*Dunn v. Madison*
United States Supreme Court

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Thirty-two years ago, Vernon Madison was charged with the murder of a Mobile, Alabama police officer, Julius Schulte.[1] He was convicted of capital murder by an Alabama jury and sentenced to death.[2] Madison was scheduled to be executed on May 12, 2016, but he petitioned the state court to suspend his death sentence on the grounds that he was incompetent to be executed after suffering complications from several strokes.[3] At the trial court's hearing, the court's appointed psychologist reported that "although Madison may have 'suffered a significant decline post-stroke, . . . [he] understands the exact posture of his case at this point,' and appears to have a 'rational understanding of . . . the results or effects' of his death sentence."[4] Additionally, Madison's own psychologist reported that "Madison's strokes have rendered him unable to remember 'numerous events that have occurred over the past thirty years or more,'" but that he ultimately understood what he was tried for, that he was in prison because of murder, that Alabama was seeking retribution, and that his sentence was the death penalty.[5] However, Madison's psychologist stated that "Madison does not 'understan[d] the act that . . . he is being punished for' because he cannot recall 'the sequence of events from the offense to his arrest to the trial or any of those details.'"[6]

The trial court denied Madison's petition and held that under *Ford v. Wainwright*[7] and *Panetti v. Quarterman*,[8] Madison failed to make a showing that he suffered from a "mental illness

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[1] Dunn v. Madison, No. 17-193, 2017 WL 5076050, at *1, *3 (U.S. Nov. 6, 2017); Kelsey Stein, *Who is Vernon Madison? Alabama cop-killer facing execution has claimed insanity, incompetence*, AL.COM (May 11, 2016), http://www.al.com/news/index.ssf/2016/05/who_is_vernon_madison_alabama.html.

[2] *Dunn*, at *1. Madison's first trial took place in September 1985 and he was convicted, but was given a second trial for violation which involved a race-based jury selection. Stein, *supra* note 1. He was again convicted by a jury which recommended the death penalty. *Id.* The case was retried for a third time based on improper expert witness testimony. *Id.* Madison was convicted, but the jury recommended a life sentence. *Id.* Judge McRae chose to override the jury's recommendation and instead sentenced Madison to death. *Id.*

[3] *Dunn*, at *1.

[4] *Id.* (quoting Appendix to Petition for Writ of Certiorari at 75a, *Dunn*, 2017 WL 5076050 (No.17-193); Madison v. Comm'r, Ala. Dept. of Corr., 851 F.3d 1173, 1193 (11th Cir. 2017), *cert granted, judgment rev'd sub nom*. Dunn v. Madison, No. 17-193, 2017 WL 5076050 (U.S. Nov. 6, 2017)).

[5] *Id.*

[6] *Id.* (citation omitted).

[7] Ford v. Wainwright, 477 U.S. 399 (1986). In *Ford*, the Court concluded that the Eighth Amendment prohibits executing incompetent individuals. *Id.* at 406. Justice Powell's concurring opinion, commonly accepted as the standard for competency to be executed, states that the Eighth Amendment bars the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422; Joe Hennell, *Mental Illness on Appeal and the Right to Assist Counsel*, 29 J. CONTEMP. HEALTH L. & POL'Y 350, 357 (2013).

[8] Panetti v. Quarterman, 551 U.S. 930 (2007). *Panetti* was the Court's first interpretation of *Ford* and its standard for competency to be executed. Christopher Seeds, *The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309, 311 (2009). In *Panetti*, the defendant's mental illness deprived him of the "mental capacity to understand that [he] [was] being executed as a punishment for a crime." *Panetti*, 551 U.S. at 954. The Court stated that severe delusions were not collateral to a competency determination, but should

which deprive[d] [him] of the mental capacity to rationally understand that he [would be] executed as a punishment for a crime."[9] Specifically, the trial court found that "Madison understands '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.'"[10] Madison next filed a petition for a writ of habeas corpus in Federal District Court under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[11] Madison's petition was denied because the state trial court correctly applied *Ford* and *Panetti* to the evidence.[12]

After the Eleventh Circuit granted a certificate of appealability, they reversed on the grounds that because Madison could not remember his capital offense, it logically followed that he did "not rationally understand the connection between his crime and his execution."[13] The Eleventh Circuit held that the state trial court's finding that Madison is competent to be executed was unreasonable.[14]

The Supreme Court granted the State's petition for certiorari and reversed the Eleventh Circuit.[15] The Court explained that *Panetti* addressed "whether the Eighth Amendment forbids the execution of a prisoner who lacks 'the mental capacity to understand that [he] is being executed as a punishment for a crime,'" and that retribution is not served when this is lacking.[16] Further, *Ford* "questioned the 'retributive value of executing a person who has no comprehension of why he has been singled out,'"[17] and held that the Eighth Amendment prohibits the execution of any prisoner who is insane.[18] The Court clarified that neither *Panetti* nor *Ford* held that "a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied

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instead be considered by the court when determining if the prisoner comprehends "the meaning and purpose of the punishment to which he has been sentenced." *Id.* at 960.

[9] *Dunn*, at *1 (quoting Appendix to Petition for Writ of Certiorari at 74a, *Dunn*, 2017 WL 5076050 (No.17-193)).

[10] *Id.* (quoting Appendix to Petition for Writ of Certiorari at 82a, *Dunn*, 2017 WL 5076050 (No.17-193)).

[11] *Id.*

> 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—
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> (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
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> (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.A. § 2254(d) (1996). As the Supreme Court noted in *Dunn*, a habeas petitioner will only meet this standard "when he shows that the state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Dunn*, at *1 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

[12] *Dunn*, at *1 (citing Appendix to Petition for Writ of Certiorari at 67a, *Dunn*, 2017 WL 5076050 (No.17-193)). The Federal District Court also found that the state trial court did not make an "unreasonable determination of the facts in light of the evidence." *Id.* (quoting Appendix to Petition for Writ of Certiorari at 74a, *Dunn*, 2017 WL 5076050 (No.17-193)).

[13] *Id.* at *2 (quoting *Madison*, 851 F.3d at 1186).

[14] *Id.*

[15] *Id.* at *3.

[16] *Id.* at *2 (quoting *Panetti*, 551 U.S. at 954).

[17] *Dunn*, at *2 (quoting *Ford*, 447 U.S. at 409).

[18] *Ford*, 477 U.S. at 409-10.

in his case."[19] Therefore, the state trial court's determination that Madison was competent to be executed was not unreasonable because based on the psychologists' testimonies, Madison understood "both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime."[20] The Court, therefore, denied Madison's claim for federal habeas relief under the AEDPA.[21]

However, the Court did not express a "view on the merits of the underlying question,"[22] whether a State can execute someone on death row whose mental deterioration prevents them from remembering their crime.[23] Justice Breyer elaborated on this issue, noting that prisoners sit on death row for "unconscionably long periods of time."[24] For instance, Madison has lived almost half of his life on death row, during which time his mental and physical health has deteriorated, leaving him without memory of his capital offense.[25] In fact, the average period of imprisonment before receiving the death penalty has grown from seven years in 1987 to twelve years in 2007.[26] The three inmates executed in Alabama in 2017 sat on death row for thirty-four years, twenty-one years, and nearly twenty years, respectively, before being executed.[27]

The two concurring opinions by Justice Ginsburg and Justice Breyer essentially invite petitions for certiorari to the Supreme Court by defendants on death row with memory loss.[28] The Eleventh Circuit has noted that the Supreme Court failed to specifically explain in *Panetti* "what is required for a rational understanding of death by execution and the reason for it," therefore there seems to be confusion amongst the Circuits in where the line for competency to be executed is drawn.[29]

In *Ferguson v. Secretary, Florida Department of Corrections*, the Eleventh Circuit previously affirmed a state court's finding that the prisoner was competent to be executed even though he suffered from a mental illness in which he believed he was the "Prince of God."[30] The Eleventh Circuit held that the Florida Supreme Court properly applied *Panetti* and that the prisoner possessed "a rational understanding of his execution and the reason for it," therefore the AEDPA required the federal habeas corpus to be denied.[31]

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[19] *Dunn*, at *2.
[20] *Id.*
[21] *Id.* at *3
[22] *Id.*
[23] *Id.* (Ginsburg, J., concurring).
[24] *Id.* (Breyer, J., concurring). Justice Breyer also stated that the instant case "illustrates one of the basic problems with the administration of the death penalty itself." *Id.* He ended his discussion by stating that he believes "it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself." *Id.* at *4 (Breyer, J., concurring) (citing Glossip v. Gross, 135 S. Ct. 2726, 2776 (Breyer, J., dissenting)).
[25] *Dunn*, at *3.
[26] *Id.*
[27] *Id.*
[28] *See Dunn*, at *3; Alisa Johnson, *SCOTUS Allows Execution of Prisoner with No Memory of Crime*, BLOOMBERG BNA (Nov. 6, 2017), https://www.bna.com/scotus-allows-execution-n73014471797/.
[29] Ferguson v. Sec'y, Florida Dep't of Corr., 716 F.3d 1315, 1318 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 33 (2013).
[30] *Id.*
[31] *Id.* at 1343-44.

In *Walton v. Johnson*, the Fourth Circuit affirmed the district court's finding that the prisoner was mentally competent to be executed.[32] The prisoner alleged that because he was suffering from "schizophrenia and has borderline delusional ideas about his ability to come back to life after his execution," he was incompetent to be executed.[33] However, the Fourth Circuit found that the district court properly established that the prisoner understood he was to be punished by execution and why he was to be punished; therefore, he was competent to be executed.[34] In addition, the Fourth Circuit held that the Eighth Amendment does not require that a prisoner be able to assist his counsel during the competency proceeding, and does not require that the prisoner "have the capacity to prepare for his passing to be deemed competent to be executed."[35]

In *Simon v. Fisher*, the prisoner petitioned for a writ of habeas corpus and alleged that a head injury had caused significant memory loss, which rendered him incompetent to be executed.[36] The Fifth Circuit affirmed the denial of the prisoner's petition and held that the district court did not commit error when applying the *Panetti* standard.[37] In fact, the district court had found that, based on the "medical and psychiatric records, prison administrative records, and the affidavits of various prison employees and medical personnel," the prisoner's "purported memory loss [was] feigned."[38]

In *Coe v. Bell*, the Sixth Circuit upheld Tennessee's procedure for the determination of a death-row prisoner's competency to be executed pursuant to *Ford*.[39] The prisoner alleged that the state court committed error when determining his competency to be executed "because they evaluated his present competency rather than determining his future competency at the moment of execution."[40] The prisoner additionally argued that because he suffered from Dissociative Identity Disorder, he would dissociate while his execution grew nearer and would therefore not be competent for execution.[41] The Sixth Circuit rejected these arguments and held that the state must make its determination regarding competency when execution was imminent[42] and that Tennessee's procedure was a reasonable application of *Ford*;[43] therefore the court affirmed the district court's denial of the prisoner's petition for a writ of habeas corpus.[44]

In *Bedford v. Bobby*, the Sixth Circuit granted the State's motion to vacate the district court's stay to give the prisoner time to prove he was incompetent to be executed.[45] The prisoner

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[32] Walton v. Johnson, 440 F.3d 160, 173 (4th Cir. 2006), *cert. denied*, 547 U.S. 1189 (2006). The dissent in *Walton* argued that "the district court must also specifically determine whether the condemned inmate 'understand[s] that to be executed means to have one's physical life ended.'" *Id.* at 175, 186. This was based on the defendant prisoner's beliefs in the afterlife and that he would be able to "come back to life after execution." *Id*. at 176.
[33] *Id.* at 164.
[34] *Id.* at 173.
[35] *Id.* at 172-73.
[36] Simon v. Fisher, 641 F. App'x 386, 387 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 626 (2017).
[37] *Id.* at 389.
[38] *Id.* at 390.
[39] Coe v. Bell, 209 F.3d 815, 821-22 (6th Cir. 2000), *cert. denied*, 529 U.S. 1084 (2000).
[40] *Id.* at 824.
[41] *Id.*
[42] *Id.* (citing Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 (1998)).
[43] *Id.* at 825.
[44] *Id.* at 828.
[45] Bedford v. Bobby, 645 F.3d 372, 374 (6th Cir. 2011).

contended that he was not competent to be executed because his "memory is severely impaired," his "condition has . . . deteriorated . . . with the onset of a dementia[-]form illness," and that he "does not recall a series of details about the murder or his life's history."[46] The Sixth Circuit stated that these facts failed to establish that the prisoner "does not understand the reasons for his conviction or the nature of his punishment . . . ."[47] Additionally, the court noted 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 incompetence that prohibits the execution of a defendant."[48]

Justice Ginsburg and Justice Breyer's concurring opinions invite petitions for writs of certiorari on the issue of "whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense."[49] The Circuit Courts of Appeals have been presented with several versions of this issue in the past, and their various opinions have demonstrated the confusion courts are facing in applying the *Ford* and *Panetti* "rational understanding" standard.[50] Also, the newest member of the Court, Justice Neil Gorsuch, is predicted to align with the late Justice Antonin Scalia.[51] During his time on the Tenth Circuit Court of Appeals based in Denver, Justice Gorsuch often "raised concerns about intrusive government searches and seizures that he found to violate constitutional rights."[52] It is indeed likely that given this invitation for writs of certiorari by three members of the Court,[53] and the addition of a new Justice that could be unpredictable in criminal law cases,[54] a clarification on the standard for competency to be executed will be provided in the near future.

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[46] *Id.* at 378 (omissions and alteration in original).
[47] *Id.*
[48] *Id.* at 378-79.
[49] *Dunn*, at *3.
[50] *Ferguson*, 716 F.3d at 1343-44. *See supra* notes 29-48 and accompanying text.
[51] Sam Hananel, *Neil Gorsuch could be the Supreme Court's wild card in criminal justice cases*, BUSINESS INSIDER (Mar. 14, 2017), http://www.businessinsider.com/neil-gorsuch-on-criminal-justice-law-2017-3.
[52] *Id.*
[53] Justice Ginsburg's concurring opinion was joined by both Justice Breyer and Justice Sotomayor. *Dunn*, at *3.
[54] Hananel, *supra* note 51. *See also* Jess Bravin, *Gorsuch Joins Court's Liberals Over Protections for Criminal Defendants*, WALL ST. J. (Oct. 4, 2017), https://www.wsj.com/articles/gorsuch-joins-courts-liberals-over-protections-for-criminal-defendants-1507155781.