No. 17-193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Petitioner,

v.

VERNON MADISON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

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November 16, 2017

CAPITAL CASE

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Pursuant to Supreme Court Rule 44.1, Vernon Madison respectfully petitions for rehearing of the Court's per curiam decision issued on November 6, 2017. Dunn v. Madison, No. 17-193, 2017 WL 5076050 (Nov. 6, 2017). Mr. Madison moves this Court to grant this petition for rehearing and consider his case with merits briefing and oral argument. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.

REASONS FOR GRANTING THE PETITION

Since the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and up until the issuance of its opinion in this case, this Court has never issued a per curiam opinion, without briefing or argument, reversing a lower appellate court's grant of habeas corpus relief where the constitutional claim received *no* state appellate court review.[1] But that is precisely what happened here: Alabama created a statutory remedy for Eighth Amendment

[1] See, e.g.,Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017) (per curiam reversal of habeas corpus relief where Graham claim first raised in state trial court and reviewed by Virginia Supreme Court); White v. Wheeler, 136 S. Ct. 456, 458 (2015) (per curiam reversal of habeas corpus relief where Witherspoon-Witt claim reviewed by Kentucky Supreme Court on direct appeal); Woods v. Donald, 135 S. Ct. 1372, 1375 (2015) (per curiam reversal of habeas corpus relief where ineffective assistance of counsel claim raised on direct appeal and rejected by Michigan Court of Appeals and Michigan Supreme Court).

competency-to-be-executed claims, Alabama Code Section 15-16-23, that relegated the decision of whether the Constitution prohibits an impending execution to a single, elected trial judge,[2] and then made that decision unreviewable by any state appellate court. See Ala. Code § 15-16-23 (prohibiting appellate review of trial court's competency finding); Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (Ala. Code § 15-16-23 "clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court").

This Court did not acknowledge Alabama's lack of any state appellate review for Mr. Madison's competency-to-be-executed claim when it applied the "demanding standard" of the AEDPA, Dunn, 2017 WL 5076050, at *1, and its summary disposition did not address the complicated questions about the parameters of habeas corpus law in the context of the unique procedural posture of this case. Rehearing is appropriate for this Court to consider the following substantial questions:

I. Should the Most Demanding Standard of Deference Under the AEDPA Apply to a Competency-to-be-Executed Claim Where No State Appellate Court Reviewed the Claim?

Alabama, alone among the states with a current death penalty, has

[2] Circuit judges in Alabama run in partisan elections and are elected to a term of six years. Ala. Code §17-14-6.

affirmatively opted to preclude any state review – judicial or executive– of a trial judge's rejection of a prisoner's Eighth Amendment claim that he is incompetent to be executed. Of the 31 states that currently have a death penalty, only two, besides Alabama, explicitly prohibit appellate review of a competency-to-be-executed determination. See Allen v. State, 265 P.3d 754 (Okla. Crim. App. 2011) (no right to appeal trial court competency-to-be-executed determination);[3] Or. Rev. Stat. Ann. § 137.463 ("no appeal my be taken from an order issued pursuant" to statute governing competency hearings).[4] No other state prohibits appellate court review of a trial judge's rejection of a competency-to-be-executed claim and the vast majority of states provide appellate review of such claims

[3] Oklahoma's procedures allow for more process than the statute in Alabama, however. There, if the warden determines that competency is at issue, a twelve-person jury is impaneled for a competency hearing at the trial court level. If the warden finds that the prisoner has not made a threshold showing of incompetency, the prisoner can petition the state trial court to review that determination via a writ of mandamus. Moreover, if the trial court agrees with the warden, the condemned prisoner can then appeal that decision to the Oklahoma Court of Criminal Appeals. Either way, a petitioner in Oklahoma is entitled to more extensive state court review of a competency claim than the determination of a single, elected state trial judge. See Cole v. Trammell, No. 15-CV-049-GKF-PJC, 2015 WL 4132828 at *4-5 (N.D. Okla. July 8, 2015) (staying petition to allow petitioner to exhaust available state court remedies for competency-to-be-executed claim).

[4] Oregon currently has a moratorium on the death penalty. See Oregon's New Governor Plans to Continue Death Penalty Moratorium, Death Penalty Information Center, http://deathpenaltyinfo.org/node/6060 (last visited Nov. 15, 2017).

either by statute or case law.[5]

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[5]See Ariz. Rev. Stat. Ann. § 13-4022 (within five days after superior court grants or denies motion for examination or rules whether prisoner is competent, either party may petition Arizona Supreme Court for review); Colo. Rev. Stat. Ann. § 18-1.3-1407 (within seven days after district court rules on motion raising issue of whether convicted person is mentally incompetent to be executed, either party may file for review with Colorado Supreme Court); Red Dog v. State, 620 A.2d 848, 850-51 (Del. 1993) (reviewing trial court's determination of defendant's competency-to-be-executed); Ferguson v. State, 112 So. 3d 1154 (Fla. 2012) (reviewing trial court's competency-to-be-executed finding); Ga. Code Ann. § 17-10-70 (unsuccessful applicant of competency-to-be-executed claim may appeal to Georgia Supreme Court within three days of entry of order denying relief); Timberlake v. State, 858 N.E. 2d 625 (Ind. 2006) (once Indiana Supreme Court determines competency-to-be-executed claim clears state habeas successor bar, petitioner is entitled to pursue claim under state post-conviction statute which provides for counsel at public expense and to return to trial court for competency determination subject to subsequent appellate review); Ky. Rev. Stat. Ann. § 431.2135 (court's determination of prisoner's competency-to-be-executed may be appealed to Kentucky Supreme Court by either party); La. Rev. Stat. Ann. § 15:567.1 (statute governing competency hearings states that "any party against whom a decision is rendered pursuant to this Section may make an appropriate application for a writ of certiorari or review directly to the Louisiana Supreme Court."); Miss. Code Ann. § 99-19-57 (circuit court's competency to-be-executed-determination "is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act."); State ex rel. Cole v. Griffith, 460 S.W.3d 349, 356 (Mo. 2015) (state supreme court has jurisdiction to hear original habeas raising competency-to-be-executed claim); Calambro By & Through Calambro v. Second Judicial Dist. Court, 964 P.2d 794, 796 (1998) (reviewing district court's competency-to-be-executed claim filed via next friend petition); State v. Flowers, 558 S.E.2d 179 (N.C. 1998) (requiring trial court to certify order, transcript, and record to state supreme court within 20 days of entry of order in competency-to-be-executed claim); State v. Awkal, 974 N.E.2d 200, 204 (Ohio Ct. App. 2012) (defendant can appeal competency determination but state cannot appeal determination of incompetency in part because "[a] defendant's substantial right is affected when he or she is found to be competent for execution because obviously a defendant cannot raise the issue once executed."); Commonwealth v. Banks, 29 A.3d 1129, 1135 (2011) (initial competency-to-be-executed claims should be reviewed by state trial courts and

Thus, even though this was Mr. Madison's first opportunity to raise an Eighth Amendment challenge to his competency-to-be-executed under Panetti v. Quarterman, 551 U.S. 930, 958 (2007), and Ford v. Wainwright, 477 U.S. 399, 409-10 (1986),[6] the state trial judge's factual and legal determinations were not subject to review by any state appellate court. This procedural posture raises significant concerns about the reach of the "demanding standard" of the AEDPA, Dunn, 2017 WL 5076050, at *1.

Indeed, the principles of comity that undergird the AEDPA do not carry the same force where a state has declined to provide "full and fair" procedures for reviewing a constitutional claim.[7] See Ex parte Hawk, 321 U.S. 114, 118

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that expedited direct appellate review is available to review such claims); Singleton v. State, 437 S.E.2d 53, 60 (S.C. 1993) (determination that defendant is restored to competency reviewable by state supreme court); State v. Irick, 320 S.W.3d 284, 292 (Tenn. 2010) (trial court's ruling in competency-to-be-executed claim reviewable by state supreme court); Tex. Code Crim. Proc. Ann. art 46.05 (trial court's competency-to-be-executed finding appealable if motion was filed on or after 20th day before the defendant's scheduled execution date); State v. Harris, 789 P.2d 60, 72 (Wash. 1990) (creating judicial procedures for competency-to-be-executed claim and finding "there should be a discretionary review mechanism whereby the Superior Court's conclusion may be reviewed for error, and it is appropriate that this court review such cases directly").

[6] See Panetti, 551 U.S. at 946 ("claims of incompetency to be executed remain unripe at early stages of the proceedings"); Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998) (competency to be executed claim not ripe until execution is imminent).

[7] See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("This rule of comity reduces friction between the state and federal court systems by avoiding the

(1944) ("[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless." (internal citation omitted)); see also Castille v. Peoples, 489 U.S. 346, 350 (1989) ("federal habeas review will lie where state corrective processes are ineffective to protect the rights of the prisoner" (internal quotation marks omitted)).

Consistent with this view, circuit courts have recognized that "full and fair consideration" of a petitioner's Fourth Amendment claim in state court includes "at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute." Lawhorn v. Allen, 519 F.3d 1272, 1287 (11th Cir. 2008) (citations omitted);[8] see also

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unseemliness of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." (internal quotation marks omitted)).

[8] Pursuant to Stone v. Powell, federal courts are barred from considering a petitioner's Fourth Amendment claim in habeas corpus where the state courts considered the claim fully and fairly. 428 U.S. 465, 489-93 (1978) ("The question is whether state prisoners who have been afforded the opportunity for full and fair consideration . . . by the state courts at trial *and on direct review* may invoke their claim again on federal habeas corpus review." (emphasis added)).

Willett v. Lockhart, 37 F.3d 1265, 1272-73 (8th Cir. 1994) ("As Stone suggests, a breakdown in the mechanism can occur in either the trial court or the state appellate court.").

In the context of determining whether an attorney's withdrawal from a case has deprived the defendant of his right to appellate counsel, this Court and other courts have recognized the importance of an independent review of the record by a state appellate court and discouraged "one tier" review. See Smith v. Robbins, 528 U.S. 259, 265, 281 (2000) (approving California's procedure, under which "[t]he appellate court, upon receiving a 'Wende brief,' must 'conduct a review of the entire record,' regardless of whether the defendant has filed a pro se brief"); Hughes v. Booker, 220 F.3d 346, 351 (5th Cir. 2000) ("Indeed, neither the Supreme Court nor this court has approved of a procedure for withdrawal of counsel that affords an indigent defendant only one level of review of the record for potentially meritorious appellate issues."); cf. Eskridge v. Wash. State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (holding that one level of review – by trial judge only – "cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript"); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt

or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts.")

Rehearing is appropriate for this Court to review Alabama's decision to insulate an arguably unconstitutional decision about whether Vernon Madison should be executed from any constitutional scrutiny, both because it results in the inconsistent application of the law, cf. Ornelas v. United States, 517 U.S. 690 (1996) (in Fourth Amendment context, "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles"), and because it increases arbitrariness and the likelihood of error. See Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., joined by Marshall, J., dissenting) ("There are few, if any situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property . . . .").

II. Is Applying the Demanding Standard of Deference Under the AEDPA to a Competency-to-be-Executed Claim Where No State Appellate Court Reviewed the Claim Inconsistent with the Eighth Amendment's Heightened Need for Reliability in Death Penalty Cases?

The Eighth Amendment prohibits the execution of a prisoner who is incompetent. Panetti v. Quarterman, 551 U.S. 930, 958 (2007); Ford v.

Wainwright, 477 U.S. 399, 409-10 (1986).[9] In the context of the Eighth Amendment, this Court has repeatedly recognized that state appellate review is necessary to protect against arbitrariness, capriciousness, and error.[10] Pulley v. Harris, 465 U.S. 37, 59 (1984) (Stevens, J., concurring in part) ("[O]ur decision certainly recognized what was plain from Gregg, Proffitt, and Jurek: that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges."); Parker v. Dugger, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").

Despite this Court's recognition of the need for appellate review in the

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[9] Because a competency-to-be-executed claim does not become ripe until an execution is imminent, Panetti, 551 U.S. at 946 ("claims of incompetency to be executed remain unripe at early stages of the proceedings"), this Court has recognized the exceptional nature of a Ford claim in allowing petitioners the opportunity to litigate it in federal court, even where federal habeas review has already been completed. See Stewart v. Martinez-Villareal, 523 U.S. 637, 639 (1998) (Ford claim not subject to restrictions on "second or successive" habeas petition); Panetti, 551 U.S. at 947 (same).

[10] See also Gregg v. Georgia, 428 U.S. 153, 194 (1976) (plurality) ("[T]he further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."); cf. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality) (finding unconstitutional capital sentencing scheme where "there is no way . . . for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences").

context of capital punishment, the per curiam opinion in this case will permit Vernon Madison's execution to proceed based on a trial court determination unreviewed by any state appellate court. While Petitioner believes this is untenable under the Eighth and Fourteenth Amendments, at a minimum it should be resolved by this Court after he has had an adequate opportunity to brief the issue.

III. This Court Should Not Resolve the Substantial and Important Factual Issues in this Case Without Full Briefing and Argument.

In this case, the unrebutted evidence presented in the state trial court established that in January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous severe strokes, led to significant decline in his cognitive and bodily functioning; he now 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. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia and along with cognitive decline and significant memory deficits prevent Mr. Madison from having a rational understanding of why he is to be executed by the State of Alabama.

On the basis of this evidence, each judge on the Eleventh Circuit panel found that as a matter of fact and law, Vernon Madison is incompetent and that his execution is therefore prohibited by the Eighth Amendment. See Madison,

851 F.3d at 1190 ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

Though this Court explicitly declined to express a view "on the merits of the underlying question outside of the AEDPA context," Dunn, 2017 WL 5076050, at *3, the State of Alabama has now filed a motion seeking an expedited execution date for Vernon Madison, asserting that "there are no further impediments to the execution of Madison's lawful sentence." State of Alabama's Expedited Motion to Set an Execution Date, Nov. 8, 2017.

Given the substantial questions about the parameters of habeas corpus review in the context of an Eighth Amendment competency-to-be-executed claim that was never reviewed by a state appellate court, this Court should grant rehearing so that it may have the benefit of full merits briefing and argument. See McWilliams v. Dunn, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) (admonishing majority for deciding issue without "receiv[ing] adversarial briefing, which in turn helps the Court reach sound decisions" (internal citations omitted)).

Moreover, full briefing and argument is appropriate in light of the factual determinations made in this Court's summary opinion. First, it is simply not the

case that the lower court opinion (and Dr. Goff's) was based on a finding that Mr. Madison was incompetent to be executed simply because of a "failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." Dunn, 2017 WL 5076050 at *2. Rather, the lower court's determination was based on the "unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes he has not killed anyone – as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution." 851 F.3d at 1189.

Nor was Dr. Goff's opinion based solely on what Mr. Madison remembered. As Dr. Goff testified, in evaluating Mr. Madison's competency to be executed, Dr. Goff was attempting to find the answer to two questions: "One, is there[] something wrong with him, and the other thing is does what's wrong with him cause him to be incompetent." (Doc. 8-1 at 117.) In this framework, whether an individual "forgets particular phrasing" or "begin[s] to forget certain things" does not invariably indicate that the person is incompetent: rather, it means that "something is wrong with him." (Doc. 8-1 at 117.) And, in Dr. Goff's reasoned professional opinion based on his evaluation of Mr. Madison, the review of significant medical records, and numerous neuropsychological tests, the "thing"

that was wrong with Mr. Madison was that his brain had been traumatized, leading to a DSM-V diagnosis of vascular dementia and corresponding cognitive and memory deficits. (Doc. 8-1 at 107; Doc. 8-3 at 20.)

Moreover, in Dr. Goff's opinion, the "something wrong with him" – the diagnosed condition of dementia and the corresponding deficits – prevents Mr. Madison from rationally understanding his execution. This is precisely the sort of "expert evidence" upon which this Court encouraged reliance in order to clarify the extent to which a petitioner's mental disorder renders him incompetent to be executed. See Panetti, 551 U.S. at 962; see also Ferguson v. Sec'y, Florida Dep't of Corr., 716 F.3d 1315, 1344 (11th Cir. 2013).

And, contrary to this Court's conclusion that "testimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried for and imprisoned for murder and that Alabama will put him to death as a punishment for that crime," Dunn, 2017 WL 5076050, at *2, the record establishes that Dr. Goff's conclusion is that Mr. Madison *does not* have a rational understanding of why he is being executed by the State. (Doc. 8-1 at 110, 120 (testifying that Mr. Madison does not "understand the act that he's being – that he's being punished for."). Whatever awareness Dr. Goff determined that Mr. Madison had of the "nature of execution," as well as "what he was tried for," it does not necessarily render Mr.

Madison competent because, as this Court established in Panetti, a "prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it," 551 U.S. at 959. As to the critical question of whether Mr. Madison had a rational understanding of his planned execution, in Dr. Goff's professional opinion, Mr. Madison "does not seem to understand the reasoning behind the current proceeding as it applies to him." (Doc. 8-3 at 19.)

Critically, Dr. Kirkland, the State's expert,[11] when asked by the state trial judge about whether he had an "opinion as to whether Mr. Madison understands that the State is seeking retribution against him for an act that he committed in the past," responded only that Mr. Madison, "talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." (Doc. 8-1 at 124.) Similarly, when asked by counsel for the State about whether Mr. Madison had knowledge of his execution, Dr. Kirkland testified that Mr. Madison "understands that that is, as applied to him, that he has two

[11] This Court summarily reversed even though Dr. Kirkland was arrested and charged with multiple counts of Unlawful Possession or Receipt of a Controlled Substance on April 18, 2016, just four days after Mr. Madison's competency hearing. Montgomery Psychologist Charged with Using Forged Prescription, WSFA 12 (Aug. 18, 2016 2:56 pm) http://www.wsfa.com story/32792305. Dr. Kirkland was suspended from the practice of psychology on September 9, 2016. See Ala. Bd. of Exam'r in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited Nov. 16, 2017).

choices or two sentences that are – that are there; one being execution and one being life without parole." (Doc. 8-1 at 78-79.) Dr. Kirkland could not explain why he did not include this information in his written report, (Doc. 8-1 at 80-81), or that such information was actually not true: at no point in his appeals has the sentence of life without parole been available to Mr. Madison.

These are precisely the type of factual issues that need to be resolved in full briefing and argument and for this reason, rehearing is appropriate. See Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary disposition only appropriate in cases where "law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

CONCLUSION

Mr. Madison respectfully requests that this Court grant the petition for rehearing and order full briefing and argument on the merits of this case.

Respectfully Submitted,

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November 16, 2017

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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