THIS IS A CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE EARL WARD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari
to the Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORIARI

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*****THIS IS A CAPITAL CASE*****
(No execution date has been set)

Question Presented

In *Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987), the Arkansas Supreme Court held that an indigent defendant's rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), are "duly protected" where he receives an examination at the state hospital. The court held firm to that conclusion over the next thirty-plus years, including in 2015 when, in considering Mr. Bruce Earl Ward's second penalty phase re-trial, it "decline[d] to overrule" its "precedent holding that a competency evaluation at the Arkansas State Hospital satisfied *Ake*[.]" *Ward v. State*, 455 S.W.3d 818, 826-27 (Ark. 2015).

Following this Court's decision in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), the Arkansas Supreme Court again declined to overrule this precedent and persisted in its interpretation of *Ake*, determining that Mr. Ward received at least the minimum that due process requires when a purportedly neutral state-hospital doctor – *but one who had previously testified for the State against Mr. Ward in the same prosecution* – found him competent to stand trial. *Ward v. State,* 539 S.W.3d 546 (March 1, 2018).

The Questions Presented are:

1. Are the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985), satisfied by an examination performed by a state-hospital psychiatrist who had previously testified at trial for the State against the defendant in the same prosecution?

2. Does the Due Process Clause of the Fourteenth Amendment require state-provided expert assistance only with respect to a defendant's sanity?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce Earl Ward respectfully petitions this Court for a writ of certiorari to review the decision of the Arkansas Supreme Court, which denied Mr. Ward's motion to recall the direct-appeal mandate. In that motion, Mr. Ward claimed a right to relief under the Constitution of the United States, a claim that the Arkansas Supreme Court denied on the merits.

DECISION BELOW

The Arkansas Supreme Court's decision denying Mr. Ward's motion to recall the mandate is published as *Ward v. State,* 539 S.W.3d 546 (March 1, 2018), and is Appendix A.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court's decision denying Mr. Ward's motion to recall the mandate is a final decree rendered by the highest court in the State of Arkansas. Accordingly, certiorari jurisdiction is proper under 28 U.S.C. § 1257. The Arkansas Supreme Court's decision was entered on March 1, 2018, making Mr. Ward's petition for writ of certiorari due on May 30, 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, *inter alia*: "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."

STATEMENT OF THE CASE

Bruce Ward's mental illness has been at the forefront of his legal case for nearly three decades. Over the course of his three-penalty phase trials between 1990 and 1997, through federal habeas, and in several post-conviction challenges in state court, counsel for Mr. Ward have repeatedly and consistently put forth his mental health as a prevailing issue in his case. The trial record is " replete with questions that defense counsel raised concerning Ward's mental health." App. 27a. Mr. Ward and his counsel offered the trial court detailed descriptions of his grandiose delusions. Despite this evidence, Arkansas state courts have repeatedly and consistently denied Mr. Ward the assistance of an independent expert. Instead, the only expert ever appointed to "assist" Mr. Ward's defense was a state-hospital doctor who actually testified against him.

1. The 1990 Trial

At his initial trial, in 1990, counsel for Mr. Ward entered a plea of not guilty by reason of a mental defect, and the court sent Mr. Ward to the Arkansas State Hospital for two weeks. *Ward*, 455 S.W. at 306. The state doctors issued a report finding Mr. Ward competent and that he did not suffer from an Axis I disorder. *Id, see also,* App. 58a. Thereafter, counsel requested a competence hearing, which was held approximately one month from Mr. Ward's release. The state-hospital

psychiatrist, Dr. Simon, testified that he had reviewed documents from Pennsylvania, either from the police or the DOC, and that he had conducted two interviews with Mr. Ward. *Id*. Though it had been less than two months prior, he could not recall what the first interview was about, but "assumed he had interviewed him." *Id*. The second meeting involved administering tests, including an IQ test and a proverbs test. Dr. Simon had no family information or other mental health history, or school or military records.

After the evaluation, counsel requested the assistance of an independent expert, arguing that it was necessary to investigate whether Mr. Ward had a mental disease or defect, to investigate mitigation stemming from his mental state, and to assist the defense in rebutting expert testimony. App. 61a-66a. Counsel also argued that the State evaluation was "inadequate for purposes of mitigation" and noted that the experts had failed to conduct adequate psychological testing, speak with any relatives of Mr. Ward, or examine any mitigating diagnoses beyond the issues of sanity and competence. 1-R.[1] 201-02. Counsel requested an independent expert to assist the defense throughout trial and preparation of mitigating evidence. *Id*. 203-04. Specifically, counsel noted that they wanted a psychiatrist to review Mr. Ward's mental health records from Pennsylvania. *Id*. An independent expert, counsel told the court, could talk with the previous experts, review their testing,

[1] References to "1-R.' are to the page number of the record of Mr. Ward's first trial lodged with the Arkansas Supreme Court as CR-91-36. References to "2-R." are to the page number of the record of Mr. Ward's second trial, an incomplete version of which was lodged with the Arkansas Supreme Court as Case No. CR93-823. References to "3-R." are to the page number of the record of Ward's third, final trial that was lodged with the Arkansas Supreme Court as CR-98-657.

assist the defense in developing their own history, and not rely solely on the state's file. *Id*. *Ake*, counsel argued, directed that an indigent defendant be provided with such an expert to assist counsel in preparing for trial and developing mitigation. 1-R. 207.

The trial court trivialized the motion, describing the relevance of mental health issues as a "figment of your imagination." *Id.* at 209 The trial judge proclaimed that "the Court's not going to get into hiring assistant lawyers . . . If we ain't got lawyers that can get prepared, we need to get some." *Id.* Trial counsel protested that no one in her office had the necessary psychological training, but the court rebuffed her: "[I]f you feel that you should before you try these cases, Didi, you ought not be trying them." *Id.* [2] Mr. Ward's case then proceeded to trial, where he was convicted of capital murder.

During the sentencing phase, the prosecution called the state-employed Dr. Simon as a rebuttal witness. Dr. Simon testified in front of the jury that he had evaluated Mr. Ward and reviewed various historical records pertaining to him, including records from childhood, adolescence and adulthood. App. 69a-70a. He testified that he had diagnosed Mr. Ward with antisocial personality disorder, which he described as a "life-long disorder" that is "resistant to treatment." App.

[2] These remarks resembled other aspects of the circuit court's animus toward the defense, which continued into the 1997 resentencing. See *Ward v. State*, 831 S.W.2d 100, 102 (1992) (Dudley, J., dissenting) (noting that the trial court failed to "manifest the most impartial fairness in the conduct of the trial").

70a. Mr. Ward's pattern of getting into trouble and struggling in school, he testified, were evidence of his anti-social personality disorder. *Id.*

Following Mr. Ward's first trial, the Arkansas Supreme Court affirmed the conviction of capital murder but reversed the death sentence due to an evidentiary error. *Ward v. State*, 827 S.W.2d 110 (Ark.), *cert. denied*, 506 U.S. 841 (1992).

2. Mr. Ward's 1997 Resentencing

Mr. Ward's case returned to the trial court for a final sentencing in 1995.[3] At the outset of the proceedings, in March 1996, the court again committed Mr. Ward to the state hospital for evaluation. App 45a. Subsequently, in February 1997, defense counsel moved for an *independent expert* to assist the defense and requested an "ex parte hearing on this motion under the authority of *Ake v. Oklahoma.*" App. 46a. They argued that, pursuant to *Ake*, they were entitled to an independent expert to assist in the investigation of evidence, surrounding Mr. Ward's mental state, which could provide a defense to the crime as well as to "defend against expert testimony." App. 47a. Counsel argued that they "must consult experts in the investigation for mitigating factors." *Id.* By way of example, counsel cited to one of Arkansas's statutory mitigating factors available to the defense: that "The murder was committed while the defendant was under extreme mental or emotional disturbance." *Id.* citing Ark. Code Ann. § 5-4-60(1). "Mr. Ward's attorneys are not

[3] There was a second sentencing between the 1990 trial and the 1997 resentencing. The second jury again sentenced Mr. Ward to death. But a reliable record of his sentencing was not available because of the court reporter's negligence. The state supreme court was thus unable to conduct its required review of a sentence of death, and again reversed the sentence. *Ward v. State*, 906 S.W.2d 685 (Ark. 1995).

psychologists," counsel wrote, "Nor are they skilled in administering psychological tests." *Id*. Thus they argued that, pursuant to *Ake*, they were entitled to the assistance of an expert who was so qualified. *Id*. In reliance on its own, unconstitutional authority rather than a correct application of *Ake,* the court denied both the request for an independent expert, as well as for an ex parte hearing. App. 52a.

In October 1997, three weeks before the re-sentencing, Mr. Ward's counsel moved to stay the trial proceedings. App. 53a. Mr. Ward's attorney Tammy Harris had just visited with Mr. Ward and wrote that his condition had "deteriorated to the point that he can not or will not cooperate with present counsel and is unable or unwilling to proceed to trial with present counsel." App 53a. The motion recounted a number of "demands" that Mr. Ward wished to make of the trial court. *Id.* These included a "full blanket presidential pardon," "a new Social Security number that can in no way be traced to his present Social Security number," a new "vehicle of his choosing" to replace the motorcycle seized by police at the crime scene, and a cash award of $1,000,000 for each year of his incarceration: "He states he is going on nine years and expects $9,000,000 (nine million dollars) to be paid at the rate of $1,000,000 (one million dollars) per year." App. 54a. The motion referenced additional, but privileged, evidence of Mr. Ward's mental state. *Id.* Counsel again requested that the court conduct an in camera review of the materials or relieve her of her representation so that she could reveal the information. *Id.*

The court had ample evidence to justify the requests. In addition to the information counsel supplied him about Mr. Ward's delusions (which Mr. Ward himself then affirmed in court)[4], it also had the entirety of the record from Mr. Ward's initial trial. At his first sentencing, his attorneys introduced video depositions of teachers and counselors who knew Mr. Ward during his youth and who portrayed him as a young man with serious psychological issues. Thomas Ritter, Mr. Ward's Sixth Grade Teacher, testified that Mr. Ward had mental and emotional problems, had to be referred to a psychologist, and needed therapeutic interventions that were not provided to him. Ex. C1 Tr. at 4.[5] He recalled that Mr. Ward engaged in bizarre behavior; and specifically remembered that Mr. Ward ate flies at school and did not seem to understand that there was anything wrong with the behavior. *Id.* at 7. Ms. Warthman, who supervised Mr. Ward in the civilian air patrol in 1971, testified that Mr. Ward had emotional problems when she supervised him and that she had informed Mr. Ward's family that he needed psychiatric help. *Id.* at 20. Also before the trial court was the deposition testimony of Dr. Anthony Cillufo, a Pennsylvania psychologist who evaluated Mr. Ward in

[4] During the hearing on the request for a stay, Mr. Ward asked to enter into the record "everything I can remember about the case." 3-R. 176. The court denied the request, telling Mr. Ward that "the record is complete based on what has been filed in the court, as opposed to your rambling and notes and remembrances." *Id*. *See also* 3-R. 186-87. (Mr. Ward asked the court to fire his counsel for violating his attorney client privilege and revealing a suit he was set to bring against the state and ruining the element of surprise. The court responded that there was no surprise because the state gets sued all of the time.)

[5] Transcription of Trial Court Exhibit C1, Videos Played During the Third Sentencing Hearing, CR-98-657.

1977. 2-R. 864-89.[6] Dr. Cillufo testified that Mr. Ward had features of a paranoid disorder at the time of his evaluation. 2-R. 871. He also noticed indications of neurological damage (*Id.* at 873)— a particularly significant finding given that trial counsel had discovered (and informed the trial court) that Mr. Ward had suffered from a high fever for an extended period of time during childhood, which is known to cause neurological damage and complications. Notably, these aspects of Mr. Ward's presentation were of sufficient concern that Dr. Cillufo recommended that Mr. Ward undergo further evaluation. *Id*. at 873.

The trial court denied the requests for a continuance and to relieve counsel, and declined to conduct the requested in camera review of privileged material, but it again ordered Mr. Ward to be sent back to the Arkansas State Hospital. App. 56a; *see* 1-R. 188. Once there, Mr. Ward refused to speak with the same examiners who had met with him before the first trial, including Dr. Simon, who had testified for the State at the first trial that Mr. Ward as "anti-social" and his condition was untreatable. App. 58a, 67a. The examiners did not expressly find Mr. Ward competent or sane, but wrote that their "brief interview" with the defendant did not indicate that his uncooperativeness was itself due to a mental disorder. Add. 56; cf. *Rees v. Peyton*, 384 U.S. 312, 313 (1966) ("Psychiatrists selected by the State who sought to examine Rees at the state prison found themselves thwarted by his lack of

[6] The deposition of Dr. Cilluffo, taken at Mr. Ward's first trial, was read into the record and transcribed by the court reporter during Mr. Ward's second trial, in relation to Case No. CR93-823. Dr. Cilluffo's testimony was again read into the record during Mr. Ward's third trial, in relation to Case No. CR98-657. The testimony was not transcribed by the court reporter during the third trial. Therefore, the citations here at to the second trial, Case No. CR93-823.

cooperation, but expressed doubts that he was insane."). Mr. Ward was then subjected to a third sentencing proceeding in 1997, after which he was again sentenced to death. *See Ward v. State,* 1 S.W. 3d 1 (Ark. 1999) (affirming sentence on direct appeal).

Mr. Ward's death sentence was affirmed in state post-conviction and on federal habeas corpus. See *Ward v. State*, 84 S.W.3d 863 (Ark. 2002); *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009), *cert. denied*, 559 U.S. 1051 (2010). Mr. Ward's competence was called into question again in his federal habeas corpus proceedings. See, e.g., *Ward*, 577 F.3d at 942 (Melloy, J., dissenting) (noting "compelling evidence" of mental deterioration before the 1990 trial and after Mr. Ward was examined at the state hospital).

3. The 2013 Motions to Recall the Mandate

In 2013, Mr. Ward moved the Arkansas Supreme Court to recall the mandates from his first trial and his final resentencing. *See Ward*, 455 S.W.3d 303; *Ward*, 455 S.W.3d 818. In those motions he argued that he was entitled to the assistance of a defense expert who would have assisted trial counsel in asserting Mr. Ward's incompetence for trial, and, as relevant here, in developing mitigating evidence for sentencing in his 1990 and 1997 trials. In support, Mr. Ward proffered statements from his prior counsel, about their observations of him during his prior trials (which the 1997 trial court had refused to hear ex parte). Tammy Harris and Julie Jackson, Mr. Ward's attorneys at his final resentencing, had requested and been denied an ex parte opportunity to apprise the court of these observations. Ms.

Harris recalled Mr. Ward telling her that people "at the highest levels of government" were trying to kill him, and that there was a "hit" out on Ms. Harris and her family from which Mr. Ward was trying to protect her. . App. 38a. At he time of his resentencing, counsel believed that "Mr. Ward was having a pronounced break with reality," and she was "sincerely concerned that he was not competent to proceed." *Id.* Ms. Jackson had gathered "elaborate" details from Mr. Ward concerning his belief that the mafia in Pennsylvania "were out to get him and had been after him a long time." App 43a. Ms. Jackson found Mr. Ward's beliefs to be sincere but delusional, and came to understand her client's penchant for delusions after spending a great deal of time with him. *Id.* Mr. Ward's delusions, she explained, "would not have been obvious from a brief or casual conversation." *Id.* Similarly, Didi Sallings, Mr. Ward's counsel in 1990, wrote that she had observed a "marked and rapid deterioration" in her client's mental health over the course of the representation and had observed him to be "increasingly and noticeably paranoid," lending almost no assistance to his defense. App. 34a.

The Arkansas Supreme Court denied both motions. With regard to the 1990 trial, it declined to recall the mandate for two reasons. As to trial counsel's request for an independent competence evaluation, the court held that trial counsel did not specifically cite the issue of competence as a basis for seeking funding under *Ake*, and, alternatively, that "Ward was examined at the state hospital; therefore, the requirements of *Ake* were satisfied." *Ward*, 455 S.W.3d at 312. With regard to the 1997 resentencing, the court agreed that trial counsel squarely sought the relief in

question: an independent defense expert to aid in the development of mitigating evidence; nevertheless, the Court again declined to overrule its precedent "that a competency evaluation at the Arkansas State Hospital satisfies *Ake*." *Ward*, 455 S.W.3d at 826-27, citing *Branscomb v. State*, 774 S.W.2d 426 (1989), *Dunn v. State*, 722 S.W.2d 595 (1987), *Wall v. State*, 715 208 (1986). The court further found that Mr. Ward "failed to make a threshold showing that his sanity at the time of the offense or his competence at the time of trial were significant factors." *Ward*, 455 S.W.3d at 827.

4. The 2018 Motion to Recall the Mandate

In February 2016, the State of Arkansas issued an execution date for Mr. Ward, scheduling his execution among the executions of seven other men during the final days of April. In April 2017, the Arkansas Supreme Court granted Mr. Ward's request that they his execution pending this Court's decision in *McWilliams v Dunn*.[7] *Ward v. State*, 2017 Ark. 136 (2017). After this Court issued its decision in *McWilliams*, the state supreme court ordered briefing and argument. In March 2018, a majority of the Arkansas Supreme Court denied Mr. Ward's motion to recall the mandate. First, the majority expressly declined "to overrule our precedent that holding that a competency evaluation at the Arkansas State Hospital satisfies *Ake*." App. 1a. Second, the majority held that the law of the case barred Mr. Ward's challenge under *McWilliams* because *McWilliams* "does not develop new law or

[7] The Arkansas Supreme Court separately granted Mr. Ward a stay based on his challenge to the State's procedures for litigating incompetence claims under *Ford v. Wainwright*. That matter has been briefed, but not yet argued.

change the standard pursuant to *Ake*." App. 14a. As it had held in *Ward IV*, the court reiterated that the state hospital doctor had satisfied the requirements of *Ake* and, in any case, Mr. Ward had failed to "make a threshold showing that his sanity is likely to be a significant factor in his defense" in order to trigger *Ake's* constitutional requirements. App. 13a. "Simply put," the court concluded, "*McWilliams* did not answer the question that Ward was relying on in seeking relief in this motion." App. 14a.

Arkansas Supreme Court Chief Justice Kemp, joined by Justice Hart, dissented. Observing that *Ake* requires that "a competent psychiatrist must also provide assistance in the forms of evaluation, preparation, and presentation to the defense" the dissenting justices concluded that Mr. "Ward lacked that mental health expert assistance throughout his case." App. 25a (Kemp, C.J., dissenting, joined by Hart, J.). Crucially, the dissent took issue with the majority's adherence to law of the case, "when its longstanding precedent is clearly wrong." *Id*. at 30a.

The Chief Justice's opinion diverged from the majority in several critical respects. First, the dissent captured the correct threshold inquiry and application in this case, finding that Mr. "Ward meets the threshold requirements of *Ake*" because his "mental condition was relevant to his possible punishment" by virtue of "two mitigating factors relating to mental condition at the time of the offense." App. 26a. Contrary to the majority, the Chief Justice also found that Mr. Ward's "sanity at the time of the offense was 'seriously in question.'" App. 27a. The dissenting justices

also found that the denial of counsel's request for an *ex parte* hearing at which to present mental health evidence ran afoul of *Ake* and *McWilliams*.

Having observed that Mr. Ward had made *Ake's* threshold showing, the dissent turned to the question of whether Mr. "Ward's mental-health expert conducted 'an appropriate [1] examination and assist[ed] in [2] evaluation, [3] preparation, and [4] presentation of the defense.'" App. 27a, quoting *McWilliams*, 137 S. Ct. at 1800. The dissent concluded that "[a]s in McWilliams, the three *Ake* assistance factors were not satisfied in Ward's case." *Id*. Ultimately, the Chief Justice concluded that the mandate should be recalled because "a 'presence of a defect or breakdown in the appellate process' exists because Ward did not get the requisite meaningful assistance of a competent psychiatrist to the defense as contemplated by *McWilliams* in its interpretation of Ake." App. 32a.

REASON FOR GRANTING THE WRIT

1. Presented with *McWilliams*, Arkansas Reaffirms Its Decades-Long Recalcitrance Contrary to *Ake*.

For over thirty years, Arkansas "has interpreted *Ake* to mean that when a psychiatrist examines a defendant at the state hospital, as provided by statute, the *Ake* requirements have been satisfied." App. 20a. Between this Court's decision in *Ake* and Mr. Ward's first trial in 1990, the Arkansas Supreme Court analyzed the requirements of *Ake* in multiple cases. In the first two Arkansas cases post-*Ake*, the Arkansas Supreme Court upheld the denial of funds for an independent mental

health expert on the basis that the defendant had failed to make the threshold showing that sanity would be a significant factor at trial. *See White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986). In a third case, *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987), the Arkansas Supreme Court acknowledged that the defendant had written a personal letter to the judge reflecting that he had been treated multiple times for mental illness; that the defense had filed a notice of intent to raise mental disease or defect as a defense; and that the defense had moved to invoke the right enunciated in *Ake*. Rather than challenge whether the threshold showing had been made to grant funds for an independent expert, the court concentrated on the fact that the defendant was examined at the state hospital. *Id*. Although the defendant argued that *Ake* entitled him to the assistance of a psychiatrist unaffiliated with the state or county, the court held that the defendant "misinterprets *Ake*" and that a defendant's rights are "adequately protected by the examination at the [s]tate [h]ospital, an institution which has no part in the prosecution of criminals." *Id*. at 133, 722 S.W.2d at 596. The court noted that a state-hospital evaluation as to appellant's capacity to assist in his defense (fitness to proceed) and as to appellant's sanity at the time of the alleged offense (criminal responsibility) was statutorily required once a defendant filed notice of intent to rely upon the defense of mental disease or defect. The *Dunn* court was convinced that the Oklahoma law at issue in *Ake* "simply fell short of safeguards assured a defendant under Arkansas law." *Id*. at 134, 722 S.W.2d at 596.

The statute in effect at the time, Arkansas Code Annotated section 5-2-305 then entitled "Psychiatric examination of defendant," provided that when a defendant charged in circuit court filed a notice of intent to rely on the defense of mental disease, there was reason to believe the defendant's mental disease or defect was to become an issue in the case, or fitness to proceed became an issue, the circuit court was required to suspend all further proceedings and order the defendant undergo an examination and observation at a local regional mental health center by a qualified psychiatrist appointed by the court or at the state hospital. Ark. Code Ann. § 5-2-305(a), (b) (Supp. 1989). Upon completion of an examination at a local regional mental health clinic or in lieu of such, the court could order the defendant committed to the state hospital for further examination and observation where warranted. *Id.* at § 5-2-305(c). A report was required to be filed with the clerk of the court and mailed to both the defense attorney and the prosecuting attorney. *Id.* at § 5-2-305(f). The report was required to including the following:

(1) A description of the nature of the examination;

(2) A diagnosis of the mental condition of the defendant;

(3) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;

(4) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

Id. at § 5-2-305(d).

That an examination by the Arkansas State Hospital automatically satisfies the requirements of *Ake*, without any further scrutiny, has remained the law in Arkansas. *See* App. 10a-11a, citing *Ward v. State*, 455 .W.3d 818, 826-27 ("Although Ward requests that we overrule our precedent holding that a competency evaluation at the Arkansas State Hospital satisfies *Ake*, we decline to overrule this precedent."); *Creed v. State*, 372 Ark. 221, 223-24, 273 S.W.3d 494, 497 (2008) (noting long-held precedent that "a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by" the statute); *Dirickson v. State*, 329 Ark. 572, 576, 953 S.W.2d 55, 57 ("We have repeatedly held that a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by [Ark. Code Ann. § 5-2-305 (Repl. 1993)]"); *Sanders v. State*, 308 Ark. 178, 182-83, 824 S.W.2d 353, 356 (1992) (noting that the statutorily provided review by a state hospital is sufficient under *Ake* and that unless that state evaluation establishes that sanity is at issue, a defendant is not entitled to "a second opinion."); *Day v. State*, 306 Ark. 520, 524, 816 S.W.2d 852, 854

(1991) ("We have repeatedly held that a defendant's right to an examination under *Ake* is protected by an examination by the state hospital"); *Branscomb v. State*, 299 Ark. 482, 486, 774 S.W.2d 426, 428 (1989) (concluding "that a psychiatric examination given by the state hospital is sufficiently independent of the prosecution").

a. **Arkansas Steadfastly Disregards the "*Ake* Assistance Factors"**

In *Ake*, this Court acknowledged the "pivotal role that psychiatry has come to play in criminal proceedings." *Ake*, 470 US at 79. In recognizing "that the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," this Court listed some of the tasks that the team's mental health expert could undertake in a criminal case, including: "gather facts," "analyze information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior," "offer opinions about how the defendant's mental condition might have affected his behavior at the time in question", "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," "identify the 'elusive and often deceptive' symptoms of insanity and tell the jury why their observations are relevant," and, where permissible, "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*, 740 U.S. at 80-81.

In *McWilliams,* this Court revisited *Ake* and emphasized that its Due Process Clause mandate was fulfilled not by the mere appointment of an expert to conduct

testing but by the availability of an expert to "assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." *McWilliams*, 137 S. Ct. at 1800. *McWilliams* makes clear that a mere mental health examination does not automatically satisfy *Ake's* standard. Yet, as it made clear in Mr. Ward's case, Arkansas still refuses to overrule this precedent. App. 1a.

"Arkansas has incorrectly held for decades that a competency evaluation at the state hospital is sufficient under *Ake*." App. 25a. *McWilliams* makes clear "that this view is a 'plainly incorrect' reading of *Ake*" because "more than a mental health examination provided by the State satisfies *Ake's* constitutional requirements." *Id*. citing *McWilliams*, 137 S. Ct. at 1799-1800. Specifically, "a competent psychiatrist must also provide assistance in the forms of evaluation, preparation, and presentation to the defense." App. 25a, citing *McWilliams,* 137 S. Ct. at 1800. Applying *Ake's* factors within the context of *McWilliams*, this Court observed that:

> Neither Dr. Goff nor any other expert helped the defense evaluate Goff 's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings, see P. C. T. 936–943). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

McWilliams, 137 S. Ct. at 1801.

Though the majority below quoted the relevant language from *Ake* and *McWilliams*, it failed to conduct an analysis as this Court did in *McWilliams*. Had the lower court done so, it would have concluded that "[a]s in *McWilliams*, the three

Ake assistance factors were not satisfied in Ward's case." App. 28a (Kemp, C.J., dissenting, joined by Hart, J.).

As to the first factor, "the record is devoid of any evidence that [the State's experts] helped Ward's defense counsel evaluate their mental health report." *Id*. The state hospital report consisted of 'findings . . .[from] (1) historical data from outside sources; (2) [m]edication history, physical and neurological examinations; (3) [l]aboratory and other physical; [and] (4) [p]sychological assessment by staff psychologist[s]." MRM dissent at 12 (internal citations omitted) (Kemp, C.J., dissenting, joined by Hart, J.). "Nor is there any evidence to suggest that [the State hospital doctors] helped translate this data into a legal strategy for the defense." *Id*. As discussed *infra*, one of the doctors who jointly evaluated Mr. Ward then testified against him at his prior penalty phase. Counsel could not have privileged conversations with this expert nor could they risk revealing strategy to a witness who was cooperating with the prosecution.

As to the second factor, Mr. "Ward's defense counsel lacked a mental-health expert to assist the defense in preparing and presenting its specific arguments concerning Ward's fluctuating mental-health status." *Id*. (Kemp, C.J., dissenting, joined by Hart, J.). As borne out by the record, trial counsel watched their client deteriorate and were at sea as to what to do. *See* App. 53a. Like counsel in *McWilliams*, they told the court that they were not mental health experts. App. 48a, *McWilliams,* 137 S.Ct. 1796. They did not know how to interpret their client's bizarre and delusional conduct. App. 53a. They implored the court for expert

assistance in understanding and defending their mentally ill client. App. 46a-51a. They requested an ex parte hearing to reveal confidential information about their client's mental health and, later asked the court to conduct an in camera review of such information. App. 46a, 54a. As in *McWilliams*, they requested a continuance and, finally, to be relieved of their representation. App. 54a, 1-R. 171; *McWilliams,* 137 S.Ct. 1796.

As to the third factor, Mr. "Ward did not have the assistance of a mental health expert to prepare direct examination or to testify *for the defense*." MRM dissent at 12 (Kemp, C.J., dissenting, joined by Hart, J.) (emphasis in original). "In fact," as the dissent noted, Dr. "Simon testified for the State." Obviously it is preposterous to suggest that Simon, or his colleague who jointly examined Mr. Ward, could help the defense prepare for, rebut, or impeach his own testimony. Even setting aside the inherent conflict of interest, any such conversation would necessarily put counsel in the unfortunate position of revealing strategy to a witness for the State. That the state hospital doctor had testified in a prior penalty phase necessarily meant that he was not "sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams*, at 13, citing *Ake*, 470 U.S. at 83.

Arkansas's adherence to its longstanding, incorrect precedent and the resultant refusal to apply the "*Ake* assistance factors" violates this Court's clear precedents. App. 28a (Kemp, C.J., dissenting, joined by Hart, J.). Even (then) Justice Rehnquist, dissenting in *Ake*, 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). Arkansas refuses to meet even this most basic standard.

2. Arkansas's Narrow Focus on Sanity Circumvents *Ake*

a) Arkansas's onerous threshold sanity requirement runs afoul of *Ake*.

The Arkansas Supreme Court misapplied *Ake* in a second critical way, holding that Mr. Ward had failed to "make a threshold showing that his sanity [was] likely to be a significant factor in his defense." App. 30a. Setting aside the factual inaccuracies of such an argument[8] the court's reasoning represents a narrow reading of *Ake* that circumvents that case's ultimate holding. The overarching issue in *Ake*, concerned the "meaningful access to justice." *Id* "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake*, at 1093. A fair opportunity

[8] Even without the ex parte hearing, however, the dissenting justices nevertheless found that Mr. Ward's sanity was "seriously in question." App. 27a.

> Defense counsel notified the court of Ward's mental-defect defense, requested competency evaluations, requested an *Ake* expert for sentencing, requested an ex parte hearing on his *Ake* motion, argued that an *Ake* expert was necessary for mitigation purposes, and requested a continuance based on counsel's inability to represent Ward because of Ward's mental health issues.

Id.

necessarily includes "making certain that he has access to the raw materials integral to the building of an effective defense." *Id*.

Whether those raw materials include a mental health expert was the central concern in *Ake* (*see Ake*, 470 U.S. at 77) and the Court acknowledged that a "defendant's mental issue is not necessarily at issue in every criminal proceeding." *Id*. at 82. Ultimately, this Court found that the "risk of error" from lack of psychiatric assistance and the "probable value" of such assistance is "at its height when the defendant's mental condition is seriously in question." *Id.*

Arkansas's restrictive interpretation of *Ake's* "threshold sanity" requirement represents an unreasonable interpretation of *Ake* as a whole. *Ake* does not actually require proof of insanity, but rather requires that a defendant's "mental condition is seriously in question." *Ake*, 470 U.S. at 82. *See also, McWilliams,* 137 S. Ct. at 1794. As the *Ake* Court stated, "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80.

Under this analysis, it is unmistakable that as a legal matter, Mr. Ward's mental condition was seriously at issue. Nor can there be a question that the State made his mental condition relevant to his culpability and punishment. Mr. Ward's mental condition was relevant to culpability by virtue of the plea of not guilty by reason of mental defect that his 1990 counsel entered on his behalf. CITE. His "mental condition was relevant to his possible punishment" by virtue of the

statutory mitigating circumstances available to him. App. 26a (Kemp, C.J. dissenting, Harm, J. joining). Because he was charged capitally, "the jury could hear two mitigating factors related to Ward's mental condition at the time of the offense."[9] App. 26a, citing to Ark. Code Ann § 5-4-605(1), (3). Trial counsel specifically asked for the appointment of a mental health expert to assist them in "establish[ing] the existence of potentially mitigating factors." App. 47a. As trial counsel argued: "Only a skilled professional with appropriate supporting experts and information can determine the existence of any mental disease or defect which may mitigate in this case. In order to adequately investigate the existence of a [Ark. Code Ann] § 5-4-605(1) defense, expert mental health professionals must be consulted." *Id*. Without the requisite expert assistance, counsel for Mr. Ward were foreclosed from offering evidence about his mental condition at the time of the crime, the very predicate for the two statutory mitigating factors. R 541-44. Instead, counsel were "forced to rely on noncontemporaneous evidence of his mental condition from decades earlier" including "testimony from a psychologist who examined him in 1977, school guidance counselors from the 1960's and 1970's, and a coworker from the Civil Air Patrol." App. 26a. The prosecutor capitalized on the absence of contemporaneous mental health evidence, arguing in closing that Mr. Ward does not suffered not from a mental disorder, but a "personality disorder" that

[9] Those two mitigators included that the murder "was committed while the defendant was under extreme mental or emotional disturbance" and "was committed while the defendant was acting under unusual pressures or influences." *See* Ark. Code Ann § 5-4-605(1), (3).

was "not a mental disease or defect that would deem him not culpable of his actions." 3-R. 534-35.[10] Notably, not one juror found either mitigator. 3-R. 552-553.

b. Arkansas disregards *Ake's ex parte* requirement for threshold sanity showing.

Ake held that a defendant is entitled to a psychiatrist when he "is able to make *an ex parte threshold showing* to the trial court that his sanity is likely to be a significant factor in his defense." *Id*. at 82-83 (emphasis added). Mr. Ward, however, was *never* afforded such an opportunity.

> On February 14, 1997, Ward moved the circuit court for an order authorizing certain defense expenditures to hire an expert to assist him in presenting mitigating factors. Ward stated he made the request 'because defense counsel does not wish to unnecessarily disclose the defense mitigation case' to the State. He further stated, 'Only a skilled professional with appropriate supporting experts and information can determine the existence of any mental disease or defect which may mitigate this case.' He also requested an ex parte hearing to make a requisite showing for an *Ake* expert. The circuit court denied Ward's motion for an ex parte hearing in its February 27, 1997 order, and Ward's case proceeded to his third resentencing trial

App. 31a. (Kemp, C.J, dissenting, joined by Harm, J.).

Arkansas's version of *Ake's* "threshold sanity" showing disregards the clear requirement that it be an "*ex parte threshold showing*." *Ake*, 470 U.S. at 82. "[T]he circuit court's denial of Ward's motion for an ex parte hearing runs afoul of *Ake*, and Ward should not be penalized for failing to establish a showing for an *Ake* expert." App. 31a.

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[10] The prosecution also remarked on Mr. Ward's outbursts and affect during the trial, commending the jury for paying attention and following the court rules, unlike Mr. Ward. 3-R. 551-52 ("You have already demonstrated that you are better than he is.") A proper mental health expert could have helped the defense to explain contextualize Mr. Ward's outbursts and delusional behavior.

c. Arkansas frustrates the broader application of *Ake's* mandate.

Arkansas's threshold sanity requirement disregards the broad variety of areas in which defendants are entitled to expert assistance under *Ake*. In *Ake* itself, this Court found that the petitioner was entitled to the assistance of an expert for purposes of rebutting a future dangerousness aggravator. *Ake*, 470 U.S. at 73. "Without a psychiatrist's assistance," the Court found, "the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor.'" *Id.* Thus, the inquiry for whether or not to provide an expert, even in *Ake* itself, hinged not upon an arbitrary threshold, but on an analysis of whether the defendant could fairly avail himself of the tools he needed to mount a defense and rebut or cross-examine testimony against him.

Courts applying *Ake* to requests for non-psychiatric experts have applied a similar equitable approach rooted in the principals of Due Process. Applying *Ake* in a non-capital rape case, the Eighth Circuit found error where the State had relied on a hypnotist expert, but had denied the defendant such an expert. *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988). The court interpreted *Ake* as entitling a defendant to assistance of an expert independent from the State where there is a "reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial." *Id.*, at 1243-44,*see also, id.* at 1244 ("The State called its own expert on hypnosis . . . It should not have denied [petitioner] a similar weapon."). *See also*,

United States v. Chase, 499 F.3d 1061, 1066 (9th Cir. 2007) (Petitioner in a methamphetamine production case entitled to his own expert to rebut the State's chemist. Pursuant to *Ake* and the Fourteenth Amendment, petitioner "had a right to put on a defense, and to retain an expert if 'a reasonable attorney would[have] engage[d] such services for a client having the independent financial means to pay for them."); *Williamson v. Reynolds*, 904 F.Supp. 1529, 1562 (E.D. Okla. 1995), *aff'd on other grounds, sub nom., Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (Finding *Ake* error in a capital case for failure to provide funds for a hair and serology expert; "when forensic evidence and expert testimony are critical parts of the criminal prosecution of an indigent defendant, due process requires the State to provide an expert who is not beholden to the prosecution.); *Ex parte Moody*, 684 So. 2d 114, 119 (Ala. 1996), *as modified on denial of reh'g* (Sept. 27, 1996) (*Ake* entitled petitioner to a ballistics expert; "where an indigent defendant has established a substantial need for an expert, without which the fundamental fairness of the trial will be questioned, *Ake* requires the appointment of an expert regardless of his field of expertise, even a nonpsychiatric expert"). Underlying these cases is the Due Process guarantee to meaningful access to the courts that underlies *Ake*. Arkansas's imposition of a strict sanity threshold circumvents this rule from *Ake*, and thwarts an indigent defendant's access to justice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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