OCTOBER TERM 2016

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner,

v.

DON WILLIAM DAVIS,

Respondent.

RESPONSE TO MOTION TO VACATE STAY OF EXECUTION

CAPITAL CASE – EXECUTION SCHEDULED FOR April 17, 2017

Scott W. Braden*
John C. Williams
Federal Public Defender Office
scott_braden@fd.org
john_c_williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

Deborah R. Sallings
35715 Sample Road
Roland, AR 72135
(501) 330-0286
Deborahsallings@gmail.com

*Counsel of Record (member of the Bar of the United States Supreme Court)

Dated: April 17, 2017

Pursuant to established procedures under Arkansas law, Respondent Don Davis filed a motion asking the Arkansas Supreme Court to recall its mandate in Case No. CR-00-528, and to stay his execution, scheduled for April 17, 2017. On April 17, 2017, the Arkansas Supreme Court granted the motion, indicated that the proceeding was now "taken as a case," set a briefing schedule, and stayed the execution.

The State of Arkansas has now asked this Court to vacate the stay granted by the Supreme Court of Arkansas. Granting the State's request would result in Mr. Davis's execution, and would thereby deprive the Supreme Court of Arkansas of jurisdiction of a pending case.

It is remarkably ironic that the State of Arkansas seeks to deprive its highest court of jurisdiction in a pending case in which no actual decision has been reached. More to the point, this Court does not have jurisdiction to take such action, because there is no final judgment for it to review. And even if this Court did have jurisdiction, it should not exercise it, for no error was committed by the state high court.

I. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE STATE'S REQUEST.

This Court's jurisdiction to review state court decisions extends only to "[f]inal judgments or decrees rendered in the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. § 1257(a). This historic provision, which dates back to Section 25 of the 1789 Judiciary Act, "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The effect of this final judgment rule is as follows:

> To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court. As we have recognized, the finality rule is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

Id. (quotation marks and citations omitted); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975) ("considerations of English usage as well as those of judicial policy would justify an interpretation of the final-judgment rule to preclude review where anything further remains to be determined by a State court") (internal quotations and alterations omitted); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it").

This rule of finality is not merely a technicality but a rule based on important policy considerations. As this Court has emphasized, the finality rule

> serves several ends: (1) it avoids piecemeal federal review by federal courts of state court decisions; (2) it avoids giving advisory opinions . . .; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

While this Court has recognized four exceptions to this bedrock rule, none of the exceptions apply here. The four exceptions are:

> (1) cases in which there are further proceedings yet to occur in the state courts but the federal issue is conclusive or the outcome of further proceedings preordained;
> (2) cases in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings;
> (3) cases where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had; and
> (4) cases where the federal issue has been finally decided in the state courts with further proceedings pending and a refusal immediately to review the state-court decision might seriously erode federal policy.

See Florida v. Thomas, 532 U.S. 774, 777-80 (2001).

Each of these four exceptions requires that the "the federal issue has been finally decided in the state courts," *id*., but that circumstance is obviously not present here. The Arkansas Supreme Court decided to await this Court's forthcoming decision in *McWilliams v. Dunn*, 137 S. Ct. 808 (2017), before addressing the merits of Mr. Davis's motion to recall the mandate. The state court's only "final" decision was to stay Mr. Davis's execution and set a briefing schedule so that it could address the merits of the motion. A state court's management of its docket and its order to postpone an execution that would moot its adjudication of a case are matters that fall well outside the scope of this Court's § 1257 jurisdiction.

The ruling by the Arkansas Supreme Court is unmistakably interlocutory, rather than final. The state court decided nothing beyond that it would *not* make a decision until it considered briefs as part of its normal process of considering a motion to recall its mandate. *See Robbins v. State*, 114 S.W.3d 217 (Ark. 2003) (describing criteria Arkansas Supreme Court uses in deciding whether to recall the mandate).

Moreover, the ruling does not terminate the litigation. To the contrary, in any meaningful sense it *starts* the litigation. The Arkansas Supreme Court simply found sufficient merit in the motion to recall its mandate that it now considers the motion to be a "case," to be decided by it after full briefing on the merits. Thus, its ruling is interlocutory, not final. In particular, it is entirely possible that the Arkansas Supreme Court would actually rule in favor of the State after full briefing and consideration of the merits.

Since the Arkansas Supreme Court did not decide any federal question, there is no such decision – even an interlocutory one – for this Court to review. Until the state court actually rules on a federal question, there is no jurisdiction under § 1257(a), and it would be inconsistent with this Court's longstanding principles to preemptively take jurisdiction.

The State premises its request for jurisdiction on 28 U.S.C. § 1651, 28 U.S.C. § 2101(f), and Supreme Court Rule 23. Application at 1. None of those provisions confers jurisdiction.

Section 1651 allows this Court issue writs "in aid of [its] jurisdiction," but does not in itself confer jurisdiction not granted by section 1257. Otherwise, section 1651 would drive a truck through the final judgment rule of section 1257. *See also Turner Broad. Sys. Inc. v. Federal Communications Comm'n*, 507 U.S. 1301 (Rehnquist, C.J.) (writ under § 1651 should only be granted where "necessary and appropriate in aid of [our] jurisdiction," and where the "legal rights at issue are indisputably clear") (quotations and citation omitted).

Section 2101(f) allows a party to stay a judgment for a reasonable time to enable a party to obtain a writ of certiorari. But it does not provide an independent basis for jurisdiction.

Likewise, Supreme Court Rule 23 enables a party "to a judgment sought to be reviewed" to seek a stay. Here, however, there is no judgment to be reviewed and no jurisdiction. Again, Rule 23 cannot simply be used – as the State wishes to do, to create an end run around the final judgment rule of section 1257.

II. THE STATE'S LEGAL ARGUMENTS ARE MERITLESS.

Leaving aside the Court's lack of jurisdiction to act upon the state's application, the state's contention is devoid of legal merit. The state court, after all, did not hold that Mr. Davis has prevailed or will prevail on his claim under *Ake v. Oklahoma*, 470 U.S. 68 (1985). It only granted a stay. In order to stay an execution, the Arkansas Supreme Court does no more than determine that the underlying constitutional issue is "bona fide and not frivolous." *Singleton v. Norris*, 964 S.W.2d 366, 372 (Ark. 1998) (opinion on rehearing). In essence, the State seeks review of the Arkansas Supreme Court's determination that Mr. Davis presents a non-frivolous claim.

Properly framed, the issue is easily resolved. Mr. Davis's claim is that he showed that mental health would be a significant issue in their capital trials, and that *Ake* entitled him to the aid of an independent mental health expert in order to provide mitigating evidence and otherwise to assist the penalty phase defense – such as by showing that Mr. Davis is impaired by organic brain damage. That constitutional claim is supported, and indeed compelled, by the plain language of *Ake*: "[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. Although *Ake* was clear that an indigent defendant does not have the right to an expert of his choosing, *id.* at 83, it was equally clear that the expert must become a member of the defense team – not only by evaluating the defendant, but also to "present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. More than merely plausible or non-frivolous, the prisoners' view of *Ake* enjoys majority support among the lower federal courts.[1]

This Court has granted certiorari in *McWilliams v. Dunn*, No. 16-5294. The question in *McWilliams* is not merely whether *Ake* requires an independent mental health expert to assist with the penalty phase defense. It is whether that particular right was "clearly established" by *Ake* for purposes of 28 U.S.C. § 2254(d)(1). The Court's decision to resolve that issue itself

---

[1] *Compare Jones v. Ryan*, 583 F.3d 626, 638 (9th Cir. 2009); *Schultz v. Page*, 313 F.3d 1010, 1016 (7th Cir. 2002); *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003); *Szuchon v. Lehman*, 273 F.3d 299, 317-18 (3d Cir. 2001); *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir. 2000); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990); *Morris v. State*, 956 So.2d 431, 447-48 (Ala. Crim. App. 2005) (all so holding), *with Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009); *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015); *Woodward v. State*, 726 So.2d 524, 529 (Miss. 1997) (denying that *Ake* requires an independent defense expert).

demonstrates that Mr. Davis's claim to an independent mental health mitigation expert was not frivolous.

The State's arguments about the retroactivity of any decision in *McWilliams*, Application at 3-4, highlight the presence of significant nonfederal questions in this case. The Supreme Court of Arkansas will ultimately decide as a matter of state law whether to apply any decision in *McWilliams* retroactively. *See Danforth v. Minnesota*, 552 U.S. 264 (2008) (state courts need not apply federal retroactivity principles). Whether any decision the Arkansas Supreme Court ultimately reaches will even decide a federal question is not known; all we know is that it has not yet decided any federal question.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Davis respectfully requests that this Court deny the State's motion to vacate the stay of execution granted by the Arkansas Supreme Court.

Respectfully submitted:

/s/ Scott Braden
By: Scott W. Braden, ABN 2007123
John C. Williams, ABN 2013233
Federal Public Defender Office
scott_braden@fd.org
john_ c_ williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

/s/ Deborah R. Sallings
Deborah Ruth Sallings, ABN 80127
35715 Sample Road
Roland, AR 72135
deborahsallings@gmail.com
(501) 330-2686
Little Rock, AR 72201
Attorneys for Respondent
Don William Davis

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DON WILLIAM DAVIS,

Petitioner,

v.

ARKANSAS,

Respondents.

PROOF OF SERVICE

I, Scott Braden, certify that on this date, I caused a copy of the foregoing *Emergency Application for Stay of Execution* to be served by FIRST CLASS MAIL, postage prepaid, upon all parties required to be served under SUP. CT. R. 29, listed below:

Kelly Fields, Esq.
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-8068

/s/ Scott Braden
Scott Braden

Dated: April 17, 2017