INTRODUCTION

In his seminal novel, *1984*, George Orwell constructs a dystopian future in which officials of the state’s Ministry of Love tortures political dissidents in order to cure them of their “insanity,” only to later execute the dissidents for their crimes in the future.\(^1\) 1984 also happened to be the year in which the governor of Florida signed a death warrant for Alvin Ford, a death row prisoner who suffered from a mental disorder that left him able to speak only in two-word sentences, caused him to believe that he could control the governor with his mind, and deprived him of any understanding of why the state had singled him out for execution.\(^2\) In the United States, the power dynamics between the state as executioner and the prisoner as “lunatic” eerily reflected the future that Orwell portended, with the notable distinction that Florida was willing to execute the insane without any pretense of seeking prior rehabilitation.\(^3\) In 1984, reality appeared crueler than fiction.

However, in 1986, the U.S. Supreme Court heard Ford’s case and determined that the execution of the insane “simply offends humanity,” running afoul of the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^4\) Marking an apparent shift away from the stuff of dystopian novels to a more compassionate reality, the Court remanded Ford’s case to the federal district court.\(^5\) Later, in *Panetti v. Quarterman*, the Court concluded that severe delusions could render a prisoner incompetent to be executed even if he could identify the reason for his

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* Denver Law Review, Associate Editor  
\(^1\) See generally *George Orwell*, 1984 (1949).  
\(^2\) *Ford v. Wainwright*, 477 U.S. 399, 403–04 (1986) (“Ford regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word ‘one,’ making statements such as ‘Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.’”).  
\(^3\) See Linda Malone, *Too Ill to be Killed: Mental and Physical Competency to be Executed Pursuant to the Death Penalty*, 51 TEX. TECH. L. REV. 147, 155 (2018) (describing the State’s determination of who is competent to be executed as a question that is “Orwellian in nature”).  
\(^4\) *Ford*, 477 U.S. at 409.  
\(^5\) *Id.* at 418.
execution. Most recently, in Madison v. Alabama, the Court determined that a prisoner’s inability to remember key information due to dementia could potentially prevent him from possessing the “rational understanding” of his impending execution required by Ford and Panetti. However, the majority also explicitly stated that the Eighth Amendment does not “forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime.” As a result, the law remains unsettled regarding how to define competency for execution.

This Comment argues that although the majority opinion in Madison may result in much-warranted mercy for Madison as an individual, it also marks a dangerous retreat in death penalty jurisprudence overall. The Comment begins by reviewing the constitutional restraints on capital punishment adopted by the Court after it originally deemed Georgia’s death penalty statute unconstitutional in Furman v. Georgia. It then argues that in declaring a prisoner’s genuine inability to remember his crime insufficient to bar his execution, the majority opinion in Madison offends the Eighth Amendment for three reasons. First, it fails to advance the purpose of retribution constitutionally required of all death penalty schemes. Second, it contradicts the common law reasoning upon which Ford and Panetti were decided. And finally, it promotes the very arbitrariness that Furman sought to limit.

BACKGROUND

In a seemingly fatal blow to capital punishment, the Supreme Court struck down Georgia’s death penalty statute in 1972 for being unconstitutionally arbitrary and capricious. However, rather than serving as the end of the death penalty that many had predicted, the Court’s holding in Furman simply spurred states to rewrite their capital punishment schemes in order to limit the arbitrariness that offended the Eighth and Fourteenth Amendments. In 1976, the Supreme Court upheld a revised version of

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8 Id.
10 Id.
11 Id. at 488–89 (“In the next four years, however, thirty-five states and Congress rushed to pass new death penalty schemes, leaving the Court with the bewildering task of trying
Georgia’s death penalty statute in *Gregg v. Georgia*, essentially inviting other states to modify their capital sentencing schemes and opening the floodgates for a host of new constitutional challenges to capital punishment.\(^{12}\)

Since 1976, death penalty jurisprudence has become an immensely complicated body of law, with specific rules pertaining to everything from the admissibility of victim-impact evidence to jury instructions regarding lesser-included offenses.\(^{13}\) While a full overview of present constitutional limits on the death penalty is beyond the scope of this Comment, two main themes have emerged that are particularly relevant to an assessment of the Court’s opinion in *Madison*. The first involves the limitations on arbitrariness established in *Furman*, and the second implicates the requirement that all death penalty schemes advance both penological purposes of deterrence and retribution.

**Limits on Arbitrariness**

In order to sufficiently limit the arbitrariness condemned in *Furman*, state death penalty statutes must provide for “guided discretion” in sentencing, ensuring that courts do not randomly issue death sentences to some individuals while letting the most culpable offenders forego the ultimate consequence for their actions.\(^{14}\) States have mainly achieved this end through the use of aggravating factors. Under these statutes, a defendant can only be sentenced to death if he meets one or more aggravating factors, effectively narrowing the pool of individuals who may be sentenced to death.\(^{15}\) Typical aggravating factors include murder of a victim under fourteen years of age and murder of a peace officer, among many others.\(^{16}\) Randomness in sentencing is therefore curtailed, since only a subclass of the most culpable offenders remain eligible for capital punishment.\(^{17}\)

\(^{12}\) Id. at 494.

\(^{13}\) Id. at 489–90.

\(^{14}\) Id.

\(^{15}\) Id.


\(^{17}\) Sundby, *supra* note 9, at 494.
Penological Purposes: Deterrence and Retribution

However, even if a death penalty statute complies with Furman’s mandate to reduce arbitrariness, it will not comport with the Constitution if it fails to advance both the goals of deterrence and retribution as required by the Eighth Amendment.\(^\text{18}\) In Atkins v. Virginia, the Court held that the “mentally retarded” could not be subjected to capital punishment.\(^\text{19}\) Later, in Roper v. Simmons, the Court placed a categorical bar on sentencing anyone to death who was under eighteen years old at the time of the offense.\(^\text{20}\) In both cases, the Court reasoned that neither minors nor the intellectually disabled possessed the requisite ability to fully consider the weight of their actions before committing them.\(^\text{21}\) Therefore, the penological goal of deterrence would not be achieved by executing individuals belonging to these groups.\(^\text{22}\) Furthermore, because these individuals are “less culpable than the average criminal,” the penological purpose of retribution would not be served.\(^\text{23}\)

**Standards of Competency**

The complexity of death penalty jurisprudence is further amplified when it intersects with the equally intricate body of law governing determinations of criminal competence for individuals for whom the death penalty is not categorically barred.\(^\text{24}\) Assuming the offender is neither a minor nor intellectually disabled, he must meet three separate standards for competency before a death sentence is imposed.\(^\text{25}\) First, the accused must be competent to stand trial. In Dusky v. United States, the Court held that the defendant must demonstrate “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and must possess “a rational as well as a factual understanding of the proceedings against him.”\(^\text{26}\) Second, at the time the defendant committed the offense, he must have possessed the necessary mens rea to be convicted of the

\(^{18}\) Gregg v. Georgia, 428 U.S. 153, 233 (1976) (Brennan, J., dissenting) (“The two purposes that sustain the death penalty as nonexcessive in the Court’s view are general deterrence and retribution.”).


\(^{21}\) Id.; Atkins, 536 U.S. at 320.

\(^{22}\) Roper, 543 U.S. at 578; Atkins, 536 U.S. at 320.

\(^{23}\) Atkins, 536 U.S. at 316.

\(^{24}\) See David M. Adams, Belief and Death: Capital Punishment and the Competence-For-Execution Requirement, 10 CRIM. L. & PHIL. 17, 26 (2016) (discussing the difficulties of accurately assessing competence for prisoners who are pending execution).

\(^{25}\) Malone, supra note 3, at 154.

\(^{26}\) Id. at 156 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).
underlying crime for which the death penalty was imposed. If a defendant were insane at the time he committed the crime, he likely would have lacked the *mens rea* necessary to be guilty of the offense, rendering him ineligible for conviction. Finally, if the defendant is convicted and sentenced to death, he must also be found competent for execution.

In *Ford*, the U.S. Supreme Court first attempted to establish guardrails to determine whether a prisoner demonstrates a threshold level of competency to be executed. While there was no challenge raised that Ford was legally sane when he committed the crime for which he was sentenced to death, he underwent extreme mental deterioration while on death row. His onset mental illness left him unable to speak in complete sentences, and his attorneys claimed that it led him to believe that his impending execution had nothing to do with the crime he committed. After analyzing the long-standing common law bar against executing “lunatics,” the Court determined that no retributive purpose is served by permitting the execution of an individual who has “lost his sanity” after sentencing. Notably, the Court in *Ford* did not set forth any specific guidance on the substantive determination of who was too insane to be executed, leaving this determination up to each state.

In 2007, the Court revisited the issue of determining competence for execution when it decided *Panetti*. Scott Panetti petitioned the Court for a stay of execution, claiming that he suffered from a schizophrenic disorder and psychotic delusions that rendered him incompetent to be executed. The Fifth Circuit Court of Appeals had previously found Panetti competent to be executed under *Ford* because he knew he committed the murders, knew that he was to be executed, and knew the state’s stated reason for the execution. However, Panetti’s attorneys claimed that while Panetti could

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27 *Id.* at 150–51.
28 *Id.*
29 *Id.* at 155.
31 *Id.* at 403–04.
32 *Id.*
33 *Id.* at 406–07.
34 *Id.* at 416–17 (“[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity.”).
36 *Id.* at 936–37.
37 *Id.* at 956.
recite the state’s reasons for his execution, he believed them to be a sham and instead thought his death sentence was actually a plot to get him to stop preaching.\(^{38}\)

The U.S. Supreme Court held that the Fifth Circuit’s interpretation of \textit{Ford} was too restrictive, stating that a prisoner must possess “a rational understanding” of the reason for his execution in order for administration of the death penalty to comply with the Eighth Amendment.\(^ {39}\) As in \textit{Ford}, the majority in \textit{Panetti} declined to lay down a specific standard for competency. The Court specifically stated, “Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations.”\(^ {40}\) It is within this vague context created by \textit{Ford} and \textit{Panetti} that the Supreme Court heard \textit{Madison}.

\textbf{\textit{Madison v. Alabama}}

\textbf{FACTS}

In 1985, Vernon Madison was convicted of killing a police officer, and he was later sentenced to death.\(^ {41}\) While spending over thirty years on death row, Madison suffered several strokes and developed vascular dementia.\(^ {42}\) Madison’s attorneys claimed that this condition precluded him from remembering that he killed the victim or recalling any of the details of the crime. As a result of this gap in his memory, Madison also believed he “never went around killing folks” and was innocent of the murder for which he was on death row.\(^ {43}\) In addition to issues related to his crime and punishment, Madison was blind and incontinent.\(^ {44}\) He could not recite the alphabet past the letter G and believed his mother was alive, even though he had been informed of her death.\(^ {45}\) He frequently soiled himself because he could not remember that his cell contained a toilet.\(^ {46}\) He talked about moving to Florida in the future.\(^ {47}\)

\(^{38}\) \textit{Id.} at 955.
\(^{39}\) \textit{Id.} at 956–57.
\(^{40}\) \textit{Id.} at 960.
\(^{42}\) \textit{Id.}
\(^{44}\) Malone, \textit{supra} note 3, at 158.
\(^{45}\) \textit{Id.}
\(^{46}\) \textit{Id.}
\(^{47}\) \textit{Id.}
PROCEDURAL HISTORY

After suffering his second major stroke in 2016, Madison petitioned the state trial court for a stay of execution on the basis that he was incompetent to be executed. The state held a competency hearing in which a court-appointed expert, Dr. Kirkland, indicated that Madison exhibited “no evidence of psychosis, paranoia, or delusion.” Relying largely on Dr. Kirkland’s testimony, the state court rejected Madison’s petition and deemed him competent to be executed.

Madison then filed a habeas corpus petition in federal court. While the district court denied the petition, the Court of Appeals for the Eleventh Circuit granted relief. However, the Supreme Court ultimately reversed the Eleventh Circuit decision, based on the grounds that Madison did not meet the standard for having his case heard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

When Madison’s execution was rescheduled for 2018, he repeteditioned the state court, arguing that further cognitive decline—and the fact that Dr. Kirkland’s license to practice psychology had been suspended by a state board—constituted new information that entitled him to a stay. The state court denied relief. However, the U.S. Supreme Court granted Madison’s petition for certiorari, to hear the issue whether his inability to remember the murder for which he was sentenced to death entitled him to a stay of execution under the standards set out in Ford and Panetti. Madison also claimed that his execution could not proceed since the state court’s ruling was based on the erroneous opinion that only delusions, rather than dementia, could establish a finding of incompetency. Because Madison’s petition came to the Court on direct review, the Court was able to address the substantive issues raised in the petition without deferring to the state

48 Madison, 139 S. Ct. at 723.
49 Id. at 724.
50 Id.
51 Id. at 725.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id. at 726.
court’s decisions, as was required by AEDPA when reviewing Madison’s initial federal habeas petition.57

**OPINION OF THE COURT**

Justice Kagan delivered the opinion of the Court, in which Justices Roberts, Ginsburg, Breyer, and Sotomayor joined. The majority in *Madison* addressed two substantive questions: “First, does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime? . . . Second, does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions?”58

In response to the first question, the Court unequivocally held that the Eighth Amendment does not preclude execution of a prisoner who does not remember his crime.59 The Court reasoned that a person afflicted by memory loss may still possess “a rational understanding of the reasons for his death sentence.”60 In demonstrating this concept, the Court analogized to a person’s ability to comprehend the ramifications of events that he could not personally remember:

Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story. And similarly, if you somehow blacked out a crime you committed, but later learned what you had done, you could well appreciate the State’s desire to impose a penalty.61

In the majority’s view, the singular question presented in *Ford* and *Panetti* was whether an individual could understand the state’s reasoning for imposing an execution, not whether the prisoner could remember taking part in the acts that led to this punishment.62

Mirroring the analytical approach taken by the majority in *Ford* and *Panetti*, the majority in *Madison* evaluated whether executing a prisoner

57 *Id.* (“Because the case now comes to us on direct review of the state court’s decision (rather than in a habeas proceeding), AEDPA’s deferential standard no longer governs.”).
58 *Id.* at 722.
59 *Id.*
60 *Id.*
61 *Id.* at 727.
62 *Id.*
who could not remember his crime would advance the penological purpose of retribution required by the Eighth Amendment. The Court ultimately concluded that, absent other neurological disorders that prevent a person from orienting himself to time and place or otherwise making logical connections between concepts, “a person who can no longer remember a crime may yet recognize the retributive message society intends to convey with a death sentence.”

The Court, however, went on to emphasize that while memory loss of a crime in and of itself was not sufficient to bar execution, if that loss was combined with other mental disorders, it could factor into an analysis of whether the petitioner possessed a “rational understanding” of the reasons for his execution. For example, if a degenerative disorder prevents a person from both remembering his crime as well as from retaining newly gained knowledge that he committed it, this deficit may prevent him from achieving a rational understanding of his execution. In such a case, administration of the death penalty would be barred by the Eighth Amendment, as established in Panetti.

In responding to the second substantive question, the Court firmly conveyed that dementia, or a similar disorder, could be the basis for a stay of execution under Ford and Panetti. In considering whether delusions of the type that Ford and Panetti suffered should be a prerequisite for establishing a lack of “rational understanding,” the Court concluded that the medical diagnosis behind a prisoner’s lack of understanding was not nearly as important as its effect on the ability to comprehend. Since the moral and retributivist implications of an execution were the same regardless of whether a prisoner suffered from delusions, dementia, or another disorder that resulted in cognitive decline, the Court held that these medical conditions were “all the same under Panetti, so long as they produce the requisite lack of comprehension.”

As in Ford and Panetti, the Court in Madison did not establish a particular standard for determining when a prisoner lacks the rational

\[63\] Id.
\[64\] Id.
\[65\] Id. at 727–28.
\[66\] Id. at 728.
\[67\] Id.
\[68\] Id.
\[69\] Id.
\[70\] Id.
understanding necessary to be executed. However, in reviewing the record, the Supreme Court was uncertain as to whether the state court relied on an incorrect view that delusions were a prerequisite to establishing mental incompetency.\(^{71}\) As a result, the Court remanded Madison’s case to the state court for another competency hearing.\(^ {72}\) Because of his continuing decline, however, the state never determined his competency to be executed.\(^ {73}\) Madison died from his medical ailments in prison in February 2020.\(^ {74}\) It is important to note that, until his death, Madison’s fate hung in the balance of the state court’s determination.\(^ {75}\) While the Supreme Court decision bought him time, the state court could have determined that Madison’s dementia was of a “milder form” that allowed him to comprehend why the State wished to exact punishment.\(^ {76}\) If that were the case, and Mr. Madison’s severe ailments had not caused his death, the state may still have executed him.

**DISSENT**

Justice Alito authored a dissenting opinion joined by Justices Thomas and Gorsuch.\(^ {77}\) In his dissent, Justice Alito criticized the Court for weighing in on the merits of whether dementia, rather than psychosis, could be a sufficient reason to stay a prisoner’s execution.\(^ {78}\) The dissent fervently argued that the Court should have never reached this question because it was not directly raised in Madison’s petition for certiorari.\(^ {79}\) Furthermore, Justice Alito argued that there was insufficient evidence in the record to suggest the lower court’s decision was “based on an erroneous distinction between dementia and other mental conditions.”\(^ {80}\) However, the majority discounted this claim, arguing the petition included this question, making it proper for the Court to address it.\(^ {81}\) Because the dissent focused on

\(^{71}\) *Id.* at 729.

\(^{72}\) *Id.* at 731.


\(^{74}\) *Id.*

\(^{75}\) *Id.*

\(^{76}\) Madison, 139 S. Ct. at 729.

\(^{77}\) *Id.* at 731 (Alito, J., dissenting).

\(^{78}\) *Id.* at 731.

\(^{79}\) *Id.* at 732.

\(^{80}\) *Id.* at 734.

\(^{81}\) Madison, 139 S. Ct. at 728 n.3 (“The dissent is in high dudgeon over our taking up the second question, arguing that it was not presented in Madison’s petition for certiorari.”)
procedural and semantic analyses, rather than the substance of the questions decided, it is not relevant to the points addressed in this Comment.

**ANALYSIS**

The *Madison* Court was correct in its conclusion that dementia, like delusions, could serve as the basis for a stay of execution under *Ford* and *Panetti*. However, in establishing a bright-line rule that an inability to remember a crime is insufficient to stay a prisoner’s execution, the *Madison* majority contradicts the requirements of the Eighth Amendment. For one, the rule fails to comport with the penological goal of retribution identified by the Court in *Panetti*. The majority’s rule further ignores the common law principle that an insane prisoner should not be executed; this is especially troubling considering modern death penalty jurisprudence emphasizes the importance of an individual’s ability to assist in his or her own defense in the first place. Finally, the Court’s holding violates the spirit of *Furman* by favoring those who are in full possession of their memories over those who are not, thereby increasing the likelihood that the death penalty will be administered in an unconstitutionally arbitrary fashion.

I. Executions in the Context of Retribution

The Court incorrectly concluded that the death penalty serves a retributive purpose when applied to individuals who cannot remember their crimes. In *Panetti*, the Court indicated that, from a retributive standpoint, the death penalty serves two purposes: (1) “to make the offender recognize at last the gravity of his crime,” and (2) to permit “the community as a whole . . . to affirm its own judgment that the prisoner’s culpability is so serious that the ultimate penalty must be sought and imposed.”\(^{82}\) The *Panetti* majority concluded that neither of these purposes was fulfilled when the prisoner’s “awareness of the crime and punishment has little or no relation to the understanding shared by the community as a whole.”\(^{83}\) Arguably, the same principle holds true for prisoners who genuinely possess no recollection of their crime.

Regarding the first retributive purpose identified in *Panetti*, a perpetrator who is unable to remember his crime is unlikely to fully grasp

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But that is incorrect. The petition presented two questions—the same two we address here.\(^{''}\) (majority opinion).

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\(^{83}\) *Id.* at 959.
its gravity. Using the Court’s “first day of school” analogy, if you learned you were sent home from your first day of school for hitting another student, you are unlikely to come to grips with the gravity of this event if you have no recollection of it. You cannot remember the other student. You cannot remember the student’s reaction to your transgression. You cannot recall if the student cried or laughed or threw a fit in response. You do not remember how your behavior was viewed by your fellow classmates. You do not remember your teacher’s admonishments. You cannot recall whether your principal reprimanded you. And you do not know if your mother responded with anger, disappointment, or something else. Truly grasping the severity of your actions from your mother’s account alone would be immensely difficult.

If, thirty years later, with no memory of the incident, you are told you will be punished for it. You are asked to rely entirely upon a third party’s word that you ever committed this act. Instead of your mother, you learn of your actions from a state official. You do not perceive yourself as the type of person who would have gone around hitting people. And you do not remember if you ever had the chance to defend yourself. Imposition of a punishment at this point is likely to invoke ire, defensiveness, or disbelief. But it is unlikely to produce a true appreciation for your actions. When the Court’s flat hypothetical is fleshed out to parallel Madison’s situation, it does not support the notion that executing those who cannot remember their crimes achieves the first purpose of retribution identified in *Panetti* but rather it contradicts it.

When this hypothetical is applied to capital cases, and the punishment to be exacted is execution, the sheer terror produced by subjecting defendants to death for a crime they cannot remember— and may well believe they never committed—is too much for the Eighth Amendment to bear. Regardless of Madison’s inability to orient himself to time and place, his inability to remember his crime, fortified by his disbelief that he ever committed it, should have been a sufficient basis to grant relief. In *Ford*, the Court supported an Eighth Amendment restriction in order “to protect the condemned from fear and pain without comfort of understanding.”84 The same protection should have applied here.

Similarly, if the community’s need for retribution was not sufficient in *Panetti* to justify the execution of individuals who do not possess a rational understanding of their crimes, it is not sufficient here. As discussed above,

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a prisoner who genuinely has no memory of his or her crime may still understand the “announced reason” for the punishment and fully comprehend an imminent execution; yet, it is highly unlikely they will wholly grasp its severity.85 This logic holds especially true in cases like Madison’s, where the petitioner does not believe he ever committed the crime.86 While the Court in Panetti instructs that a prisoner’s being “so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt” would not preclude him or her from being deemed competent to be executed, the example of someone suffering a “black hole” in his or her memory is altogether different.87 In Madison’s case, his inability to grasp the state’s true interest in his execution does not stem from callousness; rather, it is because his medical inability to remember the killing prompts him to deny he ever committed the murder. Regardless of Madison’s capacity to otherwise orient himself to time and place, he is just as unlikely to grasp the “real interests the State seeks to vindicate” as was Panetti.88 Therefore, the community interest in retribution would not be served through his execution.

In Ford, the Court cited the need to “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”89 Had the Court in Madison carried this reasoning to its logical conclusion, it would have adopted a categorical bar to executing those individuals who cannot remember their crimes as a result of a medical condition, especially when a gap in memory produces a prisoner’s genuine belief of innocence. Instead, the Court contorts this logic to expressly permit executions in these cases. Doing so is contrary to the Court’s previous conceptions regarding when retribution is served and fails to comport with the protections afforded by the Eighth Amendment.

II. Executions in relation to common law competency standards

In Ford, the Court relied heavily on an analysis of values reflected in the English common law to arrive at its holding that the Eighth Amendment bars execution of the insane.90 In support of its reasoning, the Court cited Blackstone’s statement that “if, after judgment, [a prisoner]
becomes of nonsane memory, execution shall be stayed.”

In its analysis, the Court concluded that these common law principles remain relevant today, since “there is now little room for doubt that the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”

Taken in the most literal sense, the Madison Court’s acceptance of executing those who lose the ability to remember committing their crime after sentencing would directly contradict the common law principle described by Blackstone.

This conclusion is further strengthened when one considers the reasoning behind the common law prohibition against executing those with compromised memory post-conviction. Blackstone explains, “[F]or peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.”

When viewed in light of basic values contained within the common law, the Madison Court’s analogy yet again serves as a gross and insensitive oversimplification of a death row prisoner’s reality. A person who hears about how he or she was sent home from school in kindergarten no longer faces any consequences for the actions as an adult. However, a death row inmate like Madison still faces the ultimate price for his transgressions, even though he does not remember what they are. By analogizing murder to a long-forgotten childhood incident, the Madison Court misses this point entirely.

As recognized by Blackstone, the formation of a “black hole” in a prisoner’s memory, one preventing him from remembering his crime, undoubtedly and significantly hinders the chances of successfully appealing the death sentence. For example, someone with memory loss may not be able to provide crucial details of his or her role in a crime in which multiple perpetrators took part. If new evidence shows another co-defendant actually acted as the triggerman, a prisoner who cannot remember any of the details of what occurred during the crime is less likely to provide a convincing account of his or her part in it.

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91 Id. at 407 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24–25 (1769)).
92 Id. at 405.
93 Id.
94 Id. at 407 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24–25 (1769)).
These issues are only exacerbated if the gap in memory extends beyond the specific crime to encompass the prisoner’s arrest and trial.\textsuperscript{95} For example, a prisoner who cannot remember the trial may not be able to raise an ineffective assistance of counsel claim, no matter how egregious or deficient his or her counsel’s behavior may have been.\textsuperscript{96} While future attorneys may raise a claim on a petitioner’s behalf, new counsel only has access to the written record, which would not capture personal information about the defendant’s past, and would not be privy to conversations between the defendant and his formal counsel. The prisoner could not speak to whether counsel failed to present crucial mitigating evidence provided by the prisoner or indicate counsel admitted guilt against the prisoner’s express and vehement objections. While these avenues would ordinarily provide a basis of relief, they would not be available to the prisoner who is suffering from episodic memory loss.\textsuperscript{97}

The importance of an individual’s ability to assist in his or her own defense finds support throughout modern death penalty jurisprudence. In \textit{Atkins} and \textit{Roper}, the majority stressed the need for defendants to be able to assist counsel.\textsuperscript{98} In both cases, the Court cited concerns that the intellectually disabled and juveniles face substantial challenges in assisting their attorneys as evidence for why they should not be subjected to the death penalty.\textsuperscript{99} Similarly, in \textit{Godinez v. Moran}, the Court applied the Dusky standard to individuals who wish to waive counsel and rights to an appeal, thereby “volunteering” themselves for the death penalty.\textsuperscript{100} The outcome of this decision means that a defendant who admits to his crime must possess a higher degree of competence in order to plead guilty to a death sentence than an individual who cannot remember committing a crime would need to be executed, since the execution standard does not require a factual understanding of the crime or the ability to assist counsel. Such a disparity in standards makes little intuitive sense.

\textsuperscript{95} See Aurélie Tabuteau Mangels, \textit{Should Individuals with Severe Mental Illness Continue to be Eligible for the Death Penalty?}, 32 CRIM. JUST. 9, 11 (2017) (discussing how a mentally ill defendant’s sentence can be overturned on appeal due to ineffective assistance of counsel claims or on other grounds).
\textsuperscript{96} See id.
\textsuperscript{97} See id.
\textsuperscript{98} See Malone, supra note 3, at 154 (indicating that the “difficulties and inequities” faced by the intellectually disabled and juveniles in assisting in their defense was a major consideration in both cases).
\textsuperscript{99} Id.
\textsuperscript{100} See Sundby, supra note 9, at 517 (summarizing the holding of Godinez v. Moran, 509 U.S. 389 (1993)).
While *Atkins*, *Roper*, and *Godinez* all concern a defendant’s ability to assist counsel prior to conviction, Blackstone’s commentaries on the common law addressed the need for prisoners to be able to effectively fight their executions after conviction. Despite basing its decision in part on Blackstone’s summary, the Court in *Ford* declined to adopt a standard that, like *Dusky*, would make an inmate’s competence to assist counsel a precursor for being found competent to be executed.\(^1\) Rather than correcting this departure from the common law, the *Madison* Court further reinforced it by expressly permitting the execution of individuals who face memory deficiencies that inhibit them from effectively participating in their own defense. The inability to assist in one’s defense after conviction is no less relevant today than it was when the Bill of Rights was adopted. The *Madison* Court missed a crucial opportunity to protect this common law right in modern times.

III. Executions in relation to arbitrariness

In addition to flouting established values enshrined in common law, the Court’s failure to adopt a more specific competency standard increases the likelihood that the death penalty will be applied in an unconstitutionally arbitrary way. In *Furman*, the Supreme Court held that Georgia’s capital punishment statute was unconstitutional because it permitted an “arbitrary and capricious” administration of the death penalty.\(^2\) While the constitutionality of the Alabama death penalty statute is not at question here, *Madison’s* plight indicates that the Court should also consider the relationship between the capital appeals process and *Furman’s* mandate to limit arbitrariness.\(^3\) To comply with the overall spirit of *Furman*, the Court should not only consider arbitrariness in who is initially sentenced to death, but also seek to limit any randomness regarding who is ultimately executed.

In considering arbitrariness, the *Madison* Court should have inquired as to whether the prisoner’s mental condition put him or her at greater risk for being executed than would someone in an identical situation who has full use of his or her mental faculties. As discussed above, it is not hard to imagine how a prisoner who is unable to remember their crime would be at

\(^{101}\) *Ford v. Wainwright*, 477 U.S. 399, 421 n.2 (1986) (noting that instituting a requirement that a defendant be able to assist in his defense “would give too little weight to the State’s interest in finality, since it implies a constitutional right to raise new challenges to one’s criminal conviction until [a] sentence has run its course.”).

\(^{102}\) *See* Sundby, *supra* note 9, at 487 (citing *Furman v. Ga.*, 408 U.S. 238 (1972)).

\(^{103}\) *See id.*
a significant disadvantage in representing his or her own interests after being sentenced to death. Indeed, Madison’s own experience demonstrates this point. Madison’s death sentence was overturned once because the prosecutor dismissed all black jurors, creating a potentially prejudicial jury biased against Madison, who was Black. After he was resentenced to death, Madison’s second capital sentence was overturned due to prosecutorial misconduct. When Madison was tried a third time, the jury recommended life, but the judge overrode this sentence in favor of capital punishment. If Madison’s dementia had occurred before any of his retrials, he would have been at an even greater disadvantage in persuading a jury not to impose death.

In focusing entirely on whether memory loss precludes a prisoner’s “rational understanding” of his or her execution, the majority in Madison overlooked the fact that a failure to remember committing a crime in and of itself could disadvantage the prisoner throughout the appeals process. In this manner, capital punishment could be imposed on those individuals who, through no fault of their own, suffer a mental infliction. The Court could have avoided this issue by imposing a categorical bar on executing individuals who could not remember their crimes. Instead, the Court’s holding is likely to have the unintended consequence of perpetuating arbitrariness and injustice in the administration of capital punishment.

**Conclusion**

In expressly allowing the execution of individuals who cannot remember their crimes, the Supreme Court appears no more concerned with upholding justice than did the so-called Ministry of Love in 1984. Short of taking the opportunity to abolish the death penalty once and for all, the majority in Madison could have placed a categorical bar on executing any defendant who genuinely cannot recall the crime for which he was sentenced to death. In failing to do so, the Court showed a lack of deference to its former jurisprudence, dangerously rejecting the Eighth Amendment’s mandates that the death penalty advance retribution and limit arbitrariness. Indeed, the Court’s opinion reveals that the State’s justifications for taking a human life are grounded in a legal fiction that is far more contrived than even Orwell could have invented.

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104 Malone, *supra* note 3, at 158.
105 *Id.*
106 *Id.*