Competence to Be Executed: The Search for a Coherent Legal Standard Continues

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The Eighth Amendment's prohibition on cruel and unusual punishment prevents a state from executing a prisoner who is incompetent.[2] The Supreme Court in *Madison v. Alabama*,[3] a recent 5-3 decision written by Justice Kagan, held that total amnesia of a crime does not, by itself, render the criminal incompetent to be executed.[4] The Court reaffirmed the governing rule that the central focus for deciding whether an individual is incompetent for execution is whether his mental illness "makes him unable to 'reach

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[2] *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986) (holding Eighth Amendment prohibits execution of prisoner who "lost his sanity"). The Court never faced this issue prior to 1986. *Id.* at 401.

[3] 139 S. Ct. 718 (2019).

[4] *See id.* at 731. Madison was convicted of killing a police officer in 1985 and has since been on death row. *Id.* at 723. While awaiting execution, Madison suffered several strokes causing substantial mental deterioration, diagnosed as vascular dementia. *Id.* He cannot remember the crime at all, and experiences confusion, disorientation, memory loss, and overall cognitive impairment. *Id.*

a rational understanding of the reason for [his] execution.'"[5] A prisoner's "rational understanding" is partly measured by the very rationale the Court put forth for disallowing execution of a mentally ill individual in the first place: An execution would have no "retributive value" for a prisoner that cannot appreciate the meaning and gravity of a community's decision to execute him, and his mental illness is so severe that execution offends morality.[6]

Justice Kagan encouraged lower courts to analyze the extent of a prisoner's competency by applying a fact-based inquiry to examine the "downstream consequence[,]" and warns against focusing on an individual's diagnosis.[7] Madison further argued that the lower court erred when deciding he was competent to be executed because he had no delusional symptoms, and the decision did not reference the effects of his dementia.[8] The Court ultimately

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[5] *See id.* at 726 (alteration in original) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)). The Court emphasized that memory loss is a factor for determining whether the prisoner rationally understands the reason he will be executed, however it is not dispositive. *See Madison*, 139 S. Ct. at 727-28.

[6] *See Madison*, 139 S. Ct. at 722-23; *see also Panetti*, 551 U.S. at 958-59.

[7] *See Madison*, 139 S. Ct. at 729.

[8] *See id.* at 724-25.

reversed and remanded, concluding that the lower court based its decision on the erroneous belief that the Eighth Amendment only precluded execution of a prisoner based upon psychotic delusions, as opposed to mental illness generally.[9]

Justice Alito, with whom Justice Thomas and Justice Gorsuch joined, dissented, reasoning that the Court granted Madison's petition for certiorari to address whether total memory loss of the capital offense rendered an individual unfit for execution, and thus it was inappropriate to hear oral argument and decide the case on the basis of the lower court's erroneous application of the existing standard.[10] The dissent principally agreed that the Eighth Amendment does not prohibit the execution of a murderer who cannot remember the capital offense, but disagreed that the lower court improperly distinguished between dementia and psychosis, even if that particular question was procedurally proper.[11]

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[9] *See* Madison v. Alabama, 139 S. Ct. 718, 731 (2019).

[10] *See id.* at 732 (Alito, J., dissenting). An appropriate question before the Court must be set out in the petition for certiorari, or "fairly included therein." *See* SUP. CT. R. 14.1(a).

[11] *See Madison*, 139 S. Ct. at 734 (Alito, J., dissenting) (stating record implicates no such distinction). Further, Justice Alito agreed with the majority on the constitutional question: "Perhaps because he concluded (*correctly*) that petitioner was unlikely to prevail on

Madison v. Alabama is merely the most recent of three Supreme Court decisions addressing the Eighth Amendment's prohibition against capital punishment on incompetent prisoners, but the decision still fails to provide a helpful guiding principal for measuring competency.[12] In part, it is difficult to articulate a cogent legal standard because "incompetent" is, in reality, a factual determination cloaked as a legal issue.[13] Notwithstanding, judges are in the best position to ultimately decide whether a prisoner is incompetent because the status implicates constitutional rights; however, such determinations would be more accurate and

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the question raised in the petition, he conceded that the argument advanced in his petition was wrong, and he switched to an entirely different argument . . . ." *Id.* at 731 (emphasis added).

[12] *See* Corinna Barrett Lain, Madison *and the Mentally Ill: The Death Penalty for the Weak, Not the Worst*, 31 REGENT U. L. REV. 209, 227 (2019) (explaining Supreme Court's line of decisions).

[13] *See Madison*, 139 S. Ct. at 734 (Alito, J., dissenting) (deeming whether evidence supported lower court's conclusion regarding competency "factbound question").

consistent with psychological science if judges received mental health-specific training.[14]

[14] *See generally* Paul S. Appelbaum, *Competence to Be Executed: Another Conundrum for Mental Health Professionals*, 37 HOSP. & COMMUNITY PSYCHIATRY 682 (1986).