
NO. 17-9207

IN THE SUPREME COURT OF THE UNITED STATES

DON WILLIAM DAVIS,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF IN OPPOSITION FOR RESPONDENT
STATE OF ARKANSAS

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CAPITAL CASE

QUESTION PRESENTED

For the second time, Don William Davis petitions for a writ of certiorari to review a criminal judgment that the Supreme Court of Arkansas affirmed on direct review in 1993. This Court considered Davis's first petition in 1994, and declined to review his claim that due process, as construed in *Ake v. Oklahoma*, 470 U.S. 68 (1986), had entitled him to funds to hire an independent psychiatric expert despite the evaluations and assistance he had received from multiple, neutral experts provided by the state.

Following the conclusion of state and federal collateral review in 2006, and on the eve of his fifth scheduled execution in 27 years, Davis, in 2017, filed a state-law motion to recall the mandate in his 1993 direct appeal. He averred that this Court, in *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), would issue a decision demonstrating that the Arkansas Supreme Court had erred in 1993 when it rejected his due process claim and affirmed his criminal judgment.

The Arkansas Supreme Court denied Davis's motion, concluding that the decision in *McWilliams* did not present the kind of extraordinary circumstances that, under Arkansas law, warranted discretionary recall of its mandate. Nevertheless, Davis erroneously uses the decision to once again ask this Court to consider his *Ake* claim, which has been repeatedly rejected in multiple courts, both state and federal, in the last quarter of a century. He presents the question, simply:

Does an examination performed by a state-hospital doctor satisfy the requirements of *Ake v. Oklahoma*?

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JURISDICTION

Although Davis's petition purports to present a due-process claim under the Fourteenth Amendment to the United States Constitution, this Court does not have jurisdiction to consider the claim under 28 U.S.C. § 1257(a). The Arkansas Supreme Court's March 1, 2018, decision denying Davis's motion to recall the mandate is not a final judgment, and it neither modified Davis's 1993 final judgment of conviction, nor reopened it for another round of review a quarter of a century later. It further decided no federal question.

STATEMENT OF THE CASE

In 1990, Don Davis shot Jane Daniel in the back of the head at point-blank range after robbing her and burglarizing her home in the middle of the day in Rogers, Arkansas. *Davis v. State*, 863 S.W.2d 259, 260-62 (Ark. 1993), *cert. denied*, 511 U.S. 1026 (1994). Davis left Jane's body in a basement storage room where he had shot her, her head face-down in a cardboard box. *Id.* She was later discovered by her husband, Richard, when he returned home from work that evening. *Id.*

Davis fled the State shortly after the crimes, but was later brought back for trial. *Id.* at 261. In 1992, he was convicted and sentenced to death for Jane Daniel's murder, and to two 40-year prison terms and \$15,000 fines for the burglary and theft. *Id.* at 260.

Davis's Mental-health Evaluations by Neutral Examiners

Pre-trial, Davis was deemed indigent and eventually entered a plea of not guilty due to mental disease or defect. *Davis v. Norris*, 423 F.3d 868, 870 (8th Cir. 2005). Under Arkansas law, mere notice that Davis intended to rely on an insanity defense, without anything more, required the state trial court to suspend proceedings and order a mental-health evaluation. See Ark. Code Ann. § 5-2-305 (a)&(b) (Repl. 1991). Davis's first evaluation was conducted by a regional psychiatrist, Dr. Travis Jenkins, who concluded there was no evidence that Davis was incompetent or psychotic at the time of the evaluation or at the time of the crime and that, while he had Attention-Deficit Hyperactivity Disorder (ADHD), it did not constitute a mental disease or defect that would negate responsibility for the crime. *Davis v. State*, 539 S.W.3d 565, 567 (Ark. 2018); *Davis*, 423 F.3d at 870.

Based on Dr. Jenkins's evaluation, Davis sought a more comprehensive evaluation by the Arkansas State Hospital (1) to ensure the report specifically addressed criteria related to Davis's competency to stand trial, as required by state law, and (2) to develop mitigating evidence for any capital sentencing proceedings that might have ensued. *Id.* at 870-71. *See also* Trial Record at 39-42. The prosecuting attorney joined the request, and the trial court granted it. *Davis*, 423 F.3d at 870-71. The evaluating doctors conducted a comprehensive evaluation and concluded that Davis was competent to stand trial and did not lack the capacity to conform his conduct to the requirements of law at the time of the crime. *Id.* at 871. Their report also referenced details with potential relevance to mitigation of punishment, including early childhood deprivation, a history of learning disabilities, and hyperactivity. *Davis v. State*, 44 S.W.3d 726, 730-31 (Ark. 2001).

Davis's Requests for, and Waiver of, a Partisan Expert

Davis's counsel subsequently requested funds to hire a private psychiatric expert, citing (1) the absence of a doctor-patient privilege between Davis and the regional and state examiners who had evaluated

him previously and (2) a desire to prepare the defense in mitigation and explore the opinion that Dr. Jenkins had given regarding ADHD. *Davis*, 423 F.3d at 871; *Davis*, 539 S.W.3d at 567. The state trial court denied Davis's request, but it later entertained a second, written one in which Davis claimed that *Ake v. Oklahoma*, 470 U.S. 68 (1986) entitled him to funds to hire an independent psychiatric expert to develop and present mitigating evidence for the penalty phase. Trial Record at 103-119. *See also Davis*, 539 S.W.3d at 567-68.

At a hearing on that motion, counsel withdrew the request for funds for an expert for the guilt phase because he was abandoning the insanity defense for lack of evidence. Trial Record at 619-20. As for the penalty phase, the trial court held that before it could decide whether there was a need for another expert, it would direct Davis's counsel first to review the state hospital records pertaining to the evaluations that had been performed and interview the experts who had examined Davis to determine whether they would be able to provide the assistance he was seeking for the penalty phase. *Davis v. State*, 539 S.W.3d at 568; Trial Record at 624-25. Davis's counsel did so and, afterward, abandoned his

request for funds to hire a partisan expert and called Dr. Jenkins to testify at sentencing. *Davis*, 539 S.W.3d at 568, 570-71.

The Penalty Phase

In the penalty phase of trial, the prosecuting attorney waived opening statement, presented no evidence or witnesses in support of aggravating circumstances, and presented none in rebuttal. He simply relied on the guilt-phase proof to establish the two aggravating circumstances: that Davis had killed Jane Daniel for pecuniary gain and to avoid or prevent arrest. Trial Record at 3429-3431. Davis called Dr. Jenkins, who testified about, among other things, Davis's deprived childhood, his history with substance abuse from an early age, and about his learning disabilities, particularly the diagnosis of ADHD and about its effects on behavior. *Davis*, 539 S.W.3d at 568. Davis called four other witnesses who offered testimony about his life details that generally related to the substance of Dr. Jenkins's testimony. *Davis*, 423 F.3d at 872-73.

The jury ultimately found the existence of the two aggravating circumstances regarding pecuniary gain and avoiding arrest. *Id.* at 873. Further, at least one member of the jury found that Davis's lack of

treatment for ADHD was a mitigating factor, but the jury collectively determined that the aggravating factors outweighed beyond a reasonable doubt any mitigating circumstances and that a death sentence was justified. *Id.*

Direct and Collateral Review and Other Litigation

Davis appealed his convictions and sentences, and the Arkansas Supreme Court affirmed. *Davis*, 863 S.W.3d 259. In so doing, it rejected Davis's argument that his trial had been infected by *Ake* error related to the independence of state doctors and the refusal of his request for funds to hire a private psychiatrist. *Davis*, 863 S.W.2d at 265. Davis sought certiorari on that issue, and on April 4, 1994, his petition was denied without dissent. *See Davis v. Arkansas*, 511 U.S. 1026 (1994). After Davis's petition was denied, the state-court mandate issued. *Davis v. State*, No. CR-92-1385, Mandate (Ark. Apr. 6, 1994).

Davis subsequently sought state post-conviction review, where he reargued the claim of *Ake* error. He contended that the Arkansas Supreme Court on direct review had "not reach[ed] the question of the employment of a private psychiatrist to assist [specifically] in the sentencing phase." *See*

Davis, 44 S.W.3d at 730-31, 732. The Arkansas Supreme Court made clear that “the issue was reached on direct appeal.” *Id.* at 731. It affirmed the denial of post-conviction relief and issued its mandate in that appeal on June 19, 2001. *Davis v. State*, No. CR-00-528, Mandate (Ark. June 19, 2001).

Davis then filed a federal habeas petition raising the *Ake* issue again. The district court denied relief on his *Ake* claim, and the Court of Appeals for the Eighth Circuit affirmed the denial. *Davis v. Norris*, 423 F.3d 868, 870, 871 (8th Cir. 2005). Davis’s motion to file a petition for writ of certiorari out of time in this Court was also denied. *Davis v. Norris*, 547 U.S. 1067 (2006).

Over the next decade, Davis repeatedly engaged in litigation about the constitutionality of sentences to death by lethal injection – challenges which eventually came to be denied with references to principles against piecemeal litigation and dilatory tactics. *See McGehee, Davis, et al. v. Hutchinson*, 854 F.3d 488, 491, 492 (8th Cir.)(*en banc*)(*per curiam*), *cert. denied*, ___ U.S. ___, 137 S.Ct. 1275 (2017); *Nooner & Davis v. Norris*, 491 F.3d 804, 810 (8th Cir. 2007), *cert. denied*, 552 U.S. 1201 (2008).

Facing execution in April of 2017, Davis returned to state court and filed a state-law motion in both his direct appeal and his post-conviction

appeal, asking the Arkansas Supreme Court to (1) recall the mandate issued in his direct appeal and (2) stay his execution pending that court's decision as to whether it would recall the mandate. *Davis v. State*, Nos. CR-92-1385 & CR-00-528, Motion to Recall the Mandate and for Stay of Execution (Ark. Apr. 12, 2017). He averred that this Court, in *McWilliams v. Dunn*, ___ U.S. ___, 137 S.Ct. 1790 (2017), would soon issue a decision demonstrating that *Ake* had clearly established a right to the provision of a partisan expert upon the requisite showing that sanity was seriously in issue. *Id.* See also *Davis*, 539 S.W.3d at 569 (stating "[f]rom Davis's motion, it is clear that his request to stay his execution was premised on the assumption that the Supreme Court would answer [the] question [about partisan experts] in *McWilliams*"). He claimed that decision would demonstrate that the Arkansas Supreme Court had erred in 1993 when it rejected his claim for funds to hire such an expert and affirmed his convictions and sentences. *Id.*

The state appellate court granted the stay of execution. *Davis v. State*, Nos. CR-92-1385 & CR-00-528, Formal Order (Ark. Apr. 17, 2017). It did not, at that time, grant or deny the recall motion, but it ordered that

briefing be submitted on it following the decision in *McWilliams*. *Id.* At both briefing and argument on the motion, the question analyzed was whether extraordinary circumstances (including a defect in the appellate process) existed under state law to justify a recall of the mandate. On March 1, 2018, the Arkansas Supreme Court unanimously answered that question in the negative, denying Davis’s motion to recall the mandate and lifting the stay of execution. *Davis*, 539 S.W.3d 565.¹

¹ The Clerk of the Arkansas Supreme Court erroneously issued a second “mandate” upon the court’s denial of the motion to recall the mandate, and Davis sought to stay that mandate in service of filing a certiorari petition. Following the State’s response and its separate motion for a rule on the clerk, the Arkansas Supreme Court denied Davis’s request to stay the second mandate and issued a rule on the clerk withdrawing the second mandate.

REASONS FOR DENYING THE WRIT

I. Jurisdiction is lacking because the petition presents no final judgment for review, and the challenged decision resolved no federal question.

This Court lacks jurisdiction to consider, for a second time, Davis's claim that his conviction and sentence are infected by *Ake* error.

Jurisdiction is lacking because the Arkansas Supreme Court's 2018 decision that denied Davis's motion to recall the mandate is not a final judgment subject to this Court's review, and it did not modify or reopen Davis's 1993 final criminal judgment for another round of review. Indeed, in denying Davis's motion to recall the mandate, the Arkansas Supreme Court did not decide a federal question.

"This Court is precluded from taking cases unless the petition is from a 'final judgment' within the meaning of 28 U.S.C. § 1257." *Bateman v. Arizona*, 429 U.S. 1402, 1406 (1976) (Rehnquist, J., in chambers). Davis has failed to affirmatively establish this Court's jurisdiction under that provision, as is his burden. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 332 U.S. 62, 70-71 (1948) (appellant has burden of affirmatively establishing Court's jurisdiction). He contends simply that the Arkansas Supreme

Court's 2018 denial of his motion to recall the mandate in his long final direct appeal "is a final decree rendered by the highest court in the State of Arkansas[]" and that it "[a]ccordingly [renders] jurisdiction . . . proper under 28 U.S.C. § 1257." Pet. at 1. The denial of Davis's motion to recall the mandate, however, is not a final judgment or decree in this criminal case.

The final judgment in a criminal proceeding is the sentence, which stands as a final determination of the merits of the criminal charges and leaves nothing to be done but to enforce what has been determined. *E.g.*; *Berman v. United States*, 302 U.S. 211, 212-213 (1937). In this case, the sentence, and hence the final judgment, was issued by the state trial court when Davis was convicted and sentenced in 1992, and it became final for purposes of jurisdiction under 28 U.S.C. § 1257 when it was affirmed on direct review by the Arkansas Supreme Court in 1993. *See* 28 U.S.C. § 1257(a) (providing that final judgments issued by the highest court of a State in which a decision could be had may be reviewed on certiorari). The Arkansas Supreme Court's 2018 decision denying Davis's motion to recall the mandate, therefore, is not itself a final judgment subject to review under 28 U.S.C. § 1257.

Further, having denied Davis's state-law motion for discretionary recall of the mandate, the Arkansas Supreme Court's decision did not modify Davis's final criminal judgment or reopen it for another round of direct review in the state court or in this Court on certiorari review. *Cf. Jimenez v. Quarterman*, 555 U.S. 113, 120 & n. 4 (2009) (order granting motion for out-of-time appeal renders State's final criminal judgment capable of modification through direct appeal in state court and on certiorari review, but mere possibility that state court may grant motion does not do so). Indeed, in denying the motion, the Arkansas Supreme Court did not decide the federal question that Davis would present now because he failed under state law to demonstrate the existence of extraordinary circumstances warranting recall.

Because the mandate had issued on direct review in 1994, jurisdiction did not lie for the Arkansas Supreme Court to rehear Davis's already definitively decided *Ake* claim when he filed his motion to recall the mandate in 2017. The time for ordinary rehearing had long expired, *see* Ark. Sup. Ct. R. 2-3(a), (g) (established time is within eighteen days of issuance of the decision), and issuance of the mandate following the denial

of rehearing had divested the Arkansas Supreme Court of jurisdiction over the appeal. *See, e.g., Barclay v. Farm Credit Services*, 8 S.W.3d 517, 519 (Ark. 2000) (state appellate court loses jurisdiction when mandate issues). As noted above at n.1, *supra* at 9, the state court was certain on this point by making sure the wrongly issued, second mandate was withdrawn.

While the Arkansas Supreme Court retained inherent authority under state law to reassert jurisdiction over the appeal by recalling its mandate, recall is only appropriate where the movant first demonstrates that extraordinary circumstances warrant it. *E.g., Robbins v. State*, 114 S.W.3d 217, 221-22 (Ark. 2003). In determining whether such circumstances exist, the Arkansas Supreme Court considers three factors, including whether there was a defect in its process of reviewing an appeal in a capital case. *Nooner v. State*, 438 S.W.3d 233, 239-40 (Ark. 2014). In the direct-appeal context, the Arkansas Supreme Court has thus far limited this defective-process criterion to capital cases in which the court altogether failed to decide an issue because it had overlooked the issue while conducting an independent review required of the court under its own rules or jurisprudence. *E.g., Nooner*, 438 S.W.3d at 241-42 (denying recall

on ground Court had not overlooked error, but had applied the law as it existed at time of direct review, and overruling *Williams v. State*, 2011 Ark. 534, where ground on which recall had been premised was not error that the Court had overlooked in its required, independent review). The court will not recall a mandate where, as in this case, it applied the law in existence at the time of its decision. *Nooner*, 438 S.W.3d at 241-42.

Applying this standard in Davis's case, the Arkansas Supreme Court concluded under state law that he failed to demonstrate the existence of a defect in the appellate process. In so doing, the court clearly did not re-decide the federal question Davis presented on direct appeal about whether neutral experts employed by the State and available to both parties are sufficiently independent to satisfy due process under *Ake*. The court explained that while it was clear Davis's motion to recall the mandate had been premised on his expectation that *McWilliams* would decide that federal question and would decide it differently than the state court had in 1993, *McWilliams* did neither. *Davis*, 539 S.W.3d at 569. Because *McWilliams* did not decide the federal question at all, the Arkansas Supreme Court had no occasion to consider whether a change in the law,

like the one Davis predicted would be wrought by *McWilliams*, would be sufficient as a matter of state law to demonstrate a defect in the appellate process and to warrant recalling the mandate to reconsider the federal claim. *See id.*

The Arkansas Supreme Court also decided no federal question when it further explained that its ruling on the issue involving the independence of neutral experts in 1993 had extended beyond Davis's initial request for funds to hire a private expert to *examine* him, and indeed had resolved his claim that *Ake* had also entitled him to funds for a private expert to *assist* him in the preparation and presentation of his case in the penalty phase. *Davis*, 539 S.W.3d at 569-70. On that point, Davis's claim of a defect in the state appellate process in 1993 was simply wrong as a matter of state law. As the Arkansas Supreme Court explained, "Davis's interpretation of our case law is incorrect" inasmuch as the "court has consistently held that the medical experts available at the Arkansas State Hospital meet the [independence] requirements of *Ake* because they are not involved in the prosecution of criminals, *not* that a mental examination is all that is required once a defendant has made a preliminary showing that his mental

state will be a ‘significant factor at trial.’” *Id.* at 570 (emphasis in original). In fact, the Arkansas Supreme Court had made that clear to Davis in 2001, when he attempted to revive the *Ake* issue on that basis in his state post-conviction proceedings. *Davis*, 44 S.W.3d at 731 (stating the issue of whether the experts had been sufficiently independent to provide assistance in the penalty phase had been decided on direct appeal). The Arkansas Supreme Court’s interpretation of what its own cases hold, of course, presents no federal question at all.

In denying the motion to recall the mandate, the Arkansas Supreme Court further observed that, in any event, Davis had abandoned his request for funds to hire a partisan expert to assist him in the preparation and presentation of his penalty-phase defense. The court said Davis abandoned his request when, following the trial court’s conditional ruling on the motion and after consultation with the doctors who had already evaluated him, he elected to present his case in mitigation using the expert testimony of Dr. Jenkins. *Davis*, 539 S.W.3d at 570-71. That conclusion, too, decided no federal question.

Because the decision Davis challenges is not a final judgment, and because it neither modified the final judgment nor decided the federal question Davis hopes to present, the petition should be denied for lack of jurisdiction.

II. The petition neither demonstrates a meritorious constitutional claim, nor presents an adequate vehicle for addressing the question presented.

The petition should be denied for the additional reason that it fails to demonstrate a meritorious constitutional claim. As noted above, *supra* at 16, Davis abandoned his claim of entitlement to funds for a private psychiatric expert, and his sanity at the time of the offense was never seriously in issue in any event. *Ake*'s due-process requirements, therefore, were never triggered, yet Davis received the sufficiently independent evaluations and assistance that *Ake* would have required even had he not abandoned his claims to those requirements.

As noted, Davis obtained two evaluations by neutral, state-affiliated experts. He received those evaluations not because he satisfied any constitutional threshold demonstrating his sanity was seriously in issue, but because (1) he simply had given notice of his intent to raise a defense of

mental disease or defect and (2) upon such notice, state law required that he be evaluated to determine his mental condition. Both evaluations concluded that Davis was not insane at the time of the crime, and Davis did not rely on a defense of insanity at trial.

With regard to the penalty phase of trial, the prosecution presented no psychiatric evidence or other evidence about Davis's mental condition. Further, despite the trial court's willingness to grant Davis's motion for funds to hire a private expert if Davis could justify it after consulting with the neutral experts, he never returned to the trial court to demonstrate the need. He elected instead to present the testimony of Dr. Jenkins at sentencing.

Ake did not hold that sanity is "seriously in issue" for due-process purposes merely because one gives notice that he will rely on an insanity defense. Nor did *Ake* hold that sanity or any other impaired mental condition is seriously in issue so as to require that an expert be provided for an indigent defendant at sentencing proceedings merely because his or her mental condition may be relevant. It was significant in *Ake* that the defendant had exhibited bizarre behavior both at his arraignment and

while in jail, and he had relied solely on an insanity defense, *Ake*, 470 U.S. at 72, whereas Davis did not. Further, psychiatric testimony regarding Ake's future dangerousness was used by the prosecution in Ake's penalty phase, and his sanity was seriously in issue, yet Ake had been altogether denied both an evaluation and assistance. *Ake*, 470 U.S. at 86-87. That was not the case for Davis.

Also in contrast with Davis's case, but consistent with *Ake*, is the fact that the prosecution in *McWilliams* presented psychiatric evidence at sentencing. The prosecution's psychiatric evidence in *McWilliams* concerned the very issue on which McWilliams had requested expert assistance and a continuance — that issue being whether McWilliams was feigning mental-health problems. The trial court, moreover, apparently denied McWilliams's request for a continuance based on that disputed issue precisely because the court believed McWilliams was feigning his mental-health symptoms. *McWilliams*, 137 S.Ct. at 1795-97, 1801. Thus, McWilliams's mental condition plainly was seriously in issue, and his efforts to obtain expert assistance on the issue were thwarted by the trial court.

In stark contrast here, the trial court stood ready to grant Davis's request for funds to hire a private expert, Trial Record at 624-25, but post-conviction testimony indicates Davis's counsel was simply unable to justify the request for a private expert after having consulted the neutral state experts. Post-conviction Record at 333-34, 339-40, 357-60, 365-66. Counsel did not return to the trial court to demonstrate that the neutral experts had been unable to satisfy counsel's desire for expert assistance and testimony at sentencing, much less that the neutral experts had been insufficient to satisfy any constitutional requirement under *Ake*. Indeed, counsel elected to call one of the neutral experts, Dr. Jenkins, who was a helpful witness for Davis at sentencing. See Trial Record at 3439-3459. See also *Davis*, 539 S.W.3d at 570 (noting Davis's counsel admitted in post-conviction testimony that even if he had obtained funds to hire a partisan expert there was no indication one would have reached a different result than Jenkins or the state hospital doctors had reached); *Davis*, 423 F.3d at 874 (noting Davis's counsel testified Jenkins had been a helpful witness at sentencing). The petition does not present a meritorious constitutional claim. It should be denied.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Arkansas
should be denied.

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