No. 17-7505

# In the Supreme Court of the United States

VERNON MADISON, PETITIONER

*v.*

STATE OF ALABAMA

*ON WRIT OF CERTIORARI*
*TO THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA*

## BRIEF FOR THE STATES OF TEXAS, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF RESPONDENT


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## INTEREST OF AMICI CURIAE

"[T]he authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). To administer those systems fairly and effectively, States need a coherent jurisprudence on the constitutional guarantees afforded defendants and prisoners. Petitioner's position, if adopted, would upend settled law in at least two respects.

First, petitioner claims that his inability to recall his crime deprives him of the "rational understanding" one needs to be competent to be executed. That same rational-understanding standard governs competence to stand trial, plead guilty, and waive counsel. And over the last half-century, federal and state courts have reached a consensus that lack of memory about a crime does not itself make a defendant incompetent in those contexts.

Second, petitioner suggests that his condition is analogous to intellectual disability, which categorically exempts a person from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). But the rationale for that exemption hinges on the fact that intellectual disability develops in childhood, which undercuts the retributive and deterrent purposes of capital punishment. The same logic does not extend to conditions like petitioner's dementia that develop after sentencing.

Because petitioner puts at risk the doctrinal consistency of settled rules of criminal law, the amici States have an interest in opposing his arguments.[1]

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[1] This amicus brief is filed with the written consent of all parties as reflected on the docket.

## SUMMARY OF ARGUMENT

I. Petitioner's claim that he is incompetent to be executed because he cannot recall committing the underlying offense clashes with uniform precedent on competency in criminal law. The standard for competence to be executed tracks the standard for competence to stand trial, plead guilty, and waive counsel. For each of those events, the person must have a "rational understanding" of the proceedings. That common metric means that cases involving competence at the trial stage provide useful guidance on the question of competence to be executed. And that is especially true here because the issue of whether amnesia renders a defendant incompetent has been frequently litigated in federal and state courts and a consensus rule has emerged: lack of memory about the events surrounding a crime does not itself make a defendant incompetent to stand trial, plead guilty, or waive counsel. It follows, then, that the same lack of memory about the crime does not cause a prisoner to be incompetent to be executed.

II. Petitioner also departs from precedent in arguing that his condition is analogous to intellectual disability, which exempts a person from the death penalty under *Atkins*. Early age of onset was material to *Atkins*'s reasoning in that intellectually disabled persons have diminished culpability for the crimes they commit, are less likely to be deterred from committing crimes by the possibility of execution, and face special risks of receiving the death penalty due to limitations on their functioning at trial. That logic does not extend to persons like petitioner who develop dementia and memory loss after being convicted and sentenced. Also, dementia and other mental illnesses are too variable for a categorical rule like *Atkins*. The existing standard suffices to protect

those whose underlying mental conditions in fact prevent them from rationally understanding their punishments and are therefore incompetent to be executed.

## ARGUMENT

### I. Loss of Memory About the Offense Does Not Make the Defendant Incompetent at Any Other Stage of a Criminal Proceeding.

Petitioner asserts that his current medical condition has left him without any memory that he killed a police officer, was convicted of murder, and received a sentence of death. Pet'r Br. 25. For that reason, he claims that he is incompetent to be executed. *Id.* But as explained below, because memory loss alone does not defeat competency at other stages of criminal proceedings, it does not render petitioner incompetent to receive his punishment.

A. "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Since *Ford*, the Court has restyled that prohibition as preventing States from executing a prisoner who is "incompetent to be executed." *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007).

The Court has not adopted a precise standard to determine whether a prisoner is incompetent to be executed. *Id.* at 960-61. But it has explained that the "substantive federal baseline" for competency "does not foreclose inquiry" into whether a prisoner has a "rational understanding" of the reason for the execution. *Id.* at 935, 958, 959. Based on that explanation, most circuits have read *Panetti* to require that a prisoner have a "rational understanding" of his death sentence and the reason for it. *E.g.*, *Ferguson v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 1315, 1335-36 (11th Cir. 2013); *Green v. Thaler*, 699 F.3d

404, 418 (5th Cir. 2012); *Bedford v. Bobby*, 645 F.3d 372, 378 (6th Cir. 2011) (per curiam).

That "rational understanding" standard mirrors the test used to assess other kinds of competency in criminal proceedings. To be competent to stand trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). The same "rational understanding" is required to show competence to plead guilty and to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389, 398-400 (1993).

Not only do these competency standards all use the same "rational understanding" wording, but they are also procedurally linked. If a prisoner was adjudged competent to stand trial, or if his competency at that stage was "sufficiently clear as not to raise a serious question," a State may presume that he is also competent to be executed when carrying out his death sentence. *Ford*, 477 U.S. at 425-26 (Powell, J., concurring); *see also Panetti*, 551 U.S. at 949 (explaining that, under the rule of *Marks v. United States*, 430 U.S. 188 (1977), Justice Powell's opinion in *Ford* "sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim"). Of course, a prisoner may seek to rebut that presumption and show that, since trial, he has become incompetent to be executed. But even then, a State may require "a substantial threshold showing" of incompetency to trigger further proceedings. *Ford*, 477 U.S. at 426 (Powell, J., concurring).

B. The Court has not defined "rational understanding" for these related competency standards. *See Pan-*

*etti*, 551 U.S. at 959 (observing that "a concept like rational understanding is difficult to define"). But since that test was first adopted in *Dusky*, lower courts have generally concluded that a criminal defendant can have the required rational understanding even if he cannot recall the events surrounding the crime.

1. That conclusion is the consensus rule among the federal circuit courts of appeals. Each circuit has addressed this issue in the context of competence to stand trial. Those courts have unanimously said that failure to remember the crime, without more, does not make a defendant incompetent.[2] Rather, "an amnesiac defendant,

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[2] *Brown v. O'Brien*, 666 F.3d 818, 826 n.9 (1st Cir. 2012) (noting that "amnesia as to pertinent events . . . do[es] not automatically prevent a defendant from being tried or pleading guilty"); *United States v. Villegas*, 899 F.2d 1324, 1341 (2d Cir. 1990) ("A defendant's amnesia about events surrounding the crime will not automatically render him incompetent to stand trial."); *United States ex rel. Parson v. Anderson*, 481 F.2d 94, 96 (3d Cir. 1973) (per curiam) (concluding that "the fact that the defendant suffered amnesia as to the commission of the crime, does not, in and of itself, render the defendant incompetent to stand trial"); *United States v. Kendrick*, 331 F.2d 110, 114-15 (4th Cir. 1964) (per curiam) (noting that, on remand, expert opinion on the defendant's amnesia may still confirm his counsel's testimony that he was competent to stand trial); *United States v. Doke*, 171 F.3d 240, 248 (5th Cir. 1999) (reaffirming circuit precedent that "amnesia by itself does not render a defendant incompetent [to stand trial]"); *Dye v. Cowan*, 472 F.2d 1206, 1207 (6th Cir. 1972) (per curiam) (holding that "claims of limited lapses of memory are not in and of themselves evidence of mental incompetence to stand trial"); *United States v. Andrews*, 469 F.3d 1113, 1118 (7th Cir. 2006) (finding it "clear that amnesia alone does not render a defendant incompetent to stand trial"); *Davis v. Wyrick*, 766 F.2d 1197, 1202 (8th Cir. 1985) ("Amnesia alone is not a bar to the prosecution of an otherwise competent defendant."); *United States v. No Runner*, 590 F.3d 962, 965 n.2 (9th Cir. 2009) (noting that circuit courts "have uniformly held that amnesia regarding the

like any other defendant, must show that he is unable 'to satisfy the ordinary competency standard.'" *Andrews*, 469 F.3d at 1119 (quoting *Rinchack*, 820 F.2d at 1569).

Several circuits have indicated that memory loss alone does not impede a rational understanding of the proceedings because other sources of information can readily fill any memory gaps. *See, e.g., id.* at 1120 (family and friends; video evidence); *Doke*, 171 F.3d at 248 (prosecution's documents); *Villegas*, 899 F.2d at 1342 (witness testimony; government files); *Rinchack*, 820 F.2d at 1570 (trial transcripts; witness testimony); *Davis*, 766 F.2d at 1202 n.8 (eyewitness accounts; prior admissions); *Borum*, 464 F.2d at 900 (prosecution files; defense investigation); *Wilson*, 391 F.2d at 464 (other evidence). Perhaps for that reason, one circuit has suggested that it would be "exceptionally rare" for a defendant's lack of memory about a crime to lead to a finding of incompetence to stand trial. *Andrews*, 469 F.3d at 1119.

2. The state courts that have addressed this issue align with the federal circuits' consensus. The highest courts of 33 States have concluded that a defendant's inability to remember the crime does not itself render him incompetent to stand trial or plead guilty. *See* Appendix

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alleged crime does not constitute incompetence per se"); *United States v. Borum*, 464 F.2d 896, 900 (10th Cir. 1972) (rejecting claim that "amnesia is a *per se* deprivation of due process" and concluding that the *Dusky* standard was met "[e]ven if the loss of memory had been a genuine loss of memory"); *United States v. Rinchack*, 820 F.2d 1557, 1569 (11th Cir. 1987) (holding that "amnesia does not render a defendant automatically incompetent to stand trial"); *Wilson v. United States*, 391 F.2d 460, 464 n.4 (D.C. Cir. 1968) (explaining that defendants' "present awareness of their whereabouts and activities at the time of the crime" is not "an essential ingredient of competence" and that the court "has never considered such lack of memory as going directly to competence to stand trial").

A. Among the remaining States, nine intermediate appellate courts have adopted the same view. *See* Appendix B.

Like the federal circuits cited above, some state courts have reasoned that a defendant's amnesia about the crime may be analogous to "'missing' evidence," but it does not logically preclude the defendant from rationally understanding the nature and object of the proceedings. *Morris v. State*, 301 S.W.3d 281, 293 (Tex. Crim. App. 2009); *accord Reagon v. State*, 251 N.E.2d 829, 831 (Ind. 1969); *Morrow v. State*, 443 A.2d 108, 112 (Md. 1982); *State v. Willard*, 234 S.E.2d 587, 593 (N.C. 1977). From that premise, one court has concluded that it would be "an extraordinary case in which an inability to recall the charged event because of amnesia could constitute mental incapacity to stand trial." *Morris*, 301 S.W.3d at 293. Indeed, the amici States could find only one state appellate decision holding that amnesia about a crime sufficed to show incompetency. *State v. McIntosh*, No. 87-2215, 1988 WL 126494, at *8-9 (Wis. Ct. App. Aug. 25, 1988) (unpublished). And even there, the issue was not the defendant's lack of rational understanding, but rather the fact that "critical evidence . . . could not be extrinsically reconstructed without his testimony, and the strength of the state's case was not such as to negate his reasonable hypothesis of innocence." *Id.* at *9.

C. Because the mere inability to recall committing a crime does not prevent a defendant from rationally understanding the proceedings for purposes of standing trial, pleading guilty, or waiving counsel, and because the same rational-understanding standard measures competency at the execution stage, it follows that a prisoner's failure to remember his capital offense does not render him incompetent to be executed.

If anything, memory loss is even less relevant in the execution context. As discussed above, most courts have identified a defendant's inability to relay or reconstruct events as the primary difficulty posed by amnesia at trial. But, again, even that obstacle does not itself negate the defendant's competence to proceed because the facts can be developed by other means. That concern should be virtually non-existent by the time an execution date is set. At that point, the defendant will have either pleaded guilty or been tried and proven guilty beyond a reasonable doubt, and he will have exhausted available appeals and post-conviction challenges.

If the Court were to accept petitioner's argument, it would inevitably raise doubts about the longstanding consensus that memory loss alone does not make a defendant incompetent to stand trial, plead guilty, or waive counsel. That coherent set of decisions should not be disturbed.

## II. Petitioner Is Not Analogous to an Intellectually Disabled Person Who Is Categorically Exempt from the Death Penalty.

Perhaps in an effort to overcome the settled law discussed above, petitioner now appears to stake his incompetence claim not only on his inability to recall his crime, but more broadly on his dementia and attendant cognitive impairments. *Compare*, *e.g.*, Pet. iii (presenting the question whether the State may "execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense"), *with* Pet'r Br. i (revising that question to ask whether the State "may execute a prisoner whose *vascular dementia and cognitive impairment* leaves him without memory of the commission of the capital offense *and* prevents him from having a rational understanding of the circumstances of his

scheduled execution" (emphases added)); *see also* Pet'r Br. 16 (arguing that States must "refrain from executing an individual whose verifiable cognitive impairments render him incompetent to rationally understand the circumstances surrounding a scheduled execution").

Relying on his overall medical condition, petitioner compares himself to persons with intellectual disability, who are exempt from the death penalty under *Atkins*. Pet'r Br. 11 n.5 (arguing that "[h]is functioning is thus akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment" (citing *Atkins*, 536 U.S. at 316)). Petitioner suggests that "age of onset is the only difference between an individual who is intellectually disabled, and therefore ineligible for the death penalty" under *Atkins* and "an individual who suffers from dementia." *Id.* at 27-28 n.17.[3]

As explained below, the *Atkins* analogy fails. Even if petitioner were correct that age of onset is the only difference between his condition and intellectual disability, that difference defeats his argument. The Court's reasons for holding that intellectually disabled persons are exempt from capital punishment do not apply to offenders like petitioner who acquired their mental impairments after being sentenced.

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[3] Petitioner's amici likewise appear to champion an *Atkins*-like categorical approach to offenders with dementia over application of the established rational-understanding test. *See* APA Amicus Br. 11 (arguing that "[t]he infirmities associated with vascular dementia, moreover, do not always map cleanly onto the concept of a 'rational understanding' of the reason for execution"), 12 (claiming that executing an individual with vascular dementia "offends humanitarian principles for additional reasons that are not strictly tied to the question of rational understanding").

A. In *Atkins*, the Court considered whether the execution of any person with intellectual disability (then called "mental retardation") was prohibited by the Eighth Amendment. 536 U.S. at 307. Then, as now, proof of intellectual disability required the presence of three characteristics: (1) significantly sub-average intellectual functioning; (2) significant limitations in adaptive skills; and (3) the onset of those two deficits before the age of 18. *Id.* at 308 n.3, 318; *accord Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017) (describing those "three core elements" of intellectual disability as "generally accepted").

To answer the Eighth Amendment question, the Court first surveyed state legislation addressing execution of the intellectually disabled and concluded that "a national consensus has developed against it." 536 U.S. at 316. Then, applying its "own judgment," *id.* at 313, the Court found that its death-penalty jurisprudence provided two reasons that confirmed the consensus that the intellectually disabled "should be categorically excluded from execution," *id.* at 318.

The first reason was that execution of persons with intellectual disability did not "measurably contribute[]" to either purpose served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." *Id.* at 319 (citations and internal quotation marks omitted).

As to retribution, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* The Court had already concluded that the mental impairments of the intellectually disabled—particularly their frequent impulsiveness and tendency to follow others—"diminish their personal culpability" for the crimes they commit. *Id.* at 318. If the intellectually disabled thus have "less[] culpability" than the average

murderer, the Court reasoned, they necessarily fall short of the culpability of that narrower class of persons whose "most serious crimes" are the only ones that merit the death penalty as retribution. *Id.* at 319.

And as to deterrence, the logic of capital sentencing is that "the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Id.* at 320. But the intellectually disabled's "cognitive and behavioral impairments," the Court explained, "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." *Id.*

The second jurisprudential reason for a categorical exemption was that persons with intellectual disability face "a special risk" that "'the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). That heightened risk arises from two factors. Some evidence pointed to the possibility that intellectually disabled persons may falsely confess to crimes. *Id.* Also, they may be less able "to make a persuasive showing of mitigation" due to their "typically poor" performance as witnesses and problems assisting counsel. *Id.* at 320-21.

B. The rationale of *Atkins* does not fit petitioner's situation. There is nothing close to a national legislative consensus against executing even those persons who had dementia or a similar mental illness *at the time of the crime*, much less those who did not become ill until after being sentenced. *See* Aurelie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to Be Eligible for the Death Penalty?*, 32 Crim. Just. 9, 13-14 (Fall 2017) (describing unenacted bills in eight States

that all require "significant impairments to the defendant's capacity at the time of the crime"). And every reason cited by the Court for exempting the intellectually disabled from the death penalty is tied to the presence of that disability before the crime, at the commission of the crime, or at trial. That is not the case with petitioner's dementia and attendant cognitive impairments.

Because petitioner did not have dementia when he murdered a police officer and attempted to murder his ex-girlfriend, his culpability for those crimes is in no way diminished by his current state. *See Allen v. Ornoski*, 435 F.3d 946, 951-52 (9th Cir. 2006) (rejecting argument to extend *Atkins* to prohibit execution of "the elderly and infirm" because "the Supreme Court's limitations on the use of the death penalty are grounded in the theory that some classes of persons are less culpable and therefore not deserving of the death penalty and Allen's age and infirmity do not render him less culpable at the time of his offenses"); *Bland v. State*, 164 P.3d 1076, 1079 (Okla. Crim. App. 2007) (rejecting argument that the Eighth Amendment bars execution of a terminally ill person because the "illness does not lessen his culpability for his crime"). Indeed, because petitioner was sane at the time of his offense and competent to stand trial, any doubt about his culpability has been conclusively resolved. Thus, the retributive purpose of petitioner's death sentence will still be served so long as he rationally understands it. *See Panetti*, 551 U.S. at 958-59.

For the same reason, executing someone who was suffering no cognitive impairment when he committed murder will deter other potential capital offenders in the same condition. They can understand the punishment of a person who was fully culpable at the time of the offense and control their conduct in response. *See Enmund v.*

*Florida*, 458 U.S. 782, 799 (1982) (indicating that capital punishment can deter those capable of "premeditation and deliberation" (citation and internal quotation marks omitted)).

Finally, because petitioner was not suffering dementia when he was charged and convicted, he faced no "special risks" of receiving the death penalty such as those discussed in *Atkins*. 536 U.S. at 320-21.

C. Petitioner's condition also does not warrant the sort of categorical exemption that applies to intellectual disability. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008); *see also* APA Amicus Br. 7 ("As with any form of dementia, the symptoms of vascular dementia and the speed with which it progresses may vary."). Also, the definitions of mental illnesses themselves "are subject to flux and disagreement" and some diagnoses "may mask vigorous debate within the [medical] profession about the very contours of the mental disease itself." *Clark v. Arizona*, 548 U.S. 735, 752, 774 (2006).

The answer to that variability is not to stretch the *Atkins* tent on a case-by-case basis to see whether it covers by analogy a specific condition or a specific offender's symptoms. The solution is already in place: a prisoner claiming incompetence to be executed must show a lack of rational understanding of the punishment and the reason for it. *See Panetti*, 551 U.S. at 958-59. That petitioner failed to make that showing here—despite the benefit of expert assistance and an evidentiary hearing—is no reason to upset the Court's settled Eighth Amendment jurisprudence.

## CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted.

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# APPENDIX

## APPENDIX A

# STATE SUPREME COURT CASES ON THE EFFECT OF MEMORY LOSS ON COMPETENCE IN CRIMINAL TRIALS

*Thompson v. State*, 364 So. 2d 682, 682 (Ala. 1977) (disapproving a lower court's opinion that the defendant's memory loss made her presumptively incompetent to stand trial and explaining that the defendant's rational understanding was the dispositive issue)

*Fajeriak v. State*, 520 P.2d 795, 801 (Alaska 1974) ("[A]fter careful deliberation we have concluded that amnesia, be it partial or total, is not an adequate ground for a declaration of incompetency to stand trial.")

*State v. Johnson*, 536 P.2d 1035, 1036 (Ariz. 1975) (approving rule that "a presently rational person" should not be held incompetent to stand trial "merely because he asserts he cannot remember the events surrounding the crime")

*Rector v. State*, 638 S.W.2d 672, 673 (Ark. 1982) (holding that the trial court "correctly pointed out that amnesia is not an adequate ground for holding a defendant incompetent to stand trial")

*People v. Jablonski*, 126 P.3d 938, 962 (Cal. 2006) (rejecting argument that "memory impairment, in and of itself, establishes a mental disorder that renders a defendant incompetent [to stand trial]")

*People v. Palmer*, 31 P.3d 863, 869 (Colo. 2001) (holding that "amnesia, in and of itself, does not constitute incompetency [to stand trial]"), *superseded by statute on other grounds as stated in In re People ex rel. W.P.*, 295 P.3d 514, 524 n.10 (Colo. 2013)

*State v. Gilbert*, 640 A.2d 61, 65 (Conn. 1994) (agreeing that "'lack of memory per se'" does not control whether a defendant is competent to stand trial (quoting *Wilson v. United States*, 391 F.2d 460, 464 n.4 (D.C. Cir. 1968))

*Parson v. State*, 275 A.2d 777, 787 (Del. 1971) ("[I]t is clear that despite his claimed amnesia with respect to the actual commission of the crime, itself, Parson was competent to stand trial.")

*Aldridge v. State*, 274 S.E.2d 525, 530 (Ga. 1981) ("Amnesia does not, per se, constitute incompetency to stand trial.")

*People v. Stahl*, 10 N.E.3d 870, 880 (Ill. 2014) (holding that "amnesia as to the events surrounding the crime does not *per se* render a defendant unfit to stand trial")

*Burr v. State*, 367 N.E.2d 1085, 1086 (Ind. 1977) (reaffirming precedent that "an amnesiac defendant who understood the charges against him was competent to stand trial, notwithstanding his stated inability to remember the facts concerning the crime")

*State v. Lyman*, 776 N.W.2d 865, 874 (Iowa 2010) ("Amnesia on its own will not render a criminal defendant incompetent to stand trial."), *overruled in part on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 & n.3 (Iowa 2016)

*State v. Owens*, 807 P.2d 101, 106 (Kan. 1991) ("Amnesia alone should not supply the basis for declaring a defendant incompetent to stand trial.")

*Commonwealth v. Griffin*, 622 S.W.2d 214, 217 (Ky. 1981) ("We reject amnesia by virtue of mental disease or otherwise as a basis for declaring an accused incompetent to stand trial. This holding includes partial loss of memory or distorted memory of events at the time of commission of a crime.")

*State v. Gray*, 291 So. 2d 390, 392 (La. 1974) (rejecting argument that the defendant was incompetent to stand trial because "he had amnesia at the time of the commission of the offense and cannot remember what transpired")

*Morrow v. State*, 443 A.2d 108, 113 (Md. 1982) (holding that "amnesia, by itself, does not amount to incompetency [to stand trial]")

*Commonwealth v. Lombardi*, 393 N.E.2d 346, 348 (Mass. 1979) (agreeing with "[t]he virtually unanimous weight of authority in this country . . . that a defendant is not incompetent to stand trial simply because he is suffering from amnesia")

*State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. 2002) ("Even if Baumruk did suffer from amnesia that affected his ability to recall the events surrounding the incident, amnesia does not bar prosecution of an otherwise competent defendant." (footnote omitted))

*State v. Austad*, 641 P.2d 1373, 1379 (Mont. 1982) (affirming finding that the defendant was competent to stand trial "despite his amnesia")

*State v. Holtan*, 287 N.W.2d 671, 676 (Neb. 1980) (per curiam) (holding that "the mere fact that the defendant maintains he does not recall committing the crime" did not require a hearing on his competency to enter a plea)

*Desai v. Eighth Judicial Dist. Ct.*, No. 63046, 2013 WL 3324971, at *1 (Nev. Apr. 29, 2013) (order denying petition) (unpublished) (explaining that "amnesia alone would not be sufficient to require further competency proceedings or a finding at this point that [the defendant] is not competent to stand trial")

*State v. Kincaid*, 960 A.2d 711, 714 (N.H. 2008) (holding that "the defendant's claim of amnesia" "does not automatically raise a bona fide or legitimate doubt triggering a due process right to a competency hearing")

*State v. Mabry*, 630 P.2d 269, 274 (N.M. 1981) (affirming ruling that the defendant was competent to stand trial despite evidence of "psychological problems which affected his memory and his ability to recall the events in question")

*People v. Francabandera*, 310 N.E.2d 292, 296 (N.Y. 1974) (rejecting view that amnesia necessarily constitutes incapacity to stand trial and adopting a totality-of-the-circumstances test)

*State v. Willard*, 234 S.E.2d 587, 593 (N.C. 1977) (adopting rule that "amnesia does not per se render a defendant incapable of standing trial or of receiving a fair trial")

*State v. Brooks*, 495 N.E.2d 407, 413 (Ohio 1986) (per curiam) ("Assuming, *arguendo*, appellant does suffer from psychogenic amnesia, this fact alone would not render him incompetent to stand trial.")

*Siah v. State*, 837 P.2d 485, 487 (Okla. Crim. App. 1992) (holding that the defendant's "lack of memory of incidents surrounding the alleged crime" "is not, in and of itself, sufficient to support the claim of lack of competency to stand trial")

*Commonwealth v. Barky*, 383 A.2d 526, 528 (Pa. 1978) ("We do not believe that appellant's amnesia alone denied him either the effective assistance of counsel or the opportunity to present a defense.")

*State v. Peabody*, 611 A.2d 826, 833 (R.I. 1992) (holding that "amnesia, without more, does not per se render an accused incompetent to stand trial")

*State v. Finklea*, 697 S.E.2d 543, 546 (S.C. 2010) (concluding that a "bare assertion" of amnesia was not enough to overturn a finding that the defendant was competent to stand trial at the sentencing phase)

*State v. Vassar*, 279 N.W.2d 678, 683 (S.D. 1979) ("Loss of memory, however, regarding the facts of the event for which the accused is charged does not, standing alone, necessarily . . . preclude mental competency as a matter of law."), *overruled in part on other grounds by State v. Waff*, 373 N.W.2d 18, 22 (S.D. 1985)

*Morris v. State*, 301 S.W.3d 281, 293 (Tex. Crim. App. 2009) (rejecting a "*per se* rule" that amnesia constitutes mental incapacity to stand trial)

*State v. Harris*, 789 P.2d 60, 65 (Wash. 1990) ("Nor does inability to recall past events necessarily constitute incompetence [to stand trial].")

## APPENDIX B

## STATE INTERMEDIATE COURT CASES ON THE EFFECT OF MEMORY LOSS ON COMPETENCE IN CRIMINAL TRIALS

*Robbins v. State*, 312 So. 2d 243, 245 (Fla. Dist. Ct. App. 1975) (holding that "the amnesia of a defendant does not, per se, render him incapable of standing trial")

*State v. Madden*, 33 P.3d 549, 566 (Haw. Ct. App. 2001) (approving "the well-accepted principle that a loss of memory of the alleged offense does not in and of itself preclude fitness to proceed" to trial)

*People v. Stolze*, 299 N.W.2d 61, 62-63 (Mich. Ct. App. 1980) (approving cases holding that amnesia does not per se render a defendant incompetent to stand trial)

*State v. Hulin*, 412 N.W.2d 333, 338 (Minn. Ct. App. 1987) (disagreeing that the defendant was incompetent "because he had lost most memory of the offense" and reasoning that "amnesia regarding the events surrounding the offense is not itself a bar to prosecution")

*Patterson v. State*, 127 So. 3d 1124, 1132-34 (Miss. Ct. App. 2013) (affirming finding that the defendant was competent to stand trial despite his inability to recall the murder)

*State v. Pugh*, 283 A.2d 537, 542 (N.J. Super. Ct. App. Div. 1971) ("Even if in fact defendant did not remember the details of the crime, he would still be competent to stand trial.")

*State v. Leming*, 3 S.W.3d 7, 16 (Tenn. Crim. App. 1998) ("[W]e first begin with the principle that amnesia, in and of itself, does not constitute incompetency to stand trial.")

*York v. Shulsen*, 875 P.2d 590, 597 (Utah Ct. App. 1994) (holding that "a defendant with amnesia is not per se incompetent to plead guilty")

*Addison v. Commonwealth*, No. 2234-96-3, 1997 WL 557012, at *5 (Va. Ct. App. Sept. 9, 1997) (unpublished) ("We also note that Addison's claims that he could not remember the shooting and that he blacked out are insufficient evidence to establish as a matter of law that Addison was incompetent to stand trial.")