

Evaluating Competency for Execution after *Madison v. Alabama*

Alexander H. Updegrove, PhD, and Michael S. Vaughn, PhD

This article summarizes the evolution of the U.S. Supreme Court's standard for assessing defendants' competency for execution. In *Ford v. Wainwright* (1986), the Court categorically exempted insane defendants from execution but failed to agree on how to define insanity. In *Panetti v. Quarterman* (2007), the Court ruled that defendants may be executed only if they rationally understand why they are being punished. In its most recent decision, the Supreme Court ruled in *Madison v. Alabama* (2019) that defendants who cannot remember committing the original crime may be executed, but dementia may prevent defendants from rationally understanding why they are being punished. The Court remanded the case to Alabama's trial court with instructions to re-determine Mr. Madison's competency. This article concludes by recommending best practices for those who evaluate defendants for competency to be executed.

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In 1986, the U.S. Supreme Court ruled that the Eighth Amendment prohibits executing insane defendants.¹ Years later, in 2007, the Court clarified that the Eighth Amendment forbids executing those who cannot rationally understand why they are to be executed and noted that psychotic disorders may preclude such an understanding.² Most recently, in 2019, the Court ruled that a finding of incompetency to be executed is not associated with any particular diagnosis but rather with a specific consequence, i.e., the defendant's inability to rationally understand the reasons for the imposition of the death sentence. This article reviews Supreme Court cases on competency for execution and concludes by recommending best practices for those who evaluate defendants in this capacity.

Ford v. Wainwright

Ford v. Wainwright (1986)¹ marked the first time that the U.S. Supreme Court addressed the question

of whether the Eighth Amendment's prohibition against cruel and unusual punishment forbids executing "the insane" (Ref. 1, p 401). Although Alvin Ford appeared competent throughout his trial, he exhibited signs of delusions during his subsequent imprisonment. Unlike many cases, the Court in *Ford* did not achieve a traditional majority opinion. Instead, Justice Powell concurred in part with four other Justices to hold that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane" (Ref. 1, pp 409–10). The Court reasoned that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications" (Ref. 1, p 417).

Four of the five Justices who formed the plurality believed that defendants should have the right to cross-examine state experts, among other procedural protections.¹ Justice Powell, however, expressed the view that "ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" (Ref. 1, p 426). The only procedural right that Justice Powell explicitly endorsed was the defendant's right to present "expert psychiatric evidence that may differ from the State's own psychiatric examination" (Ref. 1, p 427).

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Dr. Updegrove is Assistant Professor, Department of Social Sciences, Texas A&M International University, Laredo, Texas. Dr. Vaughn is Professor, Institute for Legal Studies in Criminal Justice, Department of Criminal Justice and Criminology, College of Criminal Justice, Sam Houston State University, Huntsville, Texas. Address correspondence to: Michael S. Vaughn, PhD. E-mail: mvaughn@shsu.edu.

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The Court plurality declared that “we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences” (Ref. 1, pp 416–17). In other words, the plurality did not articulate a specific standard for assessing competency for execution. Justice Powell, however, noted that, at a minimum, states’ statutes agreed that defendants must “know the fact[s] of their impending execution and the reason for it” (Ref. 1, p 422). Justice Powell wrote, “I would hold 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” (Ref. 1, p 422). Thus, Justice Powell considered a defendant able to understand why they are being executed “[i]f the defendant perceives the connection between his crime and his punishment” (Ref. 1, p 422).

When applying this standard to Mr. Ford, Justice Powell concluded, “According to petitioner’s proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated. If this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted” (Ref. 1, pp 422–23).

Panetti v. Quarterman (2007)

The Court next addressed competency for execution in *Panetti v. Quarterman* (2007),² where Scott Panetti displayed “a fragmented personality, delusions, and hallucinations” (Ref. 2, p 936). After the trial court found Mr. Panetti competent for execution, Mr. Panetti’s counsel filed a writ of *habeas corpus*. The district court³ held that “[b]ecause the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed” (Ref. 3, p 712). Mr. Panetti subsequently appealed to the U.S. Court of Appeals for the Fifth Circuit,⁴ claiming that:

the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the State’s reason for the execution . . . [and] this understanding is lacking in his case because he believes that, although the State’s purposed reason for the execution is his past crimes, the State’s real motivation is to punish him for preaching the Gospel (Ref. 4, pp 817–18).

The Fifth Circuit found Mr. Panetti competent for execution because “‘awareness,’ as that term is used

in *Ford*, is not necessarily synonymous with ‘rational understanding,’ as argued by Panetti” (Ref. 4, p 821). The Supreme Court subsequently granted *certiorari*.⁵

The Court identified the question before it as “whether [Mr. Panetti’s] delusions can be said to render him incompetent” for execution (Ref. 2, p 956). According to the Court, the Fifth Circuit found Mr. Panetti competent because “[f]irst, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question” (Ref. 2, p 956).

Nevertheless, the Court held that “the Court of Appeals’ standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment” (Ref. 2, pp 956–57). In its decision, the Court criticized the Fifth Circuit for concluding “that its standard foreclosed petitioner from establishing incompetency by . . . showing that his mental illness obstructs a rational understanding of the State’s reason for his execution” (Ref. 2, p 957). As the Court noted, a “prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter” (Ref. 2, p 959). Furthermore, although *Ford* “did not set forth a precise standard for competency” (Ref. 2, p 957), the Court explained that “[t]he beginning of doubt about competence in a case like petitioner’s . . . is a psychotic disorder” (Ref. 2, p 960).

The Court elaborated, writing that “[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose” (Ref. 2, p 960). If these delusions influence “the prisoner’s concept of reality [so] that he cannot reach a rational understanding of the reason for the execution,” then they preclude execution (Ref. 2, p 958). As a result, states cannot use “a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted” (Ref. 2, p 960).

In its opinion, the Court cautioned that “[a]lthough we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations” (Ref. 2, pp 960–

61). Nevertheless, the Court observed that “[t]he conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent” (Ref. 2, p 962).

Madison v. Alabama (2019)

First convicted of capital murder of a police officer in 1985, Vernon Madison spent so much time on death row that he “suffered [several] strokes resulting in significant cognitive and physical decline” (Ref. 6, p 1177). During Mr. Madison’s competency for execution hearing in the trial court, a defense expert testified that:

his strokes caused major vascular disorder (also known as vascular dementia) and related memory impairments and that, as a result, he has no memory of committing the murder—the very act that is the reason for his execution. To the contrary, Mr. Madison does not believe he ever killed anyone (Ref. 6, p 1177).

As a result, pursuant to *Ford* and *Panetti*, Mr. Madison’s defense claimed that he was incompetent to be executed because he lacked “a rational understanding of why the state [was] seeking to execute him” (Ref. 6, p 1177).

In contrast, Alabama’s expert testified that Mr. Madison “was able to accurately discuss his legal appeals and legal theories with his attorneys,” and therefore must rationally understand why he was being executed (Ref. 6, p 1177). The trial court overseeing Mr. Madison’s competency hearing agreed with the State of Alabama, finding Mr. Madison competent for execution. Alabama argued that Mr. Madison was competent for execution because he understood his legal situation and did not display any sign of psychosis or delusions, which the Court had focused on in *Panetti*. In response, Mr. Madison’s writ of *habeas corpus* to the relevant federal district court was denied; thereafter, he appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit observed that Mr. Madison qualified as legally blind and had experienced a minimum of two strokes recently (Ref. 6, p 1179). In the aftermath of the first stroke, Mr. Madison regularly requested that someone tell his mother about the stroke, even though she had died several years prior to the incident. After the second stroke, Mr. Madison “reported frequently urinating on himself because ‘no

one will let me out to use the bathroom,’ although he ha[d] a toilet in his cell” (Ref. 6, p 1179). Perhaps most telling, Mr. Madison informed his attorney “that he planned to move to Florida after his release from prison” (Ref. 6, p 1179). On the basis of this evidence, the Eleventh Circuit held that Mr. Madison’s dementia prevented him from “rationally understand[ing] the connection between his crime and his execution” (Ref. 6, p 1186), ruling that “the state court’s decision that Mr. Madison is competent to be executed rested on an unreasonable determination of the facts” (Ref. 6, p 1178) because the state’s expert “never testified that Mr. Madison understands that his execution is connected to the murder he committed” (Ref. 6, p 1187).

In addition, the Eleventh Circuit noted that “the State suggests that only a prisoner suffering from gross delusions can show incompetency under *Panetti*” (Ref. 6, p 1188). Rejecting this argument, the court said that neither *Ford* nor *Panetti* required that “a prisoner must suffer from delusions to be deemed incompetent” (Ref. 6, p 1188). The Eleventh Circuit held that “[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” (Ref. 6, p 1189). Finally, the Eleventh Circuit determined that, “due to his dementia and related memory impairments, Mr. Madison lacks a rational understanding of the link between his crime and execution” (Ref. 6, p 1190). The state of Alabama appealed this decision to the U.S. Supreme Court.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Supreme Court held in *Dunn v. Madison* (2017)⁷ that “[n]either *Panetti* nor *Ford* ‘clearly established’ that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime” (Ref. 7, pp 11–12). Thus, the question of whether an individual recalls committing a crime is “distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case” (Ref. 7, p 12). Mr. Madison, therefore, displayed competency to be executed despite severe memory loss because “he recognizes that he will be put to death as punishment for the murder he was found to have committed” (Ref. 7, p 12). The Court ruled that Mr. Madison’s “claim to federal *habeas* relief must fail” because the appeal was pursuant to the highly deferential standards of the AEDPA. The Court further clarified that “[w]e express no

view on the merits of the underlying question” in any context other than *habeas corpus* proceedings (Ref. 7, p 12). As a result, the Court reversed the Eleventh Circuit’s decision.

Following the Court’s *Dunn v. Madison* opinion, Mr. Madison’s attorney once again alleged on remand that he was incompetent for execution, but Alabama’s Circuit Court for Mobile County disagreed, scheduling an execution date. The Supreme Court issued a stay of execution on January 25, 2018,⁸ and granted *certiorari* on January 26, 2018.⁹ On February 27, 2019, the Court decided *Madison v. Alabama*,¹⁰ addressing two separate questions: “does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing a crime?”; and “does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions?” (Ref. 10, p 722). In a 5–3 decision written by Justice Kagan, in which Justice Kavanaugh did not participate, the Court held that “a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution” (Ref. 10, p 726). Thus, “[a]ssuming . . . no other cognitive impairment, loss of memory of a crime does not prevent rational understanding of the State’s reasons for resorting to punishment” (Ref. 10, p 727). If memory loss “interacts with other mental shortfalls,” however, and the defendant cannot rationally understand the reason for the punishment, then the defendant is incompetent to be executed (Ref. 10, 727–8). This standard applies to all defendants who have “difficulty preserving any memories, so that even newly gained knowledge (about, say, the crime and punishment) will be quickly forgotten” (Ref. 10, p 728). The same standard also applies “when cognitive deficits prevent the acquisition of such knowledge at all, so that memory gaps go forever uncompensated” (Ref. 10, p 728).

The Court further held that “a person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution” (Ref. 10, pp 726–7). According to the Court, the proper standard for determining incompetency for execution is whether “a particular *effect*” exists, specifically, “an inability to rationally understand why the State is seeking execution” (Ref. 10, p 728, italics in original). The “precise *cause*” of that effect is irrelevant (Ref. 10, p 728, italics in original). It is not the

diagnosis of mental illness, but the consequence of it that governs competency for execution. For this reason, the Court cautioned states against emphasizing a given diagnosis (or its lack) over the “downstream consequence” of that diagnosis (Ref. 10, p 729).

The Court provided additional clarity, writing that “[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” (Ref. 10, p 728). Consistent with this reasoning, “if and when that failure of understanding is present, the rationales kick in—irrespective of whether one disease or another (say, psychotic delusions or dementia) is to blame” (Ref. 10, p 729). As the Court recognized, although many delusions inhibit “the understanding that the Eighth Amendment requires,” some delusions do not (Ref. 10, p 729). Similarly, dementia

can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him But dementia also has milder forms, which allow a person to preserve that understanding. Hence the need—for dementia as for delusions as for any other mental disorder—to attend to the particular circumstances of a case . . . (Ref. 10, p 729)

In both scenarios, “[w]hat matters is whether a person has the ‘rational understanding’ *Panetti* requires—not whether he has any particular memory or any particular mental illness” (Ref. 10, p 727). This “kind of comprehension is the *Panetti* standard’s singular focus” (Ref. 10, p 727), thus “the sole inquiry for [reviewing] court[s] remains whether the prisoner can rationally understand the reasons for his death sentence” (Ref. 10, p 728). The Court concluded by remanding the case to Alabama’s trial court “for renewed consideration of Madison’s competency (assuming Alabama sets a new execution date)” (Ref. 10, p 731).

Justice Alito wrote the dissent and was joined by Justices Gorsuch and Thomas. According to the dissent, Mr. Madison’s attorney requested *certiorari* to address the issue of whether states can execute defendants who do not remember committing the crime for which they are to be executed. Following the Court’s grant of *certiorari*, however, the dissent alleged that Mr. Madison’s attorney changed tactics by then arguing that Mr. Madison’s dementia prevented him from rationally understanding why he was to be executed. In Justice Alito’s view, the Majority erred by ruling on a question that the Court did not agree to address.

Best Practices for Evaluators

When discussing whether the American Academy of Psychiatry and the Law (AAPL) should oppose executions as a professional organization, Halpern and colleagues called upon AAPL to “tak[e] a stand on vital social issues that are clearly in the public interest” (Ref. 11, p 182). This same principle holds true when it comes to establishing the minimum requirements that professionals should meet in conducting evaluations of defendants’ competency for execution.¹² Absent instruction from professional organizations like AAPL, we recommend that, at a minimum, qualified evaluators must be licensed psychologists, psychiatrists, or physicians in good standing in their profession with extensive experience assessing mental health disorders prior to being considered for appointment as an expert evaluator. This standard mirrors the minimum requirements that legal scholars have proposed for professionals who assess capital defendants for intellectual disability.¹³

Evaluators should meet with the defendant in person¹⁴ for an appropriate length of time^{15,16} when conducting a competency evaluation. What constitutes an appropriate period of time will necessarily vary based on the evaluatee’s mental state. In situations where the evaluatee is too impaired to meaningfully participate in the interview process, interviews may be brief. Other interviews, however, could last several hours. Because the required threshold for establishing competence for execution is relatively low, a single meeting may be sufficient to evaluate defendants who are cognitively intact and not actively displaying symptoms of mental illness. In other, more complex situations involving defendants exhibiting cognitive decline and active symptoms of mental illness, it may be necessary to meet with the defendant on multiple occasions.¹² The evaluations themselves should take place in “a private, distraction-free area,” which may require temporarily moving the defendant off of death row (Ref. 12, p 209), where noise pollution is prevalent.¹⁷

Because competence for execution evaluations require “a strong commitment to . . . the most thorough and detailed evaluation” possible, Radelet and Barnard recommended videotaping all evaluations (Ref. 18, p 46). AAPL, however, has previously declined to endorse “a blanket rule of requiring videotaping in all forensic interviews” (Ref. 19, p 357). Evaluators, therefore,

should educate themselves about the specific videotaping requirements of their associated jurisdictions. If the jurisdiction does not require videotaping, evaluators should rely on their own judgment and personal preferences when deciding whether to videotape evaluations.

In addition to face-to-face interviews, a forensic psychologist recommended that evaluators obtain information from as many of the following sources as possible:

- (1) prison medical records; (2) prison psychiatric records; (3) psychiatric records prior to incarceration; (4) academic records, including prior intellectual testing with raw data; (5) records of past psychological evaluations; (6) any and all videotapes made of the inmate; (7) military or veterans affairs records; (8) records and transcripts of testimony of the inmate; (9) writings or letters of the inmate [within] the prior year; (10) videotapes of the inmate demonstrating bizarre behavior; and (11) art work of the inmate (Ref. 16, p 49).

While this list serves as a useful overview of materials that evaluators may wish to explore, it need not be followed rigidly. Reviewing videotapes featuring the evaluatee is generally good practice, for example, but some videos are likely to prove more relevant than others. Evaluators, therefore, should focus the majority of their attention on recent video footage because this speaks more directly to the evaluatee’s competence to be executed. Similarly, routine surveillance footage may have limited value for ascertaining the evaluatee’s competency for execution. Academic records, including tests conducted, are sometimes a useful piece of information, but they may be less relevant if they are several decades old. Evaluatees’ artwork is also unlikely to be relevant except in a few rare instances.

In light of the Court’s *Madison* ruling, evaluators should pay careful attention to any medical diagnoses or conditions that may render defendants’ ability to formulate a rational understanding of why they are to be executed exceptionally difficult. Per *Madison*, diagnoses themselves are ultimately immaterial, but they may still serve to highlight cases that require closer examination. This topic was raised by the *Panetti* Court, in which it instructed that the presence of psychosis indicated the need to thoroughly evaluate defendants for incompetency. According to the Court, neither medical nor psychological diagnoses automatically qualify defendants as incompetent to be executed. Nevertheless, these labels may reasonably be construed as a crude screening tool signaling “[t]he beginning of doubt about competence” (Ref.

2, p 960). The same is true for major medical events like strokes, such as Mr. Madison experienced. The broader significance of *Madison*, therefore, is that the Court recognized that defendants' medical histories may directly influence their ability to rationally understand why they are to be executed, although specific diagnoses themselves are insufficient to establish incompetency. As a result, evaluators should be sure to review relevant medical records and construct a detailed medical history whenever possible.

Finally, evaluators should engage in serious self-reflection before participating in the treatment or reevaluation of incompetent capital defendants given that successful treatment exposes the evaluatee to death via execution.^{18,20} Evans²¹ argued that these behaviors constitute "the fringe of what the profession has defined as ethical conduct" (Ref. 21, p 264), although this sentiment is not shared universally.²² Radelet and Barnard²³ recommended that states protect evaluators from "the ethical dilemma created by the demand to treat prisoners so that they can be executed" by passing legislation permanently commuting incompetent defendants' death sentences to life imprisonment without possibility of parole (Ref. 23, p 306).

In conclusion, while the *Madison* Court preserved a broad interpretation of the category of persons who may qualify as incompetent for execution, the Court declined to address a number of related concerns surrounding competency evaluations. In the absence of guidance from the Court, professional organizations such as AAPL may wish to take the advice of Halpern and colleagues¹¹ and play a more prominent role by engaging in the debate. As a first step, we recommend that AAPL create a minimum set of standards that individuals must meet before they qualify to conduct evaluations of competency to be executed.

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