No. _____

In the
Supreme Court of the United States

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
VERNON MADISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVE MARSHALL
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General
*Counsel of Record

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Petitioner

August 2, 2017

QUESTIONS PRESENTED
(Capital Case)

Over thirty years ago, Vernon Madison shot and killed a police officer. Last year, after his execution was set, Madison filed a petition in state court challenging his competency to be executed. Madison's own expert testified that Madison understands "the meaning of a death sentence," "the nature of the pending proceeding," "what he was tried for," and "that he's being executed." But Madison's expert also concluded that Madison could not remember committing the murder. The state court's own appointed expert testified that Madison could remember details of his life, including around the time of the murder, and "was able to discuss his case in a very accurate manner." The state court held that Madison was competent to be executed.

After a federal district court denied Madison's habeas petition, the Eleventh Circuit stayed his execution. Four members of this Court voted to vacate the stay, but it was left undisturbed by an equally divided Court. Later, in a divided opinion, the Eleventh Circuit held that the state court was "patently unreasonable" when it found Madison competent to be executed because he is "a man with no memory of what he did wrong."

This petition raises two questions:

(1) Do this Court's precedents clearly establish that a prisoner is incompetent to be executed for a murder because he does not remember or acknowledge committing it?

(2) Was the state court objectively unreasonable in concluding that Madison was competent to be executed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The district court's order denying Madison's habeas petition and motion for stay of execution is unreported and reprinted in the appendix at 38a-66a. The Eleventh Circuit's opinion reversing is reported at 851 F.3d 1173 (CA11 2014), and reprinted in the appendix at 1a-37a. The state court's order determining that Madison is competent is unreported and reprinted in the appendix at 67a-81a.

STATEMENT REGARDING JURISDICTION

Jurisdiction is proper. *See* 28 U.S.C. § 1254 (1). The district court had jurisdiction to consider the habeas petition. 28 U.S.C. § 2254 (d). The Eleventh Circuit issued the opinion under review on March 15, 2017. App. 1a. The Commissioner filed a timely application for rehearing, which the Eleventh Circuit denied on May 4, 2017. *See* App. 82a-83a. This petition is timely filed within 90 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

The pertinent section of the Anti-Terrorism and Effective Death Penalty Act states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d).

STATEMENT OF THE CASE

In April of 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her 11-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, sneaked behind the police car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses watched Madison murder Officer Schulte and attempt to murder his girlfriend. *Id.*

Madison was charged with capital murder because he had murdered an on-duty police officer. *See* Ala. Code § 13A–5–40(a)(5). He was tried and convicted three times because of errors in his first and second trials. *See Madison v. State*, 545 So.2d 94, 99 (Ala.Crim.App.1987); *Madison v. State*, 620 So.2d 62, 63 (Ala.Crim.App. 1992); *Madison v. State*, 718 So.2d 90 (Ala.Crim.App. 1997). Madison denied committing the murder before his first two trials and claimed self-defense at his third. After each trial, Madison was sentenced to death in light of his history of violent crime. His third conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *id.* at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So. 2d 104, 108 (Ala. 1998). His appeals were denied on direct review, and, after an evidentiary hearing in federal court, he exhausted his state postconviction and federal habeas claims. *See Madison v. Thomas*, 135 S. Ct. 1562 (2015).

After the Attorney General asked the Alabama Supreme Court to set an execution date, Madison filed a state-court petition claiming he was incompetent to be executed because, among other things, he could not remember murdering Officer Schulte. Doc. 8-1.

A. The state court holds a competency hearing.

This Court has held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright,* 477 U.S. 399, 410 (1986). But it has left discretion to lower courts to determine how to meet that standard. Although a lower court cannot "foreclose[]" an inmate "from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution," this Court has

not "attempt[ed] to set down a rule governing all competency determinations." *Panetti v. Quarterman,* 551 U.S. 930, 959 (2007). The Court has also held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.* at 959.

The state court set a hearing to evaluate Madison's claims of incompetence and gave Madison the opportunity to submit evidence, including from his own psychological expert. Doc. 8-2 at 4. Before the hearing, Madison was evaluated by Dr. John Goff (a neuropsychologist retained by Madison) and Dr. Karl Kirkland (a court-appointed psychologist). At the hearing, the state court admitted Dr. Goff's report, Dr. Kirkland's report, and Madison's medical records. *Id.* at 5-9. The state court also heard testimony from Dr. Goff, Dr. Kirkland, and the warden of the prison where Madison was housed.

1. Dr. Goff's testimony. Dr. Goff testified that Madison experienced cognitive decline after suffering a stroke. Nonetheless, Dr. Goff concluded that Madison understands "the meaning of a death sentence." Doc 8-3, Tab R-14 at 7 (expert report). Dr. Goff further concluded that Madison said his crime "must have been a murder," that he had three trials, and that he felt his "conviction was unjust." *Id.* But, according to Dr. Goff, Madison could not remember the name of the victim, and he did not think he killed anyone because he purportedly "never went around killing folks." *Id.*

Dr. Goff concluded that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for." Doc. 8-3,

Tab R-14 at 8 (expert report). But, based on his interview with Madison, Dr. Goff opined that Madison did not have an independent recollection of the murder. Thus, Dr. Goff concluded that Madison did not understand the rationale of the current proceeding as it applied to him. *Id.* at 8-9. Dr. Goff remarked, "I think he understands that he's being executed, but I don't think that he understands why, because I don't think he has those--those memories." Doc. 8-1, Tab R-9 at 55 (hearing). Similarly, Dr. Goff concluded that "I think he understands that [the State is] seeking retribution" but "I don't think he understands the act that he's being -- that he's being punished for." *Id.* at 65. When Dr. Goff formed that conclusion, he was not aware that Madison had always denied responsibility for the murder. *Id.* at 65.

Dr. Goff gave three reasons for believing that Madison cannot remember killing Officer Schulte. First, Dr. Goff concluded that Madison had experienced a thalamic stroke. Doc. 8-3, Tab R-14 at 8 (expert report). Second, Dr. Goff relied on Madison's statements that he does not recall the murder and that he "never went around killing folks." *Id.* at 7; Doc. 8-1, Tab R-9 at 60-61 (hearing). Third, Dr. Goff relied on his evaluation of Madison, including a test he administered showing Madison's trouble completing basic tasks and remembering basic information and Madison's tendency to speak in a rambling vague manner, which indicated to Dr. Goff that Madison "can't remember what it is that he's told me." Doc. 8-3, Tab R-14 at 7 (expert report), Doc. 8-1, Tab R-9 at 59 (hearing).

2. Dr. Kirkland's testimony. The state court appointed Dr. Kirkland to evaluate Madison as a neutral expert on behalf of the court. After Dr. Kirkland evaluated Madison, Dr. Kirkland concluded that Madison

has had "significant body and cognitive decline as a result of strokes." Doc. 8-1, Tab R-9 at 19 (hearing). Nonetheless, Dr. Kirkland concluded that Madison has a rational understanding that he will be executed for killing a police officer in 1985. *Id.*; 8-3, Tab R-13 at 10 (expert report). Dr. Kirkland determined that Madison has a "rational understanding of the sentence, [and] the results or effects of the sentence . . . ." *Id.* at 11. Dr. Kirkland also found that Madison had normal thought content and showed no symptoms of psychosis, paranoia, or delusion. *Id.* at 9.

Dr. Kirkland's conclusions were based on his evaluation of Madison, his review of Madison's medical records, and his discussions with Madison's treating physicians. At the evaluation, Madison gave Dr. Kirkland a detailed history of his life, his criminal record, and his conviction for murder. For instance, Madison said he was the son of Willie Seale and Aldonnia Madison, was "born in an old Mobile Hospital for African Americans that no longer exists," and that he is the "oldest of 11 children, seven boys and four girls," four of whom have died. Doc. 8-3, Tab R-13 at 4-5 (expert report). Madison said he was raised "on the end of Old Stanton Road in Mobile, where Stanton Street runs into Stanton Road." *Id.* at 5. Madison remembers his multiple juvenile arrests and the details of these crimes, including shooting a man in Mississippi, and the time he escaped from the Mt. Meigs Department of Youth Services Camp, hitching "rides all the way back home." *Id.* at 4. Madison remembered trying to join the Army during the Vietnam War because he "knew they would draft him one way or the other," and he remembers being "excluded from the Army by the physical due to be[ing] rated 4F." *Id.* at 5.

Madison also remembered details of his multiple trials, convictions, and appeals. Madison discussed each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCray's court." *Id.* at 9. Dr. Kirkland testified that "[Madison] was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial." Doc. 8-1, Tab R-9 at 68 (hearing). Dr. Kirkland determined that although Madison had physical and mental limitations, Madison "clearly was able to discuss his case in a very accurate manner, including being able to accurately tell this examiner legal theories about why Judge McCray should have recused himself and why he refused to do so." Doc. 8-3, Tab R-13 at 10 (expert report). When asked if Madison had a rational understanding of the reason for his execution, Dr. Kirkland replied, "Certainly. He talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." Doc. 8-1, Tab R-9 at 75 (hearing).

3. The Warden's testimony. The warden testified that when Madison received the death warrant setting his execution date, Madison expressed no confusion or lack of understanding of what it meant, commenting, "[M]y lawyers are supposed to be handling that." Doc. 8-1, Tab R-9 at 75 (hearing). The warden also testified that Madison was not receiving treatment for a mental condition in prison. *Id.*

4. The state court's decision. The state court issued a detailed order, finding Madison competent to be executed. App. 69a-83a. The state court found that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of

the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed. . . . ." App. 82a. In reaching this conclusion, the state judge relied on a number of facts from the hearing, Dr. Kirkland's examination, and Madison's medical records. *See* App. 82a.

Alabama law does not provide a right to appeal this determination in the state court system. *See* Ala. Code § 15-16-23. This is because of the expedited nature of last-minute litigation about executions and because the Alabama Supreme Court is the body that sets an execution date in the first place.

B. Madison files a petition for habeas corpus and receives a stay of execution.

Madison filed a habeas petition in federal court, raising the same claims he raised in the state court proceeding. *See* Doc. 1. The parties agreed that the habeas petition was governed by the deferential standard in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* Doc. 1 at 3; Principal Brief of Petitioner-Appellant, May 11, 2016, at 12–13. A habeas petitioner cannot obtain relief under AEDPA without showing that a state court's adjudication is "contrary to, or an unreasonable application of, clearly established law," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The district court denied Madison's petition for writ of habeas corpus, finding that the state court's decision was not an unreasonable application of the law or facts. App. 67a. The district court explained that the state court had conducted a "fair hearing" where Madison presented evidence through his own

hired expert. App. 60a. The district court concluded that the "state court's determination was neither an unreasonable application of, nor contrary to, clearly established federal law." App. 66a. "It is apparent that the state court adjudication of these claims applied the relevant *Panetti*/*Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." App. 61a.

The Eleventh Circuit granted Madison a stay of execution and a certificate of appealability on the morning of the scheduled execution. App. 87a. The Commissioner asked this Court to vacate the stay of execution because Madison had not established a likelihood of success on his claim that he was incompetent to be executed. Four Justices—the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito—voted to vacate the stay. App. 86a. There were only eight Justices serving on the Court at that time, and the Eleventh Circuit's stay of execution was undisturbed.

C. The court of appeals overrules the state court.

After full briefing and argument, a divided panel of the Eleventh Circuit reversed the district court and granted Madison's petition for writ of habeas corpus. App. 1a. Judges Martin and Wilson concluded that the state court both unreasonably determined the facts and unreasonably applied the law. *See* App. 19a, 25a.

Both of these conclusions stem from the majority's belief that an inmate cannot be executed if he does not remember or acknowledge committing murder.

First, the court of appeals rejected the state court's fact-finding that Madison had a rational understanding of why he was being executed. The problem with the state court's fact finding, according to the majority, was that "Dr. Kirkland's testimony is not relevant to the competency inquiry called for by the Supreme Court." App. 19a. This was so, the court reasoned, because "the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime." App. 20a. It was not relevant, according to the majority, that Dr. Kirkland "'testified that Mr. Madison 'was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense." App. 20a-21a. According to the majority, Madison's ability to remember events before and after the offense does not show that he "can remember the event that matters here—his capital offense." App. 20a.

Second, the court of appeals held that the state court's decision involved an unreasonable application of clearly-established law. The problem, according to the two judges in the majority, is that the state court "never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone." App. 25a. According to the court of appeals, it is dispositive that Madison "isn't aware he committed the underlying crime—he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. "A person cannot rationally understand why he is being killed if, according to his 'concept of reality,' he never committed a crime." App. 27a. "A finding that a man with no memory of what

he did wrong has a rational understanding of why he is being put to death is patently unreasonable." App. 27a.

Judge Jordan dissented. App. 29a. He relied on the deferential standard of review that must be afforded to a state court's fact-findings under AEDPA. "I do not believe that Mr. Madison can overcome the presumption of correctness afforded to the state trial court's factual finding by clear and convincing evidence." App. 32a. "What matters here is that there is evidence in the record which supports a finding that Mr. Madison is competent." App. 35a. Specifically, Judge Jordan noted that the court's expert Dr. Kirkland found Madison to be competent after examining him and reviewing his medical records. App. 36a. Dr. Kirkland's conclusion was based on the fact that Madison has no "psychosis, paranoia, or delusion," remembers his trials and appeals in detail, and can discuss legal theories and other similar matters with his attorneys. App. 36a. Judge Jordan explained that "the state trial court considered but implicitly rejected Dr. Goff's [contrary] opinion." App. 37a.

REASONS THE COURT SHOULD GRANT THE WRIT

The Eleventh Circuit's decision to bar Madison's execution creates a circuit split and conflicts with numerous decisions of this Court. The Constitution prohibits "a State from carrying out a sentence of death upon a prisoner who is insane," *Ford*, 477 U.S. at 409–10, including one who "suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960. But this Court has expressly held that a State may execute

prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id*. at 959.

The Court should grant the writ and reverse, either summarily or after full briefing and argument. In this case, the experts agree that Madison is not delusional and that he understands the nature, cause, and consequences of his death sentence. That Madison claims he forgot the murder he committed—a murder for which he has never accepted responsibility—is not a legitimate reason to bar his execution. At the very least, the state court's decision to reject the testimony of Madison's hired expert was not objectively unreasonable under AEDPA.

I. The lower courts are split on whether a prisoner can be executed if he does not remember or otherwise acknowledge committing the murder.

The Eleventh Circuit's decision creates a clear split of authority on the question of whether a state can execute an inmate who does not remember or otherwise acknowledge committing murder. On one side of the split stands the Eleventh Circuit. On the other side stands the Sixth Circuit, the Fifth Circuit, and state supreme courts.

This Court's caselaw. This Court has addressed an inmate's competency to be executed two times. Each time, this Court focused on an inmate's *sanity*. It has never even suggested that a murderer cannot be executed because he forgot, or otherwise denies responsibility for, committing the murder for which he was convicted.

First, in *Ford v. Wainwright,* 477 U.S. 399 (1986), the Court held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Id. at* 410 (plurality opinion). Concurring in *Ford*, Justice Powell declared that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring).

Second, in *Panetti v. Quarterman,* 551 U.S. 930 (2007), the Court rejected a lower court's rule that "foreclosed petitioner from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Id.* at 959. There were two important caveats to the Court's holding. The Court conceded that "a concept like rational understanding is difficult to define" and, therefore, did not "attempt to set down a rule governing all competency determinations." *Id.* at 960-61. The Court also held that its rule did not apply to prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id.* at 959.

The Eleventh Circuit. In this case, the Eleventh Circuit misapplied *Ford* and *Panetti.* It held that a murderer cannot be executed unless he remembers or otherwise acknowledges committing the murder that led to his conviction. The court adopted that proposition as a bright-line rule: "[a] finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." *Id.* at 1188-89. According to the Eleventh Circuit, a person cannot be executed if he "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App.

26a. The Eleventh Circuit held that this principle was "clearly established" by this Court's precedents such that it applies even under AEDPA. And it rejected the state court's fact-finding because the state court's appointed expert never "assessed whether Mr. Madison could remember the crime." App. 19a. The Eleventh Circuit barred Madison's execution.

The Sixth Circuit. The Sixth Circuit has adopted precisely the opposite rule. Whereas the Eleventh Circuit believes an inmate's memory and acknowledgement of the crime is dispositive, the Sixth Circuit believes it is irrelevant. In *Bedford v. Bobby*, 645 F.3d 372, 374-75, 378 (CA6 2011), an inmate filed a petition for habeas corpus, claiming that he was not competent to be executed because he did not remember the murder. There, as here, the inmate's expert testified that his "condition ha[d] ... deteriorated ... with the onset of . . . dementia," his "memory [wa]s severely impaired," and he "lack[ed] intact memories of events and easily confuse[d] memories he does have or that others attempt to remind him about." *Id.* at 378.

The district court granted the prisoner's motion for a stay of execution, but the Sixth Circuit reversed. *Id.* at 380. The Sixth Circuit held that the inmate's claim had no chance of success on the merits. The Sixth Circuit reasoned that, "even on their own terms," the expert's conclusions about the inmate's lack of memory "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment, much less make it unreasonable to conclude to the contrary (as the state courts did)." *Id.* Instead, the Sixth Circuit correctly explained that the "Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of incompetence that prohibits the execution

of a defendant." *Id.* at 378-79. This Court denied the inmate's request to stay his execution, and he was executed that same day. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011); *Ohio Man Executed for Double Murder He Doesn't Remember*, Daily Mail (May 17, 2011).[1]

The Fifth Circuit. The Fifth Circuit has also rejected an incompetence claim based on purported amnesia. In *Simon v. Fisher*, 641 F. App'x 386, 386-87 (CA5 2016), an inmate alleged that he was incompetent to be executed because he suffered significant memory loss from a head injury. *Id.* The inmate's expert opined that the inmate suffered from "global amnesia" and had "essentially lost his identity in his amnesia"; the state's expert testified that the petitioner was malingering his memory loss. *Id.* at 387-88. Citing the Sixth Circuit, the district court held "that Simon's purported inability to recall that he committed several murders and was sentenced to death is, standing alone, insufficient to constitutionally restrict his death sentence." *Simon v. McCarty*, No. 2:11-CV-111-SA, 2014 WL 7338860, at *34 (N.D. Miss. Dec. 22, 2014). The Fifth Circuit affirmed the district court's competency decision because it "rest[ed] on an evaluation of conflicting expert opinions." 641 F. App'x at 389-90. Although the court's discussion focused on allegations that the petitioner was malingering his memory loss, the Fifth Circuit also quoted the Sixth Circuit's holding that "[t]he Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of in-

---

[1] http://www.dailymail.co.uk/news/article-1388091/Ohio-man-Daniel-Lee-Bedford-executed-double-murder-doesnt-remember.html (last visited July 27, 2017)

competence that prohibits the execution of a defendant." *Id.* at 389. This Court denied certiorari earlier this year. *See* 137 S. Ct. 626 (Jan. 9, 2017).

Although *Simon* is unpublished, it is nonetheless important for two reasons. First, because of the time pressures of a pending execution, most litigation about competency to be executed is resolved by unpublished opinions. Second, the psychologist who opined that Simon suffered from "global amnesia" was the same psychologist who testified that Madison could not remember his crimes—Dr. John Goff. *See Simon*, 2014 WL 7338860 at *17 (summarizing Goff's conclusions). The Fifth Circuit properly allowed the district court in *Simon* to disbelieve Dr. Goff even though AEDPA played no role in that case; the Eleventh Circuit improperly disallowed the state court from doing the same thing here even though AEDPA imposes a more highly deferential standard of review. *See* App. 37a (Jordan, J., dissenting) ("the state trial court considered but implicitly rejected Dr. Goff's opinion").

State supreme courts. State supreme courts have likewise held that an inmate may be executed in circumstances like these.

In *State v. Irick*, 320 S.W.3d 284, 286 (Tenn. 2010), the Tennessee Supreme Court held that an inmate could be executed even though he purportedly forgot the murder. There, the inmate argued that he could not be executed because, among other things, he "has no memory of the events surrounding the murder." *Id.* at 296. The inmate's expert concluded that the inmate's "expressed inability to remember the offense was genuine." *Id.* at 289. The state's expert agreed that his memory problems were genuine, but testified

that they were not "outside the range of age-related memory decline." *Id.* at 291. Ultimately, the court rejected the inmate's competency claim because, just like Madison, he understood "that he has been convicted of murdering the victim," understood that he was "scheduled to be executed for this crime," and did not "manifest any symptoms of formal thought disorder, hallucinations, or delusions." *Id.* at 295-96.

Similarly, in *State ex rel. Middleton v. Terry Russell*, 435 S.W.3d 83 (Mo. 2014), the Supreme Court of Missouri held that a prisoner could be executed even though delusions caused him to believe that he did not commit a murder. A psychologist testified that the prisoner had a "psychotic mental illness" that led him to believe "his conviction was the result of a conspiracy." *Id.* at 84. The court held that this kind of mental problem was not the lack of rational understanding contemplated in *Panetti*: "Middleton plainly understands he is to be executed as punishment because he was found guilty of murdering his three victims; he simply believes he should not have been convicted." *Id.* at 85. This Court denied a stay of execution. *See Middleton v. Russell*, No. 14A64 (July 16, 2014). The Missouri Supreme Court continues to apply this rule in other cases. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 745 (Mo. 2015) ("neither the fact that Clayton believes he should not have been convicted nor the fact that he believes he will be spared execution are sufficient to make a threshold showing that he is incompetent"), *cert. denied* 135 S.Ct. 1697 (2015).

This split of authority compels certiorari review. As this Court's docket reflects, states in the Eleventh,

Sixth, and Fifth Circuits conduct the majority of executions in this country.[2] And states that actually conduct executions are the only states in which the competency issue can be raised. *E.g. Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998) ("because his execution was not imminent . . . his competency to be executed could not be determined at that time"). If Madison had litigated this issue in Ohio, instead of Alabama, he would have been executed on May 12, 2016.

II. The court of appeals' decision is contrary to this Court's precedents.

Not only does the decision below create a split, it is also a demonstrably incorrect application of this Court's precedents. "It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013). The ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice."

---

[2] The Court allowed an execution to proceed in the Sixth Circuit the week before this petition was filed. *See Phillips v Jenkins*, 17A105 (July 25, 2017). Over the last two Terms, this Court has allowed 12 executions to proceed in the Eleventh Circuit alone. *See Melson v. Dunn*, 16A1212 (June 8, 2017); *Arthur v. Dunn*, 16A1161 (May 25, 2017); *Ledford v. Dozier*, 16A1118 (May 16, 2017); *Smith v. Alabama*, 16A569 (Nov. 22, 2016); *Lawler v. Sellers*, 16A390 (Oct. 19, 2016); *Terrell v. Bryson*, 15A606 (Dec. 8, 2015); *Bolin v. Jones*, 15-7662 (Jan. 7, 2016); *Jones v. Bryson*, 15A800 (Feb. 2, 2016); *Hittson v. Chatman*, 15A857 (Feb. 17, 2016); *Bishop v. Chatman*, 15A1012 (March 31, 2016); *In re Kenneth Fults*, 15A1033 (April 12, 2016); *Daniel v. Chatman*, 15A1116 (April 27, 2016).

Woods v. Donald, 135 S.Ct. 1372, 1376 (2015) (per curiam). Likewise, when evaluating factual determinations, AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007) (quoting 28 U.S.C. § 2254(e)). This is "meant to be" a difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Eleventh Circuit purported to apply this deferential standard, but it obviously did not.

A. A prisoner's failure to remember or acknowledge his crime does not render him incompetent to be executed.

This Court has never held that the Constitution bars an execution if the murderer "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, all of this Court's competency cases are about "the prohibition against executing a prisoner *who has lost his sanity*." *Panetti,* 551 U.S. at 958 (emphasis added). With respect to other allegations of incompetence, the Court has declined to "attempt to set down a rule." *Id.* at 959. Moreover, the Court has held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.*

1. The absence of any holding from this Court is dispositive under AEDPA. By applying a rule that this Court has never adopted, the court of appeals committed the same error that led this Court to

reverse the lower courts in *White v. Woodall*, 134 S.Ct. 1697 (2014), and in *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017).

In *Woodall*, as here, the court of appeals granted a habeas petition in a capital case. The court held that the Constitution required a "no-adverse inference instruction" when a defendant declined to testify at the penalty phase of his capital trial. *Woodall*, 134 S.Ct. at 1703. In reversing, this Court explained that its cases had left "open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." *Id.* Although there were "reasonable arguments" that these precedents should be extended to require a "no-adverse inference instruction" at the penalty phase of trial, the Court held that a federal court may not extend this Court's precedents to their "logical next step" in a habeas case. *Id.* at 1706.

Similarly, a few months ago in *Virginia v. LeBlanc*, the Court summarily reversed the lower court's application of *Graham v. Florida*, 560 U.S. 48 (2010), in a habeas case. In *Graham*, the Court held that life-without-parole sentences may not imposed on non-murderer juvenile offenders. In *LeBlanc*, the court of appeals determined that a state court unreasonably relied on the availability of a "geriatric release program" to satisfy *Graham*'s requirement that juvenile offenders have an opportunity for parole. 137 S.Ct. at 1728. This Court summarily reversed the court of appeals because "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented." *Id.*

The Court should reverse the court of appeals for the same reasons it reversed in *Woodall* and *LeBlanc*. As in *Leblanc*, the Court has never addressed the issue here: whether a murderer can be executed if he "believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, as in *Woodall*, the Court has left the question open. The Court intentionally declined to "attempt to set down a rule" governing claims of incompetence "other than those stemming from a severe mental illness." *Panetti*, 551 U.S. at 959. A federal court cannot create a new rule in an AEDPA case, but that is precisely what the Eleventh Circuit did here.

2. Even apart from AEDPA, however, the court of appeals' rule would be wrong. A murderer's purported inability to remember his crime does not undermine his "recognition of the severity of the offense" or the community's interest in "affirm[ing] its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti*, 551 U.S. at 958-59. "[E]veryone is amnesic to some degree" because "every individual's memory process is marked by some distortion." *Note, Amnesia: A Case Study in the Limits of Particular Justice*, 71 Yale L. J. 109, 109-10 (1961). But such memory problems do not stop us from having a rational understanding of our past. Adults do not independently remember every bad act they committed as a child, but they can rationally understand that they were responsible for them, acknowledge why they were punished, and feel remorse for their wrongdoing.

For their part, the relevant professional associations have adopted standards that focus on psychosis, not memory. The American Bar Association does not address "memory" in its standard for competence to be

executed. That standard instead provides that a "convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment." Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[3] Like the ABA, the American Psychiatric Association and the American Psychological Association are concerned about inmates with "profound deficiencies in understanding" that are "associated with mental retardation and with delusional beliefs." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 676 (2006). These organizations believe an inmate is competent to be executed if he has "a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people." *Id.*

Lastly, there are significant practical problems with the Eleventh Circuit's holding that amnesia is a bar to execution. In particular, "false pleas of amnesia by criminal defendants are both common and difficult to detect." *Price v. Thurmer*, 637 F.3d 831, 834 (CA7 2011) (citing Marko Jelicic, Harald Merckelbach & Saskia van Bergen, "Symptom Validity Testing of Feigned Amnesia for a Mock Crime," 19 Archives of Clinical Neuropsychology 525 (2004)). Although there are tests for detecting false claims of amnesia, "'there is still ... no 'gold standard' measure for distinguishing between cases of genuine and feigned amnesia.'" *Id.*

---

[3] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

(quoting Xue Sun et al., "Does Feigning Amnesia Impair Subsequent Recall?," 37 Memory & Cognition 81 (2009)).

B. The state court was not objectively unreasonable when it found that Madison was competent to be executed.

As Judge Jordan explains in dissent, the majority's decision to reject the state court's fact-finding is even more egregious than its conclusion that the state court made a legal error. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen,* 558 U.S. 290, 301, 130 S. Ct. 841 (2010). Instead, the prisoner bears the burden of rebutting the state court's factual findings by clear and convincing evidence. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

The court of appeals erroneously rejected the state court's fact-finding for two reasons. Both are based on the Eleventh Circuit's conclusion that a prisoner may not be executed if he does not remember or otherwise acknowledge committing murder.

First, the court of appeals incorrectly held that Dr. Kirkland's opinion was irrelevant because he never asked Madison if he could remember the crime. But, because this Court has never held that an inmate's lack of memory bars an execution, it is simply not true that Dr. Kirkland's "testimony is not relevant to the competency inquiry called for by the Supreme Court" or that Dr. Kirkland "simply wasn't looking at the right issues." App. 20a-21a. *See* also App. 19a (complaining that Dr. Kirkland never "assessed whether Mr. Madison could remember the crime"). Dr. Kirkland reviewed Madison's medical records, consulted

his treating physicians, and interviewed him about his understanding of the case and the pending execution. Dr. Kirkland concluded that Madison was not suffering from psychosis or delusions and understood that he was being executed for murder. Even Dr. Goff admitted that Madison "understands the sentence" and that the state is "seeking retribution." Doc. 8-3, Tab R-14 at 18; Doc. 8-1, Tab R-9 at 65. These are relevant considerations in determining whether a prisoner has a rational understanding of his punishment. *See* Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[4]

Second, the court of appeals was wrong that "it is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense." App. 19a. Although no one disputes that Madison has experienced cognitive decline over the years, Madison did not testify. Instead, the only evidence in the record for Madison's selective amnesia is the testimony of Dr. Goff, which the state trial court declined to credit and which merely vouched for Madison's own self-serving statements. When Dr. Goff made his assessment, he did not even know that Madison has always refused to take responsibility for committing the murder. Perhaps for these reasons, among others, "the state trial court considered but implicitly rejected Dr. Goff's" testimony. App. 37a (Jordan, J., dissenting).

Moreover, Dr. Kirkland's testimony undermined Madison's claim of amnesia. As the Eleventh Circuit noted, Dr. Kirkland testified that Madison "was able

---

[4] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

to talk with me about very specific things that would indicate he could remember specific things about the time of the offense." App. 20a. That Madison admits to remembering events around the murder—and other violent crimes that he has committed—obviously weakens his assertion that he cannot remember the murder itself. Other than this kind of circumstantial evidence, the only way for the Commissioner to challenge Madison's claim of amnesia would be for Madison to admit that he committed the murder and can remember it. But the state courts should not have to take a condemned murderer at his word that he has selective amnesia. *See Price*, 637 F.3d at 834 (for amnesia to "operate as a defense to competence to stand trial . . . something more than the defendant's word would have to be shown, given the ease of making such a claim, the difficulty of countering it, and hence the temptation to abuse it"). As Judge Jordan concluded in dissent, the state court was within its rights to find Madison competent to be executed.

III. The case is a good vehicle for summary reversal or plenary review.

This case is a good candidate for summary reversal or plenary review. As explained above, the court of appeals' decision creates a split of authority and contradicts this Court's caselaw. Other considerations also underscore that the Court should grant the writ.

First, the Court is already familiar with this case. Last year, after the Eleventh Circuit stayed Madison's execution, four members of the Court voted to vacate that stay, presumably concluding that Madison could not establish a substantial likelihood of success. App. 86a.

Second, this case comes to the court after a full review in the lower courts, which is unusual for a claim about an inmate's competency to be executed. Most litigation about an inmate's competency to be executed occurs on an expedited basis and, when a motion to stay execution is denied, the case is over. Because the court of appeals (erroneously) granted a stay of execution in this case, the Court can address the question presented in a full and orderly manner based on a published panel opinion with a dissent.

Third, the Court should answer this question now so that it does not have to answer it through ad hoc motions to stay execution. If the Court does not take this case, the Court will need to decide whether to grant stays of execution for prisoners who refuse to acknowledge committing murder but who were tried outside of the Eleventh Circuit. The Court's rulings on those motions will, as a practical matter, answer the question for the inmate involved. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011) (denying stay of execution). But that is not the best or fairest way to adjudicate a legal issue.

Fourth, although only a few circuits are responsible for the split at issue here, those circuits are the ones that matter. States in the Eleventh, Sixth, and Fifth Circuits have been responsible for the majority of executions over the last few years. Because the Eleventh Circuit's decision reverses a state court on habeas review, state courts in Alabama, Georgia, and Florida are, as a practical matter, bound to follow it.

Fifth, this case has consumed enormous state resources. Madison has been tried and convicted three times for this murder. He has been through the full

gamut of post-conviction review with attendant appeals. The district court held an evidentiary hearing on Madison's initial habeas petition. The state court appointed its own expert to review Madison's competency and held a hearing on that claim as well. The Eleventh Circuit's decision "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 131 S. Ct. at 786.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General
*Counsel of Record

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Petitioner

August 2, 2017