No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

_____

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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CAPITAL CASE

QUESTIONS PRESENTED

The defendant's mitigation in this Alabama death penalty case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. Thus, as the dissent below noted, "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."[1]

This meaningless expert assistance violated McWilliams's rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant's mental health is a significant factor at trial, the State must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." However, there is a division among the circuits with regard to this holding, which affects the type of expert assistance indigent defendants receive nationwide, in both capital and non-capital trials. Most circuits have held that an independent defense expert is required by *Ake*, but a minority of circuits, including the court below, have found that *Ake* is satisfied by an expert who reports to both sides and the court.

The questions presented are:

(1) When this Court held in *Ake* 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?

(2) Did the Alabama courts unreasonably apply *Ake* in finding that McWilliams's rights were satisfied when the only mental health expert he was provided distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records?

[1] *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 716 (11th Cir. 2015) (Wilson, J., dissenting).

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PETITION FOR WRIT OF CERTIORARI

Petitioner James McWilliams respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing en banc is attached as Appendix A. The per curiam decision of the Eleventh Circuit affirming the district court's denial of McWilliams's petition for a writ of habeas corpus, along with the concurring and dissenting opinions, is reported at *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015), and attached as Appendix B. The opinion of the Alabama Supreme Court affirming McWilliams's conviction is reported at *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), and attached as Appendix C. The opinion of the Alabama Court of Criminal Appeals affirming McWilliams's conviction is reported at *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), and attached as Appendix D.

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, and subsequently denied McWilliams's petition for rehearing en banc via an order dated February 16, 2016. On March 24, 2016, Justice Thomas extended the time within which to file this petition for writ of

certiorari to and including July 15, 2016. 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 defense." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides that "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 law." 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

In elementary school, James McWilliams sustained a head injury when a group of boys attacked him and beat him over the head with a glass bottle. (Vol. 7 at 1304-05; Vol. 8 at 1632.)[2] He lost consciousness, he bled from the ear and scalp, and glass had to be removed from inside of his head. (Vol. 8 at 1632.) After that injury, McWilliams's behavior changed; he became a disruptive child. (Vol. 7 at 1305-06.) He required follow-up treatment both in and out of the hospital, had difficulties with his vision in his left eye, and lost some motor functioning in his left arm and hand following the injury. (Vol. 7 at 1305-06; Vol. 8 at 1632.) Previously an aspiring violinist, McWilliams could no longer play the instrument. (Vol. 8 at 1632.) By the time he was a teenager, the doctor treating him at his local hospital recommended that he begin seeing a psychiatrist due to his severe headaches and worsening behavior following the head injury, but his mother never took him for this recommended treatment. (Vol. 7 at 1305-06.)

A few years later, McWilliams suffered another head injury, lost consciousness again, and suffered a broken jaw. (Vol. 8 at 1632.) Following that, he suffered a third significant head injury when his head struck the front windshield during a car accident. (Vol. 7 at 1306-07; Vol. 8 at 1632.) When he tried to go home after leaving the hospital, he collapsed, but he never received further follow-up medical treatment. (Vol. 7 at 1306-07.)

[2] Citations to the state court record are to the volume and page number as certified to the Alabama Court of Criminal Appeals and as indicated in Appellant's Record Excerpts, which was filed in the Eleventh Circuit below.

Following these injuries, McWilliams's behavior changed dramatically. He suffered from significant memory loss. McWilliams sometimes would act out violently at home, but then could not recall doing so until his mother told him what had happened. (Vol. 7 at 1310-11.) Prior to dropping out of high school, he was referred to a psychiatrist after a self-inflicted overdose of Librium, a benzodiazepine that he was prescribed, but McWilliams never saw one. (Vol. 7 at 1308, 1323-24.) When a family doctor recommended that McWilliams be admitted to the psychiatric unit of a hospital for inpatient treatment, his mother again disregarded the recommendation. (Vol. 7 at 1308-10.)

On August 26, 1986, McWilliams was convicted of the robbery, rape, and murder of a convenience store clerk in Tuscaloosa, Alabama. (Vol. 7 at 1292.) The next day, the court conducted a sentencing hearing before a jury that lasted from 9:00 a.m. until 2:25 p.m. (Vol. 7 at 1295, 1399.) In mitigation, the defense presented only the lay testimony of McWilliams and his mother. (Vol. 7 at 1303-36.) Although McWilliams's mother explained her son's head trauma, the ways in which his behavior changed after the trauma, the subsequent recommendations for psychiatric treatment, and her failures to follow up on those recommendations, she was unable to offer a professional opinion as to his mental health. (Vol. 7 at 1304-06.) When pressed on cross-examination, all she could say was, "I am no expert. I don't know whether my son is crazy or not. All I know, that my son do [*sic*] need help." (Vol. 7 at 1317.)

In rebuttal, the State presented the expert testimony of two state psychiatrists from the Taylor Hardin Secure Medical Facility who had evaluated McWilliams and opined that McWilliams was a malingerer who did not have any mental health disorders at all. (Vol. 7 at 1336-69.) The jury recommended that McWilliams be sentenced to death by a non-unanimous vote of ten to two. (Vol. 7 at 1400.)

Following the jury's sentencing recommendation, the trial court noted that evidence had been presented that McWilliams suffered severe blows to the head and exhibited behavior problems years before the offense. (Vol. 8 at 1612, 1615.) On September 3, 1986, the court granted defense counsel's motion for a mental health expert to perform neurological and neuropsychological examinations of McWilliams and to assist the defense at the judicial sentencing hearing, which was scheduled for October 9, 1986. (Vol. 8 at 1612.)

On October 7, 1986, Dr. John Goff, a clinical neuropsychologist employed by the state of Alabama at the Taylor Hardin Secure Medical Facility, issued a neuropsychological evaluation diagnosing McWilliams with Organic Personality Syndrome. (Vol. 8 at 1636.) Dr. Goff was a colleague of the two experts who had testified before the jury for the State against McWilliams (Vol. 7 at 1337, 1360), yet he was the expert appointed by the trial court supposedly to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Dr. Goff's report was distributed to McWilliams's counsel a mere two days before sentencing. It

simultaneously was distributed to the prosecuting attorney and the judge to use as they saw fit.

Dr. Goff traced McWilliams's mental health diagnosis to "organic brain dysfunction . . . localized to the right cerebral hemisphere." (Vol. 8 at 1635.) "The difficulties he has, with his left hand in particular, are suggestive of a right hemisphere lesion." (Vol. 8 at 1635.) In Dr. Goff's opinion, "symptoms includ[ing] left hand weakness, poor motor coordination of the left hand, sensory deficits . . . and very poor visual search skills" were indicative of "cortical dysfunction attributable to right cerebral hemisphere dysfunction." (Vol. 8 at 1636.) Dr. Goff's report, therefore, linked the head injuries McWilliams suffered as a child to his mental health disorders—hence the diagnosis of Organic Personality Syndrome.[3] Because the results were reported so shortly before the judicial sentencing hearing, however, defense counsel had no opportunity to discuss these findings with Dr. Goff or to educate themselves as to what the diagnosis meant for purposes of a mitigation case.

Dr. Goff also administered a Minnesota Multiphasic Personality Inventory (MMPI) test that revealed a "cry-for-help" assessment, as opposed to a "fake-bad" assessment, which the State doctors had reported as support for their opinion that McWilliams was a malingerer. (Vol. 8 at 1635.) There was no further explanation

[3] Organic Personality Syndrome—now referred to within the medical community as "Personality Change Due to Another Medical Condition"—is a disorder characterized by a "persistent personality disturbance that represents a change from the individual's previous characteristic personality pattern," which is "the direct pathophysiological consequence of another medical condition." American Psychiatric Association, *Diagnostic and statistical manual of mental health disorders: DSM-5* 682 (5th ed. 2013). This condition causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.*

in the report of what a "cry-for-help" assessment meant or how the defense might be able to use it to advocate for a sentence other than death.

As a result, McWilliams's counsel arrived to court on the morning of the judicial sentencing hearing with a report diagnosing McWilliams with a significant mental health impairment, traceable to brain injuries suffered as a child and teen, and containing findings that contradicted the prior findings by the State's doctors. Moreover, voluminous medical and psychological records that counsel had been seeking for over six weeks[4] from Holman Prison did not arrive until the morning of sentencing. (Vol. 8 at 1406, 1618.) Defense counsel had subpoenaed the records after learning that McWilliams was being administered Mellaril (an antipsychotic drug), Librium (a benzodiazepine), Restoril (a benzodiazepine), and a version of Thorazine (an antipsychotic drug) while incarcerated. (Vol. 7 at 1326-27.) McWilliams was also seeing a psychologist three times per week and a psychiatrist approximately once per month, and had received mental health treatment at the Taylor Hardin Secure Medical Facility on various occasions during his incarceration. (Vol. 7 at 1327.)

Allowed virtually no time prior to sentencing to review Dr. Goff's report, the mental health diagnosis, and the medical and psychological records, defense counsel repeatedly told the judge that McWilliams was being deprived meaningful expert assistance because he lacked the chance to review the report and underlying test

[4] Counsel subpoenaed the prison records in August of 1986. Having not received them, counsel filed a motion in September for the Department of Corrections to show cause as to why it should not be held in contempt for failing to comply. Nevertheless, the records did not arrive until the morning of sentencing on October 9, 1986. (Vol. 8 at 1405-06, 1618.)

results, to discuss the report and psychological records with Dr. Goff, and to utilize Dr. Goff's assistance to evaluate, prepare, and present McWilliams's sentencing evidence and arguments. (Vol. 8 at 1404, 1406, 1408-11, 1423-28.) Thus, counsel argued:

> [B]ased on the medications prescribed and the brief notes in the records . . . someone has determined some psychotic behavior on the part of Mr. McWilliams. But we are unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing . . . Mr. McWilliams is being punished instead of the people who have not provided the material.

(Vol. 8 at 1409-10.)

The morning of the judicial sentencing amounted to nothing more than argument about the denial of meaningful expert assistance, followed by the testimony of a probation and parole officer who prepared a pre-sentence report for the prosecution and the court. (Vol. 8 at 1404-22.) Dr. Goff did not testify and the defense presented no witnesses. (Vol. 8 at 1404-22.) The trial court then recessed until 2:00 p.m. for sentencing. (Vol. 8 at 1422.)

Unable to effectively represent McWilliams due to a lack of meaningful access to an expert—with whom defense counsel had not even had the opportunity to speak—counsel filed a motion to withdraw over the lunch break. "Counsel feels the arbitrary position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." (Vol. 8 at 1644.) The motion to withdraw was denied. (Vol. 8 at 1644.)

That afternoon, after again refusing to grant the defense's request for time to consult with Dr. Goff, the trial judge asked defense counsel whether he wished to make a closing argument to rebut the closing argument the prosecutor had just made. (Vol. 8 at 1426.) Defense counsel's argument began as follows:

> Your Honor, I would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce any mitigating circumstances.

(Vol. 8 at 1426-27.) One paragraph worth of transcript later, counsel's closing argument as to why McWilliams's life should be spared ended as follows:

> In my opinion, the Court has foreclosed[,] by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms. And at that point, I have nothing else to say.

(Vol. 8 at 1428.) The judge then sentenced McWilliams to death. (Vol. 8 at 1431-32.)

McWilliams subsequently challenged the trial court's *Ake* ruling on direct appeal.[5] The Court of Criminal Appeals held that the requirements of *Ake* were met simply upon provision of a "competent psychiatrist." *McWilliams v. State*, 640 So. 2d 982, 991 (Ala. Crim. App. 1991). The Supreme Court of Alabama affirmed. *Ex parte McWilliams*, 640 So.2d 1015 (Ala. 1993). Following state collateral proceedings,[6] McWilliams filed a habeas petition in federal court, which was denied.

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[5] *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part and remanded in part*, *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand*, *McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *aff'd following remand*, *McWilliams v. State*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd*, *Ex parte McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied*, *McWilliams v. Alabama*, 516 U.S. 1053 (1996).

[6] *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004); *Ex parte McWilliams*, No. 1031428 (Ala. Sept. 24, 2004).

On December 16, 2015, the United States Court of Appeals for the Eleventh Circuit, in a per curiam decision by a vote of two to one, affirmed the denial of the petition. *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015). In dissent, Judge Wilson wrote that McWilliams was denied his *Ake* right to "meaningful access" to expert mental health services:

> 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.

Id. at 716 (Wilson, J., dissenting). Judge Wilson also made clear 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." *Id.* at 715 (Wilson, J., dissenting) (internal quotations omitted). The Eleventh Circuit denied McWilliams's petition for rehearing via an order dated February 16, 2016.

REASONS FOR GRANTING THE WRIT

Ake v. Oklahoma established that an indigent defendant has a constitutional right to an independent expert to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. A minority of the federal courts of appeals, however, including the Eleventh Circuit below, have misunderstood this

mandate and held that the provision of a non-independent expert who is equally accessible to both the prosecution and defense is sufficient to satisfy *Ake*.

The Court should resolve the split created by the minority of circuits that have misread *Ake*'s holding to ensure that indigent defendants nationwide, in capital and non-capital trials alike, receive the expert assistance *Ake* guaranteed. This case provides an excellent vehicle through which to resolve this split because McWilliams's case for mitigation at sentencing depended entirely on his mental health history. Yet McWilliams was appointed a non-independent expert so late in the proceedings that defense counsel could not meaningfully consult with him or utilize his assistance, and McWilliams was thereby deprived of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

I. THE COURT SHOULD RESOLVE THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS AS TO WHAT *AKE V. OKLAHOMA* ESTABLISHED.

This Court held, in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), that when a defendant demonstrates that his mental health is a significant factor at trial, he is entitled to meaningful access to a psychiatrist "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." While *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 assistance must be meaningful, *id.* at 77, 82. This Court reasoned that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, *to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses*, the

risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82 (emphasis added).

Nevertheless, in arriving at its decision below, the Eleventh Circuit recognized that there is an unresolved split among the federal circuits as to what *Ake* held. "In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake* . . . Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*." *McWilliams*, 634 F. App'x at 705-06 (citations omitted). The Eleventh Circuit further observed that the Supreme Court "has thus far declined to resolve this disagreement among the circuits." *Id.* at 706. With its decision, the Eleventh Circuit joined the minority of circuits that have misunderstood that *Ake* requires an independent expert, which has perpetuated a split with the circuits that have properly applied *Ake*.

The majority of circuits have correctly interpreted *Ake* to require expert assistance that is independent of the prosecution. The Sixth Circuit has held that "an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by court appointment of a 'neutral' psychiatrist – i.e., one whose report is available to both the defense and the prosecution." *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003); *accord Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006). The Sixth Circuit noted that the Eighth, Ninth, Tenth, and D.C. Circuits are among the majority of circuits that have held that a neutral, i.e. shared, court psychiatrist does not satisfy due process. *Powell*, 332 F.3d at 391. The Third, Fourth, and Ninth Circuits have held the same.

See Szuchon v. Lehman, 273 F.3d 299, 317-18 (3d Cir. 2001) (noting that *Ake* is not satisfied by the appointment of a non-independent expert alone); *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir. 2000) (interpreting *Ake* to require "two views on a mental health issue"); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("evaluation by a 'neutral' court psychiatrist does not satisfy due process").[7]

In 1985, the same year that *Ake* was decided, the Tenth Circuit held that *Ake* cannot be satisfied by the appointment of a non-independent expert, for "[t]he 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." *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985). Thus, when a defendant seeks "the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination," he is "deprived of the fair trial due process demands" if he does not receive that assistance. *Id.* at 929.

In practice, then, indigent defendants in almost every circuit are afforded an independent expert under *Ake*, which is consistent with the plain language of the *Ake* opinion itself. The Fifth Circuit, however, has misinterpreted *Ake*, and the Eleventh Circuit's per curiam decision relied upon this misunderstanding in

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[7] Even the Eleventh Circuit has, in the past, applied the clear mandate of *Ake*. Quoting the Ninth Circuit, "The 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 . . . ." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (quoting *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990)). The court there emphasized that "*Ake* holds that psychiatric assistance must be made available for the *defense*." *Id.* (emphasis in original). Thus, an expert who provided information to both the prosecution and the defense was insufficient to satisfy the due process demands of *Ake*. *Id.*

denying McWilliams relief. As recently as 2009, the Fifth Circuit held—in terms starkly contradictory to *Ake* itself—that "*Ake* does not clearly provide a constitutional right to an 'independent' psychiatrist." *Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009). Following suit, the Eleventh Circuit below joined the minority of circuits that believe a shared expert satisfies *Ake*.

Just because a minority of circuits have misinterpreted the holding of *Ake*, however, does not indicate that *Ake* failed to clearly establish an indigent defendant's right to an independent mental health expert. Indeed, following *Ake* this Court noted that 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) (citing *Ake*, 470 U.S. at 83-84) (emphasis added). The circuits that have read *Ake* to hold anything less are simply wrong.

Accordingly, the Ninth Circuit has correctly held that it was contrary to clearly established Supreme Court precedent to find that a court-appointed shared mental health expert, without more, satisfied *Ake*. *Jones v. Ryan*, 583 F.3d 626, 638 (9th Cir. 2009), *vacated and remanded on other grounds*, 563 U.S. 932 (2011).[8] Absent confidentiality, an expert has "no obligation to protect or further the interests of the defendant," and cannot "sufficiently assist in the preparation, evaluation, and presentation of the defense." *Id.* at 639 (citations and internal

[8] When this Court grants a petition for writ of certiorari, vacates the lower court judgment, and remands the case for further proceedings, that "does not negate the precedential authority or persuasiveness of the holding and reasoning" of the lower court's opinion, as such orders "are not reversals and do not indicate that the lower court's decision was erroneous." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 375 n.3 (7th Cir. 2015); *accord Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013).

quotations omitted). Thus, "[a]s the Supreme Court explained in *Ake*, without the assistance of a defense psychologist who can not only testify, but prepare counsel for cross-examination of the State's witnesses, the risk of inaccurately resolving the mental health issues presented grows impermissibly high." *Id.* at 638. *See also Detrich v. Ryan*, 619 F.3d 1038, 1054 (9th Cir. 2010), *vacated and remanded on other grounds*, 563 U.S. 984 (2011) (observing once again that a state court unreasonably applies *Ake* if it finds that the appointment of a shared court-appointed psychologist is sufficient to satisfy due process).

Likewise, the Seventh Circuit observed that under *Ake*, "the defendant is *clearly* entitled to his *own* expert and examination to help prepare his defense [where] the state has signaled that it may use psychological evidence against the defendant." *Schultz v. Page*, 313 F.3d 1010, 1016 (7th Cir. 2002) (holding that the state court's rejection of an *Ake* claim was contrary to and an unreasonable application of clearly established law) (emphasis added).

Justice Rehnquist, in his dissent in *Ake* itself, argued that if the Court grants a defendant the right to a state-appointed expert, *all* that should be required is "a psychiatrist who acts *independently of the prosecutor's office*." *Ake*, 470 U.S. at 92 (Rehnquist, J., dissenting) (emphasis added). In other words, Justice Rehnquist read the majority opinion in *Ake* to require something even *beyond* independent expert assistance: "a defense consultant." *Id.* at 87 (Rehnquist, J., dissenting). He would have scaled the majority opinion back to require only an independent expert,

something the Fifth and Eleventh Circuits erroneously believe was not even required by *Ake*.

Yet McWilliams was deprived of even that baseline independent expert assistance. He received neither an independent expert nor a defense consultant. Rather, 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." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting). He received an expert who was simultaneously and equally serving the State. Accordingly, this case presents an ideal vehicle for this Court to resolve the circuit split with regard to what *Ake* held.

"[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 U.S. at 76. Nor is it meaningful where, as here, the expert's report and voluminous medical and psychological records were provided to the defense so close to sentencing that counsel lacked the opportunity to assess those critical documents or consult with the expert about his findings.

Ake was clear. It entitled McWilliams to an independent expert. This Court should grant certiorari in this case to resolve the split and ensure that all trials, capital and non-capital, are conducted in accordance with the due process *Ake* required.

II. EVEN UNDER THE MOST RESTRICTIVE READING OF *AKE*, MCWILLIAMS WAS DENIED MEANINGFUL ACCESS TO EXPERT ASSISTANCE.

Even assuming arguendo that *Ake* did not clearly establish an indigent defendant's right to an independent expert, McWilliams was denied meaningful access to an expert. It is undisputed that McWilliams made the showing required that entitled him to meaningful mental health expert assistance at sentencing. Instead, he was given an expert who simultaneously was free to and did share his thoughts, findings, and opinions with the State for its use. Moreover, defense counsel learned the expert's findings just two days before sentencing, was unable to confer with the expert regarding his diagnoses and the support for his conclusions, and did not receive substantial, long overdue, medical and psychiatric records until the very morning of sentencing.

For expert assistance to be meaningful, the defense expert must be able to assist the defense in preparing for his direct examination, anticipating cross-examination, crafting an effective cross-examination of any State experts, and articulating the probative value of the expert's findings during argument. Only then can courts be confident that the adversary system is serving its function and that "the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors' and would therefore be competent to 'uncover, recognize, and take due account of . . . shortcomings'" in the expert opinions. *Ake*, 470 U.S. at 84 (citation omitted). McWilliams could avail himself of none of this assistance. Whereas an affluent

defendant is free to hire experts bound by privilege to further his defense, an indigent defendant like McWilliams who receives only a non-independent expert is deprived the assistance required to meaningfully contest the State's experts.

McWilliams's trial counsel repeatedly argued that he was being denied meaningful expert assistance, and counsel felt he was rendered so ineffective that he was compelled to request to withdraw from the case. 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. 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.

McWilliams, 634 F. App'x at 716 (Wilson, J., dissenting). McWilliams never had the chance to discuss the report or underlying records with Dr. Goff, let alone utilize him to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

The expert assistance McWilliams received in this case lacked meaning. Trial counsel captured the harm to McWilliams from being deprived meaningful assistance when, during his closing argument at the judicial sentencing hearing, he observed, "the Court has foreclosed . . . the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms." (Vol. 8 at 1428.) "And at that point, [he had] nothing else to say." (Vol. 8 at 1428.) That is not meaningful expert assistance. In finding otherwise, the Alabama courts unreasonably applied the clear dictates of *Ake* to the facts of this case.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to resolve the split among the circuits as to what was established by *Ake v. Oklahoma* and to reverse the denial of habeas relief.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on July 15, 2016, I served a copy of the foregoing via first-class mail, postage prepaid, and via email, upon counsel for the Respondent:

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