Supreme Court of the United States

No. 17-7505

***** *CAPITAL CASE* *****

VERNON MADISON, SR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

CERTIORARI TO THE MOBILE COUNTY CIRCUIT COURT

October Term 2018

Argued October 02, 2018 — Decided January 08, 2019

Graham L. Vogtman

It forsakes our concept of justice to discipline an individual who does not understand why he is being punished. We ought not to discipline a naïve child as we would an adolescent who knows right from wrong. We ought not to fire an employee who unknowingly makes a mistake as we might a careless, undisciplined worker. And in criminal law, we ought not to punish an offender who does not understand the wrongfulness of his conduct to the same degree as a habitual felon with no regard for the law.

Moreover, it forsakes our concept of justice to impose the *ultimate* punishment—a sentence of death—upon a prisoner who has no ability to understand the consequences of capital punishment and why he is being subjected to it. It is the comprehension of why a prisoner is being executed that fulfills the objectives of capital punishment. By truly recognizing why he is to face the ultimate punishment, a prisoner realizes at last the severity of his crime. And when the offender comes to grips with the consequences of, and reasons for his execution, the community he wronged achieves in full its quest for retribution, atonement, and justice. But to execute a prisoner who does not have the wherewithal to comprehend why he is being "stripped of his fundamental right to life" neither fosters the offender's penological revelation nor fulfills the community's quest for vindication. *Ford* v. *Wainwright*, 477 U.S. 399, 409 (1986). Such an execution disregards our Eighth Amendment protection against cruel and unusual punishment. As such, we extend our competency standard espoused in *Ford* v. *Wainwright* and *Panetti* v. *Quarterman* and hold that the execution of a prisoner who does not understand the nature of the death penalty and why it is being imposed upon him violates the Eighth Amendment to our Constitution of the United States.

I

On April 18, 1985, Petitioner visited the home of his recent ex-girlfriend to get his belongings and move out. When Petitioner arrived, his ex-girlfriend informed him of her missing daughter. Petitioner then left the residence in search of the child. During his absence, his ex-girlfriend filed a missing person's report, to which Mobile Police Corporal Julius Schulte responded. By the time Officer Schulte arrived on scene, however, the child had been found and Petitioner had returned to the residence.

Petitioner then continued gathering his belongings under the supervision of Officer Schulte. When Petitioner had removed all of his belongings from the house and appeared to be leaving the premises, Officer Schulte returned to his patrol car to fill out necessary paperwork. In fact, however, Petitioner had not left the premises. Instead, Petitioner retrieved his .32 caliber pistol from his vehicle and approached Officer Schulte's patrol car from the rear. Without warning, Petitioner fired two shots into the back of Officer Schulte's head. He then turned and shot his ex-girlfriend in the back as she attempted to flee. While Petitioner's ex-girlfriend survived the attack, Officer Schulte's injuries were fatal, and he was taken off life-support the following week.

Petitioner was charged with capital murder for killing an on-duty police officer. ALA. CODE § 13A-5-40(a)(5) (2016). A jury found him guilty and the Mobile County Circuit Court sentenced him to death. See *Madison* v. *State*, 545 So. 2d 94, 96 (Ala. Crim. App. 1987). On appeal, however, the Alabama Court of Criminal Appeals reversed his conviction and ordered a new trial. The appeals court found that, by striking all seven of the black veniremembers without a

race-neutral cause, the State had violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). *Madison* v. *State*, 545 So. 2d 94, 95–99 (Ala. Crim. App. 1987).

Petitioner was again tried for capital murder in the circuit court. This time, Petitioner pleaded not guilty by reason of mental disease or defect. The jury was not sympathetic to his claims, however, and again convicted and sentenced Petitioner to death. However, the Alabama Court of Criminal Appeals reversed his conviction for the second time and ordered a third trial. The appeals court found that the State had introduced inadmissible evidence, thereby violating *Ex parte Wesley*, 575 So. 2d 127 (Ala. 1990). *Madison* v. *State*, 620 So. 2d 62, 73 (Ala. Crim. App. 1992).

At the third trial, the jury again convicted Petitioner of capital murder. At the penalty phase of the trial, a defense expert introduced evidence that Petitioner suffered from a delusional disorder and had been prescribed numerous psychotropic medications. These findings were not contested by the State's psychiatric expert. See *Madison* v. *State*, 718 So. 2d 90, 96–97 (Ala. Crim. App. 1997). In light of this evidence, the jury opted for a sentence of life imprisonment without the possibility of parole, rather than a sentence of death. See *id*., at 94. The presiding judge overruled the jury's sentence, however, and sentenced Petitioner to death for the third time. See *ibid*. The Alabama Court of Appeals upheld the sentence of death, see *id*., at 104, and the Alabama Supreme Court affirmed, *Ex parte Madison*, 718 So. 2d 104 (Ala. 1998).

Petitioner then filed in state court a petition for post-conviction relief. The circuit court dismissed the petition without a hearing. The Alabama Court of Criminal Appeals affirmed the dismissal, *Madison* v. *State*, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court

denied certiorari review. Petitioner then filed for habeas corpus relief in federal court pursuant to the federal habeas corpus statute. 28 U.S.C. § 2254. The United States District Court for the Southern District of Alabama denied relief and the United States Court of Appeals for the Eleventh Circuit affirmed the denial. *Madison* v. *Comm'r, Ala. Dep't of Corr.*, 761 F. 3d 1240 (11th Cir. 2014). This Court denied certiorari and a subsequent petition for rehearing. See *Madison* v. *Thomas*, 135 S. Ct. 1562 (2015); *Madison* v. *Thomas*, 135 S. Ct. 2346 (2015).

During the duration of the federal court proceedings, Petitioner's mental health began to deteriorate. In May 2015, Petitioner suffered a basilar artery occlusion, his first severe stroke. This stroke resulted in white matter low attenuation, impaired Petitioner's memory, and served as the beginning of Petitioner's severe cognitive decline. Brief for Petitioner 6. In particular, this stroke severely hampered Petitioner's ability to make sense of his reality. For example, after the stroke, Petitioner repeatedly asked when his mother would be visiting him even though she had passed several years earlier. *Id.*, at 7. In January 2016, Petitioner suffered his second severe stroke, one that was particularly devastating to his memory capacity and cognitive abilities. This stroke rendered him thenceforth fecally incontinent and left him temporarily insensate and unconscious on the floor of his prison cell. *Id.*, at 5. MRI imaging confirmed the stroke damaged Petitioner's thalamus, causing a significant loss of long-term memory and gravely impairing his cognitive functioning. *Id.*, at 6.

The Alabama Supreme Court set Petitioner's execution date for May 12, 2016. In light of Petitioner's mental afflictions and medical developments, Petitioner's counsel filed in the Mobile County Circuit Court a petition for a stay

of execution under the proper Alabama statute. ALA. CODE § 15-16-23 (2016). The circuit court judge determined that Petitioner had made a preliminary showing of incompetency, ordered a psychiatric evaluation, and scheduled a hearing on the petition for a stay of execution. For the evaluation, Petitioner's counsel appointed Dr. John Goff, and the State appointed Dr. Karl Kirkland, both of whom were licensed neuropsychologists.

Dr. Goff conducted extensive neuropsychological testing on Petitioner, determining that Petitioner's cognitive and bodily functioning had declined severely as a result of the strokes. Brief for Petitioner 8–13. Dr. Goff found that Petitioner has an IQ of 72, placing him on the borderline range of mental deficiency, and a Working Memory Score of 58, indicating severe memory deficits. *Id.*, at 10. At the evaluation, Petitioner could not recite the alphabet beyond the letter G, could not count by threes, could not rephrase simple sentences, and could not name either the previous President or the Warden of the correctional facility at which he had been incarcerated for over thirty years. *Id.*, at 11.

At the ensuing competency hearing, Petitioner could only speak in a slurred manner, was legally blind, and could not walk independently. *Id.*, at 1. It was undisputed that Petitioner now suffers from vascular dementia, a major vascular neurocognitive disorder commonly caused by a stroke. *See* American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* 621–624 (5th ed. 2013) (hereinafter DSM-5) (giving an overview of "vascular neurocognitive disorder"); Brief for Petitioner 9–10. Dr. Goff further introduced medical records and neuroimaging evidence indicating that Petitioner has been diagnosed with: retrograde amnesia, a disorder that considerably

hampers the ability to recall previously-formed memories, Brief for Petitioner 10; encephalomalacia, the softening or death of brain tissue, *id.*, at 8; and chronic small vessel ischemic disease, a prominent cause of cognitive decline, see *id.*, at 8, n. 4.

Dr. Goff testified that this assortment of mental illnesses and cognitive disorders has significantly diminished Petitioner's capacity to rationally understand the circumstances of his scheduled execution. Brief for Petitioner 9. Specifically, because of his vascular dementia and retrograde amnesia, Petitioner has no memory of the murder or the legal proceedings to date and does not have the intellectual capacity to understand why he is being put to death. Brief for Petitioner 10; Brief for Respondent 8. Dr. Goff further noted that Petitioner's vascular dementia is "distinct from typical memory loss" that often accompanies old age and will cause his cognitive functioning to continuously decline. Brief for Petitioner 12.

Dr. Kirkland, on the other hand, disagreed with Dr. Goff's determination of incompetency. While he did not rebut Petitioner's diagnoses of mental illnesses, Dr. Kirkland argued that Petitioner's mental illnesses do not prevent him from having a rational understanding of the trial proceedings and the consequences of his scheduled execution. Brief for Respondent 6–8. The trial court sided with Dr. Kirkland's determinations, found Petitioner competent to be executed, and dismissed his petition for a stay of execution.

Petitioner then returned to federal court and filed another habeas corpus petition and motion for a stay of execution. The district court denied his petition and motion. On the day of his scheduled execution, however, the Eleventh Circuit reversed the district court's denial, stayed

Petitioner's execution, and ordered expedited briefing and oral argument on his habeas claim. After oral argument, the Eleventh Circuit held that "due to his dementia and related memory impairments, Mr. Madison lacks a rational understanding of the link between his crime and his execution," and is therefore incompetent to be executed. *Madison* v. *Comm'r, Ala. Dep't of Corr.*, 851 F. 3d 1173, 1190 (11th Cir. 2017).

In a *per curiam* decision, however, this Court reversed the Eleventh Circuit's judgment. *Dunn* v. *Madison*, 583 U.S. ____ (2017) (*per curiam*). We held that the Alabama trial court's "determinations of law and fact were not 'so lacking in justification' as to give rise to error 'beyond any possibility for fairminded disagreement,'" and we therefore denied Petitioner's habeas relief claim. *Id*, at ____ (slip op., at 4) (quoting *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011)). While we declined to express our views on the merits of Petitioner's case, we acknowledged that "[t]he issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is a substantial question not yet addressed by the Court." *Dunn* v. *Madison*, 583 U.S. ____ , ____ (2017) (GINSBURG, J., concurring). Given a suitable vehicle, this question "would warrant full airing." *Ibid*.

By virtue of our decision, the Alabama Supreme Court re-set Petitioner's execution date for January 25, 2018. But in this case's final twist to date, new information emerged in the months prior to the scheduled execution about Dr. Karl Kirkland, the state-appointed neuropsychologist upon whom the trial court and this Court in *Dunn* v. *Madison* relied in finding Petitioner competent to be executed. Specifically, at the time of his psychiatric evaluation of Petitioner, Dr. Kirkland was suffering from substance abuse

and had used forged prescriptions to obtain controlled substances—including doing so just four days after the evaluation. Brief for Petitioner 13, n. 9. Dr. Kirkland was charged with four felonies and has since been suspended from practicing psychology. See *ibid.*

Armed with this new information and in light of his ever-worsening physical and cognitive condition, Petitioner once again challenged his competency to be executed and filed for a stay of execution in the Mobile County Circuit Court. At the ensuing hearing, the State did not refute the allegations against Dr. Kirkland or the evidence of Petitioner's worsened condition. Nonetheless, on January 16, 2018, the trial court held that Petitioner "did not provide a substantial threshold showing of insanity . . . sufficient to convince this Court to stay the execution," and therefore denied Petitioner's motion for a stay. *State* v. *Madison*, Case No. CC-1985-001385.90 (Cir. Ct. Mobile County 2018). Under the Alabama Code, once a trial court has adjudged a habeas claim, no other judge or court may review or revise the trial court's judgment thereof. ALA. CODE § 15-21-23 (2016).

His state court remedies now exhausted, Petitioner appealed to this Court directly and petitioned for a review of the trial court's finding of competency. On January 25, 2018, we ordered a stay of execution, *Madison* v. *Alabama*, 138 S. Ct. 943 (2018), and on February 26, 2018, we granted certiorari, *Madison* v. *Alabama*, 138 S. Ct. 1172 (2018).

II

The first question presented in the case asks us the following:

> Consistent with the Eighth Amendment and this Court's decisions in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007), may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense?

This Court has routinely adhered to an instructive framework when determining whether a type of punishment violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. First, we must consider "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford* v. *Wainwright*, 477 U.S. 399, 405 (1986).

However, the scope of the protections guaranteed by the Eighth Amendment is not so rigid as to include those punishments deemed "cruel and unusual" by only the early common law. Accord *Gregg* v. *Georgia*, 428 U.S. 153, 171 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.) ("But the Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner"). See also *Ford*, 477 U.S., at 406. Rather, the Eighth Amendment also "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). When determining whether a particular punishment comports with those evolving standards, we must look at "objective factors to the maximum possible extent," *Rummel* v. *Estelle*, 445 U.S. 263, 274–275 (1980), the "clearest and most reliable" of which "is the legislation enacted by the

country's legislatures," *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989).

Third and finally, "the Constitution contemplates that in the end our own judgment will be brought to bear on the acceptability of the death penalty under the Eighth Amendment." *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality op.). Accord *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982) ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty"). See also *Thompson* v. *Oklahoma*, 487 U.S. 815, 833, n. 40 (1988). Both the determinations made by common law sources and the evidence presented by contemporary statutes are informative. Thus, the confluence thereof acts as a guidepost that will aid us in our own judgment of whether the Eighth Amendment shields from execution a prisoner whose mental illness prevents him from remembering the crime for which he was convicted.

A

We begin, then, with the early common law. As previously said, in order to determine whether executing an individual whose mental illness robs him of his memory and diminishes his comprehension of his situation violates the Eighth Amendment, it would be helpful to understand how the principal framers of the Amendment intended its language to be interpreted. The Eighth Amendment's prohibition of cruel and unusual punishment was adopted verbatim from the English Bill of Rights of 1689. 1 W. & M., 2d sess., c. 2. Thus, to interpret the meaning of the Cruel and Unusual Punishment Clause as its framers envisioned,

we must consult common law sources from the seventeenth and eighteenth centuries and ascertain what punishments were cruel and unusual at common law.

Indeed, this Court has regularly undertaken this kind of Eighth Amendment analysis. In *Ford* v. *Wainwright*, 477 U.S. 399 (1986), we held that the Eighth Amendment bars the State from executing a prisoner who is insane. The *Ford* Court cited a number of early common law sources, all of which indicated that the laws of those times likewise prohibited such a punishment. *Ford*, 477 U.S., at 406–408; *id.*, at 419–421 (Powell, J., concurring). We also consulted common law sources in: *Penry* v. *Lynaugh*, 492 U.S. 302, 330–334 (1989) (holding that the execution of the mentally retarded does not violate the Eighth Amendment; overruled in *Atkins* v. *Virginia*, 536 U.S. 304 (2002)); *Stanford* v. *Kentucky*, 492 U.S. 361, 368–369 (1989) (holding that the execution of sixteen- and seventeen-year-olds does not violate the Eighth Amendment; overruled in *Roper* v. *Simmons*, 543 U.S. 551 (2005)). See also *Thompson* v. *Oklahoma*, 487 U.S. 815, 864 (1988) (Scalia, J., dissenting); *Atkins* v. *Virginia*, 536 U.S. 304, 340–341 (2002) (Scalia, J., dissenting); *Panetti* v. *Quarterman*, 551 U.S. 930, 980–981 (2007) (THOMAS, J., dissenting).

1

Turning to the early common law regarding the mentally ill, it is worth noting that the terms "dementia," "mental disease," and "mentally ill" either were not used in the same sense as today or were simply not included in the era's lexicon. Instead, "lunatic"—hoary though it may now be—was most commonly used, in addition to the Latin "*non*

compos mentis" (literally, "not of sound mind").[1] Nonetheless, the common law afforded lunatics and the *non compos mentis* much the same qualities that we might afford persons afflicted with a mental illness today. For example, the common law grouped lunatics, as well as other individuals who have lost (fully or partially) their cognitive functioning to a mental disease, under the legal definition of *non compos mentis*. The influential William Blackstone in 1769 wrote:

> "A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not. . . . But under the general name of *non compos mentis* . . . are comprized not only lunatics, but persons . . . who lose their intellects by disease . . . or such, in short, as are by any means rendered incapable of conducting their

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[1] It appears from Matthew Hale's *Pleas of the Crown* that, while the word "dementia" was in fact used at common law, it was used more loosely than today and was still referred to in the italicized, Latin context. It seemed to serve as an umbrella term for all cognitive impairments—whether caused by a mental disease or not—including all ranges of intellectual or memory decline and all types of defects in the ability to reason. See 1 Matthew Hale, *Pleas of the Crown* 29 (1st ed. 1736): "Now concerning another sort of defect or incapacity, namely *ideocy*, *madness*, and *lunacy* . . . and this defect comes under the general name of *Dementia*, which is thus distinguished" (italics in original).

However, as one might imagine, the more contemporary terms "mental disease," "mentally ill," and the like were seldom, if ever, used at early common law.

> own affairs." 1 William Blackstone, *Commentaries on the Laws of England* *294 (1769) (internal citation omitted) (hereinafter Blackstone).

Blackstone was not the first to illustrate the legal standing of lunatics and the *non compos mentis*. Indeed, as early as 1628, Sir Edward Coke placed four classes of individuals under the scope of *non compos mentis*: those who have had a defect of understanding since birth ("ideots"); those "that by sickness, griefe, or other accident, wholly loseth [their] memorie[s] and understanding"; those "that hath sometime [their] understanding and sometime not . . . and therefore [they are] called *non compos mentis*, so long as [they] hath not understanding" ("lunatique[s]"); and "drunkard[s]", who have impaired their own intellectual capacities for a short period of time; 1 Sir Edward Coke, *Institutes of the Lawes of England* 247 (Lib. 3 § 405) (1st ed. 1628) (hereinafter Coke). See also Samuel Polsky, *Present Insanity – From the Common Law to the Mental Health Act and Back*, 2 VILL. L. REV. 504, 506–510 (1957) (further discussing the meanings and applications of "*non compos mentis*" and "lunatique" at common law).

Turning now to the competency of such persons, it is evident that the common law exculpated both lunatics and the *non compos*. Coke in 1644 first expounded this notion of reprieve for idiots, lunatics, and the like. He plainly wrote that "a man *non compos mentis* shall not answer for a Felony or a Treason by him committed, nor shall suffer exe-

cution for them." 3 Coke 225 (1st ed. 1644).[2] Some decades later, William Hawkins reaffirmed Coke's statements, writing that "those who are under a natural Disability of distinguishing between Good and Evil, as Infants, . . . Ideots and Lunaticks, are not punishable by any criminal Prosecution whatsoever." 1 William Hawkins, *Pleas of the Crown* 2 (2nd ed. 1716) (hereinafter Hawkins). Hawkins further stated that "if one who has committed a capital Offence, become *Non Compos* after Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed." *Ibid*.

Perhaps the clearest statement of immunity from punishment, however, came from Blackstone. Blackstone succinctly echoed Hawkins, writing that:

> "Another cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award of execution. . . . [T]hough a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after

[2] A separate (and somewhat peculiar) area in which prisoners who were *non compos* were exempted from punishment was suicide. Coke wrote that "[i]f a man lose his memory by the rage of sickness or infirmity, or otherwise, kill himself while he is not *compos mentis*, he is not *Felo de se*" (a "felon of himself"). 3 Coke, at 54. Since such a *non compos* individual "cannot commit murder upon another, so in that case he cannot commit murder upon himself." *Ibid* (internal citation omitted). Put differently, *non compos mentis* already immunized individuals against being convicted or punished for murder. Since the early common law considered suicide as simply a different form of murder, one likewise could not be convicted or punished for murdering oneself.

> indictment, he shall not be convicted; if after conviction, he shall not receive judgment; [and] if after judgment, he shall not be ordered for execution." 4 Blackstone, *388–*389.

In much the same sense, Blackstone also wrote that "if a man in his sound memory commits a capital offence . . . [but] if, after judgment, he becomes of nonsane memory, execution must be stayed." *Id.*, at *24. Offering support for both passages, Blackstone explained that "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Id.*, at *24–*25 (internal citation omitted).

2

The mutual sentiment among these sources well establishes that, at common law, lunatics and persons *non compos mentis* were spared from suffering punishment, especially a punishment of death. And while today we might regard the use of "lunatic" or "*non compos*" as inappropriate for a legal class of individuals, we have embodied their meanings into more suitable classifications: the "mentally ill," the "cognitively impaired," and the like.

Take Petitioner in our case here, for instance. Petitioner suffers from vascular dementia and retrograde amnesia. The former has diminished his intellectual abilities, the latter has obstructed his memory to a great extent, and the two in tandem have inhibited his ability to come to grips with the world around him. At common law, any sensible layman would have classified Petitioner as "*non compos*" or a "lunatic" based on the effects of his mental illnesses. Blackstone wrote that "[a] lunatic, or *non compos*

mentis, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason." 1 Blackstone *294. Petitioner—and other prisoners like him—certainly could be said to have possessed his reason and understanding at some point, but by stroke or "[mental] disease" no longer retains his ability to understand fully his situation and the circumstances of his punishment.

Similarly, prisoners suffering from severe dementia, Alzheimer's Disease, and other significant memory impairments possess a degree of recollection and reason sometimes and are without their memory and reason at other times. At common law, such persons would also be lunatics. See, *e.g.*, 1 Blackstone, at *294: "A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not"; 1 Hawkins, at 2, n. 2 (7th ed. 1795): Lunacy was "a partial derangement of the intellectual faculties, the senses returning at uncertain intervals" (accord *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989) (quoting the same)); 1 Matthew Hale, *Pleas of the Crown* 30 (1st ed. 1736): "[A]ccidential *dementia*, whether total or partial, is distinguished into that which is permanent or fixed, and that which is interpolated, and by certain periods and vicissitudes: . . . the latter is that, which is usually call'd *lunacy*" (italics in original).

If criminals who are afflicted with a mental illness which robs them of much of their memory and reason would have been classified as lunatics or *non compos mentis* at common law, it follows that such criminals likewise would have been spared from suffering a punishment of death for their crimes. Respondent contends that "there is no . . . common law prohibition on the punishment of someone who cannot recall committing a crime." See Brief for Respondent 28–32. We disagree. In the face of such overwhelming

evidence from a consensus of common law sources, we are compelled to conclude that the common law did indeed shield from execution prisoners who suffered from a mental illness which deprived them—in full or in part—of their memory and reason.

B

Having found that the common law prohibited the execution of the mentally ill, we move now to the second prong of our Eighth Amendment analysis test: determining whether our "evolving standards of decency that mark the progress of a maturing society" still agree with that common law sentiment from many decades ago. *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). In doing so, we must consult "objective indicia that reflect the public attitude toward a given sanction." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.). Chief among these indicia are the "[state] statutes passed by society's elected representatives." *Stanford* v. *Kentucky*, 492 U.S. 361, 370 (1989). Recognizing that several "acceptable" punishments used many years ago are no longer permissible under contemporary standards, this Court has routinely employed this type of external, legislative analysis in capital punishment cases. See, *e.g.*, *Coker* v. *Georgia*, 433 U.S. 584, 593–596 (1977) (finding that the State of Georgia was the only state to allow a punishment of death for the crime of rape); *Enmund* v. *Florida*, 458 U.S. 782, 789–793 (1982) (finding that only eight states permitted the punishment of death for a criminal who did not commit, did not attempt to commit, and did not intend to commit murder); *Ford* v. *Wainwright*, 477 U.S. 399, 408–410 (1986) (finding that no state permitted the execution of the insane); *Atkins* v. *Virginia*, 536 U.S.

304, 313–317 (2002) (finding that a significant number of states had passed laws prohibiting the execution of the mentally retarded since the Court had last addressed the issue in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)); *Roper* v. *Simmons*, 543 U.S. 551, 564–567 (2005) (finding that a significant number of states had passed laws prohibiting the execution of minors since the Court had last addressed the issue in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989)).

Factored into our assessment of our society's contemporary standards must be the second question presented in the case here before us:

> Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

Verbose though it may be, the question draws our attention specifically to this second prong of Eighth Amendment assessment and instructs us to answer whether our society's evolving standards of decency now forbid the execution of Petitioner and others like him who have a severe mental illness which inhibits their memory and cognitive functions.

We move now to our society's evolving standards of decency with regard to the severely mentally ill. When Petitioner was first convicted of capital murder in 1986, this Court had only just levied its decision in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), which barred the execution of

the insane. At the time, "no State in the Union permit[ted] the execution of the insane." *Ford*, 477 U.S., at 408 (internal citation omitted). However, that same unanimity against executing the insane evidently had not yet been extended to executing the mentally ill. Indeed, only three states at the time prohibited the execution either of those with a severe mental disease or of those who cannot understand why the death penalty was being imposed upon them. Finally, only twelve states had abolished the death penalty—two of which (Massachusetts and Rhode Island) had done so just two years prior to *Ford*.

Since then, the degree of change is striking. What has ensued in the years since *Ford* is a steady procession of states that have banned the execution of persons who, as a result of a mental illness, are incapable of understanding the consequences of the death penalty and why they are being put to death. Immediately following *Ford*, five states amended their respective statutes and codes to prohibit the execution of those who cannot rationally understand the circumstances of their execution because of a mental disease.[3] Eight states did so in the 1990s.[4] Another four did so in the 2000s.[5] Furthermore, an additional eight states abolished the death penalty entirely beginning in 2007.[6]

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[3] Nebraska (1986), Arkansas and Wyoming (1987), Georgia (1988), and Missouri (1989).

[4] Montana (1991), Arizona (1993), Kansas (1994), Kentucky, Ohio, and Oklahoma (1998), and Oregon and Texas (1999).

[5] Colorado (2002), Louisiana (2004), and Mississippi and South Dakota (2008).

[6] New Jersey and New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), and Washington (2018).

Thus, as it stands now, twenty states have categorically abolished the death penalty.[7] Of the thirty states that permit capital punishment, twenty have statutorily banned the execution either of those with a mental illness or of those who cannot rationally understand the circumstances of their execution by virtue of a mental disease.[8] See Appendix A, *infra* at 41–47, for a table and accompanying notes. This leaves only ten states in the Union—of which the State of Alabama, Respondent in this case, is one—which permit the execution of a prisoner who has a mental disease.[9] See Appendix B, *infra* at 48–49, for a table and accompanying notes. However, it is worth noting that all but one of those

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[7] Alaska, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Washington, and Wisconsin.

[8] ARIZ. REV. STAT. ANN. § 13–4021 *et seq*. (2010); ARK. CODE ANN. § 16–90–506(d)(1)(B)(ii) (West 2008); COLO. REV. STAT. ANN. § 18–1.3–1402 *et seq*. (West 2013); FLA. STAT. §§ 922.07(1) and 922.07(3); GA. CODE ANN. § 17–10–60 *et seq*. (West 2014); KAN. STAT. ANN. § 22–4006(d) (2016); KY. REV. STAT. ANN. §§ 431.213 and 431.240.2 (2017); LA. STAT. ANN. § 15:567.1 *et seq*. (2016); MISS. CODE ANN. § 99–19–57 *et seq*. (2017); MO. REV. STAT. § 552.060(1) (2016); MONT. CODE ANN. § 46–19–202(2) (2017); NEB. REV. STAT. § 29–1822 (2016); NEV. REV. STAT. § 176.455(1) (2015); N.C. GEN. STAT. § 15A–1001(a) (2017); OHIO REV. CODE ANN. § 2949.29(B) (West 2016); OKLA. STAT. § 22–1008 *et seq*. (2017); OR. REV. STAT. § 137.463(6) *et seq*. (2015); S.D. CODE § 23A–27A–24 (2017); TEX. CODE CRIM. PRO. § 46.05 *et seq*. (2017); WYO. STAT. ANN. § 7–13–902(f) (2017).

[9] Alabama, California, Idaho, Indiana, New Hampshire, Pennsylvania, South Carolina, Tennessee, Utah, and Virginia.

ten states qualify "mental disease," "mental illness," "mental impairment," or some language of the like as a *mitigating* factor for juries to consider when deciding whether to recommend a sentence of death.[10] Put differently, even in the ten states that allow the execution of the mentally ill, nine posit that the manifestation of a "mental illness,"[11] the presence of "mental or emotional disturbance,"[12] or an impairment of the defendant's ability to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law"[13] ought to "militate in favor of a lesser penalty" than death. See *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983) (internal citation omitted).

Respondent again claims that "[t]here is not a shred of legislative evidence that [Petitioner's] execution would flout contemporary 'standards of decency,'" and that "not one State has proscribed the use of capital punishment against prisoners with dementia-induced memory loss." Brief for Respondent 32. We again disagree. Today, forty states have

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[10] California is the only state in the Union which neither prohibits the execution of the mentally ill nor lists mental disease, mental impairment, etc., as a mitigating factor at sentencing.

[11] IDAHO CODE § 19–2523 (2017); IND. CODE § 30–50–2–9(c)(6) (2016).

[12] ALA. CODE § 13A–5–51 *et seq*. (2016); N.H. REV. STAT. ANN. § 630:5(VI)(f) (2016); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (2016); S.C. CODE ANN. § 16–3–20(C)(b)(2) (2017); TENN. CODE ANN. § 39–13–204(j)(2) (2017); UTAH CODE ANN. § 76–3–207(4)(b) (West 2017); VA. CODE § 19.2–264.4(B)(ii) (2017).

[13] ALA. CODE § 13A–5–51 *et seq*. (2016); N.H. REV. STAT. ANN. § 630:5(VI)(a) (2016); 42 PA. CONS. STAT. ANN. § 9711(e)(3) (2016); S.C. CODE ANN. § 16–3–20(C)(b)(6) (2017); TENN. CODE ANN. § 39–13–204(j)(8) (2017); UTAH CODE ANN. § 76–3–207(4)(d) (West 2017); VA. CODE § 19.2–264.4(B)(iv) (2017).

barred the execution either of those with a mental illness or of those who have an inability to understand the consequences of the death penalty and why it is being administered to them. Of the remaining ten states, only one does not list mental disease or its consequences as a mitigating factor at sentencing. It therefore follows that forty-nine of our fifty United States either prohibit or look with disdain upon the execution of a prisoner whose mental illness prevents him from remembering the offense for which he was convicted or understanding the circumstances of his execution.

It is true that states which have abolished the death penalty outright do not have statutes which bar the execution specifically of the mentally ill. Thus, one might argue that these states skew the number of states which explicitly prohibit the execution of the mentally ill, and ought not to be included in the tally.

But this argument is nonsensical. In *Roper* v. *Simmons*, 543 U.S. 551 (2005), we confronted an identical argument in regard to states which had banned the execution of juveniles. See *Roper*, 543 U.S., at 610–611 (Scalia, J., dissenting). That issue was first brought before this Court in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989). The *Stanford* Court found that only twelve states in 1989 banned the imposition of the death penalty upon those who were sixteen or seventeen years old. *Stanford*, 492 U.S., at 370–372. The *Stanford* Court did not, however, include in its tally the states which had banned capital punishment in its entirety. *Ibid*. Addressing the same question sixteen years later of whether the Eighth Amendment prohibits the execution of juveniles, the *Roper* Court admonished the *Stanford* Court's exclusion of states which had fully abolished capital punishment. See *Roper*, 543 U.S., at 575: "It should be observed,

furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty" (internal citation omitted). The *Roper* Court asserted that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Ibid*.

This reasoning has by no means lost its veracity. States which have abolished the death penalty in full evidently hold that the execution of *any* person—competent or incompetent—comports with neither the Eighth Amendment, our society's progressing standards of decency, nor the foundational principles that form the bedrock of our Constitution. In the same vein, such States would hold that the execution of any prisoner, whether he be suffering from a mental disease or not, is unfitting and impermissible. It therefore follows that we must include those states which have categorically abolished the death penalty in our tally of states which prohibit the execution of the mentally ill.

It is statistically significant that forty states currently forbid the execution a prisoner who either has a mental illness or who—by virtue of a mental illness—is incapable of understanding the nature of the death penalty and why it is being imposed. Additionally intriguing is the fact that nine of the remaining ten states place mental illness as a mitigating factor at sentencing. In other words, only *one* state—California, ironically—does not seem to furnish mental illness with any sort of alleviating property under the law. It is therefore clear that the "ancestral legacy" of the common law's prohibition of executing the mentally ill "has not outlived its time." *Ford* v. *Wainwright*, 477 U.S. 399, 408 (1986). Guided by this assessment, we conclude that our

nation's evolving standards of decency pointedly indicate that capital punishment may not be administered to a prisoner whose mental illness inhibits his ability to comprehend the link between his crime and the objectives of his punishment.

C

The empirical evidence from both our common law heritage and our contemporary standards is illuminating. Nonetheless, this Court is duty-bound under the Constitution to levy its "own judgment . . . on the acceptability of the death penalty under the Eighth Amendment" regarding a particular class of individuals. *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality op.). Accord *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982). In making our independent judgment, we often attempt to square the penological objectives of the death penalty with the distinctiveness of a "category of defendants defined by their mental state." *Ford* v. *Wainwright*, 477 U.S. 399, 419 (1986) (Powell, J., concurring). This Court has long since "identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty."[14] *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.)). Thus, to ascertain our own, proper judgment in the case presently before us, we must establish whether the

[14] We have looked to retribution and deterrence in every case in which we exempted a class of individuals from execution. See *Ford* v. *Wainwright*, 477 U.S. 399, 421–422 (1986) (Powell, J., concurring); *Thompson* v. *Oklahoma*, 487 U.S. 815, 833–838 (1988); *Atkins* v. *Virginia*, 536 U.S. 304, 317–321 (2002); *Roper* v. *Simmons*, 543 U.S. 551, 571–574 (2005).

execution of the mentally ill serves both a valid deterrent and retributive purpose. In short, we hold that it does not.

1

The first penological objective of capital punishment is its deterrent effect. The theory of deterrence is based on the idea that the gravity of the death penalty dissuades would-be offenders from committing capital crimes, lest they face the harshness of death. Accord *Atkins*, 536 U.S., at 320. The question therefore becomes: whether executing a prisoner who has a mental illness dissuades other persons afflicted with a mental disease from potentially committing capital crimes. However, we are not persuaded that anyone could suitably answer such a question.

Petitioner attempts to answer "no." In his Brief, Petitioner equates a prisoner who has dementia with a person who is incompetent to be executed under the presumption that both lack a rational understanding of the death penalty and the reason for its imposition. Since this Court "made it plain" that putting an incompetent person to death "provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment," Petitioner therefore argues that executing a person with dementia likewise undercuts the goal of deterrence. Brief for Petitioner 28 (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 407 (1986)).

But we hesitate to liken a prisoner afflicted with a mental illness—as broad as that may be—to an insane prisoner under *Ford* on the grounds that neither party is deterred from capital crime if executed. "Mental disorder" is an incredibly broad term that encompasses an exhaustive list of illnesses affecting one's cognition, memory, intellectual

capacity, behavior, personality, development, etc. Indeed, the APA's DSM–5 lists twenty-one different groups of mental illnesses and defines each group by the characteristics of the mental disorders it contains. See APA, DSM–5, at vi–vii. These groups include, *inter alia*, everything from schizophrenic and psychotic disorders, to neurocognitive and memory disorders, to depressive and bipolar mood disorders, to eating and substance-related disorders, to more common disorders like ADHD, obsessive-compulsive disorder, sleep abnormalities, anxiety, and the like.

Needless to say, the description "mental illness" is in fact hardly descriptive at all. Because of its great ambiguity, we are wary of transposing "mental illness" into the discussion of deterrence in capital sentencing. Petitioner zeroes in on dementia and similar *memory* disorders. But such memory disorders ought not to affect the cost-benefit analysis made by a criminal when he elects to commit a capital crime. This Court has held that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." *Enmund* v. *Florida*, 458 U.S. 782, 799 (1982). If we embrace this view, we must subscribe to the idea that, when debating whether to commit a capital offense, a potential offender balances his reasons for committing the crime against the absoluteness of the death penalty. But a mental disorder that impairs only one's memory, such as general dementia or amnesia, could not be said to impair the "cold calculus that precedes the decision" of whether to commit a capital offense. *Gregg* v. *Georgia*, 428 U.S. 153, 186 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.). Nor are a handful of other mental illnesses, such as eating disorders, ADHD and OCD, anxiety, etc., likely to obstruct the cognitive decision-making process that goes before the commission of a capital crime. Perhaps mental

illnesses that do affect one's thought processes, such as schizophrenia, Alzheimer's disease, bipolar disorder, antisocial personality disorder, and the like, would inhibit that complex decision-making process. But it is not persuasive to say that any and all mental diseases obstruct a potential offender's cold calculus to such an extent that the value of deterrence in capital sentencing is not met. And to qualify mental disease to include only those illnesses which inhibit intellectual functioning is impractical—such a wild goose chase would involve questions concerning what constitutes sufficient intellectual impairment under the law, which mental illnesses meet that requirement, upon what standard could a diagnosis be introduced, how different would such a standard be from the insanity standard in *Ford*, etc., all of which are hardly answerable under the law.

But Respondent for its part also fails to offer a convincing argument. In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), when we barred the execution of the mentally retarded, we noted that the value of deterrence in capital sentencing is lessened for criminals afflicted with the "same cognitive and behavioral impairments that make . . . defendants less morally culpable." *Atkins*, 536 U.S, at 320. These types of impairments "make it less likely" that criminals "can process the information of the possibility of execution as a penalty, and as a result, control their conduct based upon that information." *Ibid*. Respondent contends, however, that "this logic applies only to cognitive impairments that have taken hold *before* an offender has committed a capital crime." Brief for Respondent 38 (emphasis added). In contrast to minors and the mentally retarded, criminals who develop cognitive impairments *after* their commission of a crime "do not form a class of persons who are 'less likely to consider potential punishment' when deciding whether to

commit a capital offense." *Id*., at 39 (quoting *Miller* v. *Alabama*, 567 U.S. 460, 472 (2012)).

This contention may seem plausible on its face. Indeed, juveniles—who are immature and whose frontal lobes have not yet fully developed—and the mentally retarded—who suffer from an intellectual disability and diminished decision-making capabilities from birth—carry with them their cognitive impairments before and during the commission of their crime. But arguably the most pitiful class of individuals which we have excused from suffering death do not fall into this same category. Insane persons, whose cognitive impairments often extend far beyond those of juveniles and the mentally retarded, do not necessarily bear the burden of their insanity at the time of their commission of the offense. Take, for example, a young adult with schizophrenia or a psychotic disorder, but who has yet to be diagnosed. Suppose this young adult commits a capital crime but does so before the onset of delusional symptoms. Appearing fully functional, he is convicted and sentenced to death.

By the time his execution date is set, however, his psychotic disorder will have been given ample time to manifest itself, in all its monstrosity. Indeed, decades after his criminal act, his mental disease may render him utterly delusional, insane under *Ford*, and therefore incompetent to be executed. This scenario is not unlike that of Alvin Bernard Ford, the petitioner in *Ford*, who was sane when he committed his crime but was diagnosed with psychosis and delusions after being sentenced to death. Executing Mr. Ford, as we held in *Ford*, would provide no deterrent effect whatsoever to other delusional would-be offenders. The same might be said to apply to our hypothetical young adult, whose condition—and sanity—would progressively worsen over the years.

Were we to apply Respondent's argument to our young adult, however, his execution *would* still provide a valid deterrent effect simply because he committed his crime before his mental afflictions rendered him incompetent. This misses the point of deterrence. General deterrence posits that by executing a criminal from a group of persons, all other persons in that group are dissuaded from committing the same crime. But if the thought processes of each person in a group are so impaired that they cannot appropriately weigh the consequences of the death penalty, deterrence is not served. Put differently, executing the insane does not discourage other insane persons from committing a capital offense. Nor does executing juveniles or minors. But the value of general deterrence does not hinge on the manifestation of a cognitive impairment *before* the commission of a crime. Thus, Respondent's contention falls short.

But all these arguments with respect to deterring the mentally ill presuppose the efficacy of deterrence itself. Indeed, the actual deterrent value of capital punishment has been hotly contested since even the early common law.[15] Those who subscribe to the usefulness of deterrence assume

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[15] See Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 61–62, n. 3–11 (1975) (giving an expansive list of studies involving whether the death penalty provides a deterrent effect). See also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Y.L.J. 85 (2004); John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Jonathan F. Mitchell, *Capital Punishment and the Courts*, 130 HARV. L. REV. 269 (2017).

that capital offenders (1) take notice of the gravity of the death penalty and upon whom it is imposed, (2) take time before committing their crime to reflect on the consequences of the death penalty, (3) weigh those consequences against whatever objective they might see in committing their offense, and then (4) decide that the penalties they would have inevitably faced outweigh their reasons for committing the crime.

This seems like a logical path that a capital offender might travel. But nothing about the commission of a capital crime is logical. How are we to decide correctly if a capital offender is reasonable enough to deliberate on such a thought process, or is simply evil and immune from any sensible decision-making? How can we so precisely place ourselves inside the ruminations of a capital offender that we truly determine whether such a rational, sound assessment of the deterrent value of the death penalty ever crosses his mind? Yet the effectiveness of deterrence necessitates that we do just that—a dangerous proposition at the very least.

With these concerns in mind—and given the fact that neither party in this case presents an overly convincing argument—we hesitate to declare with certainty whether the execution of a mentally ill prisoner does or does not provide a valid deterrent effect.

2

The second justification for capital punishment, retribution, yields a far simpler analysis in the context of the mentally ill. Retribution is "an expression of society's moral outrage at particularly offensive conduct." *Gregg* v. *Georgia*, 428 U.S. 153, 183 (joint op. of Stewart, Powell, and Stevens,

JJ.). When an offender wrongs a community, the community exacts its vengeance upon that offender by ensuring that he receives his "just deserts" and by imposing a punishment with a severity comparable to the crime that was committed. *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982). If the community via a jury feels that capital punishment is warranted, the community necessarily demonstrates that "the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti* v. *Quarterman*, 551 U.S. 930, 958 (2007). It might be said that the inherent aim of retribution is the expectation of an offender to reflect on his offenses, to appreciate the wrongfulness of his conduct, and to understand that his punishment is an expression of vindication espoused by the community he wronged. Accord *Panetti*, 551 U.S., at 958 ("[C]apital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime"). Retribution therefore "depends on the defendant's awareness of the penalty's existence and purpose." *Ford* v. *Wainwright*, 477 U.S. 399, 421 (Powell, J., concurring).

But executing a prisoner whose mental illness prevents him from remembering the crime for which he was convicted cannot be said to serve this aim of retribution. Such a prisoner does not have an "awareness" of the death penalty's *purpose* simply because he no longer has the ability to recall the crime he committed. It is that very crime on which he is supposed to be reflecting and because of which the community exacts its vengeance. Respondent on this point insists that a criminal's "failure to independently recall committing his crime does not prevent him from possessing an understanding of his crime and sentence that corresponds to the conception of the community as a whole." Brief for Respondent 36. Respondent therefore contends that a prisoner need

not retain the memory of his crime to satisfy the aim of retribution that a criminal recognize the heinousness of his conduct and understand the community's subsequent call for vindication. But this argument comes up short. To say that someone who does not comprehend a certain concept nevertheless understands fully the effects that follow from that concept is questionable, at best.

Suppose I sit down to try my hand at an old calculus problem. Upon reading the question, I recall learning about this type of arithmetic some time ago, but due to many years of absence from calculus I no longer remember the formulas I must use and, most importantly, how I must solve the problem. Imagine that I am then given the answer to the problem. While I might now recognize what the end solution to the problem is, I cannot say that I have an adequate understanding of *how* one comes to that conclusion. In essence, because I no longer remember what kind of calculus problem it is, what formulas it requires, and how I must use those formulas to obtain the answer, the solution becomes entirely meaningless as I could not replicate the procedure on any similar question. Indeed, I would not be able to "show my work," perhaps the most critical portion of a math problem.

It is the recognition of the type of math problem that forms the foundation on which I may build up. Assuming I am a competent math student, once I know the form of the math problem, I then may choose the necessary formulas, plug in the appropriate values, and ultimately calculate my final answer. But a failure to remember what type of math problem I am faced with collapses the entire structure. Such is the same with the understanding of why a community exacts its vengeance upon a criminal who did wrong. If the criminal fails to remember his base offense, it cannot be said

that simply telling him he is being executed because of his crime enables him to share in the understanding of the members of the community who *do* remember his offense. A prisoner who does not remember the facts of his crime or the legal proceedings that followed cannot appreciate the criminality of his actions or fully comprehend the reasons for which his community is handing down retribution. The *Panetti* Court said it best:

> "The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called into question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S., at 958–959.

Petitioner—and others like him—whose mental illness prevents him from remembering his crime plainly fit within this standard. Retribution carries with it a vital meaning: to ensure a maximum level of justice and "community vindication," a prisoner must recognize the unlawfulness of his actions to the same extent as that of society. But retribution is less meaningful if the prisoner cannot remember his crime and therefore share to the same degree in the understanding of the impropriety of his actions as does his community. Thus, the execution of a prisoner whose mental illness prevents him from remembering his crime does not serve a valid retributive purpose.

III

We have established that the execution of a prisoner who cannot remember his crime due to a mental disease was prohibited at common law. Nearly all our state legislatures today likewise indicate that executing such a prisoner does not comport with the "evolving standards of decency that mark the progress of [our] maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). Furthermore, the execution of such a prisoner does not adequately contribute to a community's quest for retribution, and its deterrent effect is incredibly flimsy, at best. Since such an execution does not "contribute[] to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,'" and hence prohibited under the Eighth Amendment. *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002) (quoting *Enmund* v. *Florida*, 458 U.S. 782, 798 (1982)).

It must be said that the Eighth Amendment does not protect any and all mentally ill prisoners from execution. A mental disease may manifest itself in a plethora of ways and with a wide range of severity. As we discussed earlier, the execution of a prisoner whose mental illness is so mundane that it does not measurably detract from his quality of life cannot be said to run counter to the protections guaranteed by the Eighth Amendment. See *supra*, at 24–26. Only a mental illness that considerably hampers a prisoner's ability to recognize the link between his crime and punishment might be said to incur Eighth Amendment protection. See *Ford* v. *Wainwright*, 477 U.S. 399, 417 (1986) (plurality op.) ("It 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 [death] penalty or its implications"). Our final task then is to

determine whether this conclusion comports with the competency standards this Court set forth in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). We hold that it does.

A

In *Ford*, this Court held that the Eighth Amendment prohibits the execution of the insane (or, the "incompetent"). Admittedly, however, the *Ford* Court did not outline a precise test for determining competency. See *Panetti*, 551 U.S., at 957 ("The opinions in *Ford*, it must be acknowledged, did not set forth a precise standard for competency. The four-Justice plurality discussed the substantive standard at a high level of generality; and Justice Powell wrote only for himself when he articulated more specific criteria"). Furthermore, the *Ford* Court's discussion of its competency standard was not carried out in the majority opinion. Procedurally speaking, "[w]hen there is no majority opinion, the narrower holding controls." *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Because Justice Marshall in his plurality opinion only vaguely discussed his test for competency, and because Justice Powell's concurrence provided narrower holdings on both the competency test and an unrelated procedural matter, Justice Powell's concurrence carried the day. Accord *Panetti*, 551 U.S., at 949.

Justice Powell wrote that the goal of retribution in capital punishment is realized "[i]f the defendant perceives the connection between his crime and his punishment." *Ford*, 499 U.S., at 422 (Powell, J., concurring). He further stressed that "only if the defendant is aware that his death is approaching can he prepare himself for his passing." *Ibid.* Thus, Justice Powell outlined his competency test as

follows: "[T]he Eighth Amendment forbids the execution only of those who are unaware of the punishment they are to suffer and why they are to suffer it." *Ibid*. Put differently, the *Ford* Court's competency standard dictated that a prisoner who has no awareness of either his impending death or the reasons he is being put to death is incompetent to be executed.

Twenty-one years later, this Court faced the case of Scott Louis Panetti, a capital offender plagued by "a fragmented personality, delusions, and hallucinations." *Panetti*, 551 U.S., at 936 (internal citation omitted). The question on the merits presented before the *Panetti* Court was "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the mental capacity to understand that he is being executed as a punishment for a crime." *Id*., at 954 (internal citation and quotation marks omitted).

Had the *Panetti* Court answered this question in full, it is plausible that we would not be faced with the case presently before us. Sadly, it did not. It also declined to "set down a rule governing all competency determinations." *Id*., at 960–961. It did, however, shed light on the extent of the competency standard set out in *Ford*. The critical issue with Mr. Panetti in the context of his competency hinged on *why* he thought the State of Texas sought to execute him. Mr. Panetti was consciously *aware* that he was to be put to death, but his delusions prevented him from understanding that his execution was punishment for his crime. In fact, Mr. Panetti's mental state was so impaired that he thought all his legal proceedings to date were "part of spiritual warfare . . . between the demons and the forces of darkness[,] and God and the angels and the forces of light." *Id*., at 954 (quoting the record) (internal citation omitted). When asked why

he thought he was being executed, Mr. Panetti responded that Texas' reason is a "sham" and that his execution was actually "to stop him from preaching." *Id.*, at 955 (quoting the record) (internal citation omitted).

Nevertheless, the Fifth Circuit Court of Appeals found Mr. Panetti competent to be executed under *Ford*. The Fifth Circuit held that Mr. Panetti is aware "that he [is] going to be executed and why he [is] going to be executed," and that he therefore meets the *Ford* competency standard. See *Panetti* v. *Dretke*, 448 F. 3d 815, 819 (5th Cir. 2006). On appeal, however, we stressed that the Fifth Circuit employed "too restrictive" a test under *Ford* in finding Mr. Panetti competent. *Panetti*, 551 U.S., at 956. Specifically, the Fifth Circuit utterly ignored Mr. Panetti's delusions and determined that his only requisite quality was simply his *awareness* of the stated reasons for his execution. But "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Id.*, at 959. Thus, since Mr. Panetti's delusions prohibited him from rationally understanding the reasons for his death sentence, his awareness of his punishment did not itself render him competent to be executed.

This completes the rendition of the competency standard as it stands today. A simple awareness of one's punishment and the stated reasons for that punishment is not enough. Under *Ford* and *Panetti*, a prisoner must also rationally understand why he is being sentenced to death.

B

Our conclusion—that it is cruel and unusual to execute a prisoner whose mental illness prevents him from remembering the crime for which he was convicted and

understanding the reasons for his execution—plainly fits hand in hand with the *Ford* and *Panetti* standard. In any logical assessment of the relationship between a concept and its consequences, a failure to remember the concept itself does not allow for a reasonable comprehension of what the concept does or why it is important. See *supra*, at 32–33. So it is with Petitioner: his failure to remember his crime prohibits him from having a fully-fledged comprehension of why he is being sentenced to death—and certainly from having a level of understanding equal to that of his community, as the retributive goal of capital punishment requires.

Again, it is not practical to hold that the Eighth Amendment prohibits the execution of *all* mentally ill prisoners. See *supra*, at 34. Some mental illnesses do not impair one's ability to rationally understand the circumstances of, and reasons for an execution. Nor is it practical to attempt to outline a standard governing which mental illnesses do and do not sufficiently impair that rational understanding. Doing so would give "talismanic importance" to a prisoner's mental health diagnoses and would inject a "shifting, debatable, and subjective" field inebriated with "'subtleties and nuances'" into the already shifting, subjective field of criminal law. Brief for Respondent 41–42 (quoting *Addington* v. *Texas*, 441 U.S. 418, 430 (1979)). See also *supra*, at 26–27.

We need not subscribe to such a broad holding, however. We have already determined that the incompetency of a prisoner whose mental illness prevents him from remembering his crime runs in tandem with the competency standard evinced in *Ford* and *Panetti*. The importance is not *what* a prisoner is afflicted with. The importance is not whether a prisoner is insane or has a mental illness. The critical factor is whether a prisoner does or does not comprehend the reasons for his execution. Thus, we hold that the

Eighth Amendment prohibits the execution of a prisoner who cannot rationally understand the nature of the death penalty and why he is being put to death—whether that be by virtue of outright insanity, a mental disease or defect, or any other factor that so impairs a prisoner's ability to comprehend the link between his crime and punishment. The execution of such a prisoner was impermissible at common law, does not comport with our society's "evolving standards of decency," and does not serve either penological objective of capital punishment. Finally, as was our approach in *Ford* v. *Wainwright* and *Atkins* v. *Virginia*, "we leave to the State[s] the task of developing appropriate ways to enforce [this] constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. 304, 317 (2002) (quoting *Ford*, 477 U.S. 399, 416–417 (1986) (plurality opinion)).

* * *

Today we hold that the Eighth Amendment prohibits the execution of a capital offender who does not rationally understand the circumstances of his execution and the reasons for which the State is subjecting him to the ultimate punishment. Since Petitioner's mental illness so impairs his memory that it wipes clean his recollection of his crime, Petitioner cannot be said to fully "comprehen[d] . . . why he has been singled out and stripped of his fundamental right to life." *Ford* v. *Wainwright*, 477 U.S. 399, 409 (1986). Therefore, the judgment of the Mobile County Circuit Court is reversed.

It is so ordered.

APPENDICES

APPENDIX A

States Which Prohibit the Execution of the Mentally Ill or of Those Who Lack Rational Understanding

State	Relevant Statute	Notes
Alaska	*No Death Penalty Statute*	Alaska has never employed capital punishment. It was abolished two years before Alaska achieved statehood.
Arizona	ARIZ. REV. STAT. ANN. § 13–4021 *et seq*. (2010)	§ 13–4021(A): "A person who is sentenced to death shall not be executed as long as he is mentally incompetent to be executed." § 13–4021(B): "As used in this article, 'mentally incompetent to be executed' means that *due to a mental disease or defect* a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death" (emphasis added).
Arkansas	ARK. CODE ANN. § 16–90–506(d)(1)(B)(ii) (West 2008)	§ 16–90–506(d)(1)(B)(ii): "If the individual is found incompetent *due to mental illness*, the Governor shall order that appropriate mental health treatment be provided. The Director of the Department of Correction may order a reevaluation of the competency of the individual as circumstances may warrant" (emphasis added). See generally § 16–90–506 ("Reprieve, new trial, etc." for "Execution of Sentence—Death Penalty").
Colorado	COLO. REV. STAT. ANN. § 18–1.3–1402 *et seq*. (West 2013)	§ 18–1.3–1402(1): "A person who is sentenced to death shall not be executed so long as the person is mentally incompetent to be executed." See also § 18–1.3–1401(2): "'Mentally incompetent to be executed' means that, *due to a mental disease or defect*, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that crime is death" (emphasis added).

Connecticut	*No Death Penalty Statute*	Connecticut abolished capital punishment in 2012.
Delaware	*No Death Penalty Statute*	Delaware abolished capital punishment on August 2, 2016 (see *Rauf* v. *State*, 145 A. 3d 430 (Delaware 2016)).
Florida	FLA. STAT. §§ 922.07(1) and 922.07(3)	§ 922.07(1): "When the Governor is informed that a person under the sentence of death may be insane, the Governor shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. § 922.07(3): "If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him or her, the Governor shall have the convicted person committed to a Department of Corrections mental health treatment facility."
Georgia	GA. CODE ANN. § 17–10–60 *et seq*. (West 2014)	§ 17–10–61: "A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed as defined in Code Section 17–10–60." § 17–10–60: "As used in this article, the term "mentally incompetent to be executed" means that because of a *mental condition* the person is presently unable to know why he or she is being punished and understand the nature of the punishment" (emphasis added).
Hawai'i	*No Death Penalty Statute*	Hawai'i has never employed capital punishment. It was abolished before Hawai'i achieved statehood.
Illinois	*No Death Penalty Statute*	Illinois abolished capital punishment in 2011.
Iowa	*No Death Penalty Statute*	Iowa abolished capital punishment in 1965.

Kansas	KAN. STAT. ANN. § 22–4006(d) (2016)	§ 22–4006(d): "If, at the conclusion of a hearing pursuant to this section, the judge determines that the convict is insane, the judge shall suspend the execution until further order." Ironically, Kansas is one of four states that does not offer an option to plead "not guilty by reason of insanity." Thus, Kansas does not provide a definition of "insanity" within the context of § 22–4006(d). Nevertheless, persons in Kansas may be found "incompetent to stand trial" (a common synonym for an insanity defense) if, "because of *mental illness or defect*, [a person] is unable: (a) To understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense." § 22–3301(1) *et seq*.
Kentucky	KY. REV. STAT. ANN. §§ 431.213 and 431.240.2 (2017)	§ 431.240(2): "If the condemned person is insane, as defined in [Kentucky Revised Statute] 431.213 . . . on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity." § 431.213: "'Insane' means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed."
Louisiana	LA. STAT. ANN. § 15:567.1 *et seq*. (2016)	§ 15:567.1(A): "A person who is not competent to proceed may not be executed." § 15:567.1(B): "A person is not competent to proceed to execution when a defendant presently lacks the competency to understand that he is to be executed, and the reason he is to suffer that penalty."
Maine	*No Death Penalty Statute*	Maine abolished capital punishment in 1887.
Maryland	*No Death Penalty Statute*	Maryland abolished capital punishment in 2013.
Massachusetts	*No Death Penalty Statute*	Massachusetts abolished capital punishment in 1984.
Michigan	*No Death Penalty Statute*	Michigan abolished capital punishment in 1847.
Minnesota	*No Death Penalty Statute*	Minnesota abolished capital punishment in 1911.

Mississippi	MISS. CODE ANN. § 99–19–57 *et seq*. (2017)	§ 99–19–57(2)(a): "If it is [found] that an offender under sentence of death has become *mentally ill* since the judgment of the court, . . . the court shall suspend the execution of the sentence" (emphasis added). § 99–19–57(2)(b): "For the purposes of this subsection, a person shall be deemed to be a person with mental illness if the court finds that the offender does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, and a sufficient understanding to know any fact that might exist that would make his punishment unjust or unlawful and the intelligence requisite to convey that information to his attorneys or the court."
Missouri	MO. REV. STAT. § 552.060(1) (2016)	§ 552.060(1): "No person condemned to death shall be executed if as a result of *mental disease or defect* he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency, or reasons why the sentence should not be carried out" (emphasis added).
Montana	MONT. CODE ANN. § 46–19–202(2) (2017)	§ 46–19–202(2): "If it is found that the defendant lacks fitness, the execution of judgment[—including death—]must be suspended and the court shall commit the defendant to the custody of the superintendent of the Montana state hospital to be placed in an appropriate facility of the department of public health and human services for as long as the lack of fitness endures." See also: § 46–19–201: "If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title"; § 46–14–101 *et seq*. ("Relevance of Mental Disease or Disorder).

Nebraska	NEB. REV. STAT. § 29–1822 (2016)	§ 29–1822: "If, after judgment and before execution of the sentence, [a] person shall become mentally incompetent, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the incompetency."
Nevada	NEV. REV. STAT. § 176.455(1) (2015)	§ 176.455(1): "If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death." As in Kansas, Nevada does not offer a plea of "not guilty by reason of insanity" despite the fact that an "insane" person is evidently exempt from execution. However, Nevada does offer a plea of "guilty but mentally ill," see § 174.035 *et seq*., and the consequences of pleading thusly are much the same as those of pleading "not guilty by reason of insanity" in other states.
New Jersey	*No Death Penalty Statute*	New Jersey abolished capital punishment in 2007.
New Mexico	*No Death Penalty Statute*	New Mexico abolished capital punishment in 2009.
New York	*No Death Penalty Statute*	New York abolished capital punishment in 2007.
North Carolina	N.C. GEN. STAT. § 15A–1001(a) (2017)	§ 15A–1001(a): "No person may be tried, convicted, sentenced, or punished for a crime when by reason of *mental illness or defect* he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner" (emphasis added).
North Dakota	*No Death Penalty Statute*	North Dakota abolished capital punishment in 1947.

Ohio	OHIO REV. CODE ANN. § 2949.29(B) (West 2016)	§ 2949.29(B): "If it is found that the convict is insane and if authorized by the supreme court, the judge shall continue any stay of execution of the sentence previously issued." See also § 2949.28(A): "As used in this section and section 2949.29 of the [Ohio] Revised Code, 'insane' means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict."
Oklahoma	OKLA. STAT. § 22–1008 *et seq*. (2017)	§ 22–1008: "If it is found that the defendant is insane, the warden must suspend the execution. . . . " Note that in Oklahoma, a claim of "not guilty by reason of insanity" includes persons "impaired by reason of mental retardation, a *mentally ill person*, an insane person, or a person of unsound mind." § 22–925 (emphasis added).
Oregon*	OR. REV. STAT. § 137.463(6) *et seq*. (2015)	§ 137.463(6)(a): "If the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications." See also § 137.463(6)(b)(A) (holding subsequent competency hearings after a finding of incompetency to be executed); § 137.466(2) ("If the court determines that, *due to mental incapacity*, the defendant cannot engage in reasoned choices of legal strategies and options, the court shall continue the appointment of counsel provided under [Oregon Revised Statute] 137.463").
Rhode Island	*No Death Penalty Statute*	Rhode Island abolished capital punishment in 1984.

South Dakota	S.D. CODE § 23A–27A–24 (2017)	§ 23A–27A–24: "If the sentencing court finds the defendant is not mentally competent to be executed the sentencing court shall suspend the execution of sentence until the defendant is mentally competent to be executed." See also § 23A–27A–22.1: "A defendant is mentally competent to be executed if the defendant is aware of the impending execution and the reason for it."
Texas	TEX. CODE CRIM. PRO. § 46.05 *et seq*. (2017)	§ 46.05(a): "A person who is incompetent to be executed may not be executed." § 46.05(h): "A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed.
Vermont	*No Death Penalty Statute*	Vermont abolished capital punishment in 1972.
Washington	*No Death Penalty Statute*	The Washington Supreme Court declared capital punishment unconstitutional in October of 2018, thereby invalidating Washington's capital punishment statute (see *State* v. *Gregory*, No. 88086–7 (Washington 2018)).
West Virginia	*No Death Penalty Statute*	West Virginia abolished capital punishment in 1965.
Wisconsin	*No Death Penalty Statute*	Wisconsin abolished capital punishment in 1853.
Wyoming	WYO. STAT. ANN. § 7–13–902(f) (2017)	§ 7–13–902(f): "If the court finds by clear and convincing evidence that the convict does not have the requisite mental capacity, the judge shall suspend the execution of the convict until a time when it is found that the convict has the requisite mental capacity" (accord § 7–13–903(a)). See also § 7–13–901(a)(v): "'Requisite mental capacity' means the ability to understand the nature of the death penalty and the reasons it was imposed."

* In 2011, then-Governor John Kitzhaber declared an indefinite moratorium on any and all sentences of death in the State of Oregon. The moratorium has been reaffirmed by every Governor of Oregon since.

APPENDIX B

States Which Permit the Execution of the Mentally Ill and of Those Who Lack Rational Understanding

State	Capital Punishment Statute	Notes
Alabama	ALA. CODE § 13A–5–40 *et seq*. (2016)	But see § 13A–3–1 *et seq*. (use of "severe mental disease" as a defense to a crime); § 13A–5–51 *et seq*. (consideration of "extreme mental or emotional disturbance" and inability "of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" as mitigating factors at sentencing).
California	CAL. PENAL CODE § 190 *et seq*. (West 2014)	–
Idaho	IDAHO CODE § 18–4004 and § 19–2515 (2017).	But see § 19–2523 (consideration of mental illness as a mitigating factor at sentencing).
Indiana	IND. CODE § 35–50–2–9 (2016).	But see § 30–50–2–9(c)(6) (consideration of mental illness as a mitigating factor at sentencing).
New Hampshire	N.H. REV. STAT. ANN. § 630:1 *et seq*. (2016)	But see §§ 630:5(VI)(a) and 630:5(VI)(f) (respectively, consideration of the impairment of the defendant's ability "to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law" and of "severe mental or emotional disturbance" as mitigating factors at sentencing).
Pennsylvania	18 PA. CONS. STAT. ANN. § 1102(a) *et seq*. and 42 PA. CONS. STAT. ANN. § 9711 *et seq*. (2016)	But see 42 PA. CONS. STAT. ANN. §§ 9711(e)(2) and 9711(e)(3) (respectively, consideration of "extreme mental or emotional disturbance" and of the impairment "of the defendant['s ability] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" as mitigating factors at sentencing).

South Carolina	S.C. CODE ANN. § 16–3–20 *et seq*. and § 24–3–510 *et seq*. (2017)	But see §§ 16–3–20(C)(b)(2), 16–3–20(C)(b)(6), and 16–3–20(C)(b)(7) (respectively, consideration of "mental or emotional disturbance," of the impairment "of the defendant['s ability] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," and of the "mentality of the defendant at the time of the crime" as mitigating factors at sentencing).
Tennessee	TENN. CODE ANN. § 39–13–201 *et seq*. (2017)	But see § 39–13–204(j)(2) and 39–13–204(j)(8) (respectively, consideration of "extreme mental or emotional disturbance" and of the impairment "*as a result of mental disease or defect*" of the defendant's ability to "appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law" as mitigating factors at sentencing (emphasis added)).
Utah	UTAH CODE ANN. § 76–3–206 *et seq*., § 77–18–5.5, and § 77–19 *et seq*. (West 2017)	But see §§ 76–3–207(4)(b) and 76–3–207(4)(d) (respectively, consideration of "mental or emotional disturbance" and of the impairment "*as a result of a mental condition*" of the defendant's ability to "appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law" as mitigating factors at sentencing (emphasis added)).
Virginia	VA. CODE § 18.2–31 *et seq*. and § 53.1–232 *et seq*. (2017)	But see §§ 19.2–264.4(B)(ii) and 19.2–264.4(B)(iv) (respectively, consideration of "extreme mental or emotional disturbance" and of the impairment "of the defendant['s ability] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" as mitigating factors at sentencing).