No. 17-193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Petitioner,

v.

VERNON MADISON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANGELA L. SETZER
COUNSEL OF RECORD
RANDALL S. SUSSKIND
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Respondent

September 5, 2017

CAPITAL CASE

QUESTION PRESENTED

(Rephrased)

In January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous strokes, led to significant decline in his cognitive and bodily functioning; he now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. He was given an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, which, along with cognitive decline and significant memory deficits, prevents Mr. Madison from having a rational understanding of why he is to be executed by the State.

Prior to the setting of the execution date in this case, Mr. Madison challenged his competency to be executed in the state trial court pursuant to Ala. Code § 15-16-23. In summary fashion, the state trial court determined that Mr. Madison was competent to be executed.

Pursuant to Alabama state law, this claim could not be reviewed by any state appellate court, and in federal habeas corpus proceedings, the district court rejected Mr. Madison's competency claim. On appeal, after

invoking the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and setting forth the appropriate standard of deference, the Eleventh Circuit Court of Appeals applied the governing law set forth in this Court's opinions in Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007), and determined that the state trial court unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law before concluding that habeas corpus relief was warranted.

Thus, the question presented is:

> Should this Court decline review where the federal court invoked the appropriate standard of deference required by the AEDPA, correctly applied the governing legal precedents from this Court, and properly determined the unreviewed state court decision to be objectively unreasonable in light of the unique facts of this case and controlling federal law?

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES. iv

INTRODUCTION. 1

STATEMENT OF THE CASE. 4

A. PRIOR PROCEEDINGS. 4

B. PROCEEDINGS BELOW. 8

REASONS FOR DENYING THE WRIT. 22

A. THE ELEVENTH CIRCUIT'S DECISION REPRESENTS THE PROPER APPLICATION OF LAW TO FACTS IN DETERMINING THE UNREVIEWED STATE COURT DECISION TO BE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND AN UNREASONABLE DETERMINATION OF FACTS.. 22

B. CERTIORARI IS INAPPROPRIATE TO REVIEW A DECISION THAT NEITHER CONFLICTS WITH PRECEDENT FROM THIS COURT NOR WITH DECISIONS FROM OTHER COURTS OF APPEAL OR STATE COURTS OF LAST RESORT. 27

CONCLUSION. 36

APPENDIX A Order Granting Motion to Stay, Madison v. Comm'r, Ala. Dep't. Of Corr., No. 16-12279 (11th Cir. May 12, 2016)

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002). 13

Batson v. Kentucky, 476 U.S. 79 (1986). 5, 8

Bedford v. Bobby, 645 F.3d 372 (6th Cir. 2011). 32, 33

Brumfield v. Cain, 135 S. Ct. 2269 (2015). 25, 27

Carey v. Musladin, 549 U.S. 70 (2006). 31

Carter v. Kentucky, 450 U.S. 288 (1981). 29

State ex rel. Clayton v. Griffith, 457 S.W.3d 735 (Mo. 2015). 35, 36

Ferguson v. Sec'y. Fla. Dep't. of Corr., 716 F.3d 1315 (11th Cir. 2013) 20, 21, 23, 24, 26

Ford v. Wainwright, 477 U.S. 399 (1986). . . . . passim

Graham v. Florida, 560 U.S. 48 (2010). 30

State v Irick, 320 S.W.3d 284 (Tenn. 2010). 34

Knowles v. Mirzayance, 556 U.S. 111 (2009). 29, 30

Ex parte Madison, 718 So. 2d 104 (Ala. 1998). 7

Madison v. Alabama, 525 U.S. 1006 (1998). 7

Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012) 8

Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014) 8

Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173 (11th Cir. 2017) . . . . . passim

Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987). 3, 5

Madison v. State, 620 So. 2d 62, 65 (Ala. Crim. App. 1992). . . . 2, 3, 4, 5

Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997). 2, 6, 7

Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006). 7

Madison v. Thomas, 135 S. Ct. 1562 (2015). 8

In re Medina, 109 F.3d 1556 (11th Cir. 1997). 24

State ex. rel. Middleton v. Russell, 435 S.W.3d 83 (Mo. 2014). 35

Panetti v. Quarterman, 551 U.S. 930 (2007). . . . . passim

In re Provenzano, 215 F.3d 1233 (11th Cir. 2000). 24

Renico v. Lett, 559 U.S. 766 (2010).. 20

Simon v. Fisher, 641 F. App'x 386 (5th Cir. 2016). 33, 34

Thomas v. Madison, 568 U.S. 1019 (2012). 8

Virginia v. LeBlanc, 137 S. Ct. 1726 (2017). 29, 30

Weeks v. State, 663 So. 2d 1045 (Ala. Crim. App. 1995). 19

Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). 5

White v. Woodall, 134 S. Ct. 1697 (2014). 29, 30

Woodward v. Alabama, 134 S. Ct. 405 (2013). 4

STATUTES

28 U.S.C. § 2254. . . . . 8, 30

Ala. Code § 15-16-23. . . . . i, 9, 10, 19

MISCELLANEOUS

Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2014). 10, 11

Equal Justice Initiative, The Death Penalty in Alabama: Judge Override (2011), http://eji.org/eji/files/Override_Report.pdf. 4

John G. Baker et al., Cerebral Small Vessel Disease: Cognition, Mood, Daily Functioning, and Imaging Findings from a Small Pilot Sample, 2.1 Dementia & Geriatric Cognitive Disorders 169 (2012), available at http:// www. ncbi. nlm.nih.gov/ pmc/ articles/PMC3347879/#. 15

INTRODUCTION

The State of Alabama seeks this Court's review based on a factual characterization of the record that is inaccurate and by relying on the testimony of a since-discredited state court-appointed psychologist. The mischaracterization of the record, however, cannot conceal what is evident from the proceedings below: there is nothing particularly compelling or unique about a federal court properly applying governing legal precedent to the specific and undisputed facts of a case to declare an unreviewed state trial court decision to be objectively unreasonable. Under these circumstances, certiorari should be denied.

In January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous strokes, led to significant decline in his cognitive and bodily functioning; he now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, and along with cognitive decline and significant memory deficits prevent Mr. Madison from having a rational

understanding of why he is to be executed by the State of Alabama.

Petitioner does not address this significant and well-documented medical evidence of Mr. Madison's strokes and his significant cognitive decline, or the unrefuted DSM-5 diagnosis in this case, instead repeatedly asserting that Mr. Madison has "always denied responsibility for [Officer Schulte's] murder," Pet. at 5; see also Pet. at 3, 12, 24. The assertion that Mr. Madison has never admitted his involvement in this crime is inaccurate: at the trial underlying his current conviction and death sentence, Mr. Madison admitted shooting Officer Schulte, but asserted self-defense, Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997) ("he again claimed that the killing was committed in self-defense"); likewise, at his second trial, Mr. Madison did not deny shooting the victim, but asserted a mental health defense. See Madison v. State, 620 So. 2d 62, 65 (Ala. Crim. App. 1992) ("he admitted through counsel that he shot Officer Schulte").

Petitioner alternatively argues that the lower court's decision is in conflict with other courts, and certiorari is appropriate to review this alleged split. Pet. at 12-18. But a close reading of the cases cited by

Petitioner makes clear that each of these courts properly applied this Court's governing legal precedents to a wide range of facts and came to different conclusions based on the application of the law to the unique facts of each case.

Finally, Petitioner's argument that this case is an appropriate vehicle for this Court's review because "enormous state resources" have been expended in this case and the lower court's opinion "frustrates" the State's "good-faith attempts to honor constitutional rights," Pet. at 27, is belied by Petitioner's own conduct in this case. The three decades Vernon Madison has spent on death row are a direct result of the State of Alabama's misconduct and its insistence on defending the misconduct for years and in multiple courts. The State illegally removed of all seven of the qualified African American prospective jurors at Mr. Madison's first trial, Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987), and introduced illegal evidence at Mr. Madison's second trial, Madison v. State, 620 So. 2d 62 (Ala. Crim. App. 1992). Critically, Mr. Madison would not be on death row had Mobile County Circuit Court Judge Ferrill

McRae[1] not rejected the verdict of the death-qualified jury sentencing Mr. Madison to life without parole. Certiorari should be denied.

STATEMENT OF THE CASE

(Corrected)

A. PRIOR PROCEEDINGS

Vernon Madison was indicted on two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court in Mobile, Alabama. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr.

---

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

Madison's conviction and sentence after concluding that the Mobile County District Attorney's Office had engaged in racially discriminatory jury selection when it struck all seven qualified African American veniremembers, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison v. State, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987).

At the second trial, Mr. Madison did not deny shooting the victim; rather, his primary defense was that he was not guilty by reason of mental disease or defect. Madison, 620 So. 2d at 65. On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had engaged in prosecutorial misconduct when it elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At the guilt phase of trial, Mr. Madison again did not deny that he shot the victim, but claimed that he did so in self-defense. Madison v.

State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997).[2] On April 21, 1994, the jury found Mr. Madison guilty of capital murder. It was undisputed at the penalty phase of trial that Mr. Madison suffered from a mental illness marked by paranoid delusions. This mitigating circumstance was established primarily through the testimony of defense expert Dr. Barry C. Amyx. (Doc. 11-4 at 2-44.) Dr. Amyx testified that Mr. Madison suffered from a delusional disorder; had experienced persecution delusions since he was a teenager; was out of touch with reality and unable to gather his thoughts; and could not appreciate fully the criminality of his conduct. (Doc. 11-4 at 7,9,13,16,25,43.) Dr. Amyx explained that Mr. Madison's struggles with mental illness had been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. (Doc. 11-4 at 2, 7.) To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications. (Doc. 11-4 at 10.)

Although the State called psychiatric expert Dr. Claude Brown to contest the *severity* of Mr. Madison's impairment, Dr. Brown agreed that

---

[2]This belies Petitioner's repeated assertions that Mr. Madison has never admitted killing the victim in this case.

Mr. Madison suffered from a mental illness "of a paranoid type." (Doc. 11-5 at 2, 7.) Dr. Brown did not refute the defense evidence that Mr. Madison had been diagnosed as mentally ill years earlier by prison psychiatrists in Mississippi or that he was required to take numerous psychotropic medications. (Doc. 11-5 at 2-7.)

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

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

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

B. PROCEEDINGS BELOW

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. On February 12,

2016, before the Alabama Supreme Court scheduled the execution, Mr. Madison's counsel filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, moving the trial court to stay Mr. Madison's execution because, as a result of his dementia, strokes, and cognitive decline, Mr. Madison no longer understands why the State is attempting to execute him and he is incompetent to be executed under the Eighth and Fourteenth Amendments. On February 15, 2016, Mr. Madison's counsel moved the Alabama Supreme Court to delay setting an execution date until after Mr. Madison's competency claim had been adjudicated. Nevertheless, on March 3, 2016, the Supreme Court of Alabama ordered that Thursday, May 12, 2016, be set as the date for Mr. Madison's execution.

On March 15, 2016, the Mobile County Circuit Court judge determined that Mr. Madison had made a preliminary showing of incompetency, ordered that he be evaluated by a court-appointed expert,[3]

---

[3] The court-appointed psychologist was Dr. Karl Kirkland, who had a long-standing contract with the State of Alabama. (Doc. 8-1 at 68.) Subsequent to the oral argument in this case, Dr. Kirkland was arrested and charged with multiple counts of Unlawful Possession or Receipt of a Controlled Substance in conjunction with forging a prescription on April 18, 2016, just four days after Mr. Madison's competency hearing.

and scheduled a hearing on Mr. Madison's § 15-16-23 petition, which occurred on April 14, 2016.

At the hearing, the submitted evidence established that Mr. Madison suffers from a major vascular neurological disorder, see Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"), or vascular dementia, which was caused in part by a thalamic stroke he suffered in January, 2016. (Doc. 8-1 at 101-02, 107.) Both Dr. Kirkland and Dr. John Goff, a licensed neuropsychologist who, at Mr. Madison's request, conducted extensive neuropsychological testing and evaluated Mr. Madison's competence to be executed, agreed that Mr. Madison's cognitive and bodily functioning has declined significantly as a result of several strokes he has suffered over the past couple of years, as well as other medical conditions with which he is afflicted. (Doc. 8-1 at 74, 105, 108-09; Doc. 8-3 at 9-10, 19.)

Dr. Kirkland did not dispute the diagnosis of dementia. (Doc. 8-1 at

---

http://www.wsfa.com/story/32792305/montgomery-psychologist-charged-with-using-forged-prescription. Dr. Kirkland was suspended from the practice of psychology on September 9, 2016. See Ala. Bd. of Exam'r in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited Sept. 5, 2017).

123-24.)

On January 4, 2016, Mr. Madison was found unresponsive in his prison cell and fecally incontinent after suffering a thalamic stroke,[4] which necessitated transfer from Holman Prison and outside hospitalization. (Doc. 11-32 at 25; Doc. 11-60 at 13.) This thalamic stroke is particularly relevant to Mr. Madison's competency because it resulted in significant memory loss. (Doc. 8-3 at 19; Doc. 8-1 at 101-04.) The thalamus is a "connection organ" that links the limbic system in the lower area of the brain to the frontal lobes, (Doc. 8-1 at 101-02), and when the thalamus is damaged, "the most common thing" that results is memory loss. (Doc. 8-1 at 102; Doc. 8-3 at 19.)

Consistent with that pattern, Mr. Madison suffers from vascular dementia and resulting retrograde amnesia. (Doc. 8-3 at 19; Doc 8-1 at 102, 107.) Clinical features of vascular dementia, or vascular neurological disorder, include the onset of cognitive deficits, like memory loss, that are temporally related to a cerebrovascular event, such as a stroke. DSM-5 at 621; (Doc. 8-1 at 107-108). In this case, Mr. Madison's retrograde amnesia

---

[4]MRI imaging on January 4, 2016, confirmed this thalamic stroke. (Doc. 11-60 at 13.)

has meant that his episodic memory – memory related to events that happened to him in the past – has significantly declined. (Doc. 8-3 at 19.)

Consequently, Mr. Madison cannot remember numerous events that have occurred over the past 30 years. (Doc. 8-3 at 19.) Critically, he cannot independently recall the facts of the offense for which he was convicted or the previous legal proceedings in his case. (Doc. 8-3 at 19; Doc. 8-1 at 110.) Dr. Goff's examination revealed that Mr. Madison was unable to recollect the sequence of events from the offense to his arrest or to his trial, and could not recall the name of the victim. (Doc. 8-3 at 18-19.) Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Doc. 8-3 at 19-20; Doc. 8-1 at 110, 119-20.)

Dr. Goff's neuropsychological testing revealed that Mr. Madison has an IQ score of 72, which places him in the borderline range of intelligence and is a significant decline from his previous scores, (Doc. 8-3 at 17, 20, Doc 8-1 at 97), and that he has a Working Memory Score of 58,

demonstrating severe memory deficits,[5] (Doc. 8-3 at 17, Doc. 8-1 at 97-98). Dr. Goff's testing revealed additional evidence of Mr. Madison's memory impairments: Mr. Madison could not recall any of the 25 elements in a brief story vignette Dr. Goff read him, could not remember the alphabet past the letter G, could not perform serial three additions, could not remember the name of the previous United States President, named Guy Hunt as the governor of Alabama, and could not remember the name of the Warden at Holman Correctional Facility, where he has been incarcerated for over 30 years.[6] (Doc. 8-3 at 16.) There is also evidence Mr. Madison has difficulty processing information. During the examination, Dr. Goff noted that Mr. Madison was unable to rephrase simple sentences and was unable to perform simple mathematical calculations. (Doc. 8-3 at

---

[5]The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Doc. 8-1 at 98.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's" thereby placing him "within the borderline to intellectually disabled range" (Doc. 8-3 at 19); akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment, see Atkins v. Virginia, 536 U.S. 304 (2002).

[6]Dr. Kirkland testified that Mr. Madison was only *partially* oriented to time and place. (Doc. 8-1 at 74-75; Doc. 8-3 at 8.)

18.) Dr. Goff concluded that these deficits likely resulted, at least in part, from the January stroke. (Doc. 8-3 at 19.)

Prior to this January stroke, Mr. Madison had suffered other strokes that have contributed to his cognitive decline. (Doc. 8-1 at 74-75, 104-07.) These strokes include a basilar artery occlusion, causing bilateral cerebral and occipital infarctions, in May 2015[7] that resulted in increased brain pressure, white matter attenuation, and possible temporal lobe damage, which can cause memory difficulties.[8] (Doc. 8-3 at 13, Doc. 8-1 at 104-05.) In the aftermath of the stroke, Mr. Madison was in an "altered mental status," (Doc. 8-3 at 13; Doc 11-28 at 43), and deemed to have a diminished ability to comprehend. (Doc. 11-30 at 14.) He was also unaware of where he was or why he was there and appeared confused. (Doc. 11-30 at 32, 36.) His speech was slurred, he exhibited signs of an impaired memory, and he could not remember the officers who were

---

[7]Records indicate that Mr. Madison suffered strokes prior to the May 2015 incident which negatively impacted his cognitive and bodily functioning. (Doc. 8-3 at 19; Doc. 8-1 at 104.)

[8]As a result, Mr. Madison was taken to the ICU and a neurosurgeon was placed on standby due to a high risk of fatal brain herniation. (Doc. 11-28 at 46.)

guarding him, whom he had known for years. (Doc. 11-30 at 36, 39; see also Doc. 8-3 at 16, 19.)

As a result of these multiple strokes, Mr. Madison also suffers from encephalomalacia, (Doc. 11-60 at 41, 49, 141; Doc. 8-1 at 106), which means that there are areas of his brain where the tissue is dead. (Doc. 8-1 at 106-07.) MRI imaging in January 2016 depicted encephalomalicia in the occipital lobes and cerebellar hemispheres. (Doc. 11-60 at 13; see also Doc. 8-1 at 106-07.)

In addition to the strokes, Mr. Madison suffers from multiple medical conditions that, over the years, have led to worsening cognitive capacity, including Type 2 Diabetes, chronic hypertension, and chronic small vessel ischemia.[9] (Doc. 8-3 at 9, 19; Doc. 8-1 at 73-74, 105-06.) Mr. Madison also suffers from occipital angioma – an abnormal collection of blood vessels – which likely contributed to his strokes and debilitating headaches. (Doc. 11-23 at 18.) Furthermore, both experts agree that Mr.

---

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

Madison now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. (Doc. 11-34 at 59; Doc. 8-1 at 73-74, 92-93, 104-105.)

Members of Mr. Madison's legal team observed changes in his mental functioning and ability to communicate that are consistent with the symptoms of these medical diagnoses: a precipitous decline in his functioning in January of 2016, (Doc. 8-1 at 21,¶ 10); slurred and halting speech, (Doc. 8-1 at 21-22, ¶ 11); struggling to retain basic information and repeating questions and conversations without any awareness of having had the conversations previously, (Doc. 8-1 at 22, ¶ 13; 25, ¶ 8); an increasing focus on a limited number of familiar topics; and nonsensical speech. (Id.)

Mr. Madison also exhibited a profound level of disorientation and confusion. For example, he rarely leaves his bed and expresses confusion about where he is. He reported frequently urinating on himself because "no one will let me out to use the bathroom," despite the fact that Mr. Madison has a toilet just inches from his bed, inside of his cell. (Doc. 8-1

at 22, ¶ 12.) He has also exhibited signs of confusion while communicating with his attorney, at one point asking a question about an in-person meeting he believed occurred the previous day, when in fact his attorney had not seen him for several months. (Doc. 8-1 at 25, ¶ 7.) During a legal visit in February 2016, he indicated confusion about the status of his case, stating that he plans to move to Florida or live abroad after he is released from prison. (Doc. 8-1 at 24-25, ¶¶ 4, 9.) Additionally, Mr. Madison has presented as increasingly and uncharacteristically disheveled, wearing a visibly soiled uniform, covered in stains and hair shavings, and, on his bare feet, wearing plastic shower sandals that did not match. (Doc. 8-1 at 21-22, ¶ 11.) In subsequent visits, his hygiene continued to deteriorate. (Doc. 8-1 at 25, ¶ 10.)

At the hearing in the state trial court, Mr. Madison appeared in a wheelchair as a "physically ill individual" and it was not clear that he followed anything that occurred at the hearing. (Doc. 8-2 at 157.)

Dr. Kirkland testified and agreed that Mr. Madison suffered significant cognitive and bodily decline as a result of these strokes, and did not dispute Dr. Goff's DSM-5 diagnosis. (See Doc. 8-1 at 123 ("I think

Dr. Goff's testimony reflects his training in neuropsychology, and I'm sure what he had to say is accurate.").) Nothing in his report indicated that he had probed the extent of Mr. Madison's understanding of his execution; when the state trial judge questioned him at the hearing about whether he had an "understanding or opinion as to whether Mr. Madison understands that the State is seeking retribution against him for an act that he committed in the past," Dr. Kirkland responded only that Mr. Madison, "talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." (Doc. 8-1 at 124.) Similarly, when asked by counsel for the State about whether Mr. Madison had knowledge of his execution, Dr. Kirkland testified that Mr. Madison "understands that that is, as applied to him, that he has two choices or two sentences that are – that are there; one being execution and one being life without parole." (Doc. 8-1 at 78-79.) Dr. Kirkland could not explain why he did not include this information in his written report, (Doc. 8-1 at 80-81), or that such information was actually not true: at no point in his appeals has the sentence of life without parole been available to Mr. Madison. Dissenting Judge Jordan acknowledged the paucity of Dr.

Kirkland's evaluation, Madison v. Comm'r, Ala. Dep't. of Corr., 851 F.3d 1173, 1194 (11th Cir. 2017), noting that he found Dr. Goff's opinion persuasive. Id. at 1193.

On April 29, 2016, the Mobile County Circuit Court denied Mr. Madison's §15-16-23 petition. In its order, the state court did not consider or even cite to Mr. Madison's diagnosed dementia, (Doc. 8-2 at 149-58), even though this diagnosis was never disputed by the court-appointed expert, Dr. Kirkland, (Doc. 8-1 at 123-24).

Pursuant to Ala. Code § 15-16-23, appellate review of that decision in the Alabama state courts was unavailable. (Doc. 13 at 8); see also Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995). On May 4, 2016, Mr. Madison filed a petition for habeas corpus and a motion for a stay of execution in the United States District Court for the Southern District of Alabama. (Doc. 1-2.) On May 10, 2016, the district court denied Mr. Madison's habeas petition and motion for a stay. (Doc. 13-14.) On May 12, 2016, the Eleventh Circuit Court of Appeals granted Mr. Madison's motion for a certificate of appealability, stayed the execution, and ordered expedited briefing and oral argument in the case. (See Doc. 20 (attached

as Appendix A).)[10]

In its March 2017 decision reversing the district court, the Eleventh Circuit Court of Appeals identified the proper standard of review, noting that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "imposes a 'highly deferential standard for evaluating state-court rulings.'" Madison, 851 F.3d at 1182 (citing Renico v. Lett, 559 U.S. 766, 773 (2010)). The lower court then correctly identified Ford v. Wainwright and Panetti v. Quarterman, this Court's controlling precedent on competency-to-be-executed claims, specifically noting Justice Powell's articulation that the "Eighth Amendment forbids the execution of 'those who are unaware of the punishment they are about to suffer and why they are to suffer it,'" id. at 1184, and this Court's decision in Panetti, clarifying that the requisite awareness required by Ford "was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution,'" id. (citing Ferguson v. Sec'y. Fla. Dep't. of Corr., 716 F.3d 1315, 1336 (11th Cir. 2013)). While "mindful of the great deference due to

---

[10]Petitioner attached the incorrect version of the lower court's order, see Pet. at 87a. The correct version is attached to this document as Appendix A.

state court decisions on federal habeas review, particularly when the state court is applying a general standard like the one in Panetti," Madison, 851 F.3d at 1178, the lower court concluded that the state trial court's decision was an unreasonable determination of the facts "because the court refused to consider undisputed evidence of [Mr. Madison's] diagnosed dementia and corresponding memory deficits," id. at 1185, and an unreasonable application of clearly established law because the state court failed to "examine the prisoner's understanding of the connection between his crime and his execution," id. at 1188. After undertaking a *de novo* review of the claim, the lower court determined that although it is "undisputed that Mr. Madison understands that his execution will result in his death," the evidence established that "Mr. Madison lacks a rational understanding of the link between his crime and his execution," and he is therefore incompetent to be executed. Id. at 1189-90.

Judge Jordan agreed with the majority of the lower court that the Eighth Amendment prohibited Mr. Madison's execution:

> After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time for his murder of a police officer three decades ago. See

> generally Panetti v. Quarterman, 551 U.S. 930, 958 [] (2007) (explaining that a state cannot put to death a prisoner who 'cannot reach a rational understanding of the reason for the execution').

Id. at 1190 (Jordan, J., dissenting), though he ultimately dissented, albeit reluctantly, with regard to the AEDPA analysis, see id. at 1190, 1194.

REASONS FOR DENYING THE WRIT

A. THE ELEVENTH CIRCUIT'S DECISION REPRESENTS THE PROPER APPLICATION OF LAW TO FACTS IN DETERMINING THE UNREVIEWED STATE COURT DECISION TO BE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND AN UNREASONABLE DETERMINATION OF FACTS.

As the opinion below makes quite clear, the Eleventh Circuit correctly applied this Court's holdings in Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007), to this case – where the facts establish that as a result of significant strokes, including a thalamic stroke in January 2016, as well as serious medical conditions, all of which are documented in the medical records submitted to the courts below, 67-year-old Vernon Madison has been diagnosed with a vascular neurological disorder, or vascular dementia, and continues to suffer a decline in cognitive functioning and significant memory deficits which

prevent him from having a rational understanding of why he is scheduled to be executed by the State of Alabama – to find that it was unreasonable for the trial court to decline to find Mr. Madison incompetent to be executed because it improperly restricted the scope of its competency review and improperly credited irrelevant expert evidence put on by the State. Madison v. Comm'r., Ala. Dep't. of Corr., 851 F.3d 1173, 1185-90 (11th Cir. 2017).

Contrary to the Petitioner's suggestion that the Eleventh Circuit does not understand Panetti or the deference required under AEDPA, the Eleventh Circuit has previously applied Panetti to deny relief in the context of a competency-to-be-executed claim.[11] See Ferguson v. Sec'y, Fla. Dep't. of Corr.,716 F.3d 1315, 1338 (11th. Cir 2013) (upholding Florida state court ruling that condemned prisoner competent to be executed, despite diagnosis of paranoid schizophrenia with delusions, because delusions did not interfere with his "rational understanding" of impending

[11] Indeed, no judge in active service on the Eleventh Circuit Court of Appeals believed the panel's decision to be so "demonstrably incorrect," Pet. at 18, as to require that the court be polled when Petitioner moved for rehearing en banc. App. 84a. Rehearing was denied.

execution and reason for it); see also 716 F.3d at 1344 (Wilson, J., concurring in result) (agreeing that court must "defer to the Florida Supreme Court's finding" and concurring in denial of habeas corpus relief).

Nor has the Eleventh Circuit had past difficulty adhering to its duty of deference under AEDPA to preserve norms of finality and federalism in competency-to-be-executed cases. See, e.g., id. at 1338 (finding Florida's competency standard "not inconsistent with clearly established federal law"), cert. denied, 134 S. Ct. 33 (2013); In re Medina, 109 F.3d 1556, 1565 (11th Cir. 1997) (holding prisoner not entitled to file successive habeas petition to pursue Ford claim), cert. denied, 520 U.S. 1151 (1997); In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000) (rejecting application to file successive petition to pursue Ford claim), cert. denied, 530 U.S. 1256 (2000).

Here, the Eleventh Circuit applied Ford in precisely the way this Court ruled it should be applied in Panetti: both the Eleventh Circuit and this Court in Panetti corrected state court rulings that were unreasonable because they were "improperly restrictive." Madison, 851 F.3d at 1189 ("A closer look at the competency standard rejected by the Supreme Court in

Panetti as 'too restrictive' makes this obvious.").

First, with regard to the state trial court's determination of the facts, the lower court evaluated the record evidence and determined that 1) Mr. Madison "has a serious mental condition"; 2) "Dr. Goff's testimony that Mr. Madison does not remember committing the murder is . . . unrefuted"; 3) "as a result of his mental disorder, Mr. Madison does not rationally understand the connection between his crime and his execution"; and that 4) because "Dr. Kirkland's report and testimony include no indication that he evaluated whether Mr. Madison understood this connection at all," the state trial court's finding that Mr. Madison has a "'rational [] understanding . . . that he is going to be executed because of the murder he committed' is not supported by the record and is therefore plainly unreasonable." Id. at 1185-87. This was plainly a proper application of the law to the facts in this case. See Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (state court's failure to consider relevant evidence – IQ score of 75 and evidence of adaptive functioning deficits – in assessment of claim petitioner was intellectually disabled and therefore exempt from execution unreasonable).

Additionally, the lower court properly recognized that Panetti "plainly requires courts making competency determinations to analyze whether the prisoner understands 'the connection between his execution and the crimes for which he is going to be executed.'" 851 F.3d at 1189 (quoting Ferguson, 716 F.3d at 1318). In this case, "[g]iven the unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes he has not killed anyone – as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution," the lower court determined that the record could not support the trial court's finding that Mr. Madison is competent to be executed. Id.

After determining that the Alabama trial court "unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law," and as such the lower court did not "owe the state court's finding that Mr. Madison is competent to be executed deference under AEDPA," the lower court determined that "Mr. Madison lacks a rational understanding of the link between his crime and his

execution," and he is therefore "incompetent to be executed." Id. at1189-90; see Brumfield, 135 S. Ct. at 2277 ("[D]eference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." (internal quotation marks omitted)).

The lower court's straightforward, and proper, application of the controlling law to the specific facts of this case, dictated by the deference required by the AEDPA, is precisely the type of case this Court has generally avoided and certiorari should be denied. See Sup. Ct. R. 10 ("[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. CERTIORARI IS INAPPROPRIATE TO REVIEW A DECISION THAT NEITHER CONFLICTS WITH PRECEDENT FROM THIS COURT NOR WITH DECISIONS FROM OTHER COURTS OF APPEAL OR STATE COURTS OF LAST RESORT.

Without addressing the unrefuted evidence of Mr. Madison's significant strokes, decline in cognitive and bodily functioning, and DSM-5 diagnosis of major vascular neurological disorder or vascular dementia, and faced with a lower court opinion that correctly identifies the

controlling precedent from this Court, engages in the proper analysis to determine the deference required by the AEDPA, and rightly applies the law to the specific facts of the case, Petitioner is left to argue that the lower court erred in applying the Ford/Panetti rule to Mr. Madison's case because this Court has not addressed those precise facts in the context of a competency claim, or, alternatively, that this "misappli[cation]" of Ford and Panetti conflicts with decisions from other courts. Pet. at 13.[12] But neither of these arguments can be squared with what the lower court actually did below and Petitioner's misrepresentations should not now

---

[12]Petitioner repeatedly diminishes the import of the uncontested diagnoses here – see, e.g., Cert. Pet. at 12 ("inmate who does not remember or otherwise acknowledge committing murder"); 12 ("Madison claims he forgot the murder he committed"); 16 ("memory problems"); 21 ("memory problems") – in an attempt to place Mr. Madison's case outside the parameter of Panetti's rule, individuals who "fail to understand" why they are to be executed for "reasons other than those stemming from a severe mental illness." Pet. at 12, 13. But the undisputed evidence of Mr. Madison's multiple strokes, encephalomalacia, and the associated physical, cognitive and neuropsychological deficiencies is well-documented in the record and the resulting DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, is unrefuted by even the State's own expert. And no amount of semantic subterfuge can change the fact this Court in Panetti drew no line whatsoever around a particular mental health diagnosis, choosing instead to state the obvious: a mental disorder is different from "a misanthropic personality or an amoral character." 551 U.S. at 960.

form the basis for this Court's review.

In support of its argument that the lower court decision is contrary to this Court's precedent and that certiorari is therefore appropriate, Petitioner cites to White v. Woodall, 134 S. Ct. 1697 (2014), and Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) – yet each involves a lower court taking a legal rule from this Court's precedent and *extending* it to the factual scenario presented. Because the lower court here correctly *applied* the legal rule from controlling Supreme Court precedent to the unique facts of Mr. Madison's case, neither case is relevant nor helpful here.

In White, this Court reversed the Sixth Circuit Court of Appeals' grant of habeas corpus relief based upon the trial court's refusal to give a no-adverse-inference instruction at the penalty phase of a capital trial when the controlling Supreme Court precedent – Carter v. Kentucky, 450 U.S. 288 (1981) – limited such a requirement to the guilt/innocence phase. 134 S. Ct. at 1702-03. While recognizing that "state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case," id. (citing Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)), this Court found that Section 2254 provides a remedy only for

"instances in which a state court unreasonably *applies* this Court's precedent," it does not, however, "require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." Id. at 1706.

Similarly, in LeBlanc, this Court found that the Fourth Circuit Court of Appeals erred in finding that the state court decision – holding that Virginia's geriatric release program complied with Graham [v. Florida, 560 U.S. 48 (2010)]'s requirement that juvenile offenders convicted of nonhomicide offenses be given "some meaningful opportunity to obtain release" – was an "unreasonable application" of the law for purposes of § 2254(d)(1), where this Court had by its own statement in Graham explicitly left this issue to the states. 137 S. Ct. at 1727-30 (noting the "legal quagmire" created by the Fourth Circuit ruling and finding "[t]he Court in Graham left it to the States, 'in the first instance, to explore the means and mechanisms for compliance' with the Graham rule." (quoting Graham, 560 U.S. at 75)).

In contrast, in this case, the Eleventh Circuit found unreasonable an unreviewed state court ruling that employed a general competency

standard that was too restrictive and that unreasonably relied upon irrelevant expert testimony, employing the same analysis, addressing the same issue, and ultimately coming to the same conclusion as the relevant controlling Supreme Court precedent, Panetti.[13] As this Court made clear in Panetti, "that the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Panetti, 551 U.S. at 953 (quoting Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). As such, certiorari is not appropriate on this basis.

Nor is Petitioner's assertion that certiorari is necessary because lower courts are split on "whether a state can execute an inmate who does not remember or otherwise acknowledge committing murder" persuasive. Pet. at 12. In fact, what Petitioner mischaracterizes as a "split" is actually a collection of various federal circuit court and state court decisions

---

[13]Indeed, in the context of competency, an alternative reading, now espoused by Petitioner, would preclude relief in every case where the specified DSM diagnosis differed from that identified in Panetti, an absurd result not mandated by AEDPA, this Court's precedents, or the Eighth Amendment.

applying the same clearly established law to differing facts, precisely the type of fact-specific case in which this Court is most inclined to deny certiorari. Sup. Ct. R. 10.

In Bedford v. Bobby, for example, the Sixth Circuit Court of Appeals analyzed a competency-to-be-executed claim brought seven days before the scheduled execution. 645 F.3d 372, 377 (6th Cir. 2011). After concluding that a stay of execution should have been denied on "this ground alone," the lower court concluded that the state court reasonably determined that Mr. Bedford "had not made a 'substantial threshold showing' that he lacked a rational understanding of the 'punishment [he is] about to suffer and why [he is] to suffer it.'" Id. at 378 (quoting Panetti, 551 U.S. at 949). Rather, the lower court found that while the defense presented evidence to the state courts that Mr. Bedford suffered from "the onset of a dementia[-] form illness," and an impaired memory, "[e]ven on their own terms, the statements in these affidavits do not establish that Bedford does not understand the reasons for his conviction or the nature of his punishment," such that the state court decision was unreasonable. Id. Far from adopting a rule that "memory and acknowledgment of the crime" is

"irrelevant," Pet. at 14, the lower court simply applied the Ford/Panetti rule to the facts of the case to conclude that the state court had reasonably concluded that Mr. Beford "had not made a substantial threshold showing of incompetence that would entitle him to additional process," id. at 380.

Likewise, in Simon v. Fisher, 641 F. App'x 386 (5th Cir. 2016), the Fifth Circuit applied Panetti's "'rational understanding' test" id. at 389, to analyze Mr. Simon's claim that he was incompetent to be executed due a head injury,[14] id. at 387. Though the defense expert, Dr. John Goff,[15] submitted a report opining that Mr. Simon exhibited signs of "global

---

[14]In contrast to this case, in Simon the "medical records are sparse and do not actually diagnose Simon with a head injury." 641 F. App'x at 387 n.2.

[15]Petitioner claims the Simon case to be "important" in part because the defense expert in that case was Dr. John Goff, the same expert who testified on Mr. Madison's behalf. Pet. at 16. While Petitioner makes much of Dr. Goff's opinion (stated in an affidavit; he did not testify at the competency hearing on Mr. Simon's behalf) that Mr. Simon suffered from "global amnesia" as a result of a head injury, see Pet. at 16, what Petitioner fails to include is the "salient fact" that Dr. Goff "reported that Simon was either malingering memory deficits or, generously stated, that he could not rule out malingering as an explanation for Simon's behavior." Simon, 641 F. App'x at 389. Far from "disbeliev[ing] Dr. Goff" as the State suggests, Pet. at 16, the district court and the Fifth Circuit actually considered all of this testimony – including Dr. Goff's opinion that Mr. Simon may have been malingering – when concluding that habeas relief was not warranted. 641 F. App'x. at 389-90.

amnesia," he made clear that this was a "'functional condition' not a neurophysicological one"; moreover, "he could not rule out . . . malingering." Id. Dr. Goff was not called to testify by the defense at the hearing, and the State's evidence – through the testimony of an expert and a prison guard – was that Mr. Simon was malingering. Id. at 388-90. Relying on all of this evidence, including Dr. Goff's report that Mr. Simon may have been malingering, the Fifth Circuit held that the district court did not err in finding that Simon was competent to be executed. Id. at 390.

Likewise, the "rational understanding" standard of Panetti was applied by the Tennessee Supreme Court in State v Irick, 320 S.W.3d 284 (Tenn. 2010). In that case, the state court noted that an expert had concluded that Mr. Irick had no memory impairment and that he had asserted that the victim's father was the one who actually committed the murder. Id. at 296. Based on this information and other evidence, the state court held that Mr. Irick had a rational understanding of his execution and that the trial court did not err in concluding that he was competent to be executed. Id. at 297, 298.

Lastly, Petitioner cites two cases out of Missouri, in support of an

asserted "split" in the lower courts. In State ex. rel. Middleton v. Russell, the Missouri Supreme Court evaluated the defendant's claim that he was incompetent to be executed because he had "developed certain beliefs about his charges and the resulting legal proceedings that are distorted by this paranoia, and may now be indicative of a psychotic delusional disorder." 435 S.W.3d 83, 84 (Mo. 2014) (en banc). Relying on Panetti's "rational understanding" standard, the state court reviewed the record and concluded that Mr. Middleton's beliefs were in line with arguments his attorneys had asserted to defend him and did not "make Middleton delusional in the way that renders him incompetent to be executed under the Eighth Amendment." Id. at 84-85.

Quoting extensively from the portion of Middleton that discusses Panetti, the Missouri Supreme Court followed Middleton's lead in utilizing Panetti's "rational understanding" standard to evaluate a claim that the defendant, Mr. Clayton, was incompetent to be executed because he expressed a belief that God was going to deliver him from execution. State ex rel. Clayton v. Griffith, 457 S.W.3d 735, 745 (Mo. 2015). In holding that Mr. Clayton failed to make a threshold showing of incompetency, the state

court noted that "religious faith and delusion" are not synonymous and that Mr. Clayton's case was distinguishable from Panetti because the inmate in Panetti "genuinely believed the true purpose behind his execution was not as punishment for a crime, but to stop him from preaching." Id. at 745.

Because each of these courts unquestionably applied the "rational understanding" standard set out by this Court in Ford and Panetti to the specific facts of each case and did not err in applying that standard, no split of authority exists and certiorari should be denied.

CONCLUSION

Vernon Madison is incompetent to be executed. In granting habeas corpus relief, the lower court correctly applied this Court's precedent to the facts of this case. Certiorari should be denied.

Respectfully Submitted,

ANGELA L. SETZER
COUNSEL OF RECORD
RANDALL S. SUSSKIND
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Respondent

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12279-P

VERNON MADISON,

Petitioner – Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent – Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before WILSON, MARTIN and JORDAN, Circuit Judges.

BY THE COURT:

This order replaces that issued by the panel earlier today.

Petitioner Vernon Madison is an Alabama prisoner scheduled to be executed on May 12, 2016. He has filed a 28 U.S.C. § 2254 petition contending that he is mentally incompetent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), and Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842 (2007). The district court found that Madison properly filed his Ford claim in federal court but denied the claim on the merits. The district court found that

Madison had exhausted his Ford claim in state court as required by 28 U.S.C. § 2254(b)(1). It also noted that Madison's Ford claim was not barred as "second or successive" under 28 U.S.C. § 2244(b).

Madison moves for a certificate of appealability ("COA") so that he may appeal the denial of his § 2254 petition. He also seeks a stay of his execution pending appeal.

This Court may issue a COA from the denial of a § 2254 petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

The Supreme Court has held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Ford, 477 U.S. at 409–10, 106 S. Ct. at 2602. Then in Panetti the Court clarified that the prisoner must have "a rational understanding of the reason for the execution." 551 U.S. at 958, 127 S. Ct. at 2861. Madison alleges that as result of a series of strokes and other serious medical conditions, he suffers from vascular dementia, which has resulted in significant memory impairment, a decline in cognitive functioning, and

ultimately an inability to rationally understand why the State of Alabama is seeking to execute him. An Alabama trial court denied this claim. Madison did not appeal this decision because, as the Alabama trial court and the district court found, Alabama state law insulates the trial court's competency decision from review by any other Alabama court. See Ala. Code §15-16-23. Madison argues that the state court's decision that he is competent to be executed was contrary to or involved an unreasonable application of Panetti and Ford. Madison also argues that the state court's decision was based on an unreasonable determination of the facts because it failed to consider evidence of his dementia and related impairments.

The Supreme Court has observed that a Ford claim is unique from other constitutional claims that arise in capital cases because it becomes ripe for adjudication only when the petitioner's execution is imminent. See Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45, 118 S. Ct. 1618, 1622 (1998); see also Panetti, 551 U.S. at 947, 127 S. Ct. at 2855 ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). This is therefore the first time that any state or federal court has had the opportunity to consider Madison's claim that his execution is prohibited by the Eighth Amendment. This claim could not have been raised before Madison's execution became imminent,

and only the Alabama trial court and the district court have reviewed Madison's claim.

Pursuant to Miller-El, Madison has satisfied § 2253(c)(2)'s standard. Madison's motion for COA is **GRANTED** as to the following issues:

> (1) Whether the state court's decision that Madison is competent to be executed is contrary to or involves an unreasonable application of clearly established federal law.
>
> (2) Whether the state court's decision that Madison is competent to be executed was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"If a certificate of appealability is granted by the district court or by this court, the panel may grant a temporary stay pending consideration of the merits of the appeal if necessary to prevent mooting the appeal." 11th Cir. R. 22-4(a)(7); see also Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330, 1344 (11th Cir. 2013) (granting temporary stay of execution under Rule 22-4(a)(7), denying state's motion to vacate the stay, and ultimately affirming the district court's denial of habeas relief after hearing oral argument on the merits of prisoner's Ford claim). Madison's death will render his appeal moot, and the Supreme Court has instructed that "a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause [now a certificate of appealability] on his initial habeas appeal." Barefoot v. Estelle, 463

U.S. 880, 893–94, 103 S. Ct. 3383, 3395 (1983); see also Lonchar v. Thomas, 517 U.S. 314, 319–20, 116 S. Ct. 1293, 1297 (1996) (holding that Barefoot applies to district courts considering initial habeas petitions). The Court therefore **GRANTS** Madison's Motion for Stay of Execution.

The Court directs the parties to brief the merits of the issues identified in the COA, pursuant to the following schedule: Petitioner shall file a brief on the merits by May 27, 2016. Respondent shall have until June 10, 2016, to file a response brief. Petitioner shall then have until June 17, 2016, to file a reply brief. The parties are directed to file the briefs electronically and to serve the briefs to opposing counsel electronically at the same time. Oral argument shall take place in Atlanta on June 23, 2016, at 9:00 a.m. EST. Counsel shall be given 30 minutes per side.

IT IS SO ORDERED.