No. 17-6261

IN THE SUPREME COURT OF THE UNITED STATES

DONALD FELL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's interlocutory mandamus petition, which challenged the district court's pretrial ruling rejecting petitioner's contention that capital punishment in all of its applications violates the Eighth Amendment's prohibition on cruel and unusual punishment.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is not reported. The opinion of the district court (Pet. App. C1-C57) is reported at 224 F. Supp. 3d 327.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2017. A petition for rehearing was denied on May 1, 2017 (Pet. App. B1). On July 20, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 28, 2017, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Vermont, petitioner was convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119(3); kidnapping in interstate commerce resulting in death, in violation of 18 U.S.C. 1201(a)(1) (2000); possessing and brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and transporting a firearm in interstate commerce while being a fugitive from justice, in violation of 18 U.S.C. 922(g)(2). 6/16/2006 Judgment 1. The district court sentenced petitioner to death on the carjacking and kidnapping counts and to a term of imprisonment on the other counts. Id. at 2. The court of appeals affirmed, and this Court denied certiorari. United States v. Fell, 531 F.3d 197 (2008), reh'g denied, 571 F.3d 264 (2d Cir. 2009), cert. denied, 559 U.S. 1031 (2010) (No. 09-7319).

The district court subsequently ordered a new trial under 28 U.S.C. 2255. Petitioner thereafter moved to preclude the imposition of the death penalty on retrial on the ground that capital punishment violates the Eighth Amendment. The district court denied that motion. Pet. App. C1-C57. The court of appeals issued a summary order denying mandamus relief. Id. at A1-A2.

1. On the evening of November 26, 2000, petitioner, then 20 years old, and his friend Robert Lee were visiting petitioner's

mother (Debra Fell) at her home in Rutland, Vermont, playing cards with her and her companion, Charles Conway. Fell, 531 F.3d at 205. Without warning, petitioner grabbed a kitchen knife, cut Conway's throat, and stabbed Conway approximately 50 times, killing him. Ibid.; 06-2882 Gov't C.A. Br. 13. Petitioner also convinced Lee to kill petitioner's mother, with whom he had a stormy relationship, telling Lee: "[K]ill her, come on, you have to. I killed him. F---en stab her, cut her f---en through." 1/19/2018 Order 27 (Doc. 1415); see Fell, 531 F.3d at 205. Petitioner's mother did not immediately die. While she was still moving on the floor, petitioner told Lee: "Hack her, make her stop, stab her, cut her through some more, start hacking, make me [hear] it." 1/19/2018 Order 27 (brackets in original). Lee killed petitioner's mother with multiple stab wounds to the head and neck. Fell, 531 F.3d at 205.

Petitioner and Lee showered, grabbed petitioner's shotgun, and departed at approximately 3:30 a.m. on November 27. Fell, 531 F.3d at 205. The men proceeded on foot to a local mall. Ibid. After discovering that the local Walmart was closed, they went to a Price Chopper grocery store, where they watched and waited for a suitable victim from whom they could steal a car. Ibid.; see 06-2882 Gov't C.A. Br. 8-9, 13.

Petitioner and Lee found Teresca King, a 53-year-old grandmother, just arriving for work in her car. Fell, 531 F.3d at 205. The two stole the car, forced King into the back seat at gunpoint,

and drove off. Ibid. King tried to escape the car while on the highway, but petitioner restrained her. Ibid.

Several hours later, after driving into New York, petitioner told King that she would be released. Fell, 531 F.3d at 205. Petitioner has stated that, when the car stopped, Lee convinced petitioner that they should kill King to prevent her from identifying them. Ibid. The two men forced King into the nearby woods, where they killed her by repeatedly kicking her head and striking her with a rock. Id. at 205-206. Before the men departed, petitioner wiped his boots on King's clothing. Id. at 206.

Petitioner and Lee fled to Pennsylvania, where they stole license plates and attached them to King's car. Fell, 531 F.3d at 206. They continued driving to Arkansas, where, on November 30, 2000, they were arrested. Ibid. During interrogation, petitioner both verbally and in writing confessed that he murdered Conway, described his mother's murder, and confessed to killing King. Ibid. Shortly thereafter, petitioner again confessed during a tape-recorded interview with police officers from Vermont. Ibid.

2. a. After a federal grand jury indicted petitioner, the district court struck the indictment's capital findings and dismissed the government's notice of intent to seek the death penalty, based on its conclusion that the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., was unconstitutional on Fifth and Sixth Amendment grounds. United States v. Fell, 217 F. Supp. 2d 469, 490-491 (D. Vt. 2002). The court of appeals reversed, and

this Court denied certiorari. 360 F.3d 135 (2d Cir.), cert. denied, 543 U.S. 946 (2004) (No. 04-5898).

In June 2005, petitioner proceeded to trial. Fell, 531 F.3d at 207.[1] Through counsel, petitioner admitted in opening statements to the jury that "he took a knife and he killed Charles Conway"; that both he and Lee also "decide[d] to take [King's] life" after they had carjacked and kidnapped her; and that he and Lee then repeatedly kicked King, Lee hit her with a stone, and the pair departed only "when they believe[d] she was dead." 6/20/2005 Trial Tr. 54-56. Rather than affirmatively contest guilt, petitioner urged the jury to recommend a sentence of life imprisonment based on mitigating factors. See Fell, 531 F.3d at 208. The jury unanimously found petitioner guilty on all counts and unanimously recommended a capital sentence, which the district court imposed. Id. at 207-208. The court of appeals affirmed, and this Court again denied certiorari. 531 F.3d 197 (2008), reh'g denied, 571 F.3d 264 (2009), cert. denied, 559 U.S. 1031 (2010).

b. In 2011, petitioner moved for relief under 28 U.S.C. 2255. In 2014, the district court granted petitioner's motion and ordered a new trial, based on the court's finding that a juror took a mid-trial "field trip" to conduct his own investigation at the actual locations of petitioner's crimes. United States v.

[1] Although the grand jury also indicted Lee on capital charges, Lee was not tried because he died in late 2001 while in prison. Fell, 531 F.3d at 206.

Fell, No. 2:01-CR-12, 2014 WL 3697810, at *20-*34, *39-*40 (D. Vt. July 24, 2014). The government did not appeal.

3. In late 2015, petitioner filed several pretrial motions seeking to preclude imposition of the death penalty at his retrial on the ground that capital punishment violates the Eighth Amendment. Docs. 668, 670, 673, 674. The district court held an evidentiary hearing to explore whether "the administration of the death penalty in the United States" is fair in light concerns articulated in Justice Breyer's dissenting opinion in Glossip v. Gross, 135 S. Ct. 2726, 2755-2780 (2015). See Pet. App. C1-C2.

On December 13, 2016, the district court denied petitioner's motions. Pet. App. C1-C57. The court found that the hearing record supported certain criticisms of the death penalty identified in Justice Breyer's dissent. Id. at C6-C48. But it declined to hold that the death penalty violates the Eighth Amendment. Id. at C50-C56.

First, the district court declined to adopt petitioner's argument that "the death penalty is a disproportionate penalty in all homicide cases," noting that petitioner's argument "reaches all possible applications of the death penalty" and is "far broader" than the more targeted Eighth Amendment challenges raised in prior cases. Pet. App. C50; see id. at C50-C52. The court determined that the record did "not support" the view that "the country has achieved consensus on the desirably of abolishing the death penalty" and that any increase in public opposition to the

death penalty was "insufficiently broad" to invalidate capital punishment in all its applications. Id. at C52. The court declined to express its "personal views" on the disproportionality issue, explaining that the court deemed it "unlikely" that this Court's Eighth Amendment jurisprudence vested a district court with authority to invalidate capital punishment on such views and because expressing such views could complicate the upcoming jury selection in this case. Ibid.

Second, the district court declined to adopt petitioner's argument that the FDPA, like (in petitioner's view) all state death-penalty statutes, contains "systemic flaws" that make the imposition of a capital sentence "inherently arbitrary" and unconstitutional. Pet. App. C52; see id. at C52-C56. The court observed that Gregg v. Georgia, 428 U.S. 153 (1976), held that "the death penalty does not invariably violate the Constitution," Pet. App. C53, and that this Court has since "rejected arguments that the actual experience of death penalty cases demonstrates the arbitrary nature of jury determinations," id. at C54 (discussing cases). Despite noting reservations about the past administration of the death penalty in other cases, the district court explained that a "trial court * * * lacks authority under any meaningful rule of law to alter [a] higher court's ruling" and that the authority to declare capital punishment unconstitutional in all of its applications is properly "reserved to the Supreme Court." Id. at C54, C56.

4. Petitioner sought a writ of mandamus in the court of appeals. The court summarily denied petitioner's request in a short, unpublished order. Pet. App. A1-A2 (C.A. No. 17-497). That order states, in relevant part, "[t]he petition for a writ of mandamus is DENIED on the merits." Id. at A2.[2]

ARGUMENT

Petitioner contends (Pet. 7-18) that this Court's review of the court of appeals' interlocutory order summarily denying his mandamus petition is necessary because the district court's order decided an "important federal question" that conflicts with "decisions of this Court." Pet. 7 (citation omitted). Petitioner is incorrect. The court of appeals properly denied mandamus relief in this criminal case, and its interlocutory, non-precedential order does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

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[2] Petitioner unsuccessfully sought to perfect an interlocutory appeal. First, petitioner moved the district court to certify its December 13 order for interlocutory appeal. Doc. 1031. The district court denied petitioner's request because the interlocutory-appeal provisions on which petitioner relied -- including 28 U.S.C. 1292(b) -- apply only to civil, not criminal, cases. 1/27/2017 Order 2 (Doc. 1145). Second, more than a month after the 14-day period for noticing an appeal from the district court's December 13 order had expired, see Fed. R. App. P. 4(b)(1)(A), petitioner filed a notice of appeal from that order. Doc. 1188 (filed Feb. 7, 2017). The court of appeals subsequently rejected petitioner's attempt to appeal. Pet. App. A2 (C.A. Nos. 17-370, 17-401). Petitioner does not seek this Court's review of that determination and, instead, seeks review only from the denial of mandamus relief. See Pet. 1.

1. This Court's review is unwarranted for the threshold reason that the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The court of appeals denied petitioner's mandamus petition in an ongoing criminal prosecution, still at the pretrial stage, in which pretrial motions remain pending in district court. If a federal jury does not unanimously find petitioner guilty on a capital count after trial, if the jury does not unanimously recommend a capital sentence, or if petitioner later succeeds in setting aside either his conviction or the capital sentence on direct appeal, petitioner's Eighth Amendment claims will be moot. Alternatively, if petitioner is convicted and sentenced to death and does not prevail on direct appeal, he may reassert his current contentions -- together with any other appropriate claims that may arise on remand -- in a single certiorari petition after final judgment. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). Petitioner provides no sound basis for departing from the Court's normal practice of denying petitions by criminal defendants

challenging interlocutory determinations that, like the decision in this case, may be reviewed after final judgment.

2. In any event, the court of appeals' summary order denying mandamus relief is correct and warrants no further review.

a. This Court has recognized three "conditions" that limit a court's authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. 1651. Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004). First, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." Ibid. (brackets and citation omitted). Second, the party seeking the writ must demonstrate "that his right to issuance of the writ is clear and indisputable." Id. at 381 (brackets, citation, and internal quotation marks omitted). Third, that party must also demonstrate that issuance of the writ is "appropriate under the circumstances," by pointing to "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." Id. at 380-381 (citations and internal quotation marks omitted). Petitioner failed to satisfy any of those prerequisites.

First, petitioner has not shown that he has "no other adequate means to attain the relief he desires." Cheney, 542 U.S. at 380 (citation omitted), or even acknowledged his threshold requirement to make such a showing. Petitioner's contention that the death penalty violates the Eighth Amendment in all of its applications ultimately seeks to prevent the imposition of a capital sentence

on petitioner in this case after his retrial. But petitioner has multiple other means to obtain such relief. He may prevail in district court at the guilt or penalty phases of his jury trial or he may prevail in setting aside any capital sentence on appeal on non-Eighth Amendment grounds. Even if petitioner receives a capital sentence after trial and even if the district court's judgment would otherwise be affirmed on non-Eighth Amendment grounds, petitioner may appeal after entry of final judgment to assert his contention that the district court erred in failing to declare capital punishment unconstitutional under the Eighth Amendment. Given those avenues for relief, the court of appeals correctly denied petitioner's mandamus petition, which petitioner has erroneously "used as a substitute for the regular appeals process," Cheney, 542 U.S. at 380-381.

Second, given the established jurisprudence of this Court and the court of appeals repeatedly upholding capital punishment against Eighth Amendment challenges, petitioner has fallen far short of showing a "clear and indisputable" right to relief, Cheney, 542 U.S. at 381 (citation omitted). This Court has repeatedly held that the Eighth Amendment's prohibition against cruel and unusual punishment does not bar capital punishment in all circumstances. See, e.g., Gregg v. Georgia, 428 U.S. 153, 168-187 (1976) (rejecting "the basic contention that the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and

Fourteenth Amendments"); McCleskey v. Kemp, 481 U.S. 279, 301-303 (1987). "The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights"; "Gregg reaffirmed that the death penalty does not violate the Constitution"; and, as this Court recently reiterated, it is now "settled that capital punishment is constitutional." Glossip v. Gross, 135 S. Ct. 2726, 2731-2732 (2015) (emphasis added). This Court has accordingly denied recent petitions for writs of certiorari and applications for stays of execution presenting as-applied Eighth Amendment challenges to the death penalty. See, e.g., Truehill v. Florida, 138 S. Ct. 3 (2017) (Nos. 16-9448, 17-5083) (Eighth Amendment challenge to jury instructions); McGehee v. Hutchinson, 137 S. Ct. 1275 (2017) (Nos. 16A1003, 16-8770) (Eighth Amendment challenge to method of execution). The governing court of appeals here has likewise held that the federal death penalty does not categorically violate the Eighth Amendment. United States v. Quinones, 313 F.3d 49, 52, 65-67, 70 (2d Cir. 2002) (holding that "FDPA is [not] unconstitutional on its face" under the Eighth Amendment), cert. denied, 540 U.S. 1051 (2003). No court of appeals has held otherwise.

Given that overwhelming body of precedent, petitioner presents no plausible claim that he is "clearly and indisputably" entitled to a writ of mandamus based on the district court's rejection of his Eighth Amendment challenge to capital punishment.

The petition for a writ of certiorari, which does not address the mandamus standard, does not contend otherwise.

Third, petitioner has not identified "'exceptional circumstances amounting to a judicial usurpation of power' or a 'clear abuse of discretion'" by the district court that would support a writ of mandamus. Cheney, 542 U.S. at 380, 390 (citations omitted). The district court's decision not to hold that capital punishment is an unconstitutional and "disproportionate penalty in all homicide cases" in light of an insufficiently developed public consensus that such punishment is intolerable, Pet. App. C50, C52, cannot meet that standard. Likewise, the district court's decision to follow the repeated decisions of this Court and the court of appeals upholding capital punishment rather than finding such punishment unlawful in all of its applications, id. at C53-C56, reflects a proper application of judicial authority, not an usurpation of power. The petition for a writ of certiorari does not contend otherwise.

b. Petitioner focuses (Pet. 7-19) almost exclusively on the district court's decision rejecting petitioner's invitation to declare the death penalty unconstitutional in all of its applications, an opinion that petitioner believes to be incorrect. See, e.g., Pet. 15 ("There are a number of problems with the district court's analysis which warrant this Court's review."). Petitioner argues (Pet. 17) that if the district court had not made certain purported errors in its analysis, the district court "could very

well have come to a [different] conclusion" about the constitutionality of capital punishment. Petitioner's arguments are misplaced.

The petition for a writ of certiorari here necessarily seeks this Court's review of the order of the court of appeals denying mandamus relief, not the underlying decision of the district court. Petitioner's argument, however, only twice mentions the court of appeals' order, asserting without explanation that the order "summarily upholding the district court's decision" warrants review by this Court. Pet. 7, 19. Petitioner's failure to address in any meaningful way the court of appeals' mandamus order (as opposed to the district court's underlying decision) confirms that certiorari should be denied.

3. a. Petitioner asserts (Pet. 7, 19) without explanation that the order of the court of appeals "conflicts with relevant decisions of this Court" (quoting Sup. Ct. R. 10(c)). But petitioner never identifies any such conflict or otherwise explains how the court of appeals' denial of his petition for mandamus is inconsistent with any decision of this Court. For the reasons above, the court of appeals' order denying interlocutory mandamus relief is fully consistent with this Court's precedents governing such mandamus review.

b. Petitioner's focus on purported errors by the district court (rather than by the court of appeals) also illustrates why this case would be a poor vehicle for review. Because of the

mandamus posture in which the case comes to this Court, this Court is not presented with the question whether the district court erred on the merits of its decision. The only merits-like question potentially before the Court would be whether petitioner has established a "clear and indisputable" right to mandamus relief. See Cheney, 542 U.S. at 381 (citation omitted). Thus, even if this Court were to conclude that petitioner's Eighth Amendment contentions about the constitutionality of capital punishment might otherwise warrant review on direct appeal from a final judgment in some case, petitioner's interlocutory certiorari petition would not provide the Court with a suitable vehicle to consider such contentions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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