Dementia and the Death Penalty

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As death row prisoners age, a new set of issues arises regarding their competence to be executed. Can a prisoner with dementia who no longer remembers the crime be put to death? What if the dementia has progressed to the point that the prisoner no longer understands that he or she faces execution, or why? These issues were considered by the U.S. Supreme Court in its recent decision in *Madison v. Alabama*. Implicitly rejecting the cruelty of executing a highly impaired prisoner, the court clarified the conditions that could preclude execution and the degree of impairment that must be present.

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Almost 35 years ago, Vernon Madison killed Officer Julius Schulte, a police officer who was trying to intervene in a dispute between Mr. Madison and his former girlfriend. During the incident, Officer Schulte was shot with two bullets to the back of the head, and Mr. Madison's ex-girlfriend was wounded. Tried and convicted for capital murder, Mr. Madison was placed on death row, where he has sat for more than 3 decades, as his case winds its way through the judicial system. In the interim, Mr. Madison had several strokes, became legally blind, was diagnosed with vascular dementia, and no longer remembers the murder of which he was convicted. Now 68 years old, he and his lawyers argue that he is no longer competent to be executed. As he waits to see whether the state will execute him for his crime, Mr. Madison may have found an ally in the U.S. Supreme Court, which recently considered whether Alabama could execute someone with such a severe impairment (1). In agreeing to hear the case, the Court took a major step toward clarifying when a prisoner's mental state precludes his execution.

A Tortuous Path to the Supreme Court

After Mr. Madison was convicted, the verdict was overturned on the grounds that African Americans had been systematically excluded from the all-white jury that heard the case. On retrial with a more fairly chosen jury, Vernon Madison was again convicted of murder, but once more the verdict was struck down, this time because the prosecution had deliberately introduced inadmissible evidence for the jury's consideration. A third trial, which took place almost a decade after the crime, again led to conviction. Although the jury declined to impose the death penalty, instead sentencing Mr. Madison to life imprisonment without the possibility of parole, that decision was overturned by the judge—an option then allowed under Alabama law—who reimposed the death sentence (2).

As is common in death penalty cases, a long series of appeals ensued, as Mr. Madison and his attorneys raised a variety of objections to the proceedings that had resulted in the sentence of death. Over the nearly 2 decades during which these challenges were heard and rejected, Mr. Madison's health steadily declined. Experiencing the complications of cerebrovascular disease, he suffered a series of small strokes, including a basilar artery occlusion in 2015 and a thalamic stroke the following year. The latter was said by his attorneys to have left him disoriented and confused and with significant memory impairment. By the time a date was selected for his execution in 2016, Mr. Madison could no longer walk without assistance, experienced urinary incontinence, and was legally blind. Moreover, he was described as being unable to remember "the sequence of events from the offense to his arrest to the trial or any of those details," including ever having killed someone. His attorneys filed a petition with the trial court claiming that their client was no longer competent to be executed (2).

In rejecting Mr. Madison's claim of incompetence, the Alabama court noted that the state's psychologist had determined that, even without a memory for the crime, Mr. Madison knew "that he is going to be executed because of the murder he committed[,] . . . that the State is seeking retribution[,] and that he will die when he is executed." His attorneys then went to a federal district court, which rejected the claim that the state court had misapplied the law. In a subsequent appeal, however, the federal Eleventh Circuit Court of Appeals held that the loss of memory for the offense meant that Mr. Madison could not rationally understand the purpose of his punishment and thus could not be executed. The U.S. Supreme Court, though,

overturned that decision, holding that Mr. Madison's appeal was based on a claim that Alabama had ignored existing law, when in fact mere loss of memory had never been determined to preclude execution. However, the court explicitly reserved judgment on the question of whether loss of memory could preclude execution (3).

With the new date for execution set for a day in early 2018, Mr. Madison's attorneys again challenged his competence to be put to death. Once more, a lower court in Alabama rejected the claim, but because Alabama law eliminates appeal of decisions about competence to be executed within the state system, Mr. Madison was able to go directly to the U.S. Supreme Court with a petition for review. The Court granted that petition, although exactly what questions they agreed to resolve was later a matter of contention. At the very least, the Court agreed to hear arguments on whether loss of memory for a capital offense per se precludes execution. It appears that a majority of the justices were also willing to consider the broader question of whether dementia can serve as the basis for a claim of incompetence, which previously had been recognized only for prisoners with psychosis.

Determination of Competence to be Executed

As early as the 17th century, English common law was held to prevent the execution of a "madman." The basis for this rule was variously attributed to the failure to deter other wrongdoers by the execution of someone who was *non compos mentis*; the cruelty of such a practice; the fact that madness is its own punishment, perhaps worse than death; and the inability of a person so afflicted to prepare for the world to come (4). Although by the mid-20th century, every state in the United States had rules barring infliction of the death penalty on an incompetent prisoner, both the standard by which to determine incompetence and the procedures by which it would be judged varied considerably.

Not until 1985, in *Ford v. Wainwright*, did the U.S. Supreme Court find that execution of the "insane" violates the Eighth Amendment's proscription of cruel and unusual punishment (4). The condemned prisoner in that case, Alvin Ford, had become psychotic on death row, developing the delusional belief that "he would not be executed because he owned the prisons and could control the Governor through mind waves." Even then, however, the majority chose not to embrace a clear standard by which competence could be judged. In an influential concurrence, Justice Lewis Powell suggested that the retributive purpose of the death penalty would not be served by the execution "of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Although not endorsed by the other justices in the majority, that standard became widely accepted as the basis for determinations of competence to be executed.

More than 20 years later, the Supreme Court had another opportunity to clarify the circumstances that make someone incompetent to be put to death, this time in *Panetti v. Quarterman* (5). Like Alvin Ford, Scott Panetti was found to be psychotic on death row, although his mental illness apparently predated his confinement. In contrast to Mr. Ford, however, Mr. Panetti was aware that he was to be executed and that the state said it was because he had committed murder—but he believed that the real reason was because the state wanted to stop him from preaching the word of God. Although once more declining to define a standard that would be binding in all cases, the Supreme Court held that mere awareness that the state intends to put one to death on the basis of an act it claims one has committed is not sufficient to be found competent. Rather, the condemned prisoner must also be able to "reach a rational understanding of the reason for [his] execution" (5).

In the wake of *Ford* and *Panetti*, it was clear that psychotic illnesses that result in delusional perceptions of the nature of the punishment one faces and the reasons for its imposition will prevent a condemned prisoner from being put to death. But Vernon Madison was indisputably not psychotic. Did that imply that he was competent to be executed?

Vernon Madison and the Claim of Incompetence

When Mr. Madison's claims of incompetence reached the Supreme Court, the majority of justices weighed two questions: whether loss of memory for a crime could serve as a basis for an incompetence determination and whether dementia or other mental impairments—not just psychosis—could be a qualifying condition. With regard to the effect of loss of memory for the offense, it should be noted that the criminal law has always been suspicious of claims of amnesia for a crime; it is easy for a defendant to contend that he or she has no memory of the events in question and almost impossible to disprove. Hence, amnesia has never been a bar to being tried for a crime, although a true loss of memory can be a substantial impediment to mounting an effective defense. In keeping with that view, the majority opinion authored by Justice Elena Kagan noted that absence of memory for a crime did not preclude a prisoner from being competent to be executed, so long as, in accord with *Panetti,* the prisoner had a rational understanding of the reason for the punishment (1). Although concern about malingered amnesia was not mentioned in the opinion, it undoubtedly lurked in the background.

Next, the majority opinion turned to the question of whether only psychotic delusions, as in *Ford* and *Panetti,* constituted qualifying conditions, as Alabama had originally claimed, or whether other bases for impairment could be considered as well. Again invoking the ruling in *Panetti*, the court held that the standard enunciated in that case "has no interest in establishing any precise cause: [p]sychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite

lack of comprehension." Madison's vascular dementia, assuming it rendered him incapable of rationally understanding why the state was putting him to death, would suffice for a finding of incompetence. Because there was reason to believe that the Alabama court had applied a standard for incompetence limited to psychotic disorders, the case was remanded to the state courts for reconsideration in light of this decision.

This seemingly straightforward application and clarification of the holding in *Panetti* evoked a fierce dissent from Justice Samuel Alito, joined by Justices Thomas and Gorsuch, two of his comrades on the Court's conservative wing. (Justice Kavanaugh, newly appointed to the Court, did not participate in this case.) Justice Alito claimed that the majority had violated the Court's own rules by considering an issue—namely whether dementia could result in incompetence to be executed—that had not been the basis for the Court's decision to hear the case. He pointed out that the focus in the petition for *certiorari* filed by Mr. Madison was the issue of amnesia and its impact on competence, noted that Mr. Madison's attorneys had abandoned that claim at oral arguments before the court, and argued that the petition for the case to be heard was granted improvidently and that the case should have been dismissed.

Madison and the Future of the Death Penalty

How can we understand the import of the court's ruling in *Madison*? At the most straightforward level, the majority opinion clarified two issues on which the Supreme Court had never ruled explicitly: by itself, amnesia for a crime does not render a condemned prisoner incompetent to be executed; and any disorder affecting mentation—not just psychosis—can serve as the basis for an incompetence claim. Given the dysfunctional manner in which the death penalty is applied in the United States, oftentimes with decades passing between sentencing and the setting of a date for execution, the aging of death row inmates cannot be ignored. Dementia, whether due to vascular changes or neurodegenerative processes, is likely to become more common among death row inmates, and, as is now clear from the decision in *Madison*, at a certain point it will render a prisoner no longer eligible for the death penalty (6).

The decision in *Madison* can also been seen as one more step toward limiting the use of the death penalty in circumstances in which putting a prisoner to death seems undeniably cruel. We have seen early applications of this concern in the proscription of use of the gas chamber or electric chair by most states and the movement toward a quiet death by lethal injection (7). It seems hard to believe that the image of a blind, incontinent man with dementia being pushed in his wheelchair into the death chamber did not play some role in persuading Chief Justice John Roberts, who usually aligns with his conservative brethren, to join the majority in this case. If that supposition is correct, we may see further limits on the death penalty down the road. Having excluded minors and people with intellectual disabilities from the death penalty, courts may decide to extend protection to people with serious mental disorders, even if they are otherwise able to meet the *Panetti* standard.

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