No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

When this Court held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," did it clearly establish that the expert should be independent of the prosecution?

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ORDERS AND OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc is unreported and appears in the Joint Appendix (J.A.) at J.A. 17a. The unpublished per curiam decision of the Eleventh Circuit affirming the district court's denial of McWilliams's petition for a writ of habeas corpus, *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015), along with the concurring and dissenting opinions, appears at J.A. 19a. The relevant excerpts from the federal magistrate judge's report and recommendation denying McWilliams's habeas petition, which was accepted by the District Court for the Northern District of Alabama without further comment on the *Ake* claim, appears at J.A. 64a. The opinion of the Alabama Court of Criminal Appeals affirming McWilliams's conviction, along with the dissenting opinion, is published at *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), and appears at J.A. 92a. The opinion of the Alabama Supreme Court affirming McWilliams's conviction without addressing the *Ake* claim is published at *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of McWilliams's petition for a writ of habeas corpus in an opinion dated December 16, 2015, J.A. 19a-63a, and subsequently denied McWilliams's petition for rehearing en banc in an order dated February 16, 2016, J.A. 17a-18a. McWilliams's petition for a writ of certiorari was filed in this Court on July 15, 2016, and granted on January 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The Alabama judge who sentenced James McWilliams to death did not find a single mitigating circumstance to weigh against three aggravating circumstances. However, two days before sentencing, the parties and the court received a neuropsychologist's assessment reporting that McWilliams had "organic brain dysfunction." T. 1634.[1] The assessment found that McWilliams had "genuine neuropsychological problems" and an "obvious neuropsychological deficit," which included "cortical dysfunction attributable to right cerebral hemisphere dysfunction" indicative of a "right hemisphere lesion." T. 1634-36.

1. "T." refers to the certified trial record, which can be found in Volumes 1-10 of the state court record as filed in the district court. *See* D. Ct. Doc. 12 (Dec. 17, 2004) (Resp't's Habeas Corpus Checklist). "P.C.R." refers to the clerk's record from the state post-conviction proceedings; "P.C.T." refers to the certified court reporter's transcript from the state post-conviction hearing. The clerk's record and court reporter's transcript from the state post-conviction proceedings can be found in Volumes 16-38 of the state court record as filed in the district court. *See* Doc. 12. The remaining volumes of the state court record contain appellate briefing and opinions.

The day before the judicial sentencing hearing, all parties received McWilliams's updated records from the state mental hospital. The following morning, just prior to the hearing, all parties received records from the state prison where McWilliams was being held, which showed that he was being treated with psychotropic medication. Defense counsel had subpoenaed the prison records approximately two months earlier, but did not receive them until moments before the hearing. Defense counsel repeatedly sought a continuance in order to consult with an independent defense expert about the neuropsychological assessment and the records so as to understand and interpret them and then to fashion a mitigation case based on the evidence of McWilliams's mental disorders and impairments. Consultation with an expert also would have provided defense counsel with an opportunity to rebut the testimony of the State's experts from a previous sentencing hearing before a jury that McWilliams had no real mental impairment and that he had malingered on his psychological tests. The judge denied the motions and sentenced McWilliams to death. In imposing that sentence, the judge concluded that McWilliams had faked the answers on his psychological tests and on that basis found no mitigating circumstances.

McWilliams argued on appeal that he was denied his right to independent expert assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Affirming the death sentence, the Alabama Court of Criminal Appeals held that *Ake* did not entitle McWilliams to anything more than the views of the psychologist who reported simultaneously to the prosecution, the defense, and the judge. J.A. 106a.

A. Trial and Sentencing Before the Jury

McWilliams was charged with the rape and murder of Patricia Reynolds, which occurred during the robbery of a convenience store in Tuscaloosa, Alabama, on December 30, 1984. T. 1646-47. The trial court found him indigent and appointed counsel to represent him. T. 1440-41. Prior to trial, the defense filed a "Petition for Inquisition Upon Alleged Insane Prisoner," T. 1526, and, in response, the court ordered that McWilliams be sent to the Taylor Hardin Secure Medical Facility, a state hospital, for examination. A "Lunacy Commission" was convened to conduct the evaluation and found that McWilliams was competent to stand trial, that he was sane at the time of the crime, and that there "seem[ed] to be no mitigating circumstances involved" in the case. T. 1544-47.

McWilliams was convicted of capital murder on August 26, 1986. T. 1292. The sentencing hearing before the jury began the following day, and testimony lasted less than three hours. T. 1294-95, 1370. The prosecution reintroduced its evidence from the guilt phase, T. 1297, and also called a police officer to testify that McWilliams had a prior conviction, T. 1299-1303.

The defense called McWilliams and his mother. Both testified about head injuries McWilliams suffered as a child and the headaches, doctor visits, and medications that followed. T. 1303-18, 1320-35. McWilliams also testified that he had been seen by several psychiatrists and psychologists both before his arrest and after it while in state custody. T. 1321-27. He then read from the report of a psychologist who had evaluated him prior to his arrest; the report stated that he had a "blatantly

psychotic thought disorder," T. 1330, and needed inpatient treatment, T. 1331-32. When the prosecutor questioned McWilliams about the neurological effects of his head injuries, McWilliams replied, "I am not a psychiatrist." T. 1328. The prosecutor also pressed McWilliams's mother:

> Q: You are not saying James is crazy, are you?
>
> A: I am no expert: I don't know whether my son is crazy or not. All I know, that my son do need help.
>
> * * *
>
> A: I said that I believe my son needs help, professional help: the help that I cannot give him.

T. 1317-18. Defense counsel had subpoenaed McWilliams's mental health records from Holman Prison on August 13, to be delivered by August 25, T. 1618, but the prison did not produce them, so the defense presented no additional evidence, T. 1319.

In rebuttal, the State presented the testimony of a psychiatrist and a psychologist from the state mental hospital. T. 1336-1369. The psychiatrist, Dr. Kamal Nagi, who was a member of the Lunacy Commission, testified that he found no evidence of psychosis. T. 1340. In support of that finding, he said that two Minnesota Multiphasic Personality Inventory assessments ("MMPIs") were performed on McWilliams. T. 1353. He then backtracked, saying that a second test was recommended, but he was not sure if it was given. T. 1353-55. He ultimately stated

that only one MMPI was done, but not by him, and he volunteered that "the results were faked bad." T. 1354. He also testified that observation and interviewing are "more important than psychological testing," T. 1355, yet he was unaware of McWilliams's history of head trauma, T. 1351-52.

Dr. Norman Poythress, a psychologist who signed the final report issued by the Lunacy Commission, testified that the MMPI administered to McWilliams by a graduate student at the state hospital was "clinically invalid" because the test's "validity scales" indicated that McWilliams had not been candid in his responses. T. 1361-64. Dr. Poythress testified that a second test was not given. T. 1365.

Ten jurors voted for a death sentence—the minimum required for a death recommendation under Alabama law. *See* Ala. Code § 13A-5-46(f) (1981). The other two jurors voted for a sentence of life in prison without parole. T. 1400. A judicial sentencing hearing was scheduled for October 9, 1986.

B. Judicial Sentencing Hearing

Prior to the judicial sentencing hearing, which is required by Alabama law,[2] defense counsel filed a motion for neuropsychological testing of McWilliams, T. 1615, as well as a motion to require the Department of Corrections

2. Because the jury's recommendation was not binding on the judge, the court was required to hold a separate judicial sentencing proceeding and impose sentence. Ala. Code §§ 13A-5-45 to -47 (1981).

to show cause as to why it should not be held in contempt for failing to produce McWilliams's mental health records, which had been subpoenaed in August but still had not been produced, T. 1618. The court granted both motions, T. 1612-13, but McWilliams's counsel did not receive the results of the neuropsychological testing until October 7, 1986—just two days before the judicial sentencing hearing—and did not receive the prison records until the morning of the sentencing. T. 1631-32; J.A. 191a-193a.

On the afternoon of October 7, an assessment prepared by Dr. John Goff, who, like Dr. Nagi and Dr. Poythress, worked for the state's Department of Mental Health, was distributed to the court and the prosecution as well as the defense. T. 1631. According to the report, Dr. Goff found that McWilliams had "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634. More specifically, McWilliams suffered from "cortical dysfunction attributable to right cerebral hemisphere dysfunction," which manifested in "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636. These deficits were "suggestive of a right hemisphere lesion," T. 1635, and were "compatible with the injuries [McWilliams] says he sustained as a child," T. 1635. Accordingly, Dr. Goff concluded that McWilliams had "genuine neuropsychological problems" and an "obvious neuropsychological deficit." T. 1635.

Counsel also did not receive McWilliams's updated records from the state mental hospital until the day before sentencing, and they did not receive the Holman Prison records until they arrived to court on the morning of the sentencing hearing. J.A. 191a-193a. The prison records indicated that McWilliams was "on an assortment

of drugs that were prescribed for him by the prison authorities," J.A. 190a, including Desyrel, Librium, and the antipsychotic Mellaril. J.A. 190a-191a.

When the sentencing hearing began, McWilliams's counsel informed the judge that due to the late arrival of the report and records, he needed time to "have someone else review these findings." J.A. 193a. He stated, "[I]t is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered," J.A. 196a, that is, an opinion other than the one produced by the neutral expert Dr. Goff. In support of his request, counsel explained that he could not understand and meaningfully present the information he had just received, as Dr. Goff's neuropsychological testing was sophisticated[3] and the records were lengthy and technical.[4] J.A. 190a-196a.

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3. Dr. Goff reported that he relied upon the Halstead-Reitan Neuropsychological Test Battery, which consisted of seven tests, as well as the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the Halstead-Wepman Aphasia Screening Test, the Trail-Making Test, and the Wechsler Memory Scale (WMS). T. 1633. Dr. Goff also had another MMPI administered, T. 1633, but he found that "[p]ersonality assessment via the MMPI was not possible." T. 1635. He indicated that the MMPI results were invalid due to either a "cry-for-help" response set or a "fake-bad." T. 1635.

4. The receipt accompanying the delivery of the records from the state hospital to the court clerk on October 8, 1986, indicates that the records spanned 1233 pages. P.C.R. 2983. Some of those were likely duplicates of records previously disclosed, but any records pertaining to Dr. Goff's evaluation of McWilliams—which spanned at least 88 pages, P.C.R. 2897-2984—would have been new to counsel. In addition, counsel also received the Holman Prison records on the morning of sentencing. Defense counsel made clear that the two sets of documents were too voluminous to review that morning. *See* J.A. 206a ("there is no way that I can go through this material").

In response, the judge stated, "All right. Well, let's proceed." J.A. 197a. The prosecution presented the testimony of the probation officer who prepared a pre-sentence investigation report and introduced the report into evidence. J.A. 198a-203a. The judge made the records from the state hospital, the prison records, and Dr. Goff's report part of the record even though Dr. Goff did not testify and no one explained his assessment or the records. J.A. 205a, 207a.[5] The judge recessed at approximately 10:40 a.m., indicating that defense counsel could review the records before pronouncement of sentence at 2:00 p.m. J.A. 205a-206a. In response, counsel reiterated that there was "no way" he could go through all the material in that amount of time. J.A. 206a.

During the recess, counsel filed a motion to withdraw, arguing that "the abritrary [sic] position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." T. 1644. The motion was denied. T. 1644.

When court resumed, defense counsel stated:

> [W]e cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition

5. Although they were admitted and made part of the record, neither the Holman Prison records nor the majority of the records from the state hospital—except for the 88 pages pertaining to Dr. Goff's assessment—are included in the state court record that was filed in the district court and is now part of the record before this Court. *See* P.C.R. 1938.

> exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

J.A. 207a. The motion was denied. J.A. 207a.

The prosecutor then gave his closing argument, stating that there were "no mitigating circumstances" to weigh against the aggravating circumstances. J.A. 209a. Defense counsel followed, beginning, "I would be pleased to respond to Mr. Freeman's remarks that there are no mitigating circumstances in this case if I were able to have time to produce any mitigating circumstances." J.A. 210a. Moments later, defense counsel concluded, "The Court has foreclosed[,] by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms." J.A. 211a.

The trial judge stated that he had reviewed the mental health records during the break and found passages indicating that McWilliams was faking and manipulative and that there was no evidence of psychosis. J.A. 211a. Defense counsel reiterated, "I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?" J.A. 211a. When the judge replied that he would have given the defense

"the opportunity to make a motion," J.A. 212a, counsel responded, "Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?" J.A. 212a. The trial judge responded, "I want you to approach with your client, please." J.A. 212a. He then sentenced McWilliams to death. J.A. 214a.

In a written sentencing order, the judge found three aggravating circumstances[6] and no mitigating circumstances because "the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative." J.A. 188a. With regard to the records from the state hospital and prison—which were unexplained by an expert or anyone else, but indicated that McWilliams was being administered antipsychotic medication—the judge stated that McWilliams "was not and is not psychotic." J.A. 188a.

C. State Appellate and Post-Conviction Proceedings

On appeal, McWilliams argued to the Alabama Court of Criminal Appeals that he was denied his due process right to meaningful expert assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Appellant's Br. at 47-52 (Vol. 11, Tab #R-33). In his brief, McWilliams stated:

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6. The trial court found that McWilliams was previously convicted of another felony offense involving violence to a person, that the murder was committed during the commission of a rape and robbery, and that the offense was especially heinous, atrocious, or cruel compared to other capital cases. J.A. 182a-184a.

> Defense counsel received Dr. Goff's written report less than two days before the sentencing hearing. He did not understand it, but he sensed that it was sufficiently favorable to merit further investigation. Counsel advised the Court that he lacked the expertise to interpret the highly technical report. He explained that Dr. Goff's findings appeared to conflict with the findings of the Taylor Hardin experts. Counsel literally begged the Court for an opportunity to consult with an expert who could explain the report to him. The Court refused to allow this.

Appellant's Br. at 48-49. McWilliams added that the accuracy of the sentencing proceeding would have been "'dramatically enhanced' if counsel had the assistance of an expert to help him 'translate a medical diagnosis into language' that the court would have understood." Appellant's Br. at 49 (quoting *Ake*, 470 U.S. at 80, 83). The Court of Criminal Appeals affirmed, holding that *Ake* is satisfied "when the State provides the [defendant] with a competent psychiatrist." J.A. 106a.

McWilliams sought certiorari review in the Alabama Supreme Court, arguing that *Ake* "prohibits granting neuropsychological testing but denying an expert to assist the defense with understanding and presenting the test results." Pet'r's Br. at 37 (Vol. 13, Tab #R-38). The Alabama Supreme Court affirmed without addressing the *Ake* issue. *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

McWilliams filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal

Procedure, raising a number of issues. Among the witnesses who testified at a hearing on the petition was Dr. George Woods, a psychiatrist, who explained that one possibility for high scores on certain MMPI scales is, in fact, "that a person is just so pathologically disturbed that their testing brings that out, and so you see a number of elevations, you see a number of areas, where they are pathologically disturbed." P.C.T. 941. An elevated scale can also reflect that a person has exaggerated certain responses but is still mentally ill. P.C.T. 940-42. The Alabama courts denied post-conviction relief. P.C.R. 1775-1828.[7]

D. Federal Habeas Proceedings

McWilliams then sought relief in the federal courts pursuant to 28 U.S.C. § 2254. In the United States District Court for the Northern District of Alabama, he argued that he was denied his Fourteenth Amendment right to due process of law because he did not receive the assistance of an independent expert required by *Ake*. D. Ct. Doc. 1 at 96-99 (Oct. 6, 2004). The magistrate judge, in his report and recommendation that was later accepted by the district court, ruled that the appointment of Dr. Goff satisfied *Ake* and, as such, the decision of the Alabama Court of Criminal Appeals was not an unreasonable application of "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). J.A. 90a.

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7. The denial of the post-conviction petition was affirmed on appeal, and the Alabama Supreme Court denied certiorari. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

The Court of Appeals for the Eleventh Circuit affirmed in a per curiam decision with one judge concurring and one judge dissenting. J.A. 19a-63a. The court found that McWilliams had received the constitutionally required expert assistance by being provided Dr. Goff's report two days before the judicial sentencing hearing. J.A. 33a-36a. The court also suggested that defense counsel could have contacted Dr. Goff, even though he was also available to the prosecution, and called him as a witness, even without understanding his assessment. J.A. 35a. It stated:

> Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

J.A. 35a. The court held that the denial of an expert was not contrary to or an unreasonable application of "clearly established Federal law" because although some circuits "have held that the state must provide a non-neutral mental health expert to satisfy *Ake*," in other jurisdictions, "a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*." J.A. 34a.

Judge Wilson dissented, finding that "the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect." J.A. 63a. He explained:

> Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process.

J.A. 58a-59a. In response to the suggestion that defense counsel could have consulted with Dr. Goff, Judge Wilson observed that Dr. Goff could not possibly provide the kind of expert assistance contemplated by *Ake* because he was free to "cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a.[8]

This Court granted certiorari to address the question of whether *Ake* clearly established that an indigent defendant who makes a threshold showing that mental health issues will be a significant factor at trial has a right to a mental health expert who is independent of the prosecution.[9]

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8. McWilliams presented his *Ake* claim again in a request for rehearing. That request was denied on February 16, 2016. J.A. 17a-18a.

9. There is no question that McWilliams's mental health was a "significant factor" in the case. *See Ake*, 470 U.S. at 83. Nearly all of

SUMMARY OF THE ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that an indigent defendant with mental health issues significant to his case is entitled to an expert to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. That assistance includes gathering information for the defense, helping the defense assess the viability of potential defenses, aiding the defense in preparing the cross-examination of the prosecution's mental health experts, and translating medical concepts into language understandable to lay people. *Id.* at 80-82. This Court recognized that such assistance is essential to providing the defendant "a fair opportunity to present his defense," *id.* at 76, and to ensuring that facts are resolved based on the views and expertise of "psychiatrists for each party," which is consistent with the adversary system, *id.* at 81. Thus, *Ake* clearly established the right to an independent expert to assist the defense. The ruling of the Alabama Court of Criminal Appeals that *Ake* was satisfied by the appointment of a neutral expert who reported to the prosecution, the defense, and the judge, *see* J.A. 106a, is contrary to and an unreasonable application of *Ake*.

First, the role of the expert guaranteed by *Ake* demonstrates that the expert provided to the defense

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the penalty phase evidence focused on it, T. 1299-1369, and both the majority and the dissent below recognized its central role, *see* J.A. 22a (per curiam) ("McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case . . . ."); J.A. 53a n.1 (Wilson, J., dissenting) ("McWilliams's mental health was a significant factor in his sentencing proceedings . . . . There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing.").

must be independent of the prosecution. The state trial court in *Ake* had denied the defendant's request for expert assistance, finding that the evaluations of "neutral" experts who reported to the court, the prosecution, and the defense were sufficient. *Ake*, 470 U.S. at 73, 84-85. This Court reversed, holding that due process requires an expert to assist the defense. *Id.* at 83-87. The specific types of assistance described by the Court, including consultation and trial preparation, cannot be achieved absent independence from the prosecution. As Judge Wilson recognized in his dissent below, it would be untenable for an expert to help the defense prepare for cross-examination of the prosecution's experts, "only to cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a. Similarly, a defense attorney could not consult with an expert about potential defenses if the expert was free to share the content of the consultation with opposing counsel. Nor could the expert assist the defense in preparing for cross-examination if the expert was going to testify for the prosecution.

Second, then-Justice Rehnquist's dissent in *Ake* confirms that *Ake* clearly established the right to an independent expert to assist the defense. Justice Rehnquist dissented to express his disagreement with the Court's holding that due process requires an expert to assist in "*evaluation, preparation, and presentation of the defense*." *Id.* at 92 (Rehnquist, J., dissenting) (emphasis in original).

Third, this Court reiterated in subsequent decisions that *Ake* requires an independent expert. It remanded a Virginia case the year *Ake* was decided and later

explained that it did so because under *Ake*, "due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995). It also emphasized in *Ford v. Wainwright*, 477 U.S. 399 (1986), that under *Ake*, "the factfinder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party.'" *Ford*, 477 U.S. at 414 (plurality opinion) (quoting *Ake*, 470 U.S. at 81).

Fourth, when *Ake* was decided, federal courts already provided for the assistance of experts "necessary for an adequate defense" under the Criminal Justice Act. This Court referred to the Criminal Justice Act in *Ake* and then adopted language similar to it. This is significant because numerous Courts of Appeals had already recognized that providing an expert "necessary for an adequate defense" under the Criminal Justice Act meant providing an expert who was independent of the prosecution. *See, e.g.*, *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971).

Fifth, the Court expressly envisioned *ex parte* proceedings when describing the threshold showing required for expert assistance. *Ake*, 470 U.S. at 82-83. The purpose of such proceedings is to ensure that indigent defendants, in making a showing of need for expert assistance, are not forced to divulge privileged and confidential information and strategic considerations that financially secure defendants would keep confidential. There would be no reason for a defendant to proceed *ex parte* in a request for expert assistance if the end result was the appointment of an expert who would share the defense's information and strategy with the prosecution.

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The governing principle of *Ake* is that due process requires a mental health expert who can assist the defense by performing the specific tasks delineated in the opinion, which include consultation and preparation with defense counsel and thus necessarily require independence from the prosecution.

The Eleventh Circuit and many other courts have recognized that *Ake* requires an independent expert. *See, e.g.*, *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985). However, the Eleventh Circuit held in this case that the right to such an expert was not "clearly established" in *Ake* because the Fifth Circuit has declined to recognize the right and the Sixth Circuit has recognized it but held that it was not clearly established in *Ake*. J.A. 34a. These cases misinterpreting *Ake* do not undermine the principles that *Ake* clearly articulated. Even the Alabama Court of Criminal Appeals, which held in this case that McWilliams was not entitled to an independent expert, has since held that *Ake* was "clear" in requiring exactly that. *See Morris v. State*, 956 So. 2d 431, 447 (Ala. Crim. App. 2005).

The absence of an independent expert rendered McWilliams unable to present any mitigating evidence on the only significant factor at the sentencing: his mental health. The sentencing judge found that there were "no mitigating circumstances," J.A. 189a, despite having received a neuropsychological report indicating that McWilliams suffered from brain damage and records

showing that state doctors were medicating McWilliams with psychotropic drugs. An expert assisting the defense would have explained in lay terms to defense counsel how to present the diagnoses and information in the report and records as mitigating circumstances. Consideration of McWilliams's brain damage and other mental health issues was essential to a fair and reliable sentencing determination. Because neither judge in the majority below considered the ways in which McWilliams would have developed and presented his mitigation case if he had been provided the independent expert assistance required by *Ake*, remand to the Eleventh Circuit is warranted.

ARGUMENT

I. THE RIGHT TO THE ASSISTANCE OF AN INDEPENDENT MENTAL HEALTH EXPERT WAS CLEARLY ESTABLISHED BY *AKE V. OKLAHOMA*.

This Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that the Due Process Clause of the Fourteenth Amendment guarantees an indigent defendant whose mental health is a significant issue a competent expert to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. The words the Court chose to express its holding leave no doubt that defendants in these circumstances are entitled to an expert who assists in the development and presentation of the defense case, and who operates independently of the prosecution. To "assist" is to "help" or to "give support

or aid."[10] The Court also provided specific and detailed guidance as to what this due process right to "assistance" encompasses: the expert is expected to "gather facts, through professional examination, interviews, and elsewhere," *id.* at 80; "analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior," *id.*; "determine whether the insanity defense is viable," *id.* at 82; "assist in preparing the cross-examination of a State's psychiatric witnesses," *id.* at 82, since the expert would "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," *id.* at 80; and "translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand," *id.* As this Court held, the Due Process Clause requires such assistance to ensure that the defendant "has a fair opportunity to present his defense." *Id.* at 76.

After observing that "[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, [and] on cure and treatment," *Ake*, 470 U.S. at 81, this Court made clear that a mental health expert working exclusively for the defense was essential to the proper functioning of the adversary process: "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light

10. *See Oxford American Dictionary* 36 (1980) ("to help"); *Webster's Third New International Dictionary* 132 (1976) ("to give support or aid").

of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* (emphasis added).

The right established in *Ake* followed from the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and other decisions that guarantee a criminal defendant the basic rights necessary to ensure the proper functioning of the adversary process.[11] Summarizing those decisions, this Court stated:

> [F]undamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly *within the adversary system*." To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 77 (citations omitted) (emphasis added). In *Ake*, the Court identified an independent mental health expert—an expert who gathers information for the defense, assists counsel in pursuing the proper defense

11. Those decisions include *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956), establishing the right to transcripts necessary for an appeal; *Douglas v. California*, 372 U.S. 353, 357-58 (1963), establishing the right to counsel on the first direct appeal as of right; *Strickland v. Washington*, 466 U.S. 668, 687 (1984), holding that defense counsel at trial must be effective; and *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985), holding that appellate counsel must be effective. *Ake*, 470 U.S. at 76.

theory, advises counsel on how to cross-examine the prosecution's experts, and provides other confidential consultation—as one of those basic tools essential to ensuring that a criminal defendant can participate fairly in the adversarial process.

Ake itself thus clearly establishes that a criminal defendant has the right to an expert who works closely with the defense and independently of the prosecution. The Alabama Court of Criminal Appeals failed to apply this law in holding that *Ake* entitled McWilliams only to the assistance of a competent mental health expert, even though the expert was shared with the prosecution. J.A. 106a. That decision was contrary to and an unreasonable application of the clearly established law set forth in *Ake*.[12]

A. *Ake* Clearly Established a Due Process Right to the Assistance of an Expert Who Is Independent of the Prosecution.

Ake itself and this Court's contemporaneous understanding of the nature of the *Ake* right confirm that the case clearly established a right to an expert who will assist the defense and operate independently of the prosecution.

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12. As this Court has explained, "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citations omitted).

First, the facts and language of *Ake* make clear that a defendant is entitled to the assistance of an independent expert. In *Ake*, the defendant was evaluated by neutral mental health professionals who worked for the state hospital, and the evaluations of those experts were presented as evidence at trial and sentencing. *Ake*, 470 U.S. at 71-73. The trial court denied the defendant's request for expert assistance based on *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), in which "neutral psychiatrists" had examined the defendant and this Court found that no additional expert assistance was necessary. *Ake*, 470 U.S. at 84-85. In reversing and ordering a new trial, this Court rejected a neutral evaluation of this kind as insufficient to meet the requirements of due process. *Id.* at 86-87. Rather, in light of the Court's "increased commitment to assuring meaningful access to the judicial process," *id.* at 85, an indigent defendant is entitled to an independent expert to assist the defense, including in trial preparation, *id.* at 83-85.

The responsibilities of an expert set out in *Ake*, including evaluating potential strategies and "preparing the cross-examination of a State's psychiatric witnesses," *id.* at 82, can be carried out effectively only if the expert is independent of the prosecution and assisting the defense. As Judge Wilson observed in dissent below, it would make a mockery of the right guaranteed in *Ake* to suggest that it would be satisfied by an expert who helps the defense prepare for cross-examination of the State's experts, "only to cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a. And it would be an even greater mockery if that expert testified for the prosecution. Likewise, it would be plainly contrary to the defendant's interests and to

the basic operation of our adversarial system of justice—and perhaps even a violation of professional ethics[13]—for defense counsel to consult with an expert who is free to share counsel's knowledge and strategic considerations with the prosecution. The prosecution and defense can no more share the same expert than they can share the same lawyer.[14]

Throughout its opinion, the Court emphasized the importance of expert assistance to the adversary process, which necessarily means that the expert must be working with the defense and independently of the prosecution. It observed that "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view," *Ake*, 470 U.S. at 84—that is, a view "opposing" the prosecution's expert—and it stated that the factfinder in a criminal case "must resolve differences in opinion within the psychiatric profession on the basis of the evidence

13. The American Bar Association has long recognized that "[w]hen providing consultation and advice to the prosecution or defense on the preparation or conduct of the case, the mental health or mental retardation professional has the same obligations and immunities as any member of the prosecution or defense team." ABA Criminal Justice Mental Health Standards § 7-1.1(c) (1984). That includes the duty of confidentiality. *See* ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983).

14. Although the Court stated that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking," *Ake*, 470 U.S. at 83, it made clear that its concern was ensuring the provision of an expert who would function in the same essential role as a retained expert if the defense were able to afford one, *id.* at 80-82 (explaining the various tasks a mental health expert undertakes).

offered *by each party*," *id.* at 81 (emphasis added).[15] When addressing the penalty phase of the trial in *Ake*, the Court explained that it had upheld the practice of permitting psychiatric testimony on the issue of future dangerousness in capital sentencing "where the defendant has had access to an expert *of his own*." *Ake*, 470 U.S. at 84 (citing *Barefoot v. Estelle*, 463 U.S. 880, 899 n.5 (1983)) (emphasis added). This was based "on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'" *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 899). The Court held in *Ake* that an indigent defendant must have "access to a competent psychiatrist *for the purpose we have discussed*," *Ake*, 470 U.S. at 83 (emphasis added), so there is no separating its explanation of the expert's role from its holding in the case.

Second, the dissent of then-Justice Rehnquist in *Ake* confirms that *Ake* itself clearly established a defendant's right to assistance from an expert independent of the prosecution. Justice Rehnquist dissented precisely because he disagreed with the Court's holding that the Due Process Clause required the provision of an expert who would assist in "evaluation, preparation, and presentation of the defense," as the majority had held. *Id.* at 92 (Rehnquist, J., dissenting). In his view, "all the defendant should be entitled to is one competent

15. *See also Ake*, 470 U.S. at 82 n.8 ("'[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.'") (quoting *Reilly v. Barry*, 166 N.E. 165, 167 (N.Y. 1929) (Cardozo, C.J.)).

opinion," *id.*, and "not to a defense consultant," *id.* at 87. If the majority meant only that a defendant was entitled to a neutral expert, Justice Rehnquist would have had no reason to dissent.

Third, decisions of this Court in the immediate aftermath of *Ake* further confirm that *Ake* itself clearly established a defendant's right to the assistance of an expert who is independent of the prosecution. The same year *Ake* was decided, the Court vacated and remanded a decision of the Virginia Supreme Court for consideration in light of *Ake*. *Tuggle v. Virginia,* 471 U.S. 1096 (1985). As the Court later explained, it vacated the decision because the prosecution presented psychiatric evidence to establish an aggravating circumstance, but the state court denied the petitioner assistance from a mental health expert. *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995). The Court confirmed that *Ake* established that in such instances, "due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Id.*

In like measure, the year after *Ake*, just months before McWilliams was sentenced to death, a plurality of this Court stated in *Ford v. Wainwright*, 477 U.S. 399 (1986):

> In *Ake v. Oklahoma* we recognized that, because "psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms," the factfinder must resolve differences in opinion within the psychiatric profession "on the basis of the evidence offered by each party" when

> a defendant's sanity is at issue in a criminal trial. The same holds true after conviction; *without any adversarial assistance from the prisoner's representative*—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information.

Id. at 414 (plurality opinion) (citations omitted) (emphasis added). Both *Tuggle* and *Ford* confirm that *Ake* established the right to an independent expert.

Fourth, the Court's reference in *Ake* to the federal Criminal Justice Act provides additional confirmation that a defendant's right to an expert who assists the defense and operates independently of the prosecution was clearly established in *Ake* itself. As the Court noted, the federal statute already provided for the assistance of all experts "necessary for an adequate defense." *Ake*, 470 U.S. at 79-80 (quoting 18 U.S.C. § 3006A(e)(1) (1982)).[16] In the years prior to *Ake*, numerous Courts of Appeals had recognized that providing an expert "necessary for an adequate defense" under the Criminal Justice Act meant providing an expert who was independent of the prosecution and

16. The Criminal Justice Act stated, in relevant part: "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. § 3006A(e)(1) (1982).

available to assist in the evaluation and preparation of the defense. *See, e.g.*, *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971) ("[The appointed expert] supplies expert services 'necessary to an adequate defense,' which embraces pretrial and trial assistance to the defense as well as availability to testify. His conclusions need not be reported to either the court or the prosecution.").[17]

Finally, the Court in *Ake* expressly envisioned that a defendant would make "an *ex parte* threshold showing" of his need for a mental health expert. *Id.* at 82. The purpose of *ex parte* proceedings in this context is to ensure that indigent defendants are not forced to disclose attorney-client communications and work product that defendants of means would be able to keep confidential. *See Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970) ("The manifest purpose of requiring that the inquiry [for expert assistance for an indigent defendant] be ex parte is to insure that the defendant will not have to make a premature disclosure of his case."); *Ex parte Moody*, 684 So. 2d 114, 120 (Ala. 1996) (holding that an

17. *See also*, *e.g.*, *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) ("[W]hen, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself."); *United States v. Bass*, 477 F.2d 723, 725-26 (9th Cir. 1973) ("[The expert] supplies expert services 'necessary to an adequate defense.' He can be a partisan witness. His conclusions need not be reported in advance of trial to the court or to the prosecution. And his services embrace pretrial and trial assistance to the defense as well as potential trial testimony."); *United States v. Shultz*, 431 F.2d 907, 911 (8th Cir. 1970) ("[T]he adversary system cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in the presentation of this issue to the jury.").

indigent defendant can proceed *ex parte* when requesting expert assistance under *Ake* because he "should not have to disclose to the state information that a financially secure defendant would not have to disclose"). There would be no point to suggesting that an indigent defendant would make a threshold showing outside the presence of the prosecution if the end result was the provision of an expert who was shared with the prosecution and free to disclose information.

B. Under this Court's Precedents Interpreting 28 U.S.C. § 2254, *Ake*'s Requirement of an Independent Expert Constitutes Clearly Established Law.

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).[18] As explained above, the right to an independent mental health expert and the responsibilities of that expert are clearly set forth in *Ake*.

This Court has held that *Strickland v. Washington*, 466 U.S. 668 (1984), which set the standard for ineffective assistance of counsel claims, clearly established the right to a defense attorney who conducts a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 521-23

18. This Court decided *Ake* the year before McWilliams's trial, six years before the Alabama Court of Criminal Appeals issued its decision, J.A. 92a-179a, and eight years before the Alabama Supreme Court affirmed the ruling of the Court of Criminal Appeals without directly addressing the *Ake* claim, *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

(2003). *Ake* clearly established a related right—the right to an expert to assist in the "evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. Both cases were concerned with providing indigent defendants with "the raw materials integral to the building of an effective defense." *Id.* at 77. This Court was far more specific in *Ake* than it was in *Strickland*. Whereas *Strickland* provided a general reasonableness standard, *Ake* articulated the duties of the required expert in extensive and precise detail. Yet this Court determined in *Wiggins* that counsel's duty to conduct a "thorough investigation of the defendant's background" was clearly established in *Strickland*, *Wiggins*, 539 U.S. at 522, despite the argument that "[t]here was nothing in *Strickland*" that identified that precise duty, *id.* at 543 (Scalia, J., dissenting). If *Strickland* clearly established that the right to effective assistance of counsel encompasses the obligation of defense counsel to conduct a reasonable investigation of the defendant's background before making strategic choices about how to proceed at trial, then *a fortiori Ake* clearly established a criminal defendant's entitlement to an independent expert to assist in the preparation and presentation of the defense.

Similarly, in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), this Court identified clearly established law based on language far less clear than the language of *Ake*. Addressing capital jury instructions, the Court found clearly established principles by conducting a lengthy, detailed analysis of *Penry v. Lynaugh*, 492 U.S. 302 (1989), and other cases. *Abdul-Kabir*, 550 U.S. at 246-63.[19] That type of analysis is not necessary here. There

19. Chief Justice Roberts argued in dissent that if the law was clearly established by "our sharply divided, ebbing and flowing

is no ambiguity in *Ake*. This Court explained that the required expert must be available to assist the defense in specific ways, including assessing the prosecution's case, evaluating potential trial strategies, assisting counsel in preparing for cross-examination, and providing testimony when needed. *Ake*, 470 U.S. at 80-82. Those responsibilities cannot be met unless the expert is working independently of the prosecution. Therefore, *Ake* clearly established the right to an independent expert.

C. The Decisions of Lower Courts Confirm that *Ake* Clearly Established the Right to an Independent Expert.

Of the federal appellate courts that have considered the matter, the majority have read *Ake* to mean what it says: a defendant is entitled to an independent expert to assist the defense, and not merely to the report of a neutral mental health professional. The Eleventh Circuit reached that conclusion in *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), holding that "'[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate.'" *Id.* at 644 (quoting *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990)).

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decisions . . . it should not take the Court more than a dozen pages of close analysis of plurality, concurring and even dissenting opinions to explain what that 'clearly established law' was." *Id.* at 266-67 (Roberts, C.J., dissenting).

Cowley was tried the same year as McWilliams and, as in *McWilliams*, the Alabama trial court in *Cowley* appointed a psychiatrist who was shared by the prosecution and the defense. *Cowley*, 929 F.2d at 641, 644. That psychiatrist testified for the prosecution that Cowley was competent to stand trial and sane when he committed the offense. *Id.* at 641. A jury found him competent, and another jury rejected the insanity defense and found him guilty. *Id.* The Eleventh Circuit granted relief, finding that the psychiatrist "did not assist in Cowley's trial preparation"—such as by "conducting 'a professional examination on issues relevant to the defense,' [and] presenting testimony"—"and obviously could not have assisted Cowley in his own cross-examination." *Id.* at 644 (quoting *Ake*, 470 U.S. at 82). The case illustrates that, as the Court recognized in *Ake*, a "neutral" expert shared by both sides simply does not work in our adversary system and therefore does not satisfy the requirement of due process.[20]

20. *See also Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), where the court reviewed a case in which the trial judge denied an independent expert and instead appointed a "friend of the court" psychologist who testified against the defendant at a competency hearing and, after the judge denied a continuance at sentencing for further testing, testified that she had not performed the requisite tests to confirm organic brain dysfunction. The court held that appointment of the "neutral psychological expert" was not sufficient to satisfy *Ake*. *Id.* at 382-84, 392.

Consistent with *Cowley*, the Third,[21] Seventh,[22] Ninth,[23] and Tenth[24] Circuits also have recognized that *Ake* requires an independent expert to assist the defense.[25] Yet just months after *Cowley*, the Alabama Court of Criminal Appeals held in this case that McWilliams was not entitled to an independent expert because "the requirements of *Ake v. Oklahoma* . . . are met when the State provides the appellant with a competent psychiatrist." J.A. 106a.

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21. *See Szuchon v. Lehman*, 273 F.3d 299, 318 (3d Cir. 2001) (recognizing that because the expert appointed by the court "was not appointed to assist the defense," his involvement did not satisfy *Ake*).

22. *See United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989) ("The independent psychiatric expert . . . can aid a defendant in determining whether a defense based on mental condition is warranted . . . [and] 'assist in preparing the cross-examination' of psychiatric experts retained by the government.") (quoting *Ake*, 470 U.S. at 1096).

23. *See Smith v. McCormick*, 914 F.2d 1153, 1158-59 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process . . . . Smith was entitled to his own competent psychiatric expert.").

24. *See United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986) (holding that the defendant was entitled to his own mental health expert to assist the defense even though "four treating or court-appointed psychiatrists testified"); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

25. The courts in these cases, like the Eleventh Circuit in *Cowley*, were not called upon to make a determination as to whether the right to an independent expert was "clearly established" under 28 U.S.C. § 2254(d), but they all understood *Ake* itself to provide for that right.

Despite its decision in *Cowley*, the Eleventh Circuit denied McWilliams relief on habeas review, holding that the right to independent expert assistance was not "clearly established" for purposes of 28 U.S.C. § 2254(d)(1). J.A. 34a. The court's only justification for this conclusion was that "[i]n some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*," citing *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), and *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), while "[o]ther circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*," citing *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985), and the case it had relied upon previously in *Cowley*, *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990). J.A. 34a.

The disagreement noted by the Eleventh Circuit traces to the outlier decision of the Fifth Circuit in *Granviel*. There, the Fifth Circuit relied on the pre-*Ake* reasoning of the Texas Court of Criminal Appeals to hold that "'[a] psychiatrist's examination is not an adversary proceeding,'" *Granviel*, 881 F.2d at 191 (quoting *Granviel v. State*, 552 S.W.2d 107, 115 (Tex. Crim. App. 1976)), and thus the "[a]vailability of a neutral expert" is sufficient to satisfy *Ake*, *Granviel*, 881 F.2d at 192. That decision was incompatible with *Ake* from the start. In fact, the Texas Court of Criminal Appeals later repudiated its own prior reasoning and disavowed the Fifth Circuit's *Granviel* decision, stating:

> In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist.

> It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts.

De Freece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993). The Court concluded, "it appears that, *Granviel v. Lynaugh* notwithstanding, the greater weight of authority holds otherwise. And, in our view, with good reason." *Id.* at 158.

Nevertheless, the Fifth Circuit's misinterpretation of *Ake* in *Granviel* has influenced the way some courts view what was "clearly established" in *Ake*. Both the Sixth and Eleventh Circuits have recognized the due process right to an independent expert, *see Miller*, F.3d at 699; *Cowley*, 929 F.2d at 644, but they have declined to hold that *Ake* clearly established that right under § 2254(d)(1), largely based on *Granviel*, *see Miller*, F.3d at 698; J.A 34a.[26] The fact that the Fifth Circuit misconstrued *Ake* in its *Granviel* decision does not undermine the principles that *Ake* clearly and expressly articulated. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[T]he mere existence

26. The Sixth Circuit noted that the Fifth Circuit's decision in *Granviel* "deviated from the decisions of other Courts of Appeals, which had held that a defendant was entitled to independent, non-neutral psychiatric assistance." *Miller*, 694 F.3d at 697. Yet the Sixth Circuit used that deviation as a basis for holding that *Ake* did not clearly establish the right to an independent expert for purposes of § 2254(d)(1). *Id.* at 699.

of conflicting authority does not necessarily mean a rule is new.") (citations and quotation marks omitted); *Hall v. Zenk*, 692 F.3d 793, 802 (7th Cir. 2012) (declining to find that the contrary decisions of other circuits meant that a principle was not clearly established where those decisions "constitute an unreasonable interpretation of Supreme Court law").

Since its decision in this case, the Alabama Court of Criminal Appeals has recognized that *Ake* made clear that an independent expert is required. *Morris v. State*, 956 So. 2d 431 (Ala. Crim. App. 2005). Morris, like McWilliams, had been medicated with antipsychotic drugs during his pretrial incarceration. The court observed that "even though Morris was treated with antipsychotic medication while he was at Taylor Hardin, he was forced to proceed to trial and was convicted and sentenced to death without the assistance of an independent mental-health expert." *Id.* at 452-53. It stated:

> [T]he Supreme Court made it clear [in *Ake*] that, once an indigent defendant had established that his sanity was likely to be a significant issue at trial, he is entitled to an independent expert—an expert devoted to assisting his defense and one who is not providing the same information or advice to the court and to the prosecution. One of the most crucial decisions a defense expert can provide assistance with is whether a mental-health defense is viable and, if so, how best to present it to the jury. Certainly, it is unreasonable to expect that a neutral expert who reports to the court and to the parties would provide the same degree of assistance

> to a defendant as could be expected from the defendant's own independent expert.

Id. at 447-48. For that reason, the court reversed his conviction and death sentence. *Id.* at 453.

The Alabama court, like others, recognized not only that *Ake* clearly established a right to an independent expert to assist the defense, but also that failure to follow *Ake*'s requirement of independence was completely impractical and incompatible with the adversary system.[27] Ultimately, however, regardless of what any lower court decisions might say, it is plain on the face of this Court's opinion in *Ake* that it established the right that McWilliams asserts here.

II. A REMAND TO THE ELEVENTH CIRCUIT IS WARRANTED BECAUSE NO COURT HAS ADDRESSED THE EFFECT AN INDEPENDENT EXPERT WOULD HAVE HAD ON McWILLIAMS'S SENTENCING.

After finding that *Ake* clearly established the due process right that McWilliams was denied in this case, this Court should follow its usual practice and remand to the

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27. *See also, e.g.*, *Moore v. State*, 889 A.2d 325, 348 (Md. 2005) ("[T]he State must, at a minimum, assure the defendant access to a defense expert who will assist in evaluation, preparation, and presentation of the defense."); *State v. Harris*, 859 A.2d 364, 444 (N.J. 2004) ("A defendant would be disadvantaged in exposing shortcomings in a court-appointed expert's testimony without expert consultation."); *Holloway v. State*, 361 S.E.2d 794, 796 (Ga. 1987) ("Holloway was entitled to the kind of independent psychiatric assistance contemplated in *Ake v. Oklahoma* . . . .").

Eleventh Circuit for a determination of whether that error had a substantial and injurious effect. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015) (vacating the judgment and remanding after holding that the petitioner "has satisfied the requirements of § 2254(d)"); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) ("Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*."); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) ("[W]e are a court of review, not of first view.") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Because that determination will involve case-specific facts and circumstances, it is a matter appropriately resolved by the courts below.

The judgment of the Eleventh Circuit in this case cannot be upheld on the basis of the statement in the court's per curiam opinion that "even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence." J.A. 36a. That ruling rests on, and flows from, an incorrect legal premise. The Eleventh Circuit reached its conclusion by considering only whether the defense would have benefited from further consultation with Dr. Goff, the expert who reported his findings simultaneously to the judge, the prosecution, and the defense two days before the judicial sentencing hearing. The Eleventh Circuit stated, "A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime."

J.A. 36a.[28] In his concurrence, Judge Jordan added, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." J.A. 49a. As neither judge who made up the majority below considered the ways in which McWilliams would have developed and presented his mitigation case if he had been provided an independent expert *to assist the defense*, as *Ake* requires, remand is warranted.[29]

In the event that this Court addresses whether the denial of an expert had a substantial and injurious effect on the outcome, the lack of an expert made it impossible for McWilliams to present any mitigating evidence on the only significant factor at the sentencing phase, his mental impairments.[30] That, in turn, made it impossible for the court, which found no mitigating circumstances, J.A. 189a, "to consider and give effect to [mitigating] evidence in imposing sentence, so that the sentence imposed . . . reflec[ts] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v.*

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28. There was not a "mountain of evidence" undercutting McWilliams's mental illness. Moreover, evidence of mental health issues is mitigating regardless of whether it relates to the commission of the crime. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004).

29. The magistrate's report, adopted by the district court, found that McWilliams was not entitled to an independent expert and did not address prejudice. *See* D. Ct. Doc. 55 at 79-81 (Feb. 1, 2008).

30. As Judge Wilson observed in finding that McWilliams was prejudiced by the denial of independent expert assistance, the defense "case for mitigation was based on his mental health history." J.A. 58a.

Johnson, 532 U.S. 782, 788 (2001) (citations and quotation marks omitted) (emphasis and alterations in original).

In the report delivered to the prosecution, defense, and judge less than forty-eight hours before sentencing, Dr. Goff stated that McWilliams had "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634. Dr. Goff reached his conclusion by administering various tests to McWilliams, including the Halstead-Reitan Neuropsychological Battery, which in 1986 was "the most widely utilized method of inferring neuropsychological functioning"[31] and "one of the best standardized methods of identifying patients with brain damage."[32] Dr. Goff concluded that McWilliams had "genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction," indicative of "a right hemisphere lesion." T. 1635-36. Physical manifestations of this dysfunction included "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636.

However, as Judge Wilson pointed out in his dissent, defense counsel did not have the time or expertise to achieve "the basic level of understanding of the report needed to use it" at the sentencing hearing. J.A. 56a. As a result, Dr. Goff was not called as a witness, and no one explained his assessment. The sentencer thus lost "'the

31. Raymond S. Dean, *Review of Halstead-Reitan Neuropsychological Test Battery* 9 (Buros Center for Testing, Lincoln, NE, 1985).

32. Richard L. Strub & F. William Black, *The Mental Status Examination in Neurology* 181 (1985).

substantial benefit of potentially probative information,' resulting in 'a much greater likelihood of an erroneous decision.'" J.A. 57a n.2 (Wilson, J., dissenting) (quoting the portion of *Ford v. Wainwright*, 477 U.S. 399, 414 (1986), discussing the application of *Ake*).

As Judge Wilson observed, "Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*." J.A. 55a. With Dr. Goff's report rendered a nullity, it is not surprising that the trial judge concluded that McWilliams was "feigning, faking, and manipulative" and did not have any genuine mental health issues. J.A. 188a. Despite mentioning the unexplained report in his sentencing order, the judge based his opinion on his own review of McWilliams's medical records, J.A. 188a, 211a, and on the views of the state doctors, who testified at the penalty phase before the jury that McWilliams had malingered on the MMPIs they reviewed, *see* J.A. 185a-186a; T. 1354, 1368-69.

Independent expert assistance would have enabled counsel to educate the judge about McWilliams's brain damage and counter the suggestion that McWilliams was "feigning" and "faking" mental illness. The presence of brain damage affects the conclusions that can be drawn from MMPI results, particularly with respect to malingering.[33] Once Dr. Goff determined that McWilliams

33. *See, e.g.*, *Textbook of Traumatic Brain Injury* 215-16 (Jonathan M. Silver, M.D. *et al.* eds., 2d ed. 2011) ("Use of the MMPI in individuals with TBI [traumatic brain injury] has been specifically cited as having potentials for misdiagnosis. . . . The Fake Bad scale has been criticized for its bias in gender-based symptoms as well as neurological symptoms commonly

had brain damage—a fact unknown to the state doctors who administered the MMPI—their opinions regarding the MMPI results should have carried far less weight. Even considering the MMPI results, a defense expert could have explained why McWilliams scored high on the scales meant to detect malingering despite having serious mental health issues, as Judge Wilson explained in his dissent below.[34]

A proper understanding of the Halstead-Reitan Battery would have further undermined the judge's misperception about McWilliams's mental health. With expert assistance, defense counsel could have shown that a neuropsychologist like Dr. Goff would not be misled easily by the type of "faking" the judge imagined. It is virtually impossible for a lay person to manipulate the instruments Dr. Goff employed to reflect a consistent profile of brain

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experienced by those with TBI."); *see also* Sureyya Dikmen & Ralph M. Reitan, *MMPI Correlates of Adaptive Ability Deficits in Patients with Brain Lesions*, 165 J. of Nervous & Mental Disease 247, 253 (1977) (recommending that caution be exercised when interpreting MMPI results for neurological patients until more sensitive scales are devised).

34. Judge Wilson explained: "[W]ith appropriate assistance, [McWilliams] would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a 'cry-for-help.' He then explained the difference between a 'fake-bad' and a 'cry-for-help' diagnosis; the former is 'someone attempting to make themselves look worse,' and the latter, while seemingly 'very similar' to the former, actually reflects 'significant psychiatric and psychological problems.'" J.A. 60a-61a.

damage in the right cerebral hemisphere.[35] A defense expert also could have assisted counsel in discovering and explaining why the psychotropic medications that were being administered to McWilliams at Holman Prison were prescribed.

The mitigating evidence that McWilliams would have presented is particularly compelling. As the Tenth Circuit has explained: "Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect." *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) (referencing, among other cases, *Rompilla v. Beard*, 545 U.S. 374, 392 (2005), and *Penry v. Lynaugh*, 492 U.S. 302, 307, 328 (1989)).[36]

Where the federal appellate courts have found *Ake* errors involving evidence similar to the evidence

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35. *See, e.g.*, Ronald A. Goebel, *Detection of Faking on the Halstead-Reitan Neuropsychological Test Battery*, 39 J. of Clinical Psychol. 731, 740-41 (1983) (describing his study that "offer[s] further support for the belief of many clinical neuropsychologists that nonimpaired individuals of at least average IQ cannot sufficiently alter their performances on neuropsychological assessment to appear brain-impaired with any significant degree of success").

36. *See also Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) ("If the medical opinion testimony in this case—that Lockett suffered from some organic brain disorder that tended to explain his violent conduct and made him less able to control his behavior than a normal person—had been presented to the jury, we think a reasonable juror could have found that his particular mental condition, which resulted from no fault of his own, made him less morally culpable for his cruel and senseless crime.").

available in McWilliams's case, they have found the errors prejudicial. For example, in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), the court granted relief where the defendant was denied an independent expert to "conduct the type of testing and evaluation that was required to diagnose [him] with organic brain damage for the purposes of showing the effect of that factor" at sentencing. *Id.* at 395. Similarly, in *Castro v. Oklahoma*, 71 F.3d 1502 (10th Cir. 1995), the court granted relief where the defendant was denied an expert to present his mental health evidence, which included "right frontal and possibly right temporal brain dysfunction." *Id.* at 1510, 1516.

Mental health experts, in contrast to lay witnesses, "can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." *Ake*, 470 U.S. at 80. Had McWilliams received the expert assistance *Ake* requires, his organic brain damage would have played an integral role within a compelling mitigation case. Instead, as Judge Wilson observed, "McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence." J.A. 58a. As a result, the court "heard almost nothing that would humanize [McWilliams] or allow [it] to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). Therefore, the absence of an independent mental health expert had a substantial and injurious effect on McWilliams's sentencing. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand this case for further proceedings.

Respectfully submitted,

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