



Equal Justice Initiative

122 Commerce Street
Montgomery, Alabama 36104

January 24, 2018

The Honorable Kay Ivey
Office of Governor Kay Ivey
600 Dexter Avenue
Montgomery, Alabama 36130

Dear Governor Ivey,

Vernon Madison is scheduled to be executed by the State of Alabama this Thursday, January 25, 2018 at 6:00 p.m. Mr. Madison currently suffers from vascular dementia, is quite impaired, and the jury who heard his case decided that he should **not** be sentenced to death and returned a sentence of life imprisonment without parole. We respectfully ask you to commute Mr. Madison's sentence and grant him clemency as Alabama law permits given the very unique features of this case.

Mr. Madison is facing execution for the April 18, 1985 shooting death of a Mobile police officer. Although the jury that convicted Mr. Madison of capital murder returned a life verdict after hearing evidence about Mr. Madison's life-long struggle with mental illness, Mobile County Circuit Judge Ferrill McRae rejected the jury's life sentence and instead sentenced Mr. Madison to death. In 2017, Alabama abandoned the practice of judge override and if Vernon Madison were sentenced under current law, he could not be executed.

Instead, Mr. Madison has been on death row for over 30 years¹ and is now 67 years old. Mr. Madison suffers from vascular dementia as a result of multiple

¹ Mr. Madison has been tried three times as a result of prosecutorial misconduct. Mr. Madison's first conviction and death sentence were reversed after the Court of Criminal Appeals found that the Mobile County District Attorney's office had engaged in illegal racially discriminatory jury selection when it removed all seven of the qualified African-American veniremembers. His second conviction and death sentence were reversed when the prosecutor introduced illegal evidence. During this same time period, the Mobile County District Attorney's office was found to have violated Swain v. Alabama, 380 U.S. 202 (1965), by engaging in

serious strokes in the last several years, and no longer has a memory of the commission of the crime for which he is to be executed. His mind and body are failing: he suffers from encephalomalacia (dead brain tissue) and small vessel ischemia; speaks in a dysarthric or slurred manner; is legally blind; can no longer walk independently; and has urinary incontinence as a consequence of damage to his brain.

This case presents a uniquely compelling case for clemency: Mr. Madison is an elderly man with diagnosed dementia whose condition continues to decline. Moreover, this case presents the first time since the abolition of override that the State of Alabama has sought to execute someone where the jury returned a life sentence. For these reasons, we ask that you grant clemency and commute Mr. Madison's sentence to life without parole.

Clemency Is Appropriate Because Mr. Madison Suffers from Dementia and Does Not Rationally Understand Why the State Is Attempting to Execute Him.

Vernon Madison suffers from diagnosed dementia as a result of multiple serious strokes that have severely impacted his cognitive functioning over the last several years. His mind and body are now failing: he speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. Significantly, as a result of his dementia and resulting retrograde amnesia, Mr. Madison's episodic memory

systematic, intentional exclusion of African Americans from jury service. Jones v. Davis, 906 F.2d 552 (11th Cir. 1990). Between 1986 and 1994, when Mr. Madison's third trial occurred, seven cases were reversed as a result of the District Attorney's racially discriminatory jury selection practices. At Mr. Madison's third trial, the District Attorney's office removed nearly half of the qualified African-American veniremembers, including three veniremembers who were never questioned by the District Attorney at all. While the Eleventh Circuit ultimately found that Mr. Madison was not entitled to habeas relief on this claim, that court did find that "the circumstances supporting Mr. Madison's prima facie case were strong" and that "[t]he history of racial discrimination at the Mobile County District Attorney's Office that prosecuted Mr. Madison is significant." Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 1252 (11th Cir. 2014).

has deteriorated, meaning that he cannot remember numerous events that have occurred over the past 30 years. In accordance with the irreversible and progressive nature of dementia, Mr. Madison's cognitive abilities continue to rapidly decline.

The first of Mr. Madison's severe strokes occurred in May 2015. This stroke had a profound impact on Mr. Madison's mental functioning and his ability to retain and process information. In the aftermath of this stroke, Mr. Madison became unable to walk without the assistance of a walker. He became legally blind and lost his ability to read or write. His hands began shaking and the simple task of signing a document became extremely difficult for him. His speech also became slurred, making it difficult to understand him.

On January 4, 2016, Mr. Madison was again found unconscious in his cell. This time, testing revealed that Mr. Madison suffered a thalamic stroke. This is particularly significant because a common feature of this type of stroke is memory loss. As a result of this stroke, Mr. Madison was diagnosed with vascular dementia. He now can no longer independently recall the crime that he was convicted of or the proceedings that took place in his case, and **he does not understand why the State of Alabama is attempting to execute him.**

It was this evidence that led three judges on the Eleventh Circuit to agree that Mr. Madison did not have a rational understanding of the link between the crime and his scheduled execution, and was therefore incompetent to be executed. Madison v. Comm'r, Ala. Dep't. of Corr., 851 F.3d 1173, 1189-90 (11th Cir. 2017) (Jordan, J., dissenting) ("After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time . . ."). Although the United States Supreme Court ultimately reversed the Eleventh Circuit's decision, finding that the lower federal court did not have the authority under governing federal law to grant relief on the kind of legal issue posed by Mr. Madison's case, the Court declined to address the question of whether Mr. Madison was competent to be executed. Instead, the Court concluded that the law is unsettled about whether the Eighth Amendment prohibits execution of a person whose mental disability prevents him from remembering the commission of the crime.

Critically, new evidence has emerged that Dr. Karl Kirkland, the court-appointed expert who found Mr. Madison competent to be executed in 2016 has since been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal opioid pills, resulting in felony charges,

including an incident occurring just four days after his critical testimony in Mr. Madison's 2016 competency hearing. At no point did the State of Alabama alert any court – the circuit court, the Alabama Supreme Court, or the U.S. Supreme Court – to this evidence, but rather continued to argue that Mr. Madison should be executed based on Dr. Kirkland's evaluation.

Dementia is an irreversible and progressive disease that results in a steady decline in brain functioning. As patients with dementia lose their memory and become increasingly incapacitated, they become uniquely vulnerable. Caregivers are routinely instructed on how to handle moments of intense fear and confusion that result when dementia patients are unable to understand that simple medical procedures are being performed for their benefit. From this standpoint, it is difficult to imagine the levels of terror and disorientation that would result for a dementia patient facing execution for reasons they can no longer remember or comprehend. As a result, following through with the execution of someone suffering from dementia is at odds with the way our society treats its most vulnerable. Doing so will no longer serve any punitive purpose, and fails “to protect the condemned from fear and pain without comfort of understanding[.]” Ford v. Wainwright, 477 U.S. 399, 410 (1986).

Clemency Is Appropriate Because Judicial Override Has Been Abolished in Alabama.

Clemency for Mr. Madison is particularly appropriate because he was only sentenced to death after Judge Ferrill McRae overrode the jury's sentence of life without parole, a practice that the State of Alabama abolished in April 2017.

At the penalty phase of Mr. Madison's trial, the jury was presented with a wealth of mitigating evidence concerning Mr. Madison's long history of mental illness, and evidence of a delusional disorder he had suffered since he was teenager, including during his incarceration in the Mississippi Department of Corrections, where he was prescribed numerous anti-psychotic medications. In addition, the defense presented testimony from Mr. Madison's mother asking the jury to spare his life because she loved him and because he had always been the most helpful of her seven sons. After carefully considering all this evidence, the jury in his case determined that Mr. Madison did **not** deserve the death penalty. Despite the jury's vote, Judge McRae overrode the jury's sentence and sentenced Mr. Madison to death.

Prior to the abolition of judicial override, Alabama was the only state that allowed a judge to override a jury life verdict and the constitutionality of Alabama's judicial override had been called into question by court decisions and legislative action. In Hurst v. Florida, the United States Supreme Court rendered Florida's judicial override procedure unconstitutional. 136 S. Ct. 616 (2016). Like Florida's judicial override procedure, Alabama's procedure put the final determination of sentencing a defendant to death in the hands of the trial court judge. However, in overturning Florida's judicial override procedure, the United States Supreme Court emphasized the importance of the community's role in deciding to sentence a fellow citizen to death and found that the Constitution requires that a jury make that determination.

As Senator Dick Brewbaker, a proponent of the bill to abolish judicial override commented:

One of the most important things about our democracy is our laws are derived from the common law That's why a crime of violence is a crime against a community. That's why we have a trial in the community. That's why we pick a jury of the community and they decide guilt, innocence, and punishment. Judicial override flies in the face of that. You are entitled to a trial of a jury of your peers, and that ought to apply to sentencing too.²

See also Ring v. Arizona, 536 U.S. 584, 615-16 (2002) (“[Jurors] reflect more accurately the composition and experiences of the community as a whole . . . [h]ence they are more likely to express the conscience of the community on the ultimate question of life or death.” (internal citations omitted)).

In this case, the community's decision to sentence Mr. Madison to life instead of death was diminished.

² See *Bill Advances to Take Away AL judges' ability to override juries*, WSFA, Feb. 24, 2017, <http://www.wsfa.com/story/34601206/bill-advances-to-take-away-al-judges-ability-to-override-juries>.

Indeed, Judge McRae's use of judicial override during his tenure on the bench reflects the arbitrary nature of Alabama's judicial override. During his tenure, Judge McRae overrode a jury's life verdicts in six cases, more than any other judge in the history of Alabama. Even members of the United States Supreme Court have taken note of Judge McRae's insistence on sentencing individuals to death despite jury life verdicts, including his pro-capital punishment political ads.³ In advocating for an end to override, Senator Brewbaker highlighted the need to eliminate judicial override in part because it "taints the process," and is used to "pressure [judges] in election years."⁴

The acute unfairness in allowing Mr. Madison to be executed under a death override sentence following the abolition of judicial override is expressed by the fact that if Mr. Madison was facing sentencing today, a judge could not override his jury life verdict to impose a death sentence.

Conclusion

Clemency plays a critical role in ensuring that the death penalty is not imposed unfairly, unjustly, or arbitrarily: "Far from regarding clemency as a matter of mercy alone, we have called it the fail safe in our criminal justice system."⁵

³ See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) (referring to Judge McRae and noting, "[o]ne Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had 'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,' and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment.") (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf).

⁴ See supra note 2.

⁵ Harbison v. Bell, 556 U.S. 180, 192 (2009) (authorizing federally appointed counsel to represent death row prisoners in state clemency proceedings).

Mr. Madison is an elderly man with diagnosed dementia, who continues to suffer irreversible and progressive physical and cognitive decline. This significant disability renders a compassionate and merciful response particularly appropriate.

Moreover, Alabama has determined that judicial override is inconsistent with the basic laws of fairness in a case where the community has determined that the appropriate punishment is life. We ask that you enforce the community's determination and grant clemency in this case.

Please let us know if we can provide any other information that would be helpful to your decision in this case. Thank you for your consideration in this very important matter.

Sincerely,

Bryan A. Stevenson
Randall S. Susskind
Angela L. Setzer

Counsel for Vernon Madison