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

REPLY BRIEF OF PETITIONER

DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

JOSHUA S. MELTZER
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

STEPHEN B. BRIGHT
Counsel of Record
MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

272410

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

I. *Ake* Clearly Established that Due Process Requires a Mental Health Expert Responsible for Assisting in the Defense. 4

II. The Case Should Be Remanded to the Eleventh Circuit for a Proper Prejudice Inquiry 13

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 12, 13

Ake v. Oklahoma,
470 U.S. 68 (1985). . . . . *passim*

Barefoot v. Estelle,
463 U.S. 880 (1983). 3

Brumfield v. Cain,
135 S. Ct. 2269 (2015). 18

Buck v. Davis,
137 S. Ct. 759 (2017). 3

Carey v. Musladin,
549 U.S. 70 (2006). 5, 11

Cave v. Singletary,
971 F.2d 1513 (11th Cir. 1992) 15

Chaidez v. United States,
133 S. Ct. 1103 (2013) 10

Cowley v. Stricklin,
929 F.2d 640 (11th Cir. 1991). 9, 18

Daniel v. Comm'r, Ala. Dep't of Corr.,
822 F.3d 1248 (11th Cir. 2016). 15

Cited Authorities

Page

De Freece v. State,
848 S.W.2d 150 (Tex. Crim. App. 1993) 9

Ex parte Carroll,
852 So. 2d 833 (Ala. 2002) 15

Ex parte Stephens,
982 So. 2d 1148 (Ala. 2006) 15

Flores v. Johnson,
210 F.3d 456 (5th Cir. 2000). 3

Ford v. Wainwright,
477 U.S. 399 (1986) 13

Glebe v. Frost,
135 S. Ct. 429 (2014) 11, 12

Granite Rock Co. v. Int'l Bhd. of Teamsters,
561 U.S. 287 (2010) 18

Gray v. Dist. Court of Eleventh Judicial Dist.,
884 P.2d 286 (Colo. 1994) 6

Knowles v. Mirzayance,
556 U.S. 111 (2009) 11, 12

Lockyer v. Andrade,
538 U.S. 63 (2003). 4

Cited Authorities

Page

Lopez v. Smith,
135 S. Ct. 1 (2014) 12

Missouri v. Jenkins,
515 U.S. 70 (1995) 10

Moore v. Texas,
137 S. Ct. 1039 (2017) 8

Morris v. State,
956 So. 2d 431 (Ala. Crim. App. 2005) 4

Solesbee v. Balkcom,
339 U.S. 9 (1950) 17

Starr v. Lockhart,
23 F.3d 1280 (8th Cir. 1994) 8

State v. Bonds,
653 P.2d 1024 (Wash. 1982) 6

Stevens v. Dep't of Treasury,
500 U.S. 1 (1991) 14

Strickland v. Washington,
466 U.S. 668 (1984) 5

Tuggle v. Netherland,
516 U.S. 10 (1995) 13

Cited Authorities

Page

United States ex rel. Smith v. Baldi,
344 U.S. 561 (1953) 8

United States v. Albertini,
472 U.S. 675 (1985) 10

United States v. Carver,
260 U.S. 482 (1923) 10-11

United States v. Fazzini,
871 F.2d 635 (7th Cir. 1989) 9

United States v. Padilla,
559 U.S. 356 (2010) 10

United States v. Williams,
504 U.S. 36 (1992) 14

Verizon Commc'ns, Inc. v. F.C.C.,
535 U.S. 467 (2002) 13

White v. Woodall,
134 S. Ct. 1697 (2014) 11

Wiggins v. Smith,
539 U.S. 510 (2003) 5, 12

Williams v. Taylor,
529 U.S. 362 (2000) 5

Page

Statutes and Rules

28 U.S.C. § 2254. 5

Ala. Code § 13A-5-46 (1981) 15

S. Ct. R. 15.2 18

Other Authorities

Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493 (2007). 2

Ron Rosenbaum, *Travels with Dr. Death*, Vanity Fair, May 1990 3

The State has no cogent response to McWilliams's showing that *Ake v. Oklahoma* clearly established a criminal defendant's right in appropriate cases to an independent expert to "assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985). This Court's opinion speaks in clear terms about the role this expert must play "to assure a proper functioning of the adversary process." *Id.* at 77. The expert is responsible for:

- providing "assistance" that "may well be crucial to the defendant's ability to *marshal his defense*," *id.* at 80 (emphasis added);

- advising the defense team on whether a particular "defense is viable," *id.* at 82;

- "assist[ing] in preparing the cross-examination of a State's psychiatric witnesses" by advising on "the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," *id.* at 80; and

- "translat[ing] 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.* at 80; *see also id.* at 81 (describing the role of testifying experts "*for each party* [to] enable the jury to make its most accurate determination of the truth on the issue before them" (emphasis added)).

None of these responsibilities could be discharged effectively by an expert providing "neutral" opinions directly to the tribunal as experts do in European-style

inquisitorial proceedings. The State does not even attempt to argue otherwise, and that failure is dispositive on the question presented. *Ake* was pellucid that defendants must be given the assistance needed "to present their claims fairly *within the adversary system*." *Id.* at 77 (citation and quotation marks omitted) (emphasis added). The State's alternative reading of *Ake* would deny indigent criminal defendants that assistance. It cannot have been what the Court in *Ake* meant.

What it lacks in substance, the State seeks to make up in rhetoric. On page after page of its brief, the State repeats the mantra that McWilliams is reading *Ake* to require the assistance of a "partisan expert," who is "predisposed toward [the defendant's] position." *E.g.*, State's Br. at 21.[1] Of course, what the State derisively labels "partisan" is exactly the kind of expert assistance routinely obtained by the State itself (and other prosecutors) as well as criminal defendants and civil litigants who can afford to pay for it. Prosecutors and other litigants of means can and do seek out experts who will testify *for their side* in litigation. They routinely screen potential experts to find those whose opinions will best advance *their cause*.[2] They often hire separate consulting

1. Various courts and authors use words such as "neutral," "non-neutral," "independent," and "partisan," in different ways. Regardless of the label that is attached to the expert, it is the role of the expert that is dispositive. Because the State characterizes McWilliams's argument as a request for a "partisan" expert who necessarily takes a position favorable to the defense, many of its arguments are inapposite.

2. *See*, *e.g.*, Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1495-1506 (2007) (describing prosecutors consulting with

and testifying experts—sometimes multiple experts in each category. The "partisan expert" is the norm in our adversarial system.

McWilliams does not argue that *Ake* requires parity for him or other indigent criminal defendants. Those defendants are entitled to only "one competent expert" to assist them, not multiple consulting and testifying experts that prosecutors and other litigants routinely use. They do not get to choose the expert they would prefer but must accept the expert appointed by the trial court. They therefore face a risk that their expert will ultimately be unwilling or unable to offer testimony that will advance their cause. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 768-69 (2017). Unlike the prosecution, indigent criminal defendants are entitled only to an "adequate opportunity to present their claims fairly within the adversary system." *Ake*, 470 U.S. at 77 (citation and quotation marks omitted). But *Ake* was clear that this minimum level of assistance requires an independent expert who assists the defense. As the Alabama Court of Criminal Appeals

---

a series of experts until finally finding ones who would reach the conclusions they wanted). Often the leanings of professional experts are apparent. For example, Texas prosecutors have regularly retained mental health experts who were well known for their willingness to predict a defendant's future dangerousness based on a hypothetical question. *See Barefoot v. Estelle*, 463 U.S. 880, 884, 902 (1983) (describing testimony of Dr. James Grigson and Dr. John Holbrook); *Flores v. Johnson*, 210 F.3d 456, 462 & n.6 (5th Cir. 2000) (Garza, J., concurring) (describing a doctor who was "frequently the state's star witness" and had found future dangerousness in 22 cases, but had not found a lack of dangerousness in a single case); Ron Rosenbaum, *Travels with Dr. Death*, Vanity Fair, May 1990, at 141 (describing Dr. Grigson testifying to future dangerousness in three cases in two days).

put it, *Ake* "made it clear" that an indigent defendant "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." *Morris v. State*, 956 So. 2d 431, 447-48 (Ala. Crim. App. 2005). McWilliams did not receive that assistance.

I. *Ake* Clearly Established that Due Process Requires a Mental Health Expert Responsible for Assisting in the Defense.

The primary source for determining what *Ake* clearly established is *Ake* itself, not a handful of lower court opinions and a law review note. This Court has defined "clearly established law" as 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 legal principle in *Ake* is that the adversarial process necessitates an independent expert who can assist the defense. The Court's opinion leaves no room for doubt on that score. *See* Pet'r's Br. at 21-31.

The State argues that *Ake* cannot have established such a principle because in *Ake* the defendant had not received expert assistance, independent or otherwise, at trial. State's Br. at 16, 23-24. That is incorrect. As an initial matter, the facts of *Ake* and of this case are in many respects congruent. Both Ake and McWilliams were evaluated at a state mental hospital by neutral doctors. Although the State focuses on the fact that the doctors did not evaluate Ake's sanity, and thus there were no experts on that issue, State's Br. at 16, 23-24, the prosecution in *Ake*, as in McWilliams's case, relied on the testimony of

those neutral doctors at the penalty phase. *Ake*, 470 U.S. at 71-73. The constitutional problem in *Ake* was not the absence of any expert testimony during the trial. The problem was that Ake, like McWilliams, did not receive a mental health expert *to assist the defense*. *See* Pet'r's Br. at 21-27; *see also Ake*, 470 U.S. at 84 ("due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase"); *id.* ("Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view . . . .").

Even more to the point, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring). To the contrary, this Court has repeatedly afforded relief under Section 2254 to defendants who have relied on governing principles that were clearly established in cases in which this Court had not even found a violation of the defendant's rights. *See*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (holding that *Strickland v. Washington*, 466 U.S. 668 (1984), clearly established the principles for ineffective assistance of counsel claims even though the Court found in *Strickland* that the petitioner's counsel were not ineffective); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (same). The State's argument that the specific factual scenario and relief provided in *Ake* foreclose McWilliams's claim is irreconcilable with those precedents.

Only an independent expert assisting the defense can perform the necessary functions identified by the Court in *Ake*. The linchpin of the State's argument is that a

neutral expert is sufficient because the psychiatrist's function under *Ake* is "not to give advice to a defense attorney." State's Br. at 29. But the plain language of *Ake* contradicts that assertion. When an expert discusses with counsel whether a particular "defense is viable," the expert provides advice. *See Ake*, 470 U.S. at 82. Similarly, when an expert tells counsel what questions to ask of the prosecution's experts and how to interpret their responses, the expert provides advice. *See id.* at 80-82 ("know[ing] the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," the expert can "assist in preparing the cross-examination of a State's psychiatric witnesses"); *id.* at 84 ("due process requires . . . assistance in preparation at the sentencing phase").[3] None of the neutral experts involved in this case fulfilled those roles, nor could they.[4]

---

3. As noted in Petitioner's Brief, it is impossible for an expert shared by the prosecution and the defense to assist defense counsel in preparing to cross-examine himself. *See* Pet'r's Br. at 25.

4. The State asserts that at the time of *Ake*, several state courts had held that communications with non-testifying defense experts were not privileged. State's Br. at 31 & n.5-6. However, many of the cases cited by the State do not support that assertion. Instead, they stand for the uncontroversial proposition that the privilege *can be waived*. *See, e.g.*, *Gray v. Dist. Court of Eleventh Judicial Dist.*, 884 P.2d 286, 293 (Colo. 1994) ("where a defendant tenders a plea of not guilty by reason of insanity or asserts the affirmative defense of impaired mental condition, the defendant waives his right to claim the attorney-client and physician/psychologist-patient privileges"); *State v. Bonds*, 653 P.2d 1024, 1034 (Wash. 1982) (although communications between defendant and his psychiatrist were within the attorney-client privilege, defendant waived the privilege by calling the psychiatrist as a defense witness at a hearing). The cases simply highlight that a defendant and counsel may make a decision about when to waive privilege given the applicable state law; they in no

Recognizing, as it must, that "[c]ertain aspects" of *Ake* dictate that a defendant should receive the kind of independent expert assistance that McWilliams seeks here, the State falls back to the argument that such assistance is required only when the State has put on its own partisan expert. State's Br. at 16-17, 22-23. The State does not identify a single judicial decision or academic article advancing this interpretation, and it is plainly wrong. *Ake* itself is clear about the requisite threshold showing: it turns on the defendant's mental state being at issue at the guilt phase or at sentencing. *Ake*, 470 U.S. at 83-84. It does not turn on whether the prosecution retains an expert or what the prosecution ultimately presents in court.

Allowing the prosecution to dictate whether an indigent defendant is entitled to expert assistance regarding his mental health would undermine the adversarial system and deny the defendant due process. Under the State's approach, the prosecution could prevent the defendant from obtaining expert assistance simply by declining to obtain an expert of its own. This would be particularly untenable where the issue is one as to which the defense bears the burden, such as an affirmative defense or a mitigating circumstance.

Likewise, the parameters of the right to assistance established in *Ake* do not in any way undermine the conclusion that *Ake* requires an independent expert. *See* State's Br. at 26. A defendant is entitled to "one competent expert" for the purposes *Ake* identified, 470 U.S. at 83,

---

way mean that a defendant should have to share an expert with the prosecution simply because he cannot afford to retain one.

which means one competent expert who is independent of the prosecution and tasked with assisting the defense. A defendant does not get to choose an expert "of his personal liking." *Id.* But a defendant *does* get an independent expert whose responsibility is to work with the defense to present its case. An indigent defendant does not get to choose a lawyer of his own liking either, but that does not mean he has to share a lawyer with the prosecution. And while the Court gives the states discretion in how to implement a constitutional right, that discretion cannot be abused to undermine the core of the right—here, the independence of the expert. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) ("Although *Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled, States' discretion, we cautioned, is not unfettered.") (citations and quotation marks omitted).

Contrary to the State's assertion, *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), has no bearing on the question presented. If anything, this Court's discussion of *Smith* in *Ake* underscores the weakness of the State's position. In *Ake*, this Court expressed its "fundamental" disagreement with *Smith*, which was decided before the Court's "increased commitment to assuring meaningful access to the judicial process" and "was addressed to altogether different variables." *Ake*, 470 U.S. at 85. The Court explained that "we are not limited by [*Smith*] in considering whether fundamental fairness today requires a different result." *Id.*; *see also Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994) ("*Ake* expressly disavows the result in *Smith* and explains that the requirements of due process have fundamentally changed since that decision."). That the State would rely on a decision that the Court in *Ake* expressly disavowed speaks volumes.

The decisions of a handful of lower courts misinterpreting *Ake* do not cast doubt on the decision's clear holding, much less provide "near-conclusive evidence" that McWilliams's entitlement to relief under *Ake* was not clearly established. *See* State's Br. at 35. Just as lower courts may not supply clearly established law where this Court did not, so too they cannot change the meaning of what this Court did say. It is for this Court to determine what was clearly established; this Court has never held that the existence of contrary lower court authority controls the inquiry into whether a principle was clearly established.

Here, the great weight of authority favors McWilliams's interpretation, and, as the State acknowledges, several courts that once held that *Ake* did not require an independent expert now recognize that it does. *See* State's Br. at 38 n.8; *see also Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991); *De Freece v. State*, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993). The State dismisses these and other decisions as "confused," or as relying in part on the Criminal Justice Act. State's Br. at 42. That some of these courts also invoked the Criminal Justice Act does not change how they understood *Ake*. *See*, *e.g.*, *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989) ("The statute, and the Court's decision in *Ake*, recognize that independent expertise is often necessary in the subtle and complicated area of mental health."). Of course, *Ake* too cited the Criminal Justice Act as "reflect[ing] a reality that we recognize today," that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80.

Then-Justice Rehnquist's dissent in *Ake* confirms McWilliams's reading. The constitutional standard that Justice Rehnquist proposed in dissent—that a neutral expert is all that the Constitution requires—is the same standard that the State today implausibly ascribes to the opinion of the Court. If the Court in *Ake* held only what the State claims it held, Justice Rehnquist would have had no reason to dissent. Implicitly conceding as much, the State urges the Court to dismiss Justice Rehnquist's interpretation of the *Ake* majority opinion as hyperbole. State's Br. at 32-33. Even if dissenting justices may sometimes exaggerate the implications of a decision, that argument is misplaced here. Justice Rehnquist's dissent makes quite clear that the Court cannot have agreed with his position that due process requires only a neutral expert.[5]

After ascribing so little deference to Justice Rehnquist's dissent on the merits in *Ake* itself, it is ironic that the State would in the next breath insist that Justice Marshall's dissents from the denial of certiorari in a few post-*Ake* cases should be given determinative weight on the question of what *Ake* clearly established. *See* State's Br. at 35-36. "Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v.*

5. The Court in *Ake* expressed no disagreement with Justice Rehnquist's interpretation of its holding, unlike the case the State cites, *United States v. Albertini*, 472 U.S. 675, 684 (1985). And in the State's other cited case on this point, *Chaidez v. United States*, 133 S. Ct. 1103, 1110 n.11 (2013), the Court did in fact look to the dissent to shed light on the significance of the majority opinion in *United States v. Padilla*, 559 U.S. 356 (2010).

Carver, 260 U.S. 482, 490 (1923)). The Court could well have denied certiorari for any number of reasons having nothing to do with whether the Court agreed with the lower courts' decisions on the merits.

Equally unavailing is the State's attempt to analogize to cases in which the Court has reversed circuit courts that erroneously granted relief by reading multiple precedents together to identify a "logical next step" that was not itself articulated in any single decision of this Court. State's Br. at 45. In *White v. Woodall*, 134 S. Ct. 1697 (2014), the Court declined to read three prior cases together to conclude that the right to a no-adverse-inference instruction at the penalty phase was clearly established, where no single decision had so concluded. *Id.* at 1702-04. By contrast, one need not stitch cases together to identify the right to an independent expert; *Ake* itself provides the right. And in *Carey v. Musladin*, 549 U.S. 70 (2006), the Court declined to extend precedents focused on state-sponsored courtroom conduct to include spectator conduct. Not only had the Court never addressed inherent prejudice related to spectator conduct, but the relevant legal test "suggest[ed] that those cases apply only to state-sponsored practices." *Id.* at 76. Unlike in *Musladin*, where the reasoning in the underlying decisions implicitly excluded spectator conduct, the role *Ake* explicitly envisions the expert to fulfill is premised on the expert being independent. *See Ake*, 470 U.S. at 80-84.[6]

6. The State's reliance on *Knowles v. Mirzayance*, 556 U.S. 111 (2009), and *Glebe v. Frost*, 135 S. Ct. 429 (2014), is similarly misplaced. In *Knowles*, the respondent conceded that the Ninth Circuit's "nothing to lose" standard for effective assistance of counsel had never been recognized by the Supreme Court, and the Ninth Circuit cited no Supreme Court cases supplying

Nor is this case analogous to those in which this Court summarily reversed circuit courts that, often relying on their own precedent, defined legal principles at a high level of generality and then applied them to very different contexts. *See* State's Br. at 46-47. As the State concedes, these cases involved circumstances in which no Supreme Court decision "addresse[d], even remotely, the specific question presented by th[e] case." State's Br. at 47 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)). Here, McWilliams is not seeking to apply an abstract principle to an unanticipated context. *Ake* addresses concretely and in detail the need for an independent expert where the defendant's mental health is a significant factor in the case. *See Ake*, 470 U.S. at 79-85.

This Court has found clearly established law based on precedent much less clear than *Ake*. The State attempts to distinguish this Court's grant of relief in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), on the ground that the Court "had addressed the same Texas jury instruction five times and held them unconstitutional before." State's Br. at 48-49.[7] But four of those five times, this Court rejected

---

that standard. *Knowles*, 556 U.S. at 121-22. In *Glebe*, the Court summarily reversed the Ninth Circuit for concluding, based on its own precedents, that Supreme Court precedent addressing the complete denial of summation applied equally to a trial court's requirement that a defendant choose between two alternative arguments in summation. 135 S. Ct. at 431.

7. Similarly, the State characterizes *Wiggins* as a mere application of an established legal standard to specific facts. The dissent took a different view, stating that "nothing in *Strickland*, or in any of our 'clearly established' precedents," supported the standard the Court applied. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting).

the defendant's challenge to the jury instruction, striking it down only once. *Abdul-Kabir*, 550 U.S. at 265 (Roberts, C.J., dissenting). Notwithstanding precedent that was described as "sharply divided, ebbing and flowing," *id.* at 266 (Roberts, C.J., dissenting), the Court identified clearly established law. Unlike in *Abdul-Kabir*, there is no contrary Supreme Court authority here, and thus none that needs to be explained away. *Ake* itself is the source of the right to an independent expert, and the explanations of *Ake* in this Court's subsequent opinions only reinforce this conclusion. *See, e.g.*, *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion).

II. The Case Should Be Remanded to the Eleventh Circuit for a Proper Prejudice Inquiry.

The State contends that McWilliams received all the assistance he requested and suffered no prejudice. State's Br. at 50-56. As an initial matter, the State advanced the argument that McWilliams received what he requested in its Brief in Opposition. State's Br. in Opp. to Cert. at 18. By granting the Petition, however, the Court has already rejected that argument. *See, e.g.*, *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) ("We accordingly rejected the incumbents' claim of waiver when they raised it in opposition to the petition for certiorari, and we reject it again today."). Indeed, every court that has reviewed McWilliams's case has understood his *Ake* claim for independent expert assistance to be properly presented and has addressed it on the merits. J.A. 33a-36a, 86a-90a, 105a-106a.[8] It is likewise properly presented here. *See*

8. The State argues that the Alabama Court of Criminal Appeals denied McWilliams's *Ake* claim on direct appeal "not

Stevens v. Dep't of Treasury, 500 U.S. 1, 8 (1991) ("We rejected that argument in granting certiorari, and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented."); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (recognizing the propriety of granting certiorari as long as the question presented was addressed by the courts below). Regardless, McWilliams did not receive what he requested. Defense counsel explained at sentencing that they needed expert assistance in order to present evidence of McWilliams's mental condition in mitigation. J.A. 207a, 210-11a.[9] Counsel never received that assistance, and the judge imposed the death penalty.

The denial of expert assistance prejudiced McWilliams. This has always been a close case as to sentencing. The

---

because of any ruling about independent psychiatrists, but because McWilliams had received the psychiatric assistance that he had requested." State's Br. at 51. However, McWilliams argued before that court that he had a right to an expert other than Dr. Goff to assist his counsel in preparing and presenting their mental health evidence. Appellant's Br. at 48-52 (Vol. 11, Tab #R-33). The court held that the appointment of Dr. Goff was sufficient because *Ake* did not require anything more than a neutral expert. J.A. 105a-106a.

9. Counsel made clear that the reason for their continuance request was that they needed expert assistance. *See*, *e.g.*, J.A. 207a ("[W]e 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."), 211a ("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."). Also, counsel never sought a "prolonged" or "indefinite" continuance of the sentencing hearing. *See* State's Br. at 8, 20. They did not specify the length of any continuance, but they stressed its purpose—to give them time to consult with an independent expert. J.A. 207a.

jury returned just ten votes for death—the minimum required for a death recommendation under Alabama law. *See* Ala. Code § 13A-5-46(f) (1981). Both the Alabama Supreme Court and the Eleventh Circuit have recognized that 10-2 cases are necessarily close, and therefore it is more likely in such cases that a sentencing error prejudiced the defendant. *See Cave v. Singletary*, 971 F.2d 1513, 1519 (11th Cir. 1992) (finding prejudice as to sentencing in part because "despite the presentation of no mitigating circumstances, Cave came within one vote of being spared execution"); *Ex parte Stephens*, 982 So. 2d 1148, 1154 (Ala. 2006) (holding that an error was harmful in part because even with the error, "two jurors voted for a sentence of life imprisonment without parole").[10] The State's contention that McWilliams could not have been prejudiced by any *Ake* error because of the nature of his offense and the jury's vote for death is contrary to both the facts and the law. State's Br. at 20, 53.

The Eleventh Circuit's divided resolution below further underscores that McWilliams's mental health was critical to the outcome at sentencing. Judge Wilson dissented and found that the *Ake* error was prejudicial. J.A. 60a-63a. He explained that the absence of expert assistance prevented defense counsel from countering

10. *See also Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (holding that the petitioner pled sufficient prejudice in part because "even without the substantial and compelling mitigation that trial counsel failed to discover and present, Mr. Daniel's jury voted 10 to 2 for death based on the brief testimony of his mother"); *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002) (explaining that the trial court's assessment of the jury's vote must "depend upon the number of jurors recommending a sentence of life imprisonment without parole").

the trial judge's belief that McWilliams did not have any serious mental health issues because he had malingered on certain tests. J.A. 60a-61a. Judge Jordan concurred but stated explicitly that the issue was "close, for the reasons outlined in Judge Wilson's dissent." J.A. 49a. Judge Jordan then explained that the reason he declined to find prejudice was that "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." J.A. 49a. But he did not consider the impact an independent expert would have had. The per curiam opinion used similar language, stating that "[a] few additional days to review Dr. Goff's findings" would not have made a difference. J.A. 36a. The question is not how additional time with Dr. Goff would have benefited the defense. The question is how an independent expert would have benefited the defense by evaluating Dr. Goff's report and McWilliams's mental health records, and assisting counsel in preparing and presenting a case for life—a question the Eleventh Circuit never addressed, and should be given the opportunity to address on remand.

Dr. Goff's report, although brief, was highly significant because it revealed organic brain dysfunction—a mitigating fact that needed to be communicated effectively to the sentencer. This is why the Court held in *Ake* that indigent defendants have a right to an expert who 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. The trial judge discounted the importance of Dr. Goff's finding of organic brain dysfunction based on his lay view that McWilliams was "feigning, faking, and

manipulative." J.A. 188a.[11] But no one had provided any explanation to the judge as to the relationship among malingering, McWilliams's mental health issues, and the tests that were administered that showed genuine brain dysfunction. Such analysis is necessarily nuanced, and is precisely why the Court in *Ake* held that, unlike a lay person, an independent psychiatrist responsible for assisting the defense "can identify the 'elusive and often deceptive' symptoms of insanity." *Ake,* 470 U.S. at 80 (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950)). As a group of psychiatric and psychological associations noted in their brief as *amici curiae* in this case, "Malingering is not inconsistent with serious mental illness; it is not clear that the trial court was aware of this fact."[12]

Finally, McWilliams did not receive assistance from "a partisan consulting psychologist" at the time of the judicial sentencing. *See* State's Br. at 2, 6, 51. A local psychologist, Dr. Marianne Rosenzweig, spoke with counsel on a voluntary basis in her spare time before counsel received any of the critical reports and records that arrived in the forty-eight hours before the sentencing hearing.[13] J.A.

---

11. The judge stated that McWilliams's organic brain dysfunction did not rise to the level of a mitigating circumstance, but even if it did, the aggravating circumstances still would outweigh the mitigating circumstances. J.A. 188a. The judge did not explain how he could meaningfully weigh the mitigating effect of evidence that he did not find mitigating.

12. Brief of American Psychiatric Association, American Academy of Psychiatry and the Law, and American Psychological Association as *Amici Curiae* in Support of Petitioner at 20 (filed herein Mar. 6, 2017).

13. The State asserts that "McWilliams's brief elides" the fact that a local psychologist volunteered some advice and argues

192a-193a; P.C.T. 251-52. An indigent defendant does not lose his right to an *Ake* expert simply because his counsel obtained informal assistance from a friend or volunteer. *See Cowley v. Stricklin*, 929 F.2d 640, 644-45 (11th Cir. 1991) (finding an *Ake* violation even though counsel, after being denied an expert, convinced a psychologist who was a personal friend to give advice and testify based on a limited review of the defendant's records).

The State invokes the "fairness" principles of due process, State's Br. at 28, but there is nothing fair about a capital case in which the critical mental health reports and records were dumped on defense counsel within forty-eight hours of the sentencing hearing and counsel had no opportunity to review them with an independent expert, determine their value, and present evidence to the court.

---

it is a reason that the Court might "choose to dismiss the writ as improvidently granted." State's Br. at 2, 51 n.17. However, the State did not mention the psychologist's involvement in its brief in opposition to McWilliams's petition for certiorari. *See* S. Ct. R. 15.2 (requiring an "objection to consideration of a question presented based on what occurred in the proceedings below"); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 & n.14 (2010). Nor did the State assert that the psychologist was a basis for denying relief under *Ake* in its brief to the Eleventh Circuit, in the District Court, or in the state courts, and no court—state or federal—has mentioned the psychologist in its *Ake* analysis. The testimony relied on by the State came during the post-conviction hearing in June of 2000 and could not possibly have been a basis for the decision of the Alabama Court of Criminal Appeals in 1991.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit and remand this case for further proceedings.

Respectfully submitted,

Donald B. Verrilli, Jr.
Michael B. DeSanctis
Munger, Tolles & Olson LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

Joshua S. Meltzer
Munger, Tolles & Olson LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

Stephen B. Bright
Counsel of Record
Mark Loudon-Brown
Patrick Mulvaney
Southern Center
for Human Rights
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner