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.,

*Respondent.*

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

# REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE MISUNDERSTANDING OF A MINORITY OF CIRCUITS CONCERNING WHAT *AKE* SAID.

The State of Alabama incorrectly frames the question presented as a request that this Court announce new law. Alabama's Br. at ii, 14. Contrary to what the State argues in Part I of its Brief in Opposition, this Court need only reiterate what it clearly held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), but has been misunderstood by a minority of federal circuit courts. *Ake* clearly established an indigent defendant's right to meaningful expert assistance. *Ake*, 470 U.S. at 82. To be meaningful, that assistance must be independent. *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) ("[W]e held in *Ake* . . . that when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist."). Thus, this Court has "squarely established" that due process requires that an indigent defendant have meaningful access to an independent expert. *Cf.* Alabama Br. at 13.

Simply because there are circuits that have incorrectly construed *Ake*, thereby creating a circuit split, does not diminish the clarity with which *Ake* spoke. In *Williams v. Taylor*, 529 U.S. 362, 377 (2000), for example, this Court rejected the notion that "a state-court judgment is 'unreasonable' in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable". *Cf.* Alabama Br. at 16. In other words, it still can be unreasonable to interpret *Ake* to

require less than an independent expert, even though a jurist or circuit elsewhere had the same mistaken interpretation.

In this case, the prosecutor presented psychiatric evidence against McWilliams at his sentencing hearing, but McWilliams did not receive the assistance of an independent psychiatrist in return, and was thereby denied meaningful expert assistance. This Court should grant certiorari to ensure that McWilliams receives the due process guarantees *Ake* established.

## II. THIS CASE IS AN IDEAL VEHICLE.

The State makes three arguments as to why this case presents a poor vehicle for this Court to reiterate the clarity with which *Ake* spoke. None of the arguments are meritorious.

First, the initial question presented in the Petition for Writ of Certiorari is whether *Ake* clearly established that due process requires expert assistance to be independent of the prosecution. Pet. at i. The Eleventh Circuit below held that *Ake* did not clearly establish that right. *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 706 (11th Cir. 2015) ("the State's provision of a neutral psychologist would not be 'contrary to, or involve[ ] an unreasonable application of, clearly established Federal law'"). The State's argument that the lower court did not decide that question, Alabama Br. at 16, is wrong.

Second, the Eleventh Circuit below, via three separate opinions—a per curiam, a concurrence, and a dissent—addressed whether McWilliams was deprived of due process under *Ake v. Oklahoma* because the State failed to provide him with

the meaningful assistance of an independent mental health expert for use at his sentencing hearing. *McWilliams*, 634 F. App'x at 706 ("we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law") (per curiam); *id.* at 712 (characterizing McWilliams's *Ake* claim as "close") (Jordan, J., concurring); *id.* at 718 ("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") (Wilson, J., dissenting). Judge Wilson was so persuaded by the *Ake* claim that he authored a lengthy dissent indicating why McWilliams should receive a new sentencing hearing. *Id.* at 712-18. Therefore, the State's argument that McWilliams did not preserve the *Ake* issue in the state courts, Alabama Br. at 16-17, is wrong as well.

Third, the State argues that this case is a poor vehicle because the lower court was correct in noting that any error had no effect on McWilliams's sentence. Alabama Br. at 17. The State captures the prejudice in its very next sentence, however, when it observes that "McWilliams had been diagnosed as a malingerer by numerous psychologists." Alabama Br. at 17. Had McWilliams been granted the meaningful assistance he needed and requested, he could have presented, to take just one example, Dr. Goff's conclusions that McWilliams had a diagnosable mental health impairment and that his personality testing did not yield a "fake-bad" assessment, but rather was indicative of a "cry-for-help." (Vol. 8 at 1635.) The trial court's refusal to grant McWilliams's trial attorneys the time and assistance they

needed to present those results in a meaningful way prevented them from painting a complete picture of McWilliams's mental health.

Because McWilliams did not receive meaningful expert assistance, he was unable to challenge the prosecution's prejudicial expert opinions. Instead, those opinions went uncontested and led to a death sentence. Thus, as Judge Wilson observed in his dissent, "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." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting). That due process violation makes this death penalty case ideal for this Court to hear.

## III. MCWILLIAMS'S UNDERLYING *AKE* CLAIM IS MERITORIOUS BECAUSE DR. GOFF, BY WORKING SIMULTANEOUSLY WITH THE PROSECUTION, WAS NECESSARILY UNABLE TO PROVIDE MEANINGFUL EXPERT ASSISTANCE.

Throughout much of its Brief in Opposition, particularly in Part III, the State attempts to shift the focus of the Petition for Certiorari from what *Ake* clearly established to what McWilliams's trial lawyers did or did not say and do in preparing for and litigating McWilliams's sentencing hearing. Alabama Br. at 17-20. In so doing, the State focuses on facts that are irrelevant to the questions presented and begs the initial dispositive question. That is, McWilliams was deprived his rights to due process because he never had access to the assistance of an independent expert, and thus McWilliams was denied an expert who could meaningfully "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

For example, the State argues that the defense lawyers got everything they asked for but chose not to meet with Dr. Goff and were never prevented from doing so. Alabama Br. at 18-19. Whether those assertions are factually accurate or not is entirely beside the point. Rather, the defense was never able to meet with Dr. Goff meaningfully, *precisely because* he was reporting simultaneously to the prosecution and never had access to McWilliams's psychological records from Holman Prison. *McWilliams*, 634 F. App'x at 715 (Wilson, J., dissenting). Thus, Dr. Goff's assistance was necessarily incomplete and the defense never received meaningful assistance, regardless of any dispute over what the trial attorneys did.

Moreover, the State's account of what McWilliams's trial lawyers did is incomplete. Once the defense finally received a report indicating that McWilliams had significant mental health impairments and, on the very morning of sentencing, received voluminous medical and psychological records they had requested long ago, (Vol. 8 at 1406, 1618, 1635-36), counsel noted that they were "unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing." (Vol. 8 at 1408.) Counsel made repeated requests for additional time to ensure meaningful expert assistance and, when those requests were denied, moved, without success, to withdraw. (Vol. 8 at 1404, 1406, 1408-11, 1423-28.) McWilliams was thus unable to present evidence of mitigating circumstances, rendering the sentencing hearing "unconscionable" and "a mockery." (Vol. 8 at 1644.)

Yet the State goes so far as to say that McWilliams—who was sentenced to death after the trial court found that he was malingering and manipulative—"actually benefitted" from Dr. Goff's assistance. Alabama Br. at 20. The fact that the trial judge found that McWilliams's mental health was *not* a mitigating circumstance (Vol. 8 at 1652) undermines that argument and starkly illustrates the deficiency of information the trial judge had regarding McWilliams' mental health, especially given that the defense "case for mitigation was based on his mental health history." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting).

Note, finally, that the jury's vote was ten for death and two for life in prison. Had just one more juror been moved by the additional mitigating mental health evidence, the jury's recommendation to the judge would have been life in prison, rather than death. *See* Ala. Code § 13A-5-46(f). Nevertheless, McWilliams was deprived the ability to present his mental health history in a meaningful way prior to being sentenced to death, in violation of "a bedrock premise on which our system of capital punishment depends." *Elmore v. Holbrook*, 580 U.S. ____, *15 (2016) (Sotomayor, J., dissenting from denial of certiorari).

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the denial of habeas relief.

## CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on October 28, 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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