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I. INTRODUCTION

Imagine you are seventy years old. Your hair is grey, your glasses are thick, and you have some trouble hearing when people speak to you. You need help standing up and going to the bathroom, you stumble because your vision has deteriorated, and you can't remember if you took all of your medications this morning. Now imagine having to live this out in prison. You do not have the comfort of someone who can help you to the bathroom. You are afraid to bump into other prisoners for fear of altercation and you have become an easy target for the younger inmates. You are afraid every day and require medical attention that you just do not get. Your brain does not work like it used to. Sometimes you wander into areas you should not be in, and you get in trouble with the guards–finding yourself in even worse conditions, in solitary confinement.

Prisons are not meant to be nice or comfortable, but they are meant to have appropriate accommodations for prisoners who need certain arrangements or attention in order to function and live their everyday lives. There are avenues where prisoners can redress their grievances for some of the inequities they face in prisons and there are alternatives to long, painful sentences. However, it is rare to be granted relief from the hardships of prison and there is very little compassion for those older prisoners who are suffering because they cannot be accommodated. Elderly prisoners present unique circumstances that set them apart from other prisoners. Their needs are specific and encapsulate the realms of mental and physical disabilities.

Elderly prisoners present the issue of dealing with later-in-life diseases such as dementia, deteriorating mental faculties, loss of vision and hearing, loss of mobility, the increased need for medications and doctor visits, diminished motor skills, incontinence, chronic illnesses, terminal illnesses, and an increased susceptibility to other health issues such as pneumonia and the flu.[1] These prisoners did not necessarily come in with these disabilities; they developed them over the course of their sentence. It is easy to sentence someone to life in prison and send them away to spend their lives in a jail cell, but these people don't just go away. They may be forgotten by the judicial system because their cases are over, but they still have constitutional rights that need to be protected. The main constitutional issue presented here is one concerning the Eighth Amendment protection from cruel and unusual punishment.[2]

Vernon Madison, an inmate in Alabama who was sentenced to death after being convicted of murdering a police officer in 1985, is

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[1] Casey N. Ferri, *A Stuck Saftey Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 Stetson L. Rev. 197 at 204-05 (2013).
[2] U.S. CONST. amend. VIII

currently facing being impacted by this exact constitutional issue.[3] Since being convicted, Madison has suffered two strokes and has developed dementia, along with other health issues[4] Madison no longer remembers his crime or why he is in prison.[5] The issue of whether it is constitutional to execute Mr. Madison – someone who does not remember his crime – or if it is considered cruel and unusual punishment, has reached the Supreme Court.[6] In this case, the Court held that in order to satisfy the standard of mental incapacity sufficient to stay an execution, the individual must be unable to rationally understand why the state wants to execute him.[7] The Court ultimately felt that while memory loss or mental incapacity in itself may not *always* be enough to stay an execution, Madison's specific case deserved a second look due to his inability to understand his punishment – as such, the case was vacated and remanded.[8] Additionally, there is the underlying issue of whether keeping a prisoner in prison who is feeble and infirmed is, itself, cruel and unusual punishment. Perhaps compassionate release could ease some of these issues, but this has been widely debated and highly controversial in recent years. There are policy issues concerning general deterrence of criminals and punishment of the individual for their specific crime. While having an individual serve their entire sentence benefits society from a penological standpoint, the effect on the individual is diminished, or altogether lost, when they have a decreased capacity to understand or there is unnecessarily increased suffering imposed on older prisoners.

This note will address the topic of elderly prisoners and how they are marginalized in the prison system. Part 1 will discuss the aforementioned case of *Madison v. Alabama*[9], including the facts of the case, the procedural posture, implications of the ruling and the policy and societal issues at stake in the case regarding the punishment of elderly prisoners. Part II will discuss incarceration rates of individuals who are arrested later in life and "older criminals" who are coming into the prison system. Part II will also discuss the prevalence of prisoners who are growing old in prison, and how the environment and their needs have changed over time. Part III will discuss the judicial response to elderly

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[3] Deborah Barfield Berry, Bryan Lyman, & Richard Wolf, *Supreme Court Hears Arguments Over Death Row Inmate With Dementia*, Montgomery Advertiser (Oct. 2, 2018, 3:25 PM), https://www.montgomeryadvertiser.com/story/news/politics/2018/10/02/u-s-supreme-court-hears-argument-alabama-execution-case/1501109002/

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 726.

[8] *Id*. at 727-28.

[9] *See generally Madison v. Alabama*, 139 S. Ct. 718 (2019).

prisoner issues, prior decisions on compassionate release, and how older prisoners seeking alternative methods of punishment are handled in the judicial system. Part IV will analyze the implications of *Madison v. Alabama*, as well as possible solutions to the issue of elderly prisoners and lack of accommodations in general.[10] Part V will conclude the note with a summary of the issues presented and discuss the constitutional and individual rights implicated in the context of the Eighth Amendment and in the context of the *Madison v. Alabama* decision.[11]

II. MADISON'S SUPREME COURT PETITION

The case of *Madison v. Alabama* involves a man named Vernon Madison, who was convicted and sentenced to death for killing a police officer in Mobile, Alabama.[12] His crime was committed in 1985 and after three separate trials and exhausting the appeals process, Madison's case made it to the Supreme Court.[13] However, during Madison's thirty years in prison, he suffered two strokes and was known to have suffered from mental health issues.[14] Due to vascular dementia, he claimed he could no longer remember committing his crime, he could not remember the victim's name, or his previous trials.[15] The issue in the Supreme Court appeal was "whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of the 'State's rationale for his execution.'"[16]

Madison argued that he met the standard set to determine incompetency that would render his execution unlawful, which is "whether a 'prisoner's concept of reality' is 'so impair[ed]' that he cannot grasp the 'execution's meaning and purpose' or the 'link between [his] crime and its punishment.'"[17] He asserted that his multiple strokes and vascular dementia interfered with his ability to understand and comprehend his execution.[18] Additionally, Madison argued there should be wider protection and an expanded legal standard under the Eighth Amendment to broaden the scope of mental disorders allowed for

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[10] *Id*.
[11] *Id*.; U.S. CONST. amend. VIII.
[12] Lauren Davendorf & Luis L. Lozada, Madison v. State of Alabama, LEGAL INFO. INST. https://www.law.cornell.edu/supct/cert/17-7505 (last visited Sept. 12, 2019).
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Madison v. Alabama*, 139 S. Ct. 718, 723 (2019).
[17] *Id*.
[18] *Id*. at 722.

incompetence.[19] The Eighth Amendment guards against cruel and unusual punishment, and Madison argued that executing him with his diminished capacity to understand his surroundings and circumstances would violate his constitutional rights and infringe on his Eighth Amendment protections.[20]

The state of Alabama, on the other hand, argued that the defendant should be executed if he can "rationally understand his punishment and if this understanding mirrors the general communities' understanding of these concepts."[21] The State contended that since he renounces his punishment, he must have an understanding of how crime and punishment fit together.[22] The State also had concerns about the implications of expanding the incompetency standards.[23] There is a fear that expanding the standard to be more inclusive of mental disorders would incentivize prisoners to claim mental deficiency to reduce or escape their sentence, and that this would make it easier for these prisoners to obtain a stay from execution or lighter sentences.[24] The State cited studies that have shown the average age of prisoners on death row has increased and thus the likelihood of prisoners claiming incompetency on death row would increase with the more lenient standards for determining incompetency.[25] Further, the State contended that Madison's memory disorder should not exempt him from execution under the Eighth Amendment.[26] To further this argument, the State pointed out that no law has been passed by any state to prohibit execution of a defendant suffering from memory loss or who does not remember their crime.[27] It is important to note that the American Psychiatric Association and the American Psychological Association have recommended that no defendant with a severe mental disorder be executed; however, the state argued that this has not traditionally been followed in the judicial system.[28] The ultimate argument by the State is that this execution of a man who has vascular dementia and has suffered multiple strokes would not violate standards of decency set forth by the Eighth Amendment.[29]

The National Association of Police Organizations (NAPO) supported the State's case, advocating to continue the trend of stricter

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[19] *Id*. at 723-25; U.S. CONST. amend. VIII.
[20] Davendorf, *supra* note 12, U.S. Const. amend. VIII.
[21] Davendorf, *supra* note 12.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.; U.S. CONST. amend. VIII.

penalties for crimes against police officers.[30] Recently, the Protect and Serve Act was passed to make criminal sanctions for crimes against police more severe and to give police the same protections as those who are victims of hate crimes.[31] NAPO has previously stated that dementia or memory loss does not make a defendant less responsible for the murder he committed and that the memory loss does not matter and, in effect, should not even be taken into consideration.[32]

These two opposing arguments are only one facet of the issues elderly prisoners face, especially those facing life sentences or the death penalty. For example, another issue which often comes up in this context is the importance of general deterrence versus that of punishing the individual and bringing justice for a particular victim and their family. Executing a person with severe mental deterioration would not serve to further general deterrence–the punishment is too harsh for society to condone, even though it would deter criminals from committing heinous crimes in fear of a similar fate as Madison. Individual (specific) deterrence is not served either. In Madison's case, he has served 30 years in prison, spending a majority of his time in solitary confinement; he had suffered two strokes, has severe memory loss, and continues to serve his sentence for a crime he does not remember.[33] Executing Madison would not serve to deter him from future crime, since he does not know why he is being executed nor the crime that got him in jail in the first place.[34] It may, of course, provide closure or a sense that justice has been served to the family of Madison's particular victim – as such, depending on which of these purported purposes of criminal law and punishment one finds to be more persuasive, one may or may not find Madison's execution to serve a justifiable purpose at all.

The implications of the *Madison* decision will have a lasting impact on the criminal justice system. This opinion will echo throughout prisons all over the country. In *Ford v. Wainwright,*[35] the court held that executing the incompetent is unconstitutional because the retributive and deterrent goals of the death penalty are not served by punishing someone who does not understand, or who is not aware, of his punishment nor the

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[30] Lauren Devendorf, Luís L. Losada, *Madison v. State of Alabama*, Cornell Law School Legal Info. Inst., https://www.law.cornell.edu/supct/cert/17-7505.
[31] Emanuella Grinberg, *New Bill Offers Police Officers Protections Similar to Those For Hate Crime Victims*, CNN (May 8, 2018), https://www.cnn.com/2018/05/08/politics/protect-and-serve-act/index.html.
[32] Devendorf, *supra* note 30.
[33] *Id*.
[34] *Id*.
[35] *Ford v. Wainwright*, 477 U.S. 399, 422 (1986).

reason for his punishment. Furthering this holding is *Atkins v. Virginia*,[36] which ruled the execution of the "mentally retarded" is unconstitutional due to the lack of culpability in relation to the severity of the punishment. However, *Allen v. Ornoski*[37] holds that limits on the death penalty set by the Supreme Court are grounded in the fact that some people, such as minors, are less culpable than others, but old age and infirmity do not render an individual less culpable at the time of the offense. These cases exemplify the split between the courts when deciding this issue and set a powerful foundation for the forthcoming decision.

III. GROWING OLD IN PRISON AND OTHER OPTIONS

In general, when society thinks of criminals and prisoners, young people come to mind.[38] However, the reality is that prisons are populated by a mix of old and young prisoners.[39] Elderly prisoners make up eight percent of the national state prison population.[40] This means that 8,354 prisoners in state prisons are over the age of fifty.[41] It is predicted that by the year 2030, one-third of the prison population will be over the age of fifty.[42] Over the last two decades, the older inmate population has increased by 750% nationwide.[43] This will continue to increase the costs to incarcerate these individuals, as the average elderly prisoner is affected by around three chronic illnesses requiring medical attention and those not affected by illness still need help navigating their daily lives in prison.[44] Young men and women who enter the prison system age as their sentences pass, and these young offenders are now older men and women who are adjusting to a different type of life in prison.

It is not only young offenders who enter the prison system, however.[45] Older individuals do commit crimes and enter the prison system already as members of the senior population.[46] Since these offenders are older, they are more likely to get lengthier sentences, thus

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[36] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).
[37] *Allen v. Ornoski*, 435 F.3d 946, 954 (9th Cir. 2006).
[38] Gennaro F. Vito, Deborah G. Wilson, *Forgotten People: Elderly Inmates*, 49 FED. PROB. 18 (1985).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *See* Casey N. Ferri, Comment, *A Stuck Safety Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 STETSON L. REV. 197 (2014).
[43] *See* William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 855 (2009).
[44] Ferri, *supra* note 42.
[45] *Id*. at 200.
[46] *Id*.

creating a greater likelihood they will age through the system.[47] It has been shown that the amount of elderly criminals is increasing.[48] Crime is not limited to those who are young, and society often forgets or neglects to think about these older offenders.[49] Older offenders experience unique issues in prison and in the judicial system, which can include adjusting to prison, being more vulnerable to victimization (by both other prisoners and prison staff, including guards) once imprisoned, learning to live in the limited physical space prisons provide, having limited access to programs, and dealing with the diversity of ages in the prison populations.[50] Most prison programs were designed for young offenders and do not take into account the elderly.[51]

With a 0.01% release rate, many of these elderly prisoners are left to serve their entire sentences without any sort of compassionate release or special accommodations for special needs that may arise.[52] There has been much conversation on the topic of compassionate release, with an underwhelming amount of action taken on the subject.[53] Compassionate release is defined as when the court chooses to terminate or reduce a prisoner's sentence when that prisoner meets a set of stringent criteria set forth in a federal statute.[54] While this may sound beneficial, particularly to elderly prisoners, compassionate release programs " . . . simply do[] not reach enough inmates to make a tangible difference."[55] In 1984, Congress passed the Sentencing Reform Act (SRA), which called for the adoption of a sentencing commission who would create mandatory sentencing guidelines for federal judges.[56] In this act, there are safety-valve provisions aimed at avoiding injustice.[57] 18 U.S.C.§ 3582(c) allows for modification of sentences under certain conditions.[58] This provides that one way of modifying a sentence would be to show a finding of "extraordinary and compelling reasons to warrant a reduction, or the defendant is at least seventy years of age, has served at least thirty years in prison and the Director of the Bureau of Prisons determines the individual is not a danger to society or to anyone's safety.[59]

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[47] *Id*. at 201.
[48] Gennaro, *supra* note 38.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 19
[52] Ferri, *supra* note 42 at 198.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] Berry, *supra* note 43.
[57] *Id*. at 859.
[58] *Id*.
[59] *Id*.

Only recently did the United States Sentencing Commission modify their guidelines to explain what "extraordinary and compelling" means.[60] This new commentary provided that extraordinary and compelling can "include terminal illness, debilitating physical illness that prevents self-care, and death or incapacitation of the only family member able to care for a child."[61] This list is not exhaustive and the Commission had provided that other extraordinary and compelling circumstances may warrant compassionate release.[62] The Senate Judiciary Committee's Report on the SRA explains the purpose behind the safety-valve provision as such:

> "The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend [ant] was convicted have been later amended to provide a shorter term of imprisonment."[63]

Conversely, the Bureau of Prisons (BOP) has said that any extraordinary and compelling events giving rise to compassionate release need to have been reasonably unforeseen at the time of the sentencing.[64] The interpretation of this provision has usually meant that the inmate is terminally ill or near death.[65] However, it is hard to figure out what would be foreseeable and what would not, which is why the Director of the BOP has scarcely used his discretion to file motions for release.[66]

The meaning and application of "extraordinary and compelling" within the compassionate release context is at the heart of the *Madison v. Alabama* case.[67] Madison argues it is extraordinary and compelling to release a man in his situation –a man far removed from his former self.[68] It is absurd, Madison argues, to punish the man that he is today, when he cannot even recall the man who he once was, who committed this crime.

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[60] *Id*. at 858.
[61] *Id*. at 853.
[62] *Id*.
[63] *Id*. at 860.
[64] *Id*. at 862.
[65] *Id*.
[66] *Id*. at 863.
[67] *Madison v. Alabama*, 139 S. Ct. 718 (2019).
[68] Devendorf, *supra* note 30.

The State argues that he has not been punished enough, and that the family of the deceased police officer deserves for Madison's sentence to be fully executed – in every sense of the word – in order to bring about justice.[69] So how does one reconcile what morally would be "extraordinary and compelling," but statutorily may miss the mark?

IV. JUDICIAL RESPONSE

Jurisdictions and courts have widely varied in their rulings on reducing sentences, especially when it comes to capital punishment. With a controversial topic such as this one, it is no surprise that the courts have been split on how to handle this issue, which makes the ultimate decision of *Madison v. Alabama* by the Supreme Court that much more impactful. The *Madison* decision will have a lasting impact on prisoner rights, elderly prisoner accommodations and programs, and will shape the future of compassionate release. The Eighth Amendment is implicated in the question of whether it is cruel and unusual to keep older prisoners incarcerated through their older age, and if prisoners set to be executed should be executed even withstanding any ailments, infirmities or disabilities they have obtained over their years in prison.

To start, the Eighth Amendment protects against, among other things, cruel and unusual punishment.[70] "The Eighth Amendment prohibition against cruel and unusual punishment . . . limits the power of the legislative body to establish penalties for crimes, restricts the courts when sentencing convicted defendants, and protects prisoners from excess of prison authorities in the Executive Branch."[71] *Rhodes v. Robinson* defines the Eighth Amendment as prohibiting the "wanton and unnecessary infliction of pain upon persons in custody."[72] "The test of cruel and unusual punishment considers whether the infliction grossly exceeds the legitimate need for force and violates the standards of contemporary society."[73] To sustain an Eighth Amendment claim, conduct must be more egregious than that sufficient to establish a common law tort.[74] The Eighth Amendment specifically provides that there should not be excessive bail, excessive fines, or cruel and unusual punishment inflicted.[75]

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[69] *Id*.
[70] *Id*.
[71] *Williams v. Mussomelli*, 722 F.2d 1130, 1132 (3rd Cir. 1983).
[72] *Rhodes v. Robinson*, 612 F.2d 766 at 771 (3rd Cir., Dec. 28, 1979).
[73] *Id*.
[74] *Mussomelli*, 722 F.2d at 1132.
[75] *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

The Supreme Court case of *Gregg v. Georgia* ruled that capital punishment for the crime of murder is not cruel and unusual punishment under the Eighth Amendment.[76] Because the punishment must generally fit the crime committed, courts have ruled that capital punishment is most acceptable in situations of murder because the offender deliberately took another's life.[77] However, courts have ruled that capital punishment for the crime of murder can still be considered unconstitutional in certain cases.[78]

For example, in *Ford v. Wainwright*, the Court ruled that it was unconstitutional to execute someone who is incompetent, the rationale for this being that the deterrent affect is not served by executing someone who does not understand the crime, their punishment, or their trial.[79] This Court noted that an evidentiary hearing to determine the mental capacity of the individual is required and the proper procedural safeguards, such as having an attorney and a fair trial, were necessary.[80] Additionally, in *Atkins v. Virginia*, the Court held that it is unconstitutional to execute a "mentally retarded" individual.[81] The Court noted that while their mental capacity does not exempt them from criminal sanctions, it is unconstitutional to execute them due to a lesser degree of understanding and awareness.[82] Following this, in *Lockett v. Ohio*, the Court ruled that when imposing the death penalty, the jury should be allowed to consider mitigating and aggravating circumstances, including the individual's character.[83] The Court held that once a prisoner is sentenced to the death penalty, the sentence must be imposed unless:

> When considering the nature and circumstances of the offense and the history, character, and condition of the offender, the sentencing judge determines that at least one of the following mitigating circumstances is established by the preponderance of the evidence. . . that the offense was primarily the product of the offender's psychosis or mental deficiency.[84]

This holds that a person's mental condition at the time of the offense affects their ability to be sentenced to death, and when read in the

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[76] *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).
[77] *Id*. at 203.
[78] *Id*. at 174.
[79] *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).
[80] *Id*. at 410.
[81] *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
[82] *Id*. at 318.
[83] *Lockett v. Ohio*, 438 U.S. 586, 603 (1978).
[84] *Id*. at 593-94.

context of other death penalty cases, this provides that a person's lack of mental capacity can render them unable to be executed, period, as doing so would violate the Eighth Amendment's protections against cruel and unusual punishment.[85] Regardless of whether the person is incapacitated at the time of the crime, the time of the trial, or at the time of their execution, the precedent holds that capital punishment of someone who has lessened mental faculties is cruel and unusual and cannot be done without offending the constitution.[86]

However, there are issues with the cases cited above where great ambiguity lies. In *Atkins v. Virginia*, the Court never provided a viable guideline on how to determine if a person claiming mental incapacity falls within the protection of the Eighth Amendment.[87] In *Hall v. Florida*, the Court held that a man whose IQ was seventy-one, rather than seventy or below, which Florida proscribed was the cutoff for intellectual disability, was allowed to present evidence of his intellectual disability before being sentenced to death.[88] The Court noted that an objective standard, such as an IQ test, for determining intellectual disability was not enough to ensure a fair process; however, subjective components make the process complex as well.[89] This is to say there is no one-size-fits-all category of mental illness or developmental delay that renders someone exempt from execution.

Conversely, courts have ruled that old age and infirmity do not render the individual less culpable at the time of the offense.[90] In *Allen v. Ornoski*, a prisoner, who was blind, old, and infirmed, had been on death row for murder for twenty-three years.[91] The court held that his physical infirmity had nothing to do with his mental state at the time of the crime nor did it affect his ability to understand why he was being executed.[92] The Court found that the execution of the elderly and the infirm generally had no legal support and could not be sustained in this case.[93] The prosecution in these cases often argues that the retributive and penological purposes served by the death penalty are still served and there is a strong deterrent effect on those who are thinking of committing similar crimes, as long as the individual who is being executed understands the nature of why they

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[85] *See Atkins*, 536 U.S. at 304; *see also Ford v. Wainwright*, 477 U.S. 399 (1986).
[86] 536 U.S. at 304.
[87] *Hall v. Florida*, 572 U.S. 701, 718 (2014); *see also Atkins*, 536 U.S. at 304.
[88] *Hall*, 572 U.S. at 724.
[89] *Id*. at 724.
[90] *Allen v. Ornoski*, 435 F.3d 946, 954 (9th Cir., 2006).
[91] *Id*. at 949.
[92] *Id*. at 952.
[93] *Id*. at 954.

are being executed.[94] Courts have also ruled that spending a significant amount of time on death row in harsh conditions does not render someone unable to be executed.[95]

This brings up the issue of treatment of older prisoners in the prison system and the lack of options for those suffering in prison. As *Ornoski* prescribes, elderly prisoners can be executed as long as their mental state is not affected and they understand why they are being executed.[96] However, the rationale in *Ornoski* and other death penalty jurisprudence does not consider what, if any, avenues of relief are available for elderly prisoners who are not on death row, necessarily. Courts have also ruled on the imposition of alternative punishments, such as compassionate release and other means of alleviating the unusual and cruel conditions elderly prisoners face that are not on death row. As stated above, the standard for extraordinary and compelling are circumstances not foreseen at the time of sentencing, and can include terminal illness, debilitating physical illness that prevents self-care, and death or incapacitation of the only family member able to care for a child, but this list is not exhaustive.[97] Additionally, compassionate release can only be granted upon a motion by the Director of the Bureau of Prisons.[98]

The case of *United States v. Dimasi* held that the reduction of an inmate's sentence from eight to five years was warranted even though there was no terminal illness, because the defendant met the criteria to be considered an elderly prisoner with "extraordinary and compelling" circumstances due to a high level of care and services that he required that could not be afforded to him in prison.[99] However, in the case *United States v. Dresbach*, a man with a terminal illness, whose wife and child also suffered from health issues, was denied compassionate release because the Director of the Bureau of Prisons had exercised its discretion in reviewing the case and had given a reasonable basis for the denial of the inmate's request.[100] The Court acknowledged that while there are medical

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[94] *Id*. at 953; Garrett Epps, *The Machinery of Death is Back on the Docket*, (Sept. 18, 2018), https://www.theatlantic.com/ideas/archive/2018/09/tinkering-with-the-machinery-of-death/570421/ (describing the State of Alabama's focus on the retributive effect of capital punishment and their goal to maintain Madison's sentence as long as he knows why he is being punished).

[95] *See generally Lackey v. Texas*, 514 U.S. 1045 (1995).

[96] *See Ornoski*, 435 F.3d at 951-52.

[97] Berry, *supra* note 43, at 863; *see also* Casey N. Ferri, *A Stuck Saftey Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 Stetson L. Rev. 197 at 204-05 (2013)..

[98] Berry, *supra* note 43, at 863.; *United States v. Lagonia*, No. 09-65, 2012 US Dist. LEXIS 21613, at *3 (D. N.J. Feb. 21, 2012).

[99] *See United States v. Dimasi*, 220 F. Supp. 3d 173 (D. Mass. 2016).

[100] *United States v. Dresbach*, 806 F. Supp. 2d 1039, 1042 (E.D. Mich 2011).

and non-medical reasons for compassionate release, the BOP had properly used its discretion in denying the request.[101] Additionally, courts have held that even terminal illness does not warrant compassionate release, arguing that the Eighth Amendment does not require release of a terminally ill individual.[102] The juxtaposition of these two cases shows that compassionate release is an inadequate remedy to the unique issues faced by elderly prisoners, in large part because of the vast discretion that the BOP – and, in turn, courts – have in granting or denying it. Indeed, as long as the BOP has followed their procedure and the sentence does not offend the Eighth Amendment's protection of cruel and unusual punishment, a denial of compassionate release will be upheld by courts.[103]

V. WHERE DO WE GO FROM HERE?

The finality of the death penalty is not the problem in *Madison v. Alabama*, nor is it an issue of the punishment fitting the crime. The problem is whether it is constitutionally acceptable to execute a man who has suffered severe health issues, who no longer remembers his crime and who is, for all intents and purposes, no longer the same person who committed the crime.[104] Madison has suffered multiple strokes, is legally blind, and can no longer recite the alphabet or rephrase a sentence.[105] He also requires assistance walking and using the restroom.[106] Taking these things into account, it is difficult to argue that it is constitutional to utilize such harsh and irreversible punishments as the death penalty as a viable method of fulfilling the goals of criminal law and punishment. If these individuals cannot or should not be executed, that of course begs the question of what should be done with them – that question can be simply answered in one of two ways: to keep Madison (and others like him) in prison, or to set him free via compassionate release.

As stated above, the concept of compassionate release is hard to obtain and there are little other alternatives for elderly prisoners in similar cases where the punishment may be on the brink of being cruel and

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[101] *Id*. at 1041.
[102] *See Engle v. United States*, 26 F. App'x. 394, 396-97 (6th Cir. 2001).
[103] *Dresbach*, 806 F. Supp. 2d at 1042.
[104] *Madison v. Alabama*, No. 17-7505 (U.S. Feb. 27, 2019); Lauren Davendorf, Luís L. Lozada, *Madison v. State of Alabama*, https://www.law.cornell.edu/supct/cert/17-7505 (last visited Sept. 12, 2019).
[105] Epps, *supra* note 94.
[106] *Id*.

unusual.[107] One possible solution would be to reform and completely redo the compassionate release standards and guidelines. This would make compassionate release a more accessible tool for prisoners who fit the criteria, rather than making the process so cumbersome with little result or progress for the inmate. There are stories where inmates have not been released in time to see their loved ones pass, even though they were set to be released in a few months.[108] It seems that executing a man with no memory of his crime in a dire health condition would implicate a similar sort of compelling circumstance. Madison was set to be executed on January 25, 2018; however, this did not happen.[109] Upon review, Madison was ruled incompetent to be executed, but in the same month was cleared and his execution was reinstated.[110] Madison's counsel placed emphasis on the Eighth Amendment's protection against cruel and unusual punishment, relying on the decision of *Ford v. Wainwright* stating that it is cruel and unusual punishment to execute a man with severe cognitive dysfunction with memory loss and a lack of understanding as to the conditions of his execution.[111] This seems to be another example where an inmate is not able to present evidence of their incapacity, or where it is merely ignored.[112]

Hearings such as this one are incredibly hard to navigate. An overhaul of the concept of compassionate release would make the process Madison is going through more streamlined and accessible by providing clear guidelines to assess the individual circumstances of each case. With more clarity, comes more availability and uniformity across the judicial system. The Commission has tried to define the "extraordinary and compelling" standards that warrant a motion for release, but the application has been messy and inconsistent.[113]

The State argued that to expand the standard for mental illness in this way leaves the door open to abuse of the system.[114] The State urged that following the *Ford* ruling would incentivize defendants to claim mental illness as a scapegoat to avoid execution.[115] The State argued that

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[107] Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 STETSON L. REV. 197, 198 (2013) (describing the low release rates of elderly prisoners and the minimal impact of compassionate release on the prison system).
[108] Berry, *supra* note 43, at 856-57.
[109] *Madison v. Alabama*, 139 S. Ct. 718 (2019); *Madison v. Alabama*, https://ballotpedia.org/Madison_v._Alabama (last visited Sept. 12, 2019).
[110] *Id*.
[111] *Ford v. Wainwright*, 477 U.S. 399, 410, 417-18 (1986).
[112] *See Hall v. Florida*, 572 U.S. 701, 724 (2014).
[113] Berry, *supra* note 43, at 853.
[114] Lauren Davendorf, Luís L. Lozada, *Madison v. State of Alabama*, https://www.law.cornell.edu/supct/cert/17-7505 (last visited Sept. 12, 2019).
[115] *Id*.

Madison is fit to be executed because he understands the correlation between crime and punishment and knows he is being punished for committing a crime.[116] Additionally, the State argues that since he insists his punishment is unfair, he is fit to understand what is happening and why it is happening.[117] The State contends that Madison is suffering from a memory disorder and this does not fall under the category of mental illness, which would allow him to escape his sentence using a one-size-fits-all approach. [118] However, the State's one-size-fits-all approach is not the answer.

As Madison contended, there are a variety of mental illnesses, some we know more about and some we know less about.[119] This does not change the fact that it is inhumane to execute someone who is experiencing mental illness. The *Hall v. Florida* decision strikes an important chord by stating that while the *Ford* decision may be extreme and all encompassing, it is important to review each case at a microscopic and individual level before signing off that someone is or is not fit for execution.[120] Taking this concept a step further, another solution could be to impose mandatory mental competency hearings upon receipt of petitions for compassionate release, especially in capital cases.[121] This would be a thorough way for the courts to look at each case and each individual to decide the appropriate course of action to level the playing field for everyone involved.[122] Arbitrary decisions based on a piece of paper do not seem to be furthering justice here. However, this proposal is not perfect as it would likely lead to an influx in petitions from inmates wanting to be examined, thus flooding the already crowded courtrooms.

Another possible solution would be to take a totality of the circumstances approach, rather than just looking at the individual and their current mental deficiencies. This approach would include looking at the crime and everything that happened afterward, including the prisoner's life inside the prison system and health conditions. Madison has a host of issues, not limited to his memory loss. He has suffered severe health issues and has served the majority of his time in solitary confinement, which has been proven to cause serious mental health issues for inmates.[123] Courts

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[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *See Hall v. Florida*, 572 U.S. 701, 724 (2014).
[121] *Id*.
[122] *Id*.
[123] Lauren Davendorf, Luís L. Lozada, *Madison v. State of Alabama*, https://www.law.cornell.edu/supct/cert/17-7505 (last visited Sept. 12, 2019); *see also* Kristin Weir, *Alone, in 'the hole'*, 43 Monitor on Psychol. 54 (2012).

should look at the whole picture, rather than focusing on trying to fit the individual into a box that they feel encompasses their version of mental health or mental incapacity.

It is important to keep in mind that just as much as the punishment must fit the crime, the punishment should also fit the person. It is important to make sure that the identity of the offender and the identity of the inmate up for execution are the same. Madison is no longer the same man who committed his heinous crime. Throughout the years, at the consequence of medical and psychological issues, he has transformed into someone far removed from the offender he came into prison as. There are situations with older prisoners who are not on death row where keeping the inmate incarcerated no longer fits the crime. People are able to be reformed, and incarceration may no longer serve a purpose, other than keeping someone locked up for the sake of locking them up. This is true when the individual is suffering through prison life and could be let out to a medical facility or a more accessible place for them to be.

There are viable options for older prisoners who no longer belong in harsh prison environments. Besides parole and probation, taking prisoners who belong in a medical facility and transferring them to an alternate permanent residency is another solution.[124] It offends the Eighth Amendment to keep older people in prison where they lack basic care and accommodations. Creating a medical facility to keep all of the resources needed to care for these individuals would lower costs to the state, while making it easy to accommodate older prisoners without actually releasing them.[125] This would provide the ability for more targeted services, more specialized attention, and would eliminate the need for transfer from location to location.[126] Additionally, these older prisoners would be in a safer place, away from younger men who serve as a threat to them.[127]

However, opening the door to releasing older prisoners does bring about some issues. The courts are often hesitant to grant certain releases of inmates due to the fear of opening the floodgates. The criteria for being "old and infirmed" is so broad and can encompass so many different conditions that it would be hard for the court to differentiate between who should get released and who is merely trying to shorten their sentence by claiming they have aged and are uncomfortable in prison, without much of a compelling basis for being released. As it is, it is hard to determine who is mentally sound enough to be executed and who is not. It is no

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[124] Casey N. Ferri, *A Stuck Saftey Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 STETSON L. REV. 197 at 210.
[125] *Id*.
[126] *Id*.
[127] *Id*.

wonder the court has difficulty granting these releases, with such a strict and somewhat vague criteria to guide them. When you think of the extraordinary and compelling circumstances test laid out by the Sentencing Commission, many people could already claim that they have met this standard.[128] The courts are navigating how far they want to extend this standard and how feasible they wish to make prison release for older inmates who may have compelling and justified reasons for being released early or who wish to be spared from their sentence of capital punishment.[129] The public also has an interest in enforcing the punishment to produce a retributive and deterrent effect, which may not happen if these individuals are released before their sentence is up.[130]

There is also the added problem of placing the burden of housing and caring for these inmates on those out in society.[131] This includes not only the physical responsibility of caring and looking after these people, but the enormous financial burden that comes with housing, feeding and looking after someone.[132] Additionally, any facilities the individual would need to be placed in, such as medical care or end-of-life care, would need to be paid for somehow and this burden would likely fall on the state, leaving taxpayers still paying for these inmates long after they have been released.[133] To release these prisoners, it is not merely about letting them out–it is about making sure they are able to sustain themselves once they are out and that they continue to stay out of trouble.

VI. CONCLUSION

Aging prisoners are a large group of people who have been overlooked throughout history and are often inadequately taken care of in attempts at prison reformation. This group of roughly one third of prisoners nation-wide are struggling to find their way in their daily lives, in the prison system, and ultimately out of prison.[134] Compassionate release is a theory that sounds good on paper, but translates rather poorly in real life.[135] With a lack of programs for the elderly, in prison and to get out of prison, this group will continue to be marginalized until real reform

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[128] William W. III Berry, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 at 853.
[129] Devendorf, *supra* note 128.
[130] Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 Fed. Sent'g Rep. 33, 35 (2010).
[131] *Id*. at 33.
[132] *Id*. at 35.
[133] *Id*.
[134] Ferri, *supra* note 124 at 197.
[135] *Id*. at 198.

happens, with an emphasis being on those over fifty. Compassionate release needs a revamped standard of review to make this idea of releasing those who no longer need to be in prison or those who have been punished enough to fit the crime a reality instead of a distant and unattainable ideal.

The Supreme Court showed Madison a modicum of compassion and ruled that the prisoner must have the ability to understand his punishment.[136] However, it almost seems as if extraordinary and compelling is an impossible standard to meet. Madison is a man, who at one point in his life committed a horrible crime.[137] However, his identity has changed because of various medical conditions and the punishment he has endured throughout his thirty-plus years in prison.[138] He has remained in solitary confinement, despite vision loss, memory loss and multiple strokes.[139] The Supreme Court found the compassionate thing to do was to release this man, who is no longer mentally the man who committed the crime, from the burden of his execution. The emphasis in the prison system should be on punishing the individual, and when the individual is "no longer there," then the punishment should be reviewed and potentially revised.

To kill a man, who does not remember his crime, his trial, the victim, and maybe even himself, is a merciless killing. It is not to be said that Madison did not deserve punishment for his crime. A life is a life, and Madison's life is not the same after his experience in the prison system. He wears his punishment of solitary confinement and poor health every day in prison. His punishment has not been lost on him, even if he has lost who he is and what he did. The Supreme Court's ruling has answered many questions, and the *Madison v. Alabama* decision will have a lasting impact on impaired prisoners on death row, older prisoner's suffering in prisons, and ultimately it will have the most extraordinary and compelling impact on the life of Madison himself.[140]

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[136] *Madison v. Alabama*, 139 S. Ct. 718 (2019); William W. III Berry, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 at 853.

[137] Lauren Davendorf, Luís L. Lozada, *Madison v. State of Alabama*, https://www.law.cornell.edu/supct/cert/17-7505 (last visited Sept. 12, 2019).

[138] *Id*.

[139] *Id*.

[140] *Madison v. Alabama*, 139 S. Ct. 718 (2019).