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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 This --

2 CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

1 MR. STEVENSON: No --

2 JUSTICE SOTOMAYOR: To be executed?

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

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

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

23 JUSTICE ALITO: Can I -- I'm just
24 trying to --

25 CHIEF JUSTICE ROBERTS: What if he

1 can --

2 JUSTICE ALITO: -- understand your --
3 your answer to the -- to Justice Sotomayor's
4 question. If a -- a person -- if -- if a
5 person simply is without memory of his
6 commission of the capital offense, does that in
7 itself render that person incompetent to be
8 executed?

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

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

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

25 JUSTICE KAGAN: In -- in your original

1 question presented, you ask whether a person, a
2 prisoner whose mental disability leaves him
3 without memory --

4 MR. STEVENSON: That's correct.

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

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

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

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

23 JUSTICE ALITO: Now, I don't
24 understand -- I don't understand your answer.
25 I don't -- I can't think of a situation in

1 which a person would lack memory of the
2 commission of the offense without that being
3 based on a mental condition.

4 MR. STEVENSON: Well, that's correct.
5 That's --

6 JUSTICE ALITO: By definition, it's a
7 mental condition.

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

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

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

21 JUSTICE KAGAN: Right. I suppose what
22 people are thinking of, and I'm -- I'm not even
23 sure if this happens ever or whether there's
24 any sort of physiology behind this, but the
25 idea of a kind of fugue state or a blackout

1 that's unaccompanied by anything else, does
2 that count as the kind of mental disability
3 that you're talking about?

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

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

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

23 Now it's significant that in this
24 Court -- and the state argued below that
25 incompetency to be executed can only be

1 established where there's a showing of
2 insanity, delusion, or psychosis.

3 In this Court, the state has taken a
4 different position. They now concede that
5 dementia can be a basis on which --

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

11 MR. STEVENSON: Well --

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

18 MR. STEVENSON: Yes.

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

25 MR. STEVENSON: Yeah.

1 CHIEF JUSTICE ROBERTS: But then I
2 also understand the state, and we can ask them,
3 but I think it is in their brief, to say that
4 if, in fact, you meet the Ford standards, they
5 don't care how you got there; if you got there
6 because you have dementia, you still meet the
7 Ford standards.

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

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

23 But, when you have the kind of
24 disorder that Mr. Madison has and he has no
25 ability to remember anything about the

1 circumstances of the offense, he cannot put
2 himself in that situation, then we argue that
3 there is a legitimate basis for arguing that
4 that person cannot rationally understand the
5 circumstances of their execution, and executing
6 them would be inhumane.

7 And the --

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

15 MR. STEVENSON: It's the severity of
16 the disability and the reliability of --

17 JUSTICE SOTOMAYOR: Mr. Stevenson,
18 that's the point. Now let's --

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

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

24 MR. STEVENSON: Yes.

25 JUSTICE SOTOMAYOR: And I do -- I'm

1 going to ask the other side where the Court
2 addressed that issue, because I don't see it.
3 They seem to be thinking that only delusions
4 could qualify, not incompetence. But putting
5 that aside for the moment, how would I define
6 severe dementia?

7 MR. STEVENSON: Yes.

8 JUSTICE SOTOMAYOR: What's the
9 difference between mild dementia, moderate, and
10 severe?

11 MR. STEVENSON: Yes.

12 JUSTICE SOTOMAYOR: And where would
13 the fact-finder settle in saying this person is
14 incompetent or not incompetent?

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

23 Moving someone from possible dementia
24 to probable dementia requires four things.
25 There needs to be an MRI where you can actually

1 see a damage to the brain. That's one of the
2 things that --

3 JUSTICE SOTOMAYOR: It's very -- it's
4 very easy -- it's very hard to be a lay person,
5 but I understand that won't show up for
6 Alzheimer's, for example.

7 MR. STEVENSON: Well, it --

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

10 MR. STEVENSON: With -- with some
11 forms. But, for vascular dementia, what we
12 know is that you will see on an MRI iterative
13 --

14 JUSTICE SOTOMAYOR: I'm -- I'm less
15 worried about that because I am worried about
16 something like Alzheimer's.

17 MR. STEVENSON: Yeah.

18 JUSTICE SOTOMAYOR: Dementia's
19 dementia.

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

21 JUSTICE SOTOMAYOR: So let's get to
22 the definition.

23 MR. STEVENSON: But I just -- I'm just
24 using the criteria that the medical community
25 gives to us. It has that. We -- we -- we have

1 to be able to assert and prove substantive --
2 substantial cognitive decline, which we could
3 here. His IQ has dropped dramatically. His
4 memory scores have dropped dramatically.

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

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

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

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

25 What we wanted to prove to the judge

1 below is that dementia, when it has these
2 features, renders someone incompetent. And the
3 perfect example comes from the record.

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

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

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

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

25 MR. STEVENSON: What -- what the --

1 JUSTICE ALITO: Did he not make that
2 finding and is that not supported by the
3 testimony of the defense expert, Dr. Goff?

4 MR. STEVENSON: I don't think he -- I
5 don't think he made that finding.

6 JUSTICE ALITO: That's a direct quote
7 from his order.

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

17 And Dr. Kirkland never testified that
18 he had independent knowledge. And what the
19 court found --

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

24 MR. STEVENSON: Well -- well --

25 JUSTICE ALITO: -- and doesn't show.

1 MR. STEVENSON: Well, Dr. Goff was
2 very clear about the point that he did not
3 remember the crime. He did not remember the
4 victim.

5 JUSTICE ALITO: Yes, he did not -- he
6 did not remember the crime. He did not
7 remember the victim.

8 MR. STEVENSON: Which --

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

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

24 And that's just what this Court dealt
25 with in Panetti. In Panetti, you had the same

1 circumstance where you had someone who was a
2 delusional but could tell you what murder is,
3 could tell you --

4 JUSTICE ALITO: This order was the
5 order that came before us when this case was
6 before us the last time, is that not right?

7 MR. STEVENSON: That's right.

8 JUSTICE ALITO: And that's what you're
9 now contesting. You're contesting the order
10 that was already before us that you chose not
11 to contest on appeal in the -- in the Alabama
12 courts.

13 MR. STEVENSON: Well, actually, the
14 order --

15 JUSTICE ALITO: And the only thing
16 that's happened since then, and what you've
17 cited, are the -- the events concerning
18 Kirkwood.

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

20 JUSTICE ALITO: Is that right?

21 MR. STEVENSON: No, we've actually
22 contended that the court below should now
23 recognize what the Eleventh Circuit recognized,
24 which is that if you consider dementia, and you
25 apply what we know about dementia to this

1 circumstance, and to Ford and Panetti, you will
2 have to conclude that this man is not competent
3 to be executed.

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

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

18 And because dementia changes the
19 interpretation of these facts, as I was -- as I
20 was arguing, you can tell Mr. Madison that he
21 was convicted in Mobile, that this was the
22 crime, this was the circumstance. He can hold
23 onto that. But the next day, the next week,
24 he's not going to have that memory. And that
25 deprives him of the kind of rational

1 understanding this Court talked about as being
2 critical in Ford and Panetti.

3 JUSTICE KAGAN: Can I ask -- can I
4 give you two versions of your argument and you
5 tell me which one you're arguing? Or --

6 MR. STEVENSON: Sure.

7 JUSTICE KAGAN: -- or maybe you can
8 tell me that there's no difference --

9 MR. STEVENSON: Sure.

10 JUSTICE KAGAN: -- between the two.

11 So one is just if you have severe dementia, you
12 are incompetent to be executed. That simple.

13 The other is, if you have severe
14 dementia, you are likely also to have a lack of
15 rational understanding of the kind we talked
16 about in Panetti.

17 So, in other words, the dementia would
18 be the -- the -- the -- the physiological
19 reason, but the standard would still be the
20 Panetti standard.

21 MR. STEVENSON: I -- I -- I think it's
22 the latter, Justice Kagan. We're not -- we're
23 not arguing that just the mere proof of severe
24 dementia alone would satisfy the Eighth
25 Amendment because there are dementia sufferers

1 whose long-term memory is actually pretty
2 secured, pretty well intact.

3 They -- they -- they struggle mostly
4 with short-term memory. And the nature of that
5 struggle might allow them to hold onto these
6 long-term memories in a way that they would
7 have a rational understanding of these
8 circumstances.

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

15 JUSTICE BREYER: So what -- what then
16 -- as -- as probably you know, I think, that
17 there are many, many, many prisoners on death
18 row under threat of execution who are in their
19 40s, 50s, 60s, 70s, possibly 80s, who have been
20 there for 20, 30, 40 years perhaps. So this
21 will become a more common problem.

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

1 All right?

2 If you are writing this standard for
3 the situation I described, what words would you
4 use? What's the sentence that you believe
5 should be seen in the U.S. reports in this --
6 on a problem that I think is general?

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

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

25 Mr. Madison's problems are -- are

1 cerebrovascular, which, of course, can happen
2 at any age.

3 JUSTICE BREYER: Right. But I would
4 think --

5 MR. STEVENSON: I take your point.

6 JUSTICE BREYER: -- Alzheimer's --

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

8 JUSTICE BREYER: -- dementia of many
9 kinds.

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

11 JUSTICE BREYER: All sorts of things.

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

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

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

1 And we think, as the Eleventh Circuit
2 did, when you accept dementia as a relevant
3 basis for coming to that conclusion, the
4 Eleventh Circuit had no difficulty finding that
5 he's clearly incompetent. Even the dissenting
6 judge starts his dissent, "Mr. Madison is
7 clearly incompetent."

8 JUSTICE ALITO: When you back -- when
9 you went back to the trial court, you
10 emphasized the events concerning Kirkwood.
11 What is his situation now?

12 MR. STEVENSON: Dr. Kirkland has been
13 suspended. He is no longer a practicing
14 psychology -- psychologist. He is under threat
15 of criminal prosecution.

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

18 MR. STEVENSON: They did at one point.
19 But he is still under investigation, still
20 suspended.

21 JUSTICE ALITO: He's still under
22 investigation by whom?

23 MR. STEVENSON: By the State of
24 Alabama. There are multiple counties involved
25 in the circumstances that gave rise to this.

1 And our only point with that, Justice Alito, is
2 that we -- the -- the court relied so heavily
3 on this conclusion that we didn't think was
4 supported by the record, that we -- we thought
5 that it was relevant that Dr. Kirkland's
6 reliability be addressed.

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

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

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

1 rationally understand what's going on.

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

4 JUSTICE GINSBURG: Now what do you do
5 with the --

6 JUSTICE SOTOMAYOR: Mr. Stevenson --

7 JUSTICE GINSBURG: -- with the
8 determination -- what do you do with the
9 determination that, one, he knew that he was
10 subject to execution for having killed a police
11 officer?

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

19 And the example that I use is a common
20 one, common problem you see in dementia. When
21 someone goes to see their mother and their
22 mother doesn't recognize them, it's
23 heartbreaking. It's devastating. Once you
24 understand that the reason why they can't
25 recognize you is dementia, you have a different

1 relation -- relationship to what that means.

2 You can say "I'm your daughter," and
3 that person will respond to you as their
4 daughter. But, when you come back the next
5 day, they don't have a rational understanding
6 of who you are.

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

13 And that's the tragedy of dementia.
14 You can't sustain that understanding. And
15 that's where the orientation to time and place
16 becomes critical.

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

22 I think here there was a very key --
23 clear case. No one disputes the severity of
24 his mental and physical decline, his
25 disabilities. He's legally blind now. He

1 can't speak without slurring his speech. He's
2 incontinent. He can't walk without assistance.
3 Everyone, including the trial court, observed
4 that he is a very severely ill person.

5 JUSTICE KAGAN: Have there been
6 changes even since 2016? Is this continuing?

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

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

20 But the point --

21 JUSTICE SOTOMAYOR: Mr. Stevenson, the
22 court below believed that Dr. Kirkland and
23 Goff's evaluations were essentially similar.
24 Do you agree with that assessment? If you
25 don't, tell me how you relate that lack of

1 similarity to the question of his reliability.

2 MR. STEVENSON: Yeah, I think on --

3 JUSTICE SOTOMAYOR: And what do you
4 think the trial court should have done --

5 MR. STEVENSON: Sure.

6 JUSTICE SOTOMAYOR: -- in order to
7 deal with that?

8 MR. STEVENSON: Yeah.

9 JUSTICE SOTOMAYOR: Okay.

10 MR. STEVENSON: Well, I think the
11 primary difference is that Dr. Kirkland in no
12 way was willing to acknowledge dementia as
13 relevant to his evaluation. So his
14 fact-findings about what the patient remembers
15 were made without any context or any
16 understanding of dementia as relevant to that.

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

1 And so Dr. Goff's evaluation, of
2 course, was that he would not be competent to
3 be executed when you consider these medical
4 facts. And Dr. Kirkland, the trial judge, nor
5 the state ever acknowledged dementia as
6 relevant to the determination, which is why I
7 don't think this Court can find that that was a
8 reliable determination.

9 I'd like to reserve the rest of my
10 time for rebuttal if there are no further
11 questions.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Govan.

15 ORAL ARGUMENT OF THOMAS R. GOVAN, JR.

16 ON BEHALF OF THE RESPONDENT

17 MR. GOVAN: Mr. Chief Justice, and may
18 it please the Court:

19 This Court granted certiorari on two
20 questions. With respect to the first question
21 concerning whether the state may execute an
22 offender who does not remember committing the
23 capital offense, there is absolutely no
24 evidence -- objective evidence of a national
25 consensus supporting such a rule, and Mr.

1 Madison does not offer any evidence to the
2 contrary.

3 Now, on the second question
4 presented --

5 JUSTICE SOTOMAYOR: Can I go back to
6 -- can I start there? It seems to me as I'm
7 reading through some of the materials that you
8 pointed to in your brief that, under the common
9 law, there were different kinds of -- of
10 defenses to murder, including lunacy. I see
11 one of your sources, Cowell, and the other
12 Hale, talking about lunacy being a condition
13 unlike insanity, which they defined as never
14 being in touch with reality. They define
15 lunacy as being able to remember some things
16 but not others.

17 And yet, to a source, the common law
18 excused lunatics, so that if states are folding
19 in dementia into lunacy, into insanity, into
20 other sort of broader labels just like the
21 common law did, how can I rely on your
22 statement that there's no consensus?

23 MR. GOVAN: Well, Your Honor --

24 JUSTICE SOTOMAYOR: I don't even know
25 that we have to get there because your

1 adversary has said that he thinks this folds
2 into Ford and Panetti because it's not dementia
3 qua dementia; it's a certain kind of dementia
4 that doesn't put you in rational touch with
5 your decision-making in your moment. But,
6 putting that aside, I -- I'm taking on your
7 starting proposition.

8 MR. GOVAN: Yes, Your Honor, for two
9 points. The first, just to address the common
10 law, is that, when we look back at the common
11 law, they were addressing something different,
12 where someone has completely lost his wits.
13 We're talking about absolute madness.

14 JUSTICE SOTOMAYOR: No, they define
15 "lunacy" as someone who can remember sometimes
16 and not remember -- have his wits sometime and
17 not have his wits other times.

18 MR. GOVAN: Well, Your Honor, the --
19 the -- our -- our view of the common law, and
20 those sources, we're talking about something
21 different. Not remembering the offense would
22 not fit into those categories of someone --
23 absolute madness or -- or losing their wits.

24 And the second point --

25 JUSTICE SOTOMAYOR: Well, do -- you

1 don't think a demented person who today doesn't
2 remember you as your son, who doesn't know
3 where he or she is, who doesn't know to call --
4 to go to the bathroom in the pot right next to
5 him -- you don't call that being out of your
6 wits?

7 It could be that maybe tomorrow they
8 might for a few minutes remember, but at the
9 moment that they're having that episode, are
10 they within their wits?

11 MR. GOVAN: Your Honor, we -- we have
12 not -- there -- there could be -- again,
13 dementia exists on a spectrum. So there's no
14 doubt there could be some case where someone
15 has dementia where they could have lost their
16 wits or meet the Ford and Panetti standard, but
17 that's not what we have here.

18 And that's --

19 CHIEF JUSTICE ROBERTS: Well, but you
20 -- it is my understanding, I'll ask the same
21 question I asked earlier of the two questions
22 accurate, you -- you are arguing that simply
23 because somebody doesn't remember the crime,
24 that that doesn't help satisfy Ford and
25 Panetti, right?

1 MR. GOVAN: Correct, Your Honor.

2 CHIEF JUSTICE ROBERTS: But you've
3 conceded that if the person meets the Ford and
4 Panetti standard by virtue of vascular
5 dementia, that he meets the Ford and Panetti
6 standard, right?

7 MR. GOVAN: Yes, yes, if someone has
8 vascular dementia or any other mental illness,
9 if it precludes them from having a rational
10 understanding of their punishment, and that
11 they will die when they're executed, they would
12 meet the Ford and Panetti standard --

13 CHIEF JUSTICE ROBERTS: So -- so I
14 understand your friend who have conceded that
15 simply not remembering the crime is not enough.
16 And you're arguing that if it's vascular
17 dementia that affects you up to the point of
18 Ford and Panetti, that that is enough.

19 So are all we arguing about whether --
20 is whether Mr. Madison himself meets the Ford
21 and Panetti standard?

22 MR. GOVAN: That's exactly right, Your
23 Honor. And that's the -- the question that had
24 -- it was already presented to the state trial
25 court in 2016, which this Court reviewed those

1 same facts last year and summarily --

2 JUSTICE GINSBURG: But this -- but
3 this -- the -- the decision we're now reviewing
4 said the Supreme Court said must be insane.
5 This man isn't insane. End of case.

6 MR. GOVAN: Yes, Your Honor, but that
7 -- that doesn't change the scenario. And we
8 have to explain the context that that occurred.
9 That was just a summary denial in the exact
10 same case.

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

21 That court held a hearing in 2018 and
22 essentially asked Madison: Do you have
23 anything else new to present? And Mr. Madison
24 said: No. And on page 12 of that hearing
25 transcript, Mr. Madison -- Mr. Madison said:

1 "We are obviously relying on the evidence that
2 was previously before the court."

3 And so, when the court was presented
4 with that same evidence, he said this Court,
5 the Supreme Court has already said --

6 JUSTICE KAGAN: Well, is there ever a
7 place where the court makes clear that it
8 understands that insanity is not a sine qua
9 non, that dementia could do the trick in
10 satisfying the Ford/Panetti standard?

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

22 MR. GOVAN: Well, yes, several parts,
23 Your Honor. On page 3 and 4 of the court's
24 order, the 2016 order, it set out the Panetti
25 standard in full.

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

2 JUSTICE KAGAN: But I don't think that
3 that does it. I mean, you can set out the
4 Panetti standard. The question is whether you
5 understand that dementia can be the basis for
6 satisfying the Ford and Panetti standard.

7 MR. GOVAN: Absolutely. On -- on page
8 6 through 8 of that court's order, the trial
9 court specifically outlined Dr. Goff's
10 testimony about that, including the fact that
11 he had had strokes, that because of those
12 strokes, he had had a loss, a memory loss, that
13 he had cognitive decline.

14 He considered --

15 JUSTICE KAGAN: Right. But if you're
16 just listing that evidence, what you might
17 think as a court if you're looking for
18 delusions is that's all irrelevant, I'm listing
19 the evidence, but that's irrelevant.

20 Is there ever a place where the court
21 makes it clear that that is relevant?

22 MR. GOVAN: Because it specifically
23 said in its conclusion on page 10 that it was
24 considering all the testimony of Dr. Goff and
25 that eventually made the final finding, which

1 Justice Alito pointed to, that, quote, "Madison
2 has a rational understanding as required by
3 Panetti that he is going to be executed."

4 And it's important also to note that
5 there were --

6 JUSTICE KAGAN: But do you see what I
7 mean, Mr. Govan? And I won't belabor this, but
8 you can list all the evidence and think to
9 yourself: I'm listing all the evidence, but I
10 find all this evidence utterly irrelevant to
11 the legal standard because I think delusions
12 are required to satisfy Ford and Panetti.

13 MR. GOVAN: Well, I understand, Your
14 Honor. I guess the point is that the judge
15 never made that finding. There's no point in
16 the judge's order where it said: I hear this
17 evidence from Madison's expert, but I can't
18 consider it. That was never in the order.

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

23 JUSTICE KAGAN: I guess what you're
24 saying is either way. We -- we can't tell
25 either way whether -- is that what you're

1 saying?

2 MR. GOVAN: No, absolutely --

3 JUSTICE KAGAN: We can't -- we can't
4 tell that he thought that delusions were
5 required, and we can't tell that -- whether he
6 thought that dementia could satisfy?

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

15 JUSTICE SOTOMAYOR: I guess --

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

1 Yes, I recognize you today; tomorrow I
2 can't, not a clue, not a clue where anything
3 is, though sometimes he answers the right
4 questions. That's what I mean by that.

5 But you heard the words. So judging
6 going back to the Eighth Amendment and using
7 the rationale of Ford, not the words, and
8 Panetti, is there a -- would you accept the
9 fact that such a person cannot be executed
10 under the Eighth Amendment? And, if not,
11 what's the difference?

12 MR. GOVAN: Your Honor, the difference
13 is -- is that, under Ford and Panetti, Madison
14 has an understanding of what matters.

15 JUSTICE BREYER: No, no, I'm not
16 saying -- I understand that the words I just
17 used are different than Ford and Panetti, but a
18 person in that circumstance either can be
19 executed or not. That would be perhaps a new
20 standard or a modification of Ford and Panetti.

21 So I want to know if you think such a
22 person can be executed and what your objection
23 is to adding the words I just said as an
24 additional standard, if you like, or a
25 modification or interpretation of the existing

1 standard, if you prefer?

2 MR. GOVAN: And the specific words
3 that they --

4 JUSTICE BREYER: The words are, one,
5 he does not recall his crime, and, two, he has
6 a severe inability to orient -- mental ability
7 -- has a severe inability to orient himself to
8 time and place.

9 MR. GOVAN: Well, I'll take the first
10 one, Your Honor. Not remembering the crime,
11 that would create an unworkable rule for the
12 state ever to prove because, essentially, it
13 would follow that --

14 JUSTICE GINSBURG: And nobody is --
15 nobody's arguing in that in this case. Mr.
16 Stevenson made that clear.

17 JUSTICE ALITO: Well, that was the
18 question we -- the principal question that we
19 granted, but, apparently, it's fallen out of
20 the case.

21 MR. GOVAN: Well, Your Honor, I think
22 the reason it's fallen out is because there's
23 such a clear lack of objective evidence for
24 such a rule.

25 JUSTICE BREYER: But that isn't --

1 that isn't -- that -- that's not really my
2 point. We've all seen people in final stages
3 of Alzheimer's. All right? Think of such a
4 person.

5 Now is there any reason to execute
6 that person when you wouldn't execute the
7 people in Ford and Panetti?

8 MR. GOVAN: Your Honor, because, in
9 this case, the state would still have a strong
10 interest in seeking retribution for a horrible
11 crime. If someone -- even if they can't
12 remember the crime, that doesn't somehow lessen
13 their ability to understand --

14 JUSTICE SOTOMAYOR: I'm sorry --

15 CHIEF JUSTICE ROBERTS: We're -- we're
16 mix --

17 JUSTICE SOTOMAYOR: -- how about --

18 CHIEF JUSTICE ROBERTS: -- we're
19 mixing up the questions. We understand your
20 friend on the other side to say it -- not
21 remembering the crime is not enough, right?

22 But, if the person meets the standards
23 of Ford and Panetti, as stated in Ford and
24 Panetti, the fact that he got there through
25 vascular dementia, I understand you to say that

1 doesn't make a difference. That still
2 qualifies.

3 MR. GOVAN: Yes. Yes, Your Honor.
4 That -- that -- that scenario, whether it's
5 vascular dementia or any other type of mental
6 illness, that would just be the starting point.
7 And the state isn't going to say that and has
8 never said that there's a --

9 JUSTICE SOTOMAYOR: All right. In
10 Panetti, the man understood that the -- that he
11 was in jail, that the state was charging him
12 with a crime, that it was going to put him to
13 death. He believed they wouldn't, because of
14 his delusions, ultimately succeed, but he
15 understood perfectly well that set of facts.
16 And we said that still qualified him.

17 So we have a man here who knows that
18 he's incarcerated or kept in a cage because
19 he's in a bed, he can't move on his own, can't
20 remember where the bathroom is next to him,
21 can't see, slurs his words. He's really not
22 quite there. But he knows that someone says he
23 committed a murder and that they're trying to
24 kill him, but he doesn't understand why. He
25 can't be present enough in time to rationally

1 understand or reflect on what he has done
2 because he can't retain information for long.
3 And why is that different than Panetti?

4 In Panetti, the man was blaming
5 someone else, which may be even worse for some
6 people, or saying that someone else is going to
7 protect him. But if you can't rationally
8 appreciate why you're putting -- being put to
9 death, how does that fulfill the Panetti
10 standard?

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

25 And that -- and that's the difference

1 here in this particular case, is that his own
2 expert admitted --

3 JUSTICE SOTOMAYOR: So what if he
4 can't understand or really follow through in
5 his thinking what that means? I mean, he's
6 just not rational in the way you and I
7 understand it.

8 I certainly don't think a demented
9 person who has Alzheimer's and is put in a --
10 in an institution might have a moment of
11 understanding one memory, and I think that they
12 are rational. I certainly don't think you
13 would let them buy an apartment in Florida the
14 way he told one of his lawyers he was going to
15 do after this case ended.

16 MR. GOVAN: Well, Your Honor, with
17 respect, on the things that matter, he does
18 understand. And we haven't talked about all
19 the things that he -- he does recall both
20 before and after the offense.

21 He remembers that he was convicted of
22 multiple juvenile offenses and sent -- spent
23 time in a youth detention facility. He
24 remembers that --

25 JUSTICE GINSBURG: Mr. Govan, can I

1 ask you whether you think this is at all
2 relevant? At the time of the conviction, over
3 30 years ago, Madison was competent. There was
4 no doubt about that. But I think this --
5 wasn't this a case of a judge overriding a jury
6 recommendation against death in -- in Madison's
7 case?

8 MR. GOVAN: Yes, Your Honor.

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

18 MR. GOVAN: Judge, I don't know. That
19 would be a situation that would -- would take
20 place in a normal sentencing hearing to
21 determine whether those mitigating
22 circumstances -- aggravating circumstances
23 outweigh the mitigators. But I would say what
24 matters here is -- is that scenario would not
25 impact the state's -- the constitutionality of

1 seeking a death sentence or the -- the
2 propriety of seeking a death sentence, which,
3 again, nothing about Mr. Madison's conditions
4 impact the state's interest in seeking
5 retribution for a -- a heinous crime.

6 CHIEF JUSTICE ROBERTS: Do you -- I
7 mean, what is the significance? I -- I would
8 have thought all we were concerned about is
9 mental significance -- mental ability and
10 understanding, the various things, blindness,
11 inability to -- to walk. None of that should
12 -- is relevant under Ford and Panetti, is it?

13 MR. GOVAN: That' -- that's correct,
14 Your Honor. That's correct. In fact, Panetti
15 talks about something similar to that, that
16 there could be other -- another category of
17 inmates who, as a result of not mental illness,
18 that they're recalcitrant, they're callous,
19 they -- they blame other people for the crime.
20 That -- that's not what Panetti is seeking to
21 carve out the narrow exception for people who
22 are insane.

23 CHIEF JUSTICE ROBERTS: What -- what
24 is your view on the significance of the MRI
25 evidence?

1 MR. GOVAN: Your Honor, and that --
2 that kind of -- Mr. Madison's point on that is
3 kind of missing, I guess, the point. MRIs can
4 help diagnose vascular dementia. And we --
5 we've never disputed whether he has vascular
6 dementia or not.

7 But MRIs can't help determine whether
8 someone has a rational understanding. That's
9 something that is inherently going to come from
10 talking with a particular inmate and
11 particularly in this case, where the
12 dispositive fact that Mr. Madison is relying on
13 is that he can't remember the crime.

14 That's inherently something that only
15 comes from the defendant. And what -- he would
16 have to admit that, whether to a psychologist
17 or in testimony. And that can't be the rule
18 because, if that was the case, no inmate would
19 ever admit to committing the crime if that
20 meant that he were incompetent.

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

24 MR. GOVAN: Yes, Your Honor.

25 CHIEF JUSTICE ROBERTS: Okay. So I

1 would have thought we can stop arguing about
2 it, but -- we don't have to -- we don't have to
3 accept a concession, but the -- the concern
4 about the MRI evidence is that it would, if I
5 understand it, tend to show something that is
6 going to have a broader effect than just not
7 remembering the facts of the crime. Is -- is
8 that not right?

9 MR. GOVAN: Well, Your Honor, I think
10 MRI evidence can help. There is this
11 suggestion as far as the -- the diagnosing. So
12 that certainly can -- can help with the
13 individual fact determinations that a trial
14 court would make.

15 CHIEF JUSTICE ROBERTS: Yeah, but
16 there's no MRI evidence that's going to be
17 looked at and you can say this shows that he
18 doesn't remember the facts of the crime. That
19 doesn't -- isn't going to have broader
20 significance, right?

21 MR. GOVAN: That's correct. But,
22 again, in this -- in this case, of course, the
23 trial court did consider -- and just in this
24 particular case, did consider the fact that,
25 according to Dr. Goff, this was a progressive

1 disease. But, the end of the day, the court
2 held that there was a rational understanding.

3 I just -- one point I also want to
4 make in this particular case, that the
5 petition, whether Madison's position, whether
6 going to the first question or the second
7 question would be contrary to how competency
8 determinations are done across the board at any
9 level, whether competency to stand trial,
10 competency to be executed, competency to waive
11 appeals. They all function the same way.

12 It's not the fact that someone comes
13 to the court and says to a trial court: Oh, I
14 have a -- I have this particular mental illness
15 and, therefore, I meet the competency standard.
16 It would apply the exact same way it occurred
17 here, that they -- that it would consider that
18 evidence and determine whether they have a
19 rational understanding. And that's what the
20 trial court did here.

21 JUSTICE GINSBURG: So you would think
22 that if he came before the trial court on a
23 question of competence to stand trial with what
24 his mental condition is now, his lack of
25 orientation to time and place, that he would

1 have been found competent to stand trial?

2 MR. GOVAN: Yes, Your Honor, I do,
3 because, again, he would have what the -- the
4 rational understanding that would be required
5 in even the competency to stand trial setting,
6 which is a rational understanding of the facts,
7 the factual proceedings, and the ability to
8 assist with counsel.

9 And here, that's what Madison's expert
10 said, that he did understand, quote, "he has
11 been able to understand the nature of the
12 pending proceeding and he has an understanding
13 of what he was tried for." So, yes.

14 JUSTICE KAGAN: And -- and -- and what
15 if what they meant by that was you can -- you
16 can make him understand what is going on today,
17 but then tomorrow he comes back and you have to
18 do it all over again, and then tomorrow -- the
19 next day comes back and you have to do it all
20 over again?

21 In other words, he -- you -- you can
22 -- you can -- you can get him to understand
23 something, but then he loses it. That's --
24 because that's the way memory works with people
25 in this -- with this form of dementia.

1 What about that?

2 MR. GOVAN: Your Honor, that -- that
3 might be a closer question, again, that you
4 would determine on the factual circumstances in
5 front of that particular court. But, again,
6 that -- that's not what we have here.

7 It was clear -- Mr. Madison said to
8 both experts that he remembered that he had
9 three separate trials, that he was convicted of
10 a death sentence. He -- to both experts, he
11 believed that he did not agree with the
12 particular sentence.

13 So that's not what we have here in
14 this particular case because, as this Court
15 noted before, both experts' testimony
16 demonstrated that he did have a rational
17 understanding of his particular sentence in
18 this case.

19 Another point I -- that would just
20 need -- I just want to harken back to, the --
21 the fact of -- we've talked about the original
22 rule, that Madison in the first question
23 presented, is that there's just simply no
24 objective evidence of a position supporting
25 Madison's position, either under the first or

1 second question presented.

2 No state legislature has determined
3 that prohibits states, of the 31 states that
4 have the death penalty, has prohibited states
5 from carrying out an execution for someone who
6 has a mental illness or who cannot remember the
7 particular facts of the crime.

8 The lower courts are -- are uniform in
9 that respect in addressing competency as well,
10 and the Texas brief points that out in regards
11 to competency to stand trial. And we point out
12 in our brief that of the three states that have
13 addressed an issue similar to this, they have
14 all come down on Alabama's side, that simply
15 having dementia and not remembering the facts
16 of the crime does not prevent you per se from
17 having a rational understanding.

18 So the final point I would just
19 mention to this Court is what, again, what
20 Madison seeks is unprecedented. This Court has
21 never created a categorical rule excluding
22 someone from capital punishment where at least
23 there was some objective evidence of a national
24 consensus in that direction. Here, there is
25 none.

1 And the consequences of such a rule
2 would prevent the state from carrying out an
3 execution on Madison, who -- a convicted --

4 JUSTICE SOTOMAYOR: But you don't
5 disagree that Ford and Panetti, read properly,
6 would not be limited to insanity, delusion, or
7 severe dementia?

8 MR. GOVAN: Of course not. All those
9 things are included in Ford and Panetti.

10 JUSTICE SOTOMAYOR: And --

11 MR. GOVAN: And the thing is that in
12 this case, the trial court did consider them
13 and found that notwithstanding those
14 conditions, the fact that he had these strokes
15 and memory loss, he still had a rational
16 understanding of his --

17 JUSTICE SOTOMAYOR: Well, that's --

18 MR. GOVAN: -- crime and punishment.

19 JUSTICE SOTOMAYOR: -- interesting to
20 me because I don't read anywhere in Kirkland
21 where he did any analysis of rationality. What
22 he did, as I understood it, is just does he
23 remember his crime or something -- he doesn't
24 remember his crime, but does he understand
25 where he is and what they're going to do to

1 him? That's not the same as rational
2 understanding.

3 He did no memory test to see how long
4 Mr. Madison retained information generally. He
5 did not describe the extent of his dementia.
6 He didn't do any of the things one would expect
7 if he was going to opine on rationality.

8 So how -- the only one who did that
9 was Dr. Goff, and that part of his discussion
10 was not addressed by the Court below at all.

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

15 And as the trial court noted in the
16 hearing, doctor -- that particular doctor had
17 done, I think, approximately 4,000 competency
18 evaluations, which was for competency to stand
19 trial, was -- is similar to the standard for
20 competency to be executed, as the Texas brief
21 points out, and he did analyze the rational
22 understanding.

23 And it would make sense, again, why
24 Dr. Kirkland would not specifically inquire to
25 whether an inmate would remember committing the

1 crime, because that is not determinative under
2 Ford and Panetti. But, in this case, because
3 Madison does have a rational understanding that
4 he was convicted of the crime of murder, that
5 he will be executed for that murder, we would
6 ask this Court to affirm the state court.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Stevenson, you have four minutes
10 remaining.

11 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON

12 ON BEHALF OF THE PETITIONER

13 MR. STEVENSON: Yes. Thank you.

14 I just want to stress and invite this
15 Court to look at the Eleventh Circuit pleadings
16 where the state took the exactly opposite
17 position.

18 There has been no point prior to this
19 Court where the state has acknowledged that
20 dementia would be a basis on which a court
21 could find someone incompetent to be executed.
22 Their brief, the post-hearing brief that they
23 filed after the hearing begins, "Initially, it
24 must be noted that Madison has failed to
25 implicate Ford or Panetti in this proceeding.

1 Both the court-appointed expert and the
2 defense-retained expert agree that Madison does
3 not suffer from psychosis or delusions."

4 That was the circle they drew around
5 the evidentiary consideration. Dr. Kirkland,
6 after hearing Dr. Goff's testimony, says "I
7 agree with it," but he conceded, he expressly
8 stated that he doesn't believe it's relevant
9 because of the very narrow legal standard here.

10 And that very legal -- narrow legal
11 standard was given to him and to the court by
12 the state as only including psychosis,
13 delusions, and insanity. At the Eleventh
14 Circuit, they made that argument. And that's
15 why the Eleventh Circuit made the judgment
16 that, if you consider dementia, you come to a
17 different finding.

18 I just don't think it's credible to
19 argue that the judge in this case considered
20 dementia and made a determination that Mr.
21 Madison's dementia does not leave him competent
22 to be executed.

23 And to that extent, we've never argued
24 that this is a case about a categorical ban on
25 executing people with a certain kind of

1 condition. What we've argued is that this
2 Court has held in Ford and Panetti that it is
3 unconstitutional to execute people who are
4 incompetent. And we've rooted that argument on
5 what this Court has acknowledged.

6 The Court has said: Look, the death
7 penalty gives the state an incredible power.
8 It's an awesome power. The authority to
9 execute someone who is not an immediate threat
10 is an awesome power. And that power has to be
11 utilized fairly, reliably, and humanely. This
12 Court's jurisprudence in Ford and Panetti
13 speaks to the humane part.

14 And what this Court said is that if
15 someone is disabled and incompetent and fragile
16 and bewildered and confused in the way that we
17 have seen, in the context of insanity, in the
18 context of other kinds of mental illness, it is
19 simply not humane to execute them.

20 And in that regard, the Eighth
21 Amendment here plays a different role than some
22 of the other amendments. The Court always
23 looks at facts and circumstances through the
24 lens of the Constitution, through the window of
25 the Constitution, and we have that here.

1 But the Eighth Amendment isn't just a
2 window. It's a mirror. And what the Court has
3 said is that our norms, our values are
4 implicated, when we do things to really
5 fragile, really vulnerable people. And what
6 we've argued is that dementia in this case
7 renders Mr. Madison frail, bewildered,
8 vulnerable in a way that cannot be reconciled
9 with executing him because of his incompetency.

10 The state never acknowledged that
11 argument as a base -- a valid argument. The
12 court never made a finding about that argument.
13 And we believe that when you consider the facts
14 of his dementia and this Court's holdings, that
15 a determination that executing someone in this
16 condition cannot be reconciled with an Eighth
17 Amendment prohibition against cruel and unusual
18 punishment.

19 And for that reason, this awesome
20 power that the state has requires obligations,
21 requires oversight. And, here, the state
22 didn't meet those obligations and oversight by
23 making the informed determination that his
24 dementia does not leave him so incapacitated
25 that he is competent -- incompetent to be

1 executed. They never said anything about
2 dementia.

3 And so I don't think this Court can
4 rely on the argument that somehow, in this
5 invisible record, with no reference to dementia
6 by the state, by the expert, or by the court,
7 that that determination has been found.

8 The only court to make a determination
9 about the relevance of dementia here was the
10 Eleventh Circuit. And what they clearly found
11 is that when you look at the level of despair
12 and the level of confusion and the level of
13 injury -- and, Mr. Chief Justice, you're right,
14 it's not just the physical symptoms. It's not
15 just that he's blind and can't walk and can't
16 speak, but those symptoms reinforce the
17 credibility, the legitimacy, the severity of
18 his acute dementia.

19 And we don't believe this Court can,
20 consistent with the Eighth Amendment's
21 prohibition against cruel and unusual
22 punishment, allow an execution of someone
23 impaired in the way that Mr. Madison is
24 impaired or to allow any defendant to be
25 declared competent to be executed with these

1 kinds of clear, medically verifiable disorders.

2 And for that reason, we would ask this
3 Court to reverse the lower court judgment.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:56 a.m., the case
8 was submitted.)

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