No. 19-5199

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

BILLY JOHN ROBERSON, Petitioner,

v.

CITY OF ROWLETT, ET AL, Respondent.

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

PETITION FOR REHEARING

Billy John Roberson 10/24/2019

BILLY JOHN ROBERSON

PROS SE FILER

1409 CALIFORNIA PKWY S

FT WORTH TX 76134

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Pursuant to Supreme Court Rule 44.1, Billy John Roberson respectfully petitions for rehearing of the Court's per curium decision issued on October 7, 2019, Mr. Roberson 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 there has been several issues been raised with Texas CPS making falsified claims and, 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.

But that is precisely what happened here: Texas should consider creating a statutory remedy for Eighth Amendment.

See, e.g., Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017) (per curium 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 curium 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 curium 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).

I believe that certain relegated the decision of whether the Constitution prohibits an impending

Decision to a single, elected trial judge, and then made that decision unreviewable by any state appellate court without having an oral argument being heard.

The finding by the trial court on the issue of there was never a weapon ever produced, as it relates to this case, is was not reviewed by any other court.

This Court did not acknowledge Texas lack of any state appellate review for Mr. Roberson's competency-to-be-executed claim when it applied the "demanding standard" of the AEDPA, Dunn, 2017 WL 5076050, 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?

Texas, alone among the states with a high rate of wrongful convictions.

2. Circuit judges in Texas run in partisan elections and are elected to a terms to serve affirmatively opted to preclude any state review – judicial or executive– of a trial judge's rejection of a prisoner's Eighth Amendment claim.

3. Rev. Stat. Ann. § 137.463 ("no appeal may 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 taken in consideration claim and the vast majority of states provide appellate review of such claims. Oklahoma's procedures allow for more process than the statute in Texas, 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. Another point to consider-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)

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" procedure for reviewing a constitutional claim.7 See Ex parte Hawk, 321 U.S. 114, 118 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"). 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).

It Just 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)). 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 since Texas has made the decision to insulate an arguably unconstitutional decision about whether Billy John Roberson should be Cleared form the original case 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]independent 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 . . . .").

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 penalty is not imposed arbitrarily or irrationally.").

III. This Court should 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 Billy John Roberson wasn't even in the area when the supposedly victim said that he pulled a gun on her.

We also basis of this evidence, gave each judge on the Fifth Circuit panel information that as a matter of fact and law, and that showed proof of said facts.

We request this Honorable Court to hear and overturn Mr. Roberson's case just like references in the summarily reversed even though Dr. Kirkland was arrested and charged with multiple counts of Unlawful Possession or Receipt of a Controlled Substance.

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's in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited Nov. 16, 2017). (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").