No. 17-7505

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MOBILE COUNTY CIRCUIT COURT

APPLICATION FOR A STAY OF EXECUTION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, JANUARY 25, 2018

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

On **January 25, 2018**, the State of Alabama has scheduled an execution date for the second time for Vernon Madison, a 67-year-old man who has been on Alabama's death row for over 30 years. On January 16, 2018, the Mobile County Circuit Court denied Mr. Madison's petition challenging his competency to be executed. Alabama law does not permit any appeal in state court, so the petition for certiorari he has filed in this Court is the only opportunity he has to

obtain review of the state circuit court's determination. Mr. Madison therefore moves this Court to stay his execution and grant his petition for certiorari to address the substantial question of whether executing Mr. Madison, whose severe cognitive dysfunction leaves him without memory of his commission of the capital offense or ability to understand the circumstances of his scheduled execution, violates evolving standards of decency and the Eighth Amendment's prohibition against cruel and unusual punishment. In support of this motion, Mr. Madison states as follows:

It is undisputed that Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last two years and no longer has a memory of the commission of the crime for which he is to be executed. His mind and body are failing: he suffers from encephalomacia (dead brain tissue), small vessel ischemia, 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.

The first time Mr. Madison was scheduled to be executed, in May, 2016, he challenged his competency in the state circuit court pursuant to the Alabama statute governing competency-to-be-executed claims. After the circuit court denied his claim, Alabama law prohibited any appeal in state court, and Mr. Madison challenged his claim in federal court. In granting habeas corpus relief,

the Eleventh Circuit majority found that Mr. Madison had no memory of the offense, and all three judges, including the dissenting judge, agreed that he was incompetent to be executed.[1]

This Court reversed the Eleventh Circuit's grant of habeas corpus relief and explicitly declined to address the "merits of the underlying question outside of the AEDPA context," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as that question was not "[a]ppropriately presented." Id. (Ginsburg, J., concurring).

The State then sought an expedited execution date, and Mr. Madison's execution was scheduled for January 25, 2018. Mr. Madison once again petitioned the Mobile County Circuit Court for relief under the same statutory provision, this time with new evidence that the court-appointed expert, Dr. Karl Kirkland, whose report the circuit court and this Court had previously relied on in denying Mr. Madison's claim, had been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal pills (including one incident occurring just 4 days after Mr. Madison's 2016 competency hearing) and eventually into drug rehab. Though the State never disclosed these facts to any court – the circuit court, the Alabama Supreme

[1] See Madison v. Comm'r, Ala. Dep't Of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017) ("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 . . . .").

Court[2] or this Court – while at the same time arguing for reliance on Dr. Kirkland to deny Mr. Madison's claim, on January 16, 2018, the circuit court again denied relief after a brief hearing and finding that Mr. Madison was competent to be executed.

Alabama law does not permit any state appellate review of the circuit court's ruling.[3] This case thus presents a unique situation where a critical question of competency to be executed is never reviewed by any appellate court, thus increasing the risk of arbitrariness, capriciousness, and error. 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

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[2] See, e.g., State of Alabama's Expedited Motion to Set an Execution Date at 2, Ex parte Madison (In re Madison v. State), No. 1961635 (Ala. Nov. 8, 2017). ("there are no further impediments to the execution of Madison's lawful sentence").

[3] Alabama Code Section 15-16-23 provides that the trial court's decision "shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge." See also Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (dismissing appeal of competency-to-be-executed determination because "[t]he statute 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").

repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").[4]

Because competency to be executed claims are generally not ripe for review until condemned prisoners have exhausted their appeals and face imminent execution, see Panetti v. Quarterman, 551 U.S. 930, 947 (2007) ("claims of incompetency to be executed remain unripe at early stages of the proceedings"), this case presents this Court with an important opportunity to address an urgent and compelling question about whether the Eighth Amendment permits the execution of someone with dementia and acute cognitive decline which will not be resolved without this Court's intervention.

This Court is empowered to grant petitioner a stay of execution in order to adjudicate his constitutional claims. As this Court held in Barefoot v. Estelle, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c), a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; .

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[4] See also Gregg v. Georgia, 428 U.S. 153, 195 (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").

. . a significant possibility of reversal of the lower court's decision; and . . . a likelihood that irreparable harm will result if that decision is not stayed." Further, a stay should be granted when necessary to "give non-frivolous claims on constitutional error the careful attention that they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." Id. at 888-89.

For these reasons, Mr. Madison respectfully requests that this Court grant certiorari and stay his scheduled execution in order to address the critical question of whether executing Mr. Madison, whose severe cognitive dysfunction leaves him without memory of his commission of the capital offense or ability to understand the circumstances of his scheduled execution, violates evolving standards of decency and the Eighth Amendment's prohibition against cruel and unusual punishment.

Respectfully Submitted,

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