there for 20, 30, 40 years perhaps. So this
17 will become a more common problem.

18 The standard used in Ford is -- the
19 word they often use is insane. All right? In
20 Panetti, the word they use, he has no
21 comprehension of why he has been singled out.
22 All right?

23 If you are writing this standard for
24 the situation I described, what words would you
25 use? What's the sentence that you believe

1 should be seen in the U.S. reports in this on
2 -- on a problem that I think is general?

3 MR. STEVENSON: Yeah, if I can just
4 first contextualize that problem before giving
5 that answer. I mean, I -- I -- I don't think
6 that the age of the offender is a predictor of
7 the scale of this phenomena, at least based on
8 what we're talking about here.

9 And this was an issue that came up in
10 Ford, where there was a real concern about the
11 flood gates. And we put a footnote in our
12 brief about the incidence, how frequently
13 competency to be executed -- competency to be
14 executed claims are raised. And it's actually
15 relatively infrequent, Justice Breyer.
16 Ninety-three percent of the 1300 people who
17 have gotten execution dates over the last 30
18 years did not raise a competency to be executed
19 claim, even though many of them were older than
20 Mr. Madison.

21 Mr. Madison's problems are -- are
22 cerebrovascular, which, of course, can happen
23 at any age.

24 JUSTICE BREYER: Right. But I would
25 think --

1 MR. STEVENSON: I take your point.

2 JUSTICE BREYER: -- Alzheimer's --

3 MR. STEVENSON: Yeah. Yes, I take --

4 JUSTICE BREYER: -- dementia of many
5 kinds.

6 MR. STEVENSON: -- I take your point.

7 JUSTICE BREYER: All sorts of things.

8 And so we could litigate each case, case by
9 case, or you answer what I -- I mean --

10 MR. STEVENSON: Yes, that's right.

11 The rule I -- I would argue is that where
12 someone has a disability that renders them
13 incapable of orienting to time or place or
14 rationally understanding the circumstances of
15 their offense, they are incompetent. And there
16 has been no reliable determination of rational
17 understanding of the circumstances here,
18 because the court was unwilling to consider any
19 evidence about that mental state that was
20 outside the scope of insanity, delusion, or
21 psychosis.

22 And we think, as the Eleventh Circuit
23 did, when you accept dementia as a relevant
24 basis for coming to that conclusion, the
25 Eleventh Circuit had no difficulty finding that

1 he's clearly incompetent. Even the dissenting
2 judge starts his dissent, "Mr. Madison is
3 clearly incompetent."

4 JUSTICE ALITO: When you back -- when
5 you went back to the trial court, you
6 emphasized the events concerning Kirkwood.
7 What is his situation now?

8 MR. STEVENSON: Dr. Kirkland has been
9 suspended. He is no longer a practicing
10 psychology -- psychologist. He is under threat
11 of criminal prosecution.

12 JUSTICE ALITO: Did the grand jury
13 refuse to return a true bill for him?

14 MR. STEVENSON: They did at one point.
15 But he is still under investigation, still
16 suspended.

17 JUSTICE ALITO: He's still under
18 investigation by whom?

19 MR. STEVENSON: By the State of
20 Alabama. There are multiple counties involved
21 in the circumstances that gave rise to this.
22 And our only point with that, Justice Alito, is
23 that the -- the court relied so heavily on this
24 conclusion that we didn't think was supported
25 by the record, that we -- we thought that it

1 was relevant that Dr. Kirkland's reliability be
2 addressed.

3 But our broad point was that, given
4 what we know about dementia, given that if you
5 apply dementia to these facts and
6 circumstances, the trial court would have to
7 conclude, like the Eleventh Circuit did, that
8 Mr. Madison is incompetent.

9 The state argued that you can't do
10 that in trial court; you can only find
11 incompetency if there's psychosis or insanity
12 or delusions. And that was the basis on the
13 trial court's rejection of our argument.

14 And I don't think it's too difficult
15 to articulate this concept of -- of
16 incompetency that relates to rational
17 understanding, orientation, disorientation, is
18 a key factor. And that's for me perhaps useful
19 for a court to articulate because, in a lot of
20 ways, your inability to orient to time and
21 place is going to undermine your ability to
22 rationally understand what's going on.

23 And that's a fairly well-developed
24 area of the medical profession. It's what --

25 JUSTICE GINSBURG: Now what do you do

1 with the --

2 JUSTICE SOTOMAYOR: Mr. Stevenson --

3 JUSTICE GINSBURG: -- with the
4 determination -- what do you do with the
5 determination that, one, he knew that he was
6 subject to execution for having killed a police
7 officer?

8 MR. STEVENSON: I -- I'd -- I would
9 deal with that the same way the Court dealt
10 with that in Panetti. The abstract
11 understanding that someone who's convicted of a
12 murder can be executed does not help resolve
13 the question of whether this defendant has a
14 rational understanding of his circumstances.

15 And the example that I use is a common
16 one, common problem you see in dementia. When
17 someone goes to see their mother and their
18 mother doesn't recognize them, it's
19 heartbreaking. It's devastating. Once you
20 understand that the reason why they can't
21 recognize you is dementia, you have a different
22 relation -- relationship to what that means.

23 You can say "I'm your daughter," and
24 that person will respond to you as their
25 daughter. But, when you come back the next

1 day, they don't have a rational understanding
2 of who you are.

3 And what the trial court and what the
4 state has argued is essentially, if we can get
5 the patient to say, "yes, that's my daughter,"
6 we can conclude that they have a rational
7 understanding of their circumstances, of their
8 family.

9 And that's the tragedy of dementia.
10 You can't sustain that understanding. And
11 that's where the orientation to time and place
12 becomes critical.

13 Now there are other circumstances. I
14 -- I just wanted to be clear that we're not
15 contending that this should be an unworkable
16 standard for states, that someone saying "I
17 don't remember" is sufficient.

18 I think here there was a very key --
19 clear case. No one disputes the severity of
20 his mental and physical decline, his
21 disabilities. He's legally blind now. He
22 can't speak without slurring his speech. He's
23 incontinent. He can't walk without assistance.
24 Everyone, including the trial court, observed
25 that he is a very severely ill person.

1 JUSTICE KAGAN: Have there been
2 changes even since 2016? Is this continuing?

3 MR. STEVENSON: It is a degenerative
4 disease and, yes, he continues to -- to
5 decline. And, of course, the circumstances
6 that he is in add to that decline. He's locked
7 in a 5-by-8 cell. He's been in solitary
8 confinement for 33 years. He is in pain.
9 There isn't the kind of medical care that he
10 might otherwise get.

11 So there's no question, and -- and
12 Dr. Goff was very clear about this, and the
13 APA's brief makes this clear, that his
14 condition will continue to degenerate and his
15 ability to function will diminish as well.

16 But the point --

17 JUSTICE SOTOMAYOR: Mr. Stevenson, the
18 court below believed that Dr. Kirkland and
19 Goff's evaluations were essentially similar.
20 Do you agree with that assessment? If you
21 don't, tell me how you relate that lack of
22 similarity to the question of his reliability.

23 MR. STEVENSON: Yeah, I think --

24 JUSTICE SOTOMAYOR: And what do you
25 think the trial court should have done --

1 MR. STEVENSON: Sure.

2 JUSTICE SOTOMAYOR: -- in order to
3 deal with that?

4 MR. STEVENSON: Yeah. Okay. Well, I
5 think the primary difference is that
6 Dr. Kirkland in no way was willing to
7 acknowledge dementia as relevant to his
8 evaluation. So his fact-findings about what
9 the patient remembers were made without any
10 context or any understanding of dementia as
11 relevant to that.

12 Dr. Goff, on the other hand, said you
13 cannot find that Mr. Madison has any
14 independent recollection of the crime, the
15 circumstances, the events that led to his
16 arrest. Dr. Goff made the finding that he
17 doesn't understand from day to day what's
18 happening, that he's disoriented, that he's
19 bewildered. None of those findings were found
20 by Dr. Kirkland.

21 And so Dr. Goff's evaluation, of
22 course, was that he would not be competent to
23 be executed when you consider these medical
24 facts. And Dr. Kirkland, the trial judge, nor
25 the state ever acknowledged dementia as

1 relevant to the determination, which is why I
2 don't think this Court can find that that was a
3 reliable determination.

4 I'd like to reserve the rest of my
5 time for rebuttal if there are no further
6 questions.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Govan.

10 ORAL ARGUMENT OF THOMAS R. GOVAN, JR.

11 ON BEHALF OF THE RESPONDENT

12 MR. GOVAN: Mr. Chief Justice, and may
13 it please the Court:

14 This Court granted certiorari on two
15 questions. With respect to the first question
16 concerning whether the state may execute an
17 offender who does not remember committing the
18 capital offense, there is absolutely no
19 objective evidence of a national consensus
20 supporting such a rule, and Mr. Madison does
21 not offer any evidence to the contrary.

22 Now, on the second question
23 presented --

24 JUSTICE SOTOMAYOR: Can I go back to
25 -- can I start there? It seems to me as I'm

1 reading through some of the materials that you
2 pointed to in your brief that, under the common
3 law, there were different kinds of -- of
4 defenses to murder, including lunacy. I see
5 one of your sources, Cowell, and the other
6 Hale, talking about lunacy being a condition
7 unlike insanity, which they defined as never
8 being in touch with reality. They define
9 lunacy as being able to remember some things
10 but not others.

11 And yet, to a source, the common law
12 excused lunatics, so that if states are folding
13 in dementia into lunacy, into insanity, into
14 other sort of broader labels just like the
15 common law did, how can I rely on your
16 statement that there's no consensus?

17 MR. GOVAN: Well, Your Honor --

18 JUSTICE SOTOMAYOR: I don't even know
19 that we have to get there because your
20 adversary has said that he thinks this folds
21 into Ford and Panetti because it's not dementia
22 qua dementia; it's a certain kind of dementia
23 that doesn't put you in rational touch with
24 your decision-making in your moment. But,
25 putting that aside, I -- I'm taking on your

1 starting proposition.

2 MR. GOVAN: Yes, Your Honor, for two
3 points. The first, just to address the common
4 law, is that, when we look back at the common
5 law, they were addressing something different,
6 where someone has completely lost his wits.
7 We're talking about absolute madness.

8 JUSTICE SOTOMAYOR: No, they define
9 "lunacy" as someone who can remember sometimes
10 and not remember -- have his wits sometime and
11 not have his wits other times.

12 MR. GOVAN: Well, Your Honor, our --
13 our view of the common law, and those sources,
14 we're talking about something different. Not
15 remembering the offense would not fit into
16 those categories of someone -- absolute madness
17 or -- or losing their wits.

18 And the second point --

19 JUSTICE SOTOMAYOR: Well, if you don't
20 think a demented person who today doesn't
21 remember you as your son, who doesn't know
22 where he or she is, who doesn't know to call --
23 to go to the bathroom in the pot right next to
24 him -- you don't call that being out of your
25 wits?

1 It could be that maybe tomorrow they
2 might for a few minutes remember, but at the
3 moment that they're having that episode, are
4 they within their wits?

5 MR. GOVAN: Your Honor, we -- we have
6 not -- there -- there could be -- again,
7 dementia exists on a spectrum. So there's no
8 doubt there could be some case where someone
9 has dementia where they could have lost their
10 wits or meet the Ford and Panetti standard, but
11 that's not what we have here.

12 And that's --

13 CHIEF JUSTICE ROBERTS: Well, but you
14 -- it is my understanding, I'll ask the same
15 question I asked earlier of the two questions
16 accurate, you -- you are arguing that simply
17 because somebody doesn't remember the crime,
18 that that doesn't help satisfy Ford and
19 Panetti, right?

20 MR. GOVAN: Correct, Your Honor.

21 CHIEF JUSTICE ROBERTS: But you've
22 conceded that if the person meets the Ford and
23 Panetti standard by virtue of vascular
24 dementia, that he meets the Ford and Panetti
25 standard, right?

1 MR. GOVAN: Yes, yes, if someone has
2 vascular dementia or any other mental illness,
3 if it precludes them from having a rational
4 understanding of their punishment, and that
5 they will die when they're executed, they would
6 meet the Ford and Panetti standard.

7 CHIEF JUSTICE ROBERTS: So -- so I
8 understand your friend who have conceded that
9 simply not remembering the crime is not enough.
10 And you're arguing that if it's vascular
11 dementia that affects you up to the point of
12 Ford and Panetti, that that is enough.

13 So are all we arguing about whether --
14 is whether Mr. Madison himself meets the Ford
15 and Panetti standard?

16 MR. GOVAN: That's exactly right, Your
17 Honor. And that's the question that had -- was
18 already presented to the state trial court in
19 2016, which this Court reviewed those same
20 facts last year and summarily --

21 JUSTICE GINSBURG: But this -- but
22 this -- the decision we're now reviewing said
23 the Supreme Court said must be insane. This
24 man isn't insane. End of case.

25 MR. GOVAN: Yes, Your Honor, but that

1 -- that doesn't change the scenario. And we
2 have to explain the context that that occurred.
3 That was just a summary denial in the exact
4 same case.

5 After this Court summarily reversed
6 the Eleventh Circuit, the Alabama Supreme Court
7 set Madison's execution date again. And what
8 Mr. Madison did is he filed another petition of
9 the same Alabama statute that uses that term
10 "insanity" -- that's why that term was used --
11 alleging the exact same evidence that he
12 presented to the trial court, the same trial
13 court judge in 2016, which had previously
14 rejected.

15 That court held a hearing in 2018 and
16 essentially asked Madison: Do you have
17 anything else new to present? And Mr. Madison
18 said: No. And on page 12 of that hearing
19 transcript, Mr. Madison said -- Mr. Madison
20 said: We are obviously relying on the evidence
21 that was previously before the court.

22 And so, when the court was presented
23 with that same evidence, he said this Court,
24 the Supreme Court has already said --

25 JUSTICE KAGAN: Well, is there ever a

1 place where the court makes clear that it
2 understands that insanity is not a sine qua
3 non, that dementia could do the trick in
4 satisfying the Ford/Panetti standard?

5 Is there ever a place where the court
6 says, even though, you know, I understand that
7 I'm not necessarily looking for delusions or
8 schizophrenia or insanity and all the -- the
9 ways that we -- that we saw it in Ford and
10 Panetti, that if I find somebody who's
11 experiencing the kind of dementia that would
12 prevent him from having a rational
13 understanding of the crime and punishment, that
14 that's enough? Is there ever a place where the
15 court makes clear that it knows that?

16 MR. GOVAN: Well, yes, several parts,
17 Your Honor. On page 3 and 4 of the court's
18 order, the 2016 order, it set out the Panetti
19 standard in full.

20 On page 10 of the court's order --

21 JUSTICE KAGAN: But I don't think that
22 that does it. I mean, you can set out the
23 Panetti standard. The question is whether you
24 understand that dementia can be the basis for
25 satisfying the Ford and Panetti standard.

1 MR. GOVAN: Absolutely. On page 6
2 through 8 of that court's order, the trial
3 court specifically outlined Dr. Goff's
4 testimony about that, including the fact that
5 he had had strokes, that because of those
6 strokes, he had had a loss, a memory loss, that
7 he had cognitive decline.

8 He considered --

9 JUSTICE KAGAN: Right. But if you're
10 just listing that evidence, what you might
11 think as a court if you're looking for
12 delusions is that's all relevant, I'm listing
13 the evidence, but that's irrelevant.

14 Is there ever a place where the court
15 makes it clear that that is relevant?

16 MR. GOVAN: Because it specifically
17 said in its conclusion on page 10 that it was
18 considering all the testimony of Dr. Goff and
19 that eventually made the final finding, which
20 Justice Alito pointed to, that "Madison has a
21 rational understanding as required by Panetti
22 that he is going to be executed."

23 And it's important also to note that
24 there were --

25 JUSTICE KAGAN: But do you see what I

1 mean, Mr. Govan? And I won't belabor this, but
2 you can list all the evidence and think to
3 yourself: I'm listing all the evidence, but I
4 find all this evidence utterly irrelevant to
5 the legal standard because I think delusions
6 are required to satisfy Ford and Panetti.

7 MR. GOVAN: Well, I understand, Your
8 Honor. I guess the point is that the judge
9 never made that finding. There's no point in
10 the judge's order where it said: I hear this
11 evidence from Madison's expert, but I can't
12 consider it. That was never in the order.

13 The judge never said that I'm denying
14 his competency petition because he doesn't have
15 a delusion. That's -- that's what my friend
16 has argued below, but that's not consistent --

17 JUSTICE KAGAN: I guess what you're
18 saying is either way. We -- we can't tell
19 either way whether -- is that what you're
20 saying?

21 MR. GOVAN: No, absolutely --

22 JUSTICE KAGAN: We can't -- we can't
23 tell that he thought that delusions were
24 required, and we can't tell that -- whether he
25 thought that dementia could satisfy?

1 MR. GOVAN: No, that's not what we're
2 saying at all. We're saying, number one, that
3 he did consider all this evidence presented by
4 Dr. Goff. And, number two, there is not a
5 single point that Madison can point to where
6 the trial court said: I can't consider this
7 evidence. That just does not appear in the
8 record.

9 JUSTICE SOTOMAYOR: I guess --

10 JUSTICE BREYER: What do you think?
11 That is, what does the state think about the
12 standard, which perhaps would be an addition to
13 Ford or Panetti, which was mentioned, if the
14 two -- and it's not exclusive, but if two
15 things are true; one, he does not recall his
16 crime; and, second, he has a severe inability
17 to orient himself to time or place, which means
18 the kinds of things that were described.

19 Yes, I recognize you today; tomorrow I
20 can't, not a clue, not a clue where anything
21 is, though sometimes he answers the right
22 questions. That's what I mean by that.

23 But you heard the words. So judging
24 going back to the Eighth Amendment and using
25 the rationale of Ford, not the words, and

1 Panetti, is there a -- would you accept the
2 fact that such a person cannot be executed
3 under the Eighth Amendment? And, if not,
4 what's the difference?

5 MR. GOVAN: Your Honor, the difference
6 is -- is that, under Ford and Panetti, Madison
7 has an understanding of what matters.

8 JUSTICE BREYER: No, no, I'm not
9 saying -- I understand that the words I just
10 used are different than Ford and Panetti, but a
11 person in that circumstance either can be
12 executed or not. That would be perhaps a new
13 standard or a modification of Ford and Panetti.

14 So I want to know if you think such a
15 person can be executed and what your objection
16 is to adding the words I just said as an
17 additional standard, if you like, or a
18 modification or interpretation of the existing
19 standard, if you prefer?

20 MR. GOVAN: And the specific words
21 that they --

22 JUSTICE BREYER: The words are, one,
23 he does not recall his crime, and, two, he has
24 a severe inability to orient -- mental ability
25 -- he has a severe inability to orient himself

1 to time and place.

2 MR. GOVAN: Well, I'll take the first
3 one, Your Honor. Not remembering the crime,
4 that would create an unworkable rule for the
5 state ever to prove because, essentially, it
6 would follow that --

7 JUSTICE GINSBURG: And nobody's --
8 nobody's arguing that in this case. Mr.
9 Stevenson made that clear.

10 JUSTICE ALITO: Well, that was the
11 question we -- the principal question that we
12 granted, but, apparently, it's fallen out of
13 the case.

14 MR. GOVAN: Well, Your Honor, I think
15 the reason it's fallen out is because there's
16 such a clear lack of objective evidence for
17 such a rule.

18 JUSTICE BREYER: But that isn't --
19 that isn't -- that -- that's not really my
20 point. We've all seen people in final stages
21 of Alzheimer's. All right? Think of such a
22 person.

23 Now is there any reason to execute
24 that person when you wouldn't execute the
25 people in Ford and Panetti?

1 MR. GOVAN: Your Honor, because, in
2 this case, the state would still have a strong
3 interest in seeking retribution for a horrible
4 crime. If someone -- even if they can't
5 remember the crime, that doesn't somehow lessen
6 their ability to understand --

7 JUSTICE SOTOMAYOR: I'm sorry --

8 CHIEF JUSTICE ROBERTS: We're -- we're
9 mix --

10 JUSTICE SOTOMAYOR: -- how about --

11 CHIEF JUSTICE ROBERTS: -- we're
12 mixing up the questions. We understand your
13 friend on the other side to say not remembering
14 the crime is not enough, right?

15 But, if the person meets the standards
16 of Ford and Panetti, as stated in Ford and
17 Panetti, the fact that he got there through
18 vascular dementia, I understand you to say that
19 doesn't make a difference. That still
20 qualifies.

21 MR. GOVAN: Yes. Yes, Your Honor.
22 That -- that -- that scenario, whether it's
23 vascular dementia or any other type of mental
24 illness, that would just be the starting point.
25 And the state isn't going to say that and has

1 never said that --

2 JUSTICE SOTOMAYOR: All right. In
3 Panetti, the man understood that the -- that he
4 was in jail, that the state was charging him
5 with a crime, that it was going to put him to
6 death. He believed they wouldn't, because of
7 his delusions, ultimately succeed, but he
8 understood perfectly well that set of facts.
9 And we said that still qualified him.

10 So we have a man here who knows that
11 he's incarcerated or kept in a cage because
12 he's in a bed, he can't move on his own, can't
13 remember where the bathroom is next to him,
14 can't see, slurs his words. He's really not
15 quite there. But he knows that someone says he
16 committed a murder and that they're trying to
17 kill him, but he doesn't understand why. He
18 can't be present enough in time to rationally
19 understand or reflect on what he has done
20 because he can't retain information for long.
21 And why is that different than Panetti?

22 In Panetti, the man was blaming
23 someone else, which may be even worse for some
24 people, or saying that someone else is going to
25 protect him. But if you can't rationally

1 appreciate why you're putting -- being put to
2 death, how does that fulfill the Panetti
3 standard?

4 MR. GOVAN: Your Honor, because this
5 case is different than the facts of Panetti.
6 So, in Panetti, the problem was the inmate knew
7 he was going to be executed, but he didn't
8 understand why. He believed that the reason he
9 was going to be executed was because it was a
10 -- a sham to get him from -- stop preaching.
11 There is no confusion from Mr. Madison's
12 perspective. His own expert said that, quote,
13 and this is on page 7 of his report, "he
14 understands the sentence, specifically the
15 meaning of a death sentence." And he said,
16 quote, that "Madison said the reason he was in
17 prison was because of murder."

18 And that -- and that's the difference
19 here in this particular case, is that his own
20 expert admitted --

21 JUSTICE SOTOMAYOR: So what if he
22 can't understand or really follow through in
23 his thinking what that means? I mean, he's
24 just not rational in the way you and I
25 understand it.

1 I certainly don't think a demented
2 person who has Alzheimer's and is put in a --
3 in an institution might have a moment of
4 understanding one memory, and I think that they
5 are rational. I certainly don't think you
6 would let them buy an apartment in Florida the
7 way he told one of his lawyers he was going to
8 do after this case ended.

9 MR. GOVAN: Well, Your Honor, with
10 respect, on the things that matter, he does
11 understand. And we haven't talked about all
12 the things that he -- he does recall both
13 before and after the offense.

14 He remembers that he was convicted of
15 multiple juvenile offenses and sent -- spent
16 time in a youth detention facility. He
17 remembers that --

18 JUSTICE GINSBURG: Mr. Govan, can I
19 ask you whether you think this is at all
20 relevant? At the time of the conviction, over
21 30 years ago, Madison was competent. There was
22 no doubt about that. But I think this --
23 wasn't this a case of a judge overriding a jury
24 recommendation against death in -- in Madison's
25 case?

1 MR. GOVAN: Yes, Your Honor.

2 JUSTICE GINSBURG: So suppose he had
3 come to that, the end of the trial, in the
4 condition he now is in; that is, he can't see,
5 he can barely walk, all of the other conditions
6 that Mr. Stevenson brought out. Is there any
7 likelihood that a jury would have recommended
8 death for such a person or that a judge would
9 override the jury's recommendation for life
10 rather than death?

11 MR. GOVAN: Judge, I don't know. That
12 would be a situation that would -- would take
13 place in a normal sentencing hearing to
14 determine whether those mitigating
15 circumstances -- aggravating circumstances
16 outweigh the mitigators. But I would say what
17 matters here is -- is that scenario would not
18 impact the state's -- the constitutionality of
19 seeking a death sentence or the -- the
20 propriety of seeking a death sentence, which,
21 again, nothing about Mr. Madison's conditions
22 impact the state's interest in seeking
23 retribution for a -- a heinous crime.

24 CHIEF JUSTICE ROBERTS: Do you -- I
25 mean, what is the significance? I -- I would

1 have thought all we were concerned about is
2 mental significance -- mental ability and
3 understanding, the various things, blindness,
4 inability to -- to walk. None of that should
5 -- is relevant under Ford and Panetti, is it?

6 MR. GOVAN: That's correct, Your
7 Honor. That's correct. In fact, Panetti talks
8 about something similar to that, that there
9 could be other -- another category of inmates
10 who, as a result of not mental illness, that
11 they're recalcitrant, they're callous, they --
12 they blame other people for the crime. That --
13 that's not what Panetti is seeking to carve out
14 the narrow exception for people who are insane.

15 CHIEF JUSTICE ROBERTS: What -- what
16 is your view on the significance of the MRI
17 evidence?

18 MR. GOVAN: Your Honor, and that --
19 that kind of -- Mr. Madison's point on that is
20 kind of missing, I guess, the point. MRIs can
21 help diagnose vascular dementia. And we've
22 never disputed whether he has vascular dementia
23 or not.

24 But MRIs can't help determine whether
25 someone has a rational understanding. That's

1 something that is inherently going to come from
2 talking with a particular inmate and
3 particularly in this case, where the
4 dispositive fact that Mr. Madison is relying on
5 is that he can't remember the crime.

6 That's inherently something that only
7 comes from the defendant. And he would have to
8 admit that, whether to a psychologist or in
9 testimony. And that can't be the rule because,
10 if that was the case, no inmate would ever
11 admit to committing the crime if that meant
12 that he were incompetent.

13 CHIEF JUSTICE ROBERTS: But you --
14 you've already prevailed on that point at least
15 with respect to your adversary's view, right?

16 MR. GOVAN: Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: Okay. So I
18 would have thought we can stop arguing about
19 it, but -- we don't have to -- we don't have to
20 accept a concession, but the -- the concern
21 about the MRI evidence is that it would, if I
22 understand it, tend to show something that is
23 going to have a broader effect than just not
24 remembering the facts of the crime. Is -- is
25 that not right?

1 MR. GOVAN: Well, Your Honor, I think
2 MRI evidence can help. There is this
3 suggestion as far as the -- the diagnosing. So
4 that certainly can -- can help with the
5 individual fact determinations that a trial
6 court would make.

7 CHIEF JUSTICE ROBERTS: Yeah, but
8 there's no MRI evidence that's going to be
9 looked at and you can say this shows that he
10 doesn't remember the facts of the crime. That
11 doesn't -- isn't going to have broader
12 significance, right?

13 MR. GOVAN: That's correct. But,
14 again, in this -- in this case, of course, the
15 trial court did consider -- and just in this
16 particular case, did consider the fact that,
17 according to Dr. Goff, this was a progressive
18 disease. But, at the end of the day, the court
19 held that there was a rational understanding.

20 I just -- one point I also want to
21 make in this particular case, that the
22 petition, whether Madison's position, whether
23 going to the first question or the second
24 question would be contrary to how competency
25 determinations are done across the board at any

1 level, whether competency to stand trial,
2 competency to be executed, competency to waive
3 appeals. They all function the same way.

4 It's not the fact that someone comes
5 to the court and says to a trial court: Oh, I
6 have a -- I have this particular mental illness
7 and, therefore, I meet the competency standard.
8 It would apply the exact same way it occurred
9 here, that they -- that it would consider that
10 evidence and determine whether they have a
11 rational understanding. And that's what the
12 trial court did here.

13 JUSTICE GINSBURG: So you would think
14 that if he came before the trial court on a
15 question of competence to stand trial with what
16 his mental condition is now, his lack of
17 orientation to time and place, that he would
18 have been found competent to stand trial?

19 MR. GOVAN: Yes, Your Honor, I do,
20 because, again, he would have what the -- the
21 rational understanding that would be required
22 in even the competency to stand trial setting,
23 which is a rational understanding of the facts,
24 the factual proceedings, and the ability to
25 assist with counsel.

1 And here, that's what Madison's expert
2 said, that he did understand, quote, "he has
3 been able to understand the nature of the
4 pending proceeding and he has an understanding
5 of what he was tried for." So, yes.

6 JUSTICE KAGAN: And -- and -- and what
7 if what they meant by that was you can -- you
8 can make him understand what is going on today,
9 but then tomorrow he comes back and you have to
10 do it all over again, and then tomorrow -- the
11 next day comes back and you have to do it all
12 over again?

13 In other words, he -- you -- you can
14 -- you can -- you can get him to understand
15 something, but then he loses it. That's --
16 because that's the way memory works with people
17 in this -- with this form of dementia.

18 What about that?

19 MR. GOVAN: Your Honor, that -- that
20 might be a closer question, again, that you
21 would determine on the factual circumstances in
22 front of that particular court. But, again,
23 that -- that's not what we have here.

24 It was clear -- Mr. Madison said to
25 both experts that he remembered that he had

1 three separate trials, that he was convicted of
2 a death sentence. He -- to both experts, he
3 believed that he did not agree with the
4 particular sentence.

5 So that's not what we have here in
6 this particular case because, as this Court
7 noted before, both experts' testimony
8 demonstrated that he did have a rational
9 understanding of his particular sentence in
10 this case.

11 Another point that would just need --
12 I just want to harken back to, the -- the fact
13 of -- we've talked about the original rule,
14 that Madison in the first question presented,
15 is that there's just simply no objective
16 evidence of a position supporting Madison's
17 position, either under the first or second
18 question presented.

19 No state legislature has determined
20 that prohibits states, of the 31 states that
21 have the death penalty, has prohibited states
22 from carrying out an execution for someone who
23 has a mental illness or who cannot remember the
24 particular facts of the crime.

25 The lower courts are -- are uniform in

1 that respect in addressing competency as well,
2 and the Texas brief points that out in regards
3 to competency to stand trial. And we point out
4 in our brief that of the three states that have
5 addressed an issue similar to this, they have
6 all come down on Alabama's side, that simply
7 having dementia and not remembering the facts
8 of the crime does not prevent you per se from
9 having a rational understanding.

10 So the final point I would just
11 mention to this Court is what, again, what
12 Madison seeks is unprecedented. This Court has
13 never created a categorical rule excluding
14 someone from capital punishment where at least
15 there was some objective evidence of a national
16 consensus in that direction. Here, there is
17 none.

18 And the consequences of such a rule
19 would prevent the state from carrying out an
20 execution on Madison, who -- a convicted --

21 JUSTICE SOTOMAYOR: But you don't
22 disagree that Ford and Panetti, read properly,
23 would not be limited to insanity, delusion, or
24 severe dementia?

25 MR. GOVAN: Of course not. All those

1 things are included in Ford and Panetti.

2 JUSTICE SOTOMAYOR: And --

3 MR. GOVAN: And the thing is that in
4 this case, the trial court did consider them
5 and found that notwithstanding those
6 conditions, the fact that he had these strokes
7 and memory loss, he still had a rational
8 understanding of his --

9 JUSTICE SOTOMAYOR: Well, that's --

10 MR. GOVAN: -- crime and punishment.

11 JUSTICE SOTOMAYOR: -- interesting to
12 me because I don't read anywhere in Kirkland
13 where he did any analysis of rationality. What
14 he did, as I understood it, is just does he
15 remember his crime or something -- he doesn't
16 remember his crime, but does he understand
17 where he is and what they're going to do to
18 him? That's not the same as rational
19 understanding.

20 He did no memory test to see how long
21 Mr. Madison retained information generally. He
22 did not describe the extent of his dementia.
23 He didn't do any of the things one would expect
24 if he was going to opine on rationality.

25 So how -- the only one who did that

1 was Dr. Goff, and that part of his discussion
2 was not addressed by the Court below at all.

3 MR. GOVAN: Just -- just two points in
4 response to that, Your Honor. We disagree,
5 number one, on page 2 of Dr. Kirkland's report,
6 he did set out the Ford and Panetti standard.

7 And as the trial court noted in the
8 hearing, doctor -- that particular doctor had
9 done, I think, approximately 4,000 competency
10 evaluations, which was for competency to stand
11 trial, was -- is similar to the standard for
12 competency to be executed, as the Texas brief
13 points out, and he did analyze the rational
14 understanding.

15 And it would make sense, again, why
16 Dr. Kirkland would not specifically inquire to
17 whether an inmate would remember committing the
18 crime, because that is not determinative under
19 Ford and Panetti. But, in this case, because
20 Madison does have a rational understanding that
21 he was convicted of the crime of murder, that
22 he will be executed for that murder, we would
23 ask this Court to affirm the state court.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Stevenson, you have four minutes
2 remaining.

3 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON
4 ON BEHALF OF THE PETITIONER

5 MR. STEVENSON: Yes. Thank you.

6 I just want to stress and invite this
7 Court to look at the Eleventh Circuit pleadings
8 where the state took the exactly opposite
9 position.

10 There has been no point prior to this
11 Court where the state has acknowledged that
12 dementia would be a basis on which a court
13 could find someone incompetent to be executed.
14 Their brief, the post-hearing brief that they
15 filed after the hearing begins, "Initially, it
16 must be noted that Madison has failed to
17 implicate Ford or Panetti in this proceeding.
18 Both the court-appointed expert and the
19 defense-retained expert agree that Madison does
20 not suffer from psychosis or delusions."

21 That was the circle they drew around
22 the evidentiary consideration. Dr. Kirkland,
23 after hearing Dr. Goff's testimony, says "I
24 agree with it," but he conceded, he expressly
25 stated that he doesn't believe it's relevant

1 because of the very narrow legal standard here.

2 And that very legal -- narrow legal
3 standard was given to him and to the court by
4 the state as only including psychosis,
5 delusions, and insanity. At the Eleventh
6 Circuit, they made that argument. And that's
7 why the Eleventh Circuit made the judgment
8 that, if you consider dementia, you come to a
9 different finding.

10 I just don't think it's credible to
11 argue that the judge in this case considered
12 dementia and made a determination that Mr.
13 Madison's dementia does not leave him competent
14 to be executed.

15 And to that extent, we've never argued
16 that this is a case about a categorical ban on
17 executing people with a certain kind of
18 condition. What we've argued is that this
19 Court has held in Ford and Panetti that it is
20 unconstitutional to execute people who are
21 incompetent. And we've rooted that argument on
22 what this Court has acknowledged.

23 The Court has said: Look, the death
24 penalty gives the state an incredible power.
25 It's an awesome power. The authority to

1 execute someone who is not an immediate threat
2 is an awesome power. And that power has to be
3 utilized fairly, reliably, and humanely. This
4 Court's jurisprudence in Ford and Panetti
5 speaks to the humane part.

6 And what this Court said is that if
7 someone is disabled and incompetent and fragile
8 and bewildered and confused in the way that we
9 have seen, in the context of insanity, in the
10 context of other kinds of mental illness, it is
11 simply not humane to execute them.

12 And in that regard, the Eighth
13 Amendment here plays a different role than some
14 of the other amendments. The Court always
15 looks at facts and circumstances through the
16 lens of the Constitution, through the window of
17 the Constitution, and we have that here.

18 But the Eighth Amendment isn't just a
19 window. It's a mirror. And what the Court has
20 said is that our norms, our values are
21 implicated, when we do things to really
22 fragile, really vulnerable people. And what
23 we've argued is that dementia in this case
24 renders Mr. Madison frail, bewildered,
25 vulnerable in a way that cannot be reconciled

1 with executing him because of his incompetency.

2 The state never acknowledged that
3 argument as a base -- a valid argument. The
4 court never made a finding about that argument.
5 And we believe that when you consider the facts
6 of his dementia and this Court's holdings, that
7 a determination that executing someone in this
8 condition cannot be reconciled with an Eighth
9 Amendment prohibition against cruel and unusual
10 punishment.

11 And for that reason, this awesome
12 power that the state has requires obligations,
13 requires oversight. And, here, the state
14 didn't meet those obligations and oversight by
15 making the informed determination that his
16 dementia does not leave him so incapacitated
17 that he is incompetent to be executed. They
18 never said anything about dementia.

19 And so I don't think this Court can
20 rely on the argument that somehow, in this
21 invisible record, with no reference to dementia
22 by the state, by the expert, or by the court,
23 that that determination has been found.

24 The only court to make a determination
25 about the relevance of dementia here was the

1 Eleventh Circuit. And what they clearly found
2 is that when you look at the level of despair
3 and the level of confusion and the level of
4 injury -- and, Mr. Chief Justice, you're right,
5 it's not just the physical symptoms. It's not
6 just that he's blind and can't walk and can't
7 speak, but those symptoms reinforce the
8 credibility, the legitimacy, the severity of
9 his acute dementia.

10 And we don't believe this Court can,
11 consistent with the Eighth Amendment's
12 prohibition against cruel and unusual
13 punishment, allow an execution of someone
14 impaired in the way that Mr. Madison is
15 impaired or to allow any defendant to be
16 declared competent to be executed with these
17 kinds of clear, medically verifiable disorders.

18 And for that reason, we would ask this
19 Court to reverse the lower court judgment.
20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:56 a.m., the case
24 was submitted.)

25

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