
NO. 17-9159

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE WARD,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

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

BRIEF IN OPPOSITION FOR RESPONDENT
STATE OF ARKANSAS

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CAPITAL CASE

QUESTION PRESENTED

In 1989, Bruce Ward strangled 18-year-old Rebecca Doss, leaving her body on the floor of a restroom at the service station where she worked. Ward was convicted and sentenced to death for Doss's murder, and the state trial court initially entered judgment against him in 1990. The judgment became final on direct review in 1999, following resentencing. Now, for the second time in three years, Ward seeks review of that judgment based on the Arkansas Supreme Court's recent denial of his fourth motion to recall a decades-old mandate in the case.

Long after the conclusion of state and federal collateral review in 2009, and facing his fourth scheduled execution in 27 years, Ward, in 2017, filed a state-court motion to recall the mandate in his 1999 resentencing appeal. Relying on this Court's decision in *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), Ward sought a stay of execution and recall of the state mandate in his resentencing appeal on the basis of a due-process claim that he conceded he had not even raised on direct review. The Arkansas Supreme Court denied Ward's motion, concluding that the decision in *McWilliams* did not present the kind of extraordinary circumstances that, under Arkansas law, warranted discretionary recall of a mandate. Nevertheless, Ward once again uses the Arkansas Supreme Court's recent denial of his serial motion as a basis for asking this Court to consider his due-process claim as if it were on direct review. He presents two questions:

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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JURISDICTION

Although Ward's petition purports to present a due-process claim under the Fourteenth Amendment to the United States Constitution, this Court does not have jurisdiction to consider the claim under 28 U.S.C. § 1257(a). The Arkansas Supreme Court's March 1, 2018, decision denying Ward's motion to recall the mandate is not a final judgment, and it neither modified the final judgment from 1999, nor reopened it for another round of review decades later. It further decided no federal question.

STATEMENT OF THE CASE

On August 11, 1989, Bruce Ward strangled 18-year-old Rebecca Doss in a restroom at the service station where she worked. Ward had lured Doss to the restroom on the pretense that the key she had given him to unlock the restroom door would not work. *Ward v. State*, CR98-657, Resentencing Record ("RR") at 471-72, 477-79. He was interrupted, however, by an officer who was on regular patrol at the station at about 2:40 a.m. The officer had noticed Doss was not visible inside the station and had not responded when he called out for her. So, he began to search outside the station and encountered Ward, disheveled, walking from the

restrooms toward a motorcycle parked next to the restrooms. RR at 441-45, 452-53. Ward was preparing to leave the station when the officer stopped him to ask about Doss. RR at 445. Another officer who had been called in for back-up assistance found Doss lifeless in the floor of the restroom, her jeans fully unbuttoned and a key to the restroom lying inches from her hand. RR at 461-62.

Ward subsequently was convicted and sentenced to death for Doss's murder, and the state trial court initially entered judgment against him in 1990. *Ward v. State*, 827 S.W.2d 110 (Ark.), *cert. denied*, 506 U.S. 841 (1992) (*Ward I*). That judgment became final on direct review in 1999, following resentencing in 1997. *Ward v. State*, 1 S.W.3d 1 (1999) (*Ward III*).

2017 Motion to Recall the State Mandate

After more than a decade of additional state and federal collateral review and other litigation, and facing his fourth scheduled execution in 27 years, Ward, in 2017, filed a state-court motion to stay his execution and recall the mandate in his 1999 resentencing appeal. *Ward v. State*, 539 S.W.3d 546, 547 (Ark. 2018). The Arkansas Supreme Court granted the stay of execution. *Id.* at 548. It did not, at that time, grant or deny the recall

motion, but it ordered that it be taken as a case – meaning that the motion was to be scheduled for briefing and oral argument. *Id.* At both briefing and argument on the motion, the question analyzed was whether extraordinary circumstances involving a defect in the appellate process, as defined by state law, existed so as to justify a recall of the mandate.

Ward contended that due process, as construed in *Ake v. Oklahoma*, 470 U.S. 68 (1986), had entitled him to funds to hire an expert to assist his counsel in resentencing. He argued that this Court’s decision in *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), demonstrated a flaw in the Arkansas Supreme Court’s longstanding interpretation of *Ake* and, hence, demonstrated an extraordinary circumstance for recalling the mandate and considering the *Ake* claim, which he conceded he had not asserted when the case was on direct review in the 1990s.¹

¹ Ward filed his motion to recall the mandate and to stay his execution jointly with another condemned inmate, Don William Davis, whose execution was set on the same day as Ward’s. Davis’s petition for writ of certiorari is pending before this Court and, at the time of this

On March 1, 2018, the Arkansas Supreme Court unanimously concluded that, contrary to Ward's claims, there had been no defect in its appellate review process. It denied Ward's motion to recall the mandate and lifted the stay of execution. *Ward*, 539 S.W.3d at 548, 556.² Ward asks this Court to review the Arkansas Supreme Court's denial of his motion to recall its decades-old mandate.

Ward's Mental-Health Evaluation by Neutral Examiners

At plea and arraignment proceedings in Ward's initial trial, Ward was deemed indigent and entered a plea of not guilty. *Ward v. State*, CR91-36, Trial Record ("TR") at 113-114. He subsequently changed his plea to writing, is scheduled for conference on September 24, 2018. *See* U.S. Sup. Ct. Case No. 17-9207.

² The Clerk of the Arkansas Supreme Court erroneously issued a second "mandate" upon the court's denial of the motion to recall the mandate, and Ward sought to stay that mandate in service of filing a certiorari petition. Following the State's response and its separate motion for a rule on the clerk, the Arkansas Supreme Court denied Ward's requests and withdrew the second mandate.

one of not guilty due to mental disease or defect. *Id.* at 5. Under Arkansas law, Ward's mere notice that he intended to rely on such a defense, without anything more, required the state trial court to suspend proceedings and order a mental-health evaluation to assess his mental condition, including his competence to stand trial and his criminal responsibility at the time of the offense. *See* Ark. Code Ann. § 5-2-305 (a) & (b) (Supp. 1991)(codifying the 1989 amendment of the statute). As a result, Ward was provided a mental-health evaluation at state expense. TR at 8-9.

The trial court issued its order committing Ward to the Arkansas State Hospital for the evaluation on November 28, 1989, *id.* at 8, and he was admitted the following day. *Id.* at 9. He remained there for sixteen days, during which he underwent observation, interviews, and testing, including an IQ test, a physical and neurological examination, and lab and other physical studies. TR at 9, 132-33. The hospital staff acquired historical records and data, including Ward's prior incarceration records from Pennsylvania. *Id.* at 9, 140. However, Ward would not permit his assigned social worker to contact his family for additional historical information. *Id.* at 144.

The Arkansas State Hospital's report of the evaluation was filed in the trial court on December 14, 1989. *Id.* The evaluators concluded that Ward was capable of understanding the criminal process and of assisting his defense counsel, and that at the time of the crime he had been capable of understanding the difference between right and wrong and could conform his conduct to the requirements of the law. TR at 9, 150-54. The evaluators concluded that Ward had no major psychiatric illness, and they diagnosed him with Antisocial Personality Disorder.

Hearing on Ward's Mental-Health Evaluation

Ward's counsel sought a hearing solely on the basis that he believed Ward's evaluation had been completed too quickly. TR at 119-120. Dr. Michael Simon, a clinical and forensic psychologist, was Ward's primary evaluator. He and the treating psychiatrist, Dr. Wendell Hall, were called by Ward's counsel to testify at the competency hearing.

In 1990, Dr. Simon testified that he met with Ward twice during his formal evaluation and met with him again, along with several other mental-health professionals, during the staffing near the end of Ward's evaluation. Dr. Simon testified that the Arkansas State Hospital had

records of Ward's prior incarceration in Pennsylvania. He further testified that he had given Ward, among other tests, a brief IQ test, on which Ward scored 119, "well above average," placing Ward intellectually in the top one percent of the people Dr. Simon had seen in the Arkansas State Hospital to that point. TR at 150. Dr. Hall likewise testified he believed Ward was the "most intelligent defendant . . . examined in the [preceding] two and a half years[]" at the State Hospital. TR at 162.

At the conclusion of the hearing, Ward's counsel requested an additional psychiatric evaluation of Ward. TR at 171. He cited no specific facts in support of his request, but simply asserted that he believed Ward was "an unusual person," and that "if more time [had been] taken and a more adequate and more appropriate evaluation . . . performed[,] . . . a different diagnosis would [have been] forthcoming." *Id.*

The trial court denied the request for an additional evaluation, concluding the evidence presented at the hearing was insufficient to raise doubt as to the validity of Ward's evaluation. The trial court noted that Ward's counsel had never even questioned the State Hospital doctors about whether they needed more time to conduct the evaluation, or about

whether, with more time, they might have reached a different opinion. Based on the evidence Ward presented at the competency hearing, the trial court found that Ward failed to overcome the presumption that he was competent. TR at 172-173.

Ward's Request for a Partisan Expert for Sentencing

The following day, January 19, 1990, Ward's counsel filed a motion requesting funds of up to \$10,000 to hire an expert psychologist and psychiatrist for sentencing. Neither the motion nor the supporting memorandum cited any facts to support the request. The motion simply asserted, generally, that the requested funds were necessary to protect Ward's various constitutional rights to effective counsel, due process, equal protection, and to be free from cruel and unusual punishment. Citing *Ake*, the motion cursorily sought an ex parte hearing on the request "because defense counsel [did] not want to unnecessarily disclose the defense mitigation case." TR at 38.

Like the motion, the supporting memorandum stated no specific facts to demonstrate the existence of an issue with Ward's mental condition. Rather, it simply noted the possibility that a capital sentence would be

imposed in the case and that, consequently, counsel needed “to explore every avenue in order to establish the existence of potentially mitigating factors.” *Id.* at 39. It then generally discussed the law related to a defendant’s constitutional rights to effective counsel, due process, and equal protection. *Id.* at 39-42. And finally, it concluded with counsel’s mere “represent[ation] to the [trial court] that he has probable cause to suspect that utilization of these particular [types of] experts will produce mitigating evidence.” *Id.* at 42.

Hearing on Ward’s Request for Funds for Penalty Phase

At a hearing on the motion for funds on February 8, 1990, Ward’s counsel noted that the prosecution had opposed his request for funds based on the adequacy of the State Hospital’s evaluation of Ward’s mental condition. Ward’s counsel contended that the adequacy of that evaluation was not the proper focus. She explained that Ward’s request for funds “[was] not for the guilt or innocence phase[]” of the trial, but “more for the mitigation evidence at the penalty phase[.]” TR at 201-02, 206-07 (stating “this is not a motion for money to assist in proving that the defendant was not culpable[, but] is . . . for money to assist in adequately preparing a

penalty phase[]”). She asserted that regardless of what the evaluation showed about Ward’s mental state at the time of the crime, the State Hospital evaluation had been inadequate for the specific purpose of developing mitigation evidence. She noted, for example, that the State Hospital evaluators had done “a Quick IQ test and we would prefer something more.” *Id.* at 206-07.

After further similar discussion, the trial court noted its previous ruling at the hearing on Ward’s competence to stand trial, where it concluded that Ward had not demonstrated a sufficient basis to question the validity of the State Hospital’s conclusions (which included findings that Ward did not suffer from any psychosis, was competent to stand trial, and had been legally responsible for his actions at the time of the crime). Based on that ruling, the trial court denied Ward’s separate motion for funds to hire an expert for sentencing, stating that Ward’s appointed public defender had sufficient funds in its office’s \$650,000 budget to hire such an expert in its discretion if it so desired. *Id.*

The Trial

At trial in 1990, Ward presented no evidence in his defense at the guilt phase. He simply argued to the jury that the prosecution's evidence had been circumstantial and failed to demonstrate Ward's guilt beyond a reasonable doubt.

In the penalty phase of the initial trial, the prosecution presented a single witness in its case in chief. The witness established Ward's previous conviction of a violent felony in Pennsylvania: the homicide of Janet Needham. Ward presented two witnesses: (1) a jail officer who testified that Ward had acclimated to his confinement since his arrest for Doss's murder and had caused no problems at the jail, and (2) a tavern operator who testified that on the night of the crime Ward had consumed seven or eight beers at the tavern before leaving at around midnight.

Ward also submitted letters from school employees, including one from a guidance counselor who stated Ward had been a discipline problem in school due to behavioral issues and that, despite having tested at the average level several times by school psychologists, Ward's behavior problems caused failure, frustration, and punishment. The counselor

suggested that, at the time the letter was written in 1990, Ward's earlier behavior would have warranted placement in a "Socially Emotionally Disturbed" classroom.

Another teacher also stated that Ward had disciplinary problems in school. She said Ward was not the kind of person that a teacher could feel at ease around, that he was unpredictable and that, "[a]s a teacher, [she] would not turn [her] back on him." She felt he was in "grave need of psychological help when he was a teenager" and that, even then, it may have been "too late."

In rebuttal, the prosecution called Dr. Simon, the clinical and forensic psychologist who had evaluated Ward at the State Hospital prior to trial. Dr. Simon was shown the letters Ward had introduced and was then asked about the diagnosis of Antisocial Personality Disorder he had given Ward. He testified that Ward's behavioral problems, as recounted in the letters from his teachers, were consistent with the diagnosis and that the disorder is not easily treatable, but does not excuse one from facing trial for criminal conduct.

The jury found the aggravating circumstance that Ward had previously committed a felony involving violence, and it found no mitigating circumstances existed. It further found that a death sentence was justified beyond a reasonable doubt.

Appeal and First Resentencing

Following Ward's initial conviction and sentence to death, he appealed and raised no issues concerning his competence to stand trial or the denial of his request for funds to hire a psychologist and/or psychiatrist to develop mitigating evidence. See *Ward I*, 827 S.W.2d 110. The Arkansas Supreme Court affirmed Ward's conviction for capital murder. However, it vacated his sentence and remanded for a new sentencing proceeding due to error in the admission of evidence of Ward's prior conviction for manslaughter.³ *Id.*

On remand, a second jury sentenced Ward to death, but the Arkansas Supreme Court vacated that sentence on appeal because the record was

³ Ward petitioned this Court for certiorari review of his conviction, claiming Arkansas's capital-murder statute violated *Furman v. Georgia*, 408 U.S. 238 (1972). This Court denied the petition. 506 U.S. 841 (1992).

incomplete. *Ward v. State*, 906 S.W.2d 685, 686-687 (Ark. 1995) (*Ward II*).

The record could not be reconstructed because the court reporter had destroyed her tapes of the proceedings, and appellate review, therefore, was not possible. *Id.*

Request for Funds for Partisan Expert on Second Resentencing

On remand for his second and final resentencing proceeding, Ward filed a motion identical to the one he had filed before his first trial, in which he sought funds of up to \$10,000 to hire a “psychologist and/or psychiatrist” to assist counsel in exploring the availability of mitigating evidence for sentencing. RR at 89-94. As with the first motion, the refiled motion presented no facts about Ward’s mental condition, but relied solely on the capital nature of the case and the consequent need to “explore . . . the existence of potentially mitigating factors.” RR at 89-94. When given the opportunity to present argument on the motion at the pretrial hearing on resentencing, Ward’s counsel declined to do so.

At that hearing on February 24, 1997, the trial court observed that Ward’s counsel had refiled 32 of the same motions that had been filed before his first trial, including the request for funds. The trial court said its

rulings on the motions would be the same, unless there was a need for a change in any ruling. Ward's counsel indicated that only two motions deserved discussion, and she made no mention whatsoever of the motion for funds for a sentencing expert. RR at 156-67. The trial court, thus, issued an order denying the motions that Ward had refiled. RR at 126.

Request for Evaluation on Competence to Waive Resentencing

Several months later, on October 3, 1997, Ward's counsel filed a motion to stay the resentencing proceedings, alleging that Ward's mental condition had deteriorated so that he either "[could] not or [would] not cooperate with [his] counsel," and that he was either "unable or unwilling to go to trial with present counsel." RR at 127-28. Counsel requested an evaluation *specifically at the Arkansas State Hospital* to determine whether Ward was "able to cooperate and assist his counsel in the sentencing phase of [the] case at [that] time." RR at 127-28, 188.

The trial court held a hearing on the motion on October 6, 1997, at which Ward cogently explained that the difficulties between him and his counsel and his desire to forego another resentencing proceeding were not due to issues with his competence. RR at 171-203. He explained, at length,

that he had been dissatisfied that he could not, on remand for sentencing, pursue challenges to his conviction, and he wanted some assurance that he would be able to pursue those issues in federal court at least. He further explained, beyond resentencing, there were several issues he wanted to present, such as the fact that fingerprint evidence could not be obtained from Doss's body, due to the fact that her body had been refrigerated after her death. RR at 175. He said he had written all he could remember about the case and wanted his recollection put in the record because he understood the record had been lost. RR at 176. The court explained that the record had not been lost and that Ward's recollections would not be admissible evidence for the record. RR at 176-77.

When addressing the reason for her motion, Ward's counsel stated that she had tried to explain to Ward that the remand of his case (due to a defective record) had been for resentencing only, so she could not raise the challenges to the conviction that he wanted her to raise and that he felt her office was forfeiting. She further indicated that, as a result, Ward had made clear he did not want her office on the case and refused to allow her to present evidence in mitigation of his punishment, so she was requesting

an evaluation of his mental capacity to ensure he was competent and understood exactly what he was requesting that the court prevent her from doing. RR at 178, 194-95. She did not take the position that he, in fact, *was* incompetent, but, rather, indicated she wanted an evaluation to ensure he understood what he was giving up by demanding that she not represent him or not present evidence in mitigation.

Ward then explained he simply was not interested in going through another sentencing proceeding if the best he could hope for was a sentence to life in prison. He sought the court's assurance that he would be able to pursue all of his trial issues even if his lawyer had left them out of the motions hearing at the resentencing proceedings, and he said he had simply wanted his counsel to sit down and explain these processes to him. RR at 180-82. He said he would not cooperate until he understood. RR at 182.

The trial court explained that the choice to cooperate was Ward's, that the court would not relieve Ward's counsel, and that because counsel had asked that Ward be evaluated, the court would grant that request. RR at 182-83. Ward said he had already been evaluated and that it was a waste

of time to do it again. RR at 183. He said he had just wanted assurance that his issues were preserved for a later time and that, “I already know I’m sane,” and “[t]here’s nothing wrong with me.” RR at 184.

The court pointed out, however, that in addition to the matters of foregoing resentencing and preserving challenges, his counsel’s request for an evaluation had also been premised on certain demands Ward had made, such as for a presidential pardon, a vehicle to replace his motorcycle, and a driver’s license. RR at 185-86. The court said Ward would have to explain why he had said these things. RR at 185-86.

Ward explained that he had shared these things with his counsel in confidence, and they concerned a lawsuit he intended to file. He said that, due to the errors that he believed had been made at his trial, he was planning to file a lawsuit against the State and believed he was entitled to monetary compensation and a pardon from his conviction, among other things. He said that, by the lawsuit, he would seek “to go back out [of prison] with what I had when I came in here” – apparently referring to his request for a pardon and expungement of his record, a vehicle in place of the motorcycle he had left at the crime scene when arrested, and his

driver's license. RR at 185-86. He said he believed that if he threatened such a lawsuit, the State might be interested in finding a way to avoid suit – apparently meaning the State might settle the case and meet his demands. RR at 187-88.

Before the close of the hearing, Ward had acquiesced that he might proceed to “pick a jury” rather than forego his resentencing options, but he would not cooperate with an evaluation. The court denied Ward's counsel's request for a stay, ultimately ruling that the resentencing case would be tried as scheduled if the Arkansas State Hospital found Ward was capable of going to trial. The following day, October 7, 1997, the court issued an order directing that Ward be evaluated, and on October 17, 1997, the Arkansas State Hospital filed a letter reporting on the evaluation in the trial court. The letter stated that a team consisting of Drs. Hall and Simon and a social worker had attempted to evaluate Ward, but that he began the interview by stating he could not participate in the evaluation. He politely told the evaluators that his attorneys sought the evaluation and that he had tried to withdraw the motion for it, but that the court had ordered he

undergo the evaluation. He explained that he was competent, that he had a right to remain silent, and that he would not submit to the evaluation.

The evaluation thus was terminated, and the Arkansas State Hospital's letter concluded that there "was no evidence to indicate [Ward's] unwillingness was due to mental disease or defect" and that Ward had "interacted in a logical, coherent manner, and exhibited no signs of psychosis." RR at 133. Ward's counsel did not seek a hearing contesting the conclusions of the Arkansas State Hospital, and, in fact, Ward proceeded with his counsel at the resentencing proceedings.

Ward was sentenced to death for a third time. At the resentencing proceeding, the prosecution presented no evidence about Ward's mental condition. Ward, on the other hand, presented videotaped testimony from three teachers who recounted his behavioral and disciplinary problems involving peers, and his ability to thrive in structured settings. He also presented deposition testimony from a psychologist, Dr. Anthony Cilluffo, concerning an extensive evaluation of Ward that Dr. Cilluffo had performed in 1977, when Ward was 20 years old and charged initially with murder for Janet Needham's death. Like the Arkansas State Hospital

evaluators, Dr. Cilluffo had found Ward competent to stand trial and criminally responsible for his conduct when he killed Needham. Dr. Cilluffo also diagnosed Ward with Antisocial Personality Disorder and noted Ward's disciplinary and behavioral problems in earlier years.

Based on Dr. Cilluffo's testimony, Ward's counsel argued to the jury, "[W]e are not standing up here telling you that [Dr. Cilluffo] said that Bruce Ward was crazy or psychotic or that he did not know what he was doing." RR at 542. Counsel argued that, rather, Dr. Cilluffo had testified that Antisocial Personality Disorder caused Ward to act as he acts, that his disorder was not a choice he had made, and that it was diagnosed based on conduct that began at a young age. Counsel drew a connection between Dr. Cilluffo's testimony about Antisocial Personality Disorder and the testimony from Ward's teachers about Ward's behavior in his earlier years, arguing perhaps Ward's life would have been different if he had received help for his personality disorder. RR at 544-45.

The jury found the aggravating circumstance that Ward had committed a prior felony involving violence. It found no mitigating circumstances, although the verdict forms indicated that one or more jurors

believed Ward probably had exhibited signs of a mental or emotional disturbance for years and that it had gone untreated. The jury did not unanimously agree that this was a mitigating circumstance, however.

Ward appealed his final sentence of death, but he raised no issues concerning the denial of his request for funds to hire an expert to assist him in the penalty phase. *Ward III*, 1 S.W.3d 1. The Arkansas Supreme Court affirmed. *Id.*

Post-conviction and Other Collateral Review Proceedings

Ward subsequently sought state post-conviction relief. The Arkansas Supreme Court affirmed the denial of relief, rejecting Ward's claims of ineffective assistance of counsel. *Ward v. State*, 84 S.W.3d 863 (2002) (*Ward IV*).

Ward also filed a federal petition for a writ of habeas corpus in 2003. *Ward v. Norris*, No. 5:01-CV-201, Doc. 1 (E.D. Ark. May 27, 2003). The petition raised no claims of *Ake* error. While the petition was pending in the district court, Ward's attorney moved for, and obtained, funds to investigate Ward's mental health. Ward refused to cooperate with the expert that his attorney hired to evaluate his mental health, and he

presented no claim or evidence to the federal court on the issue. *Ward v. Norris*, 577 F.3d 925, 930-931 (8th Cir. 2009) (*Ward V*), cert. denied sub nom. *Ward v. Hobbs*, 559 U.S. 1051 (2010). The petition was denied in 2005. *Ward v. Norris*, No. 5:01-CV-201, Docs. 20, 21 (E.D. Ark. Nov. 7, 2005).

While the case was pending on appeal to the Eighth Circuit, Ward sought post-judgment relief in the district court, claiming that he had been incompetent during the federal habeas proceedings. Relief was denied, and the Eighth Circuit affirmed the denial of habeas relief and ultimately concluded that the district court had been without jurisdiction to consider Ward's requests for post-judgment relief because they were effectively second or successive petitions that sought to raise a claim of ineffective assistance of federal habeas counsel. *Ward V*, 577 F.3d at 930-931, 938.

Ward's execution was delayed while he joined multiple state and federal lawsuits challenging lethal injection and engaged in other litigation. The Arkansas Federal Public Defender entered his case in 2010 to file, in the Arkansas Supreme Court, a petition to reinvest jurisdiction in the state trial court to consider a petition for a writ of error coram nobis. He asserted that he was entitled to the writ because he had been incompetent

at the time of his trial. The Arkansas Supreme Court summarily denied relief. *Ward*, 539 S.W.3d at 547-58 (recounting history of case).

In 2013, Ward, still represented by the Arkansas Federal Public Defender, asked the Arkansas Supreme Court to recall its mandates in his direct appeal (*Ward I*), his appeal of his final resentencing (*Ward III*), and his post-conviction appeal (*Ward IV*). Those motions made the same or similar arguments about Ward's mental competence as had been presented in his coram nobis petition. In 2015, the Arkansas Supreme Court denied the motions to recall the mandates in each appeal, and this Court denied Ward's related petitions for certiorari. *Ward v. State*, 455 S.W.3d 303 (*Ward VI*); *Ward v. State*, 455 S.W.3d 818, cert. denied, 136 S.Ct. 365 (2015) (*Ward VII*); *Ward v. State*, 455 S.W.3d 830, cert. denied, 136 S.Ct. 485 (2015) (*Ward VIII*).

As noted, *supra* at i, 2, an execution date, Ward's fourth, was scheduled for April 17, 2017, and he again moved for a stay of execution and for recall of the mandate in his resentencing appeal. For the second time in three years, he asks this Court to review the Arkansas Supreme Court's refusal, on state-law grounds, to recall that mandate.

REASONS FOR DENYING THE WRIT

I. Jurisdiction is lacking because the petition presents no final judgment for review, and the challenged decision resolved no federal question.

This Court lacks jurisdiction to consider, for a second time, Ward's claim that his judgment is infected by *Ake* error. Jurisdiction is lacking because the Arkansas Supreme Court's 2018 decision denying Ward's motion to recall the mandate is not a final judgment subject to this Court's review, and it did not modify or reopen Ward's 1999 final criminal judgment for another round of review. Indeed, in denying Ward's motion to recall the mandate, the Arkansas Supreme Court did not decide a federal question.

"This Court is precluded from taking cases unless the petition is from a 'final judgment' within the meaning of 28 U.S.C. § 1257." *Bateman v. Arizona*, 429 U.S. 1402, 1406 (1976) (Rehnquist, J., in chambers). Ward has failed to affirmatively establish this Court's jurisdiction under that provision, as is his burden. *See, e.g., Republic Nat. Gas Co. v. Oklahoma*, 332 U.S. 62, 70-71 (1948) (appellant has burden of affirmatively establishing Court's jurisdiction). He contends simply that the Arkansas Supreme

Court's 2018 denial of his motion to recall the mandate in his long final direct appeal "is a final decree rendered by the highest court in the State of Arkansas[]" and that "[a]ccordingly certiorari jurisdiction is proper under 28 U.S.C. § 1257." Pet. at 1. The denial of Ward's motion to recall the mandate, however, is not a final judgment or decree in this criminal case.

The final judgment in a criminal proceeding is the sentence, which stands as a final determination of the merits of the criminal charges and leaves nothing to be done but to enforce what has been determined. *E.g.*, *Berman v. United States*, 302 U.S. 211, 212-13 (1937). In this case, the sentence, and hence the final judgment, was issued by the state trial court when Ward was resentenced in 1997, and it became final for purposes of jurisdiction under 28 U.S.C. § 1257 when it was affirmed on direct review by the Arkansas Supreme Court in 1999. *See* 28 U.S.C. § 1257(a) (providing that final judgments issued by the highest court of a State in which a decision could be had may be reviewed on certiorari). The Arkansas Supreme Court's 2018 decision denying Ward's motion to recall the mandate, therefore, is not itself a final judgment subject to review under 28 U.S.C. § 1257.

Further, having denied Ward's state-law motion for discretionary recall of the mandate, the Arkansas Supreme Court's decision did not modify Ward's final criminal judgment or reopen it for another round of direct review in the state court or in this Court on certiorari review. *Cf. Jimenez v. Quarterman*, 555 U.S. 113, 120 & n. 4 (2009) (order granting motion for out-of-time appeal renders State's final criminal judgment capable of modification through direct appeal in state court and on certiorari review, but mere possibility that state court may grant motion does not do so). Indeed, in denying the motion, the Arkansas Supreme Court did not decide the federal questions that Ward would present now (for the second time) because he failed under state law to demonstrate the existence of extraordinary circumstances warranting recall.

Because the mandate had issued after direct review in 1999, jurisdiction did not lie for the Arkansas Supreme Court to consider Ward's newly presented claims of *Ake* error when he filed his motion to recall the mandate in 2017. The time for ordinary rehearing had long expired, *see* Ark. Sup. Ct. R. 2-3(a), (g) (established time is within eighteen days of issuance of the decision), and issuance of the mandate following the denial

of rehearing had divested the Arkansas Supreme Court of jurisdiction over the appeal. *See, e.g., Barclay v. Farm Credit Serv.*, 8 S.W.3d 517, 519 (Ark. 2000) (state appellate court loses jurisdiction when mandate issues). As noted above at n.2, *supra* at 4, the Arkansas Supreme Court was clear on this point by making sure the wrongly issued second mandate was withdrawn.

While the Arkansas Supreme Court retained inherent authority under state law to reassert jurisdiction over the appeal by recalling its mandate, recall is only appropriate where the movant first demonstrates that extraordinary circumstances warrant it. *E.g., Robbins v. State*, 114 S.W.3d 217, 221-22 (Ark. 2003). In determining whether such circumstances exist, the Arkansas Supreme Court considers three factors, including whether there was a defect in its process of reviewing an appeal in a capital case. *Nooner v. State*, 438 S.W.3d 233, 239-40 (Ark. 2014). In the direct-appeal context, the Arkansas Supreme Court has thus far limited this defective-process criterion to capital cases in which the court altogether failed to correct an obvious error because it had overlooked the error while conducting an independent review required of the court under its own

rules or jurisprudence. *E.g., id.* at 241-42 (denying recall because the court had not overlooked error, but had applied the law as it existed at time of direct review, and overruling *Williams v. State*, 2011 Ark. 534, where ground on which recall had been premised was not error that the court had overlooked in its required, independent review).

Applying this standard in Ward’s case, the Arkansas Supreme Court concluded—just as it had in 2015—that under state law Ward failed to demonstrate the existence of a defect in the appellate process. That is, the court concluded that, while conducting its independent review of the record of Ward’s resentencing in 1999, it had not overlooked the *Ake* error claimed by Ward in 2017. In rendering this decision, the court did not decide the federal question Ward presents here.

As Ward concedes, in denying his motion to recall the mandate, the Arkansas Supreme Court did not “conduct an analysis as this Court [had] in *McWilliams*” concerning whether “the three *Ake* assistance factors were . . . satisfied in Ward’s case.” *See* Pet. at 18-19. That issue, after all, was not properly before the court on a motion to recall the mandate. The court concluded it would not review that issue because Ward failed to

demonstrate extraordinary circumstances to justify recalling the mandate to consider it.

As the Arkansas Supreme Court noted, Ward filed an *Ake* motion in his 1997 resentencing proceeding, but the record demonstrated that he did not make an adequate argument or present any evidence to demonstrate that the Arkansas State Hospital evaluation he received had been inadequate. *Ward*, 539 S.W.3d at 553-54. And, as the court further noted, the record of the 1997 resentencing that it had reviewed on direct appeal in 1999 had not demonstrated that Ward's mental condition was seriously in issue, so the court could not have overlooked obvious *Ake* error. *Id.* Consequently, as the court had already found in the 2015 recall proceedings, there had been nothing in the record reviewed by the court in 1999 that demonstrated there had been an extraordinary breakdown or defect in its appellate process in 1999. For that reason, recall of the mandate to decide Ward's claim of *Ake* error on the heels of *McWilliams* was unwarranted under state law.

Because the decision Ward challenges is not a final judgment, and because it neither modified the final judgment nor decided the federal

questions Ward hopes to present for review here, the petition should be denied for lack of jurisdiction.

II. The petition does not demonstrate a meritorious constitutional claim, nor does it present an adequate vehicle for addressing the question presented.

The petition should be denied for the additional reason that it fails to demonstrate a meritorious constitutional claim. Ward contends that, in violation of *Ake*, he was deprived of the services of a mental-health expert to evaluate, prepare, and present evidence of mitigating circumstances at his final resentencing proceeding. However, Ward's argument reflects a fundamental misunderstanding of *Ake* and of the record in his own case. He never made a particularized showing that his mental condition was seriously in issue. Absent such a showing, due process did not require the State to provide Ward the assistance of a psychiatric expert. Even so, Ward received the benefit of a psychiatric expert's testimony when presenting his defense at his final resentencing proceeding.

Contrary to Ward's argument here, Pet. at 22, *Ake* did not hold that a defendant's mental condition is seriously in issue so as to require expert assistance merely because his counsel enters a plea of not guilty by reason

of mental disease or defect on his behalf. Nor did *Ake* hold, as Ward also argues, Pet. at 22-23, that a state must provide the assistance of a psychiatric expert merely because a defendant contends his mental condition may be relevant to possible mitigating circumstances in capital sentencing proceedings. Rather, *Ake* held that due process requires a state to provide the assistance of a psychiatric expert to an indigent defendant who “makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial[.]” *Ake*, 470 U.S. at 74.

Where, as here, a defendant offers “little more than undeveloped assertions that the requested assistance would be beneficial, [there is] no deprivation of due process” in the denial of an expert’s assistance.” *Caldwell v.*

Mississippi, 472 U.S. 320, 323 n.1 (1985). Ward never made a sufficient showing under this standard to demonstrate any entitlement to the services of a psychiatric expert as a constitutional matter.

Unlike Ward, *Ake* relied solely on an insanity defense that had a substantial factual basis in the record. Further, he bore the burden of proof on that defense, yet he was deprived of an evaluation and testimony on the issue. The state experts who had evaluated *Ake* and presented evidence on

his behalf had been restricted to evaluating his competence to stand trial and, thus, could not testify about his mental state at the time of the crime. Ake's request for an evaluation of the latter was denied. The prosecution, moreover, "relied significantly" on testimony from the state examiners to affirmatively prove its case in aggravation of punishment, and Ake was provided no expert to counter this testimony or introduce evidence in mitigation.

As noted, *supra* at 4-5, Ward's mental condition was evaluated by neutral experts at the Arkansas State Hospital. It was evaluated not because Ward satisfied any constitutional threshold demonstrating that his sanity was seriously in issue, but because (1) he simply had given notice of his intent to raise a defense of mental disease or defect and (2) upon such notice, state law required that he be evaluated to determine his mental condition. *See* Ark. Code Ann. § 5-2-305 (a) & (b) (Supp. 1991). This state-law mechanism served as a means of allowing an indigent defendant like Ward, who had not otherwise shown his sanity to be seriously in issue, an opportunity to demonstrate that it was. In Ward's case, however, the initial evaluation concluded that he had no psychiatric illness and that his

mental health was such that he had been responsible for his conduct at the time of the crime.⁴

Ward's subsequent motion for funds to hire an expert psychologist and/or psychiatrist for sentencing likewise failed to make a sufficient showing so as to require the services of a psychiatric expert as a constitutional matter. As noted, *supra* at 14-15, in Ward's final resentencing proceeding his counsel refiled the same motion as had been filed in Ward's original trial requesting funds of up to \$10,000 to hire an expert "psychologist and/or psychiatrist" for sentencing. RR at 89-94. However, neither the motion nor the supporting memorandum cited any facts about Ward's mental condition to demonstrate that it was seriously in issue.

Instead, the motion simply asserted, generally, that the requested

⁴ On the separate issue of whether he was competent to stand trial, the evaluation also concluded with findings that Ward was capable of understanding the proceedings against him and of assisting his counsel so that he was competent. Consequently, the trial court found Ward had not overcome the presumption that he was competent to stand trial. *See, e.g., Pate v. Robinson*, 383 U.S. 375 (1966).

funds were necessary to protect Ward's various constitutional rights to effective counsel, due process, equal protection, and to be free from cruel and unusual punishment. RR at 89. The supporting memorandum was equally vague, stating no specific facts to demonstrate the existence of an issue with Ward's mental condition. It simply noted the possibility that a capital sentence would be imposed and that counsel consequently needed "to explore every avenue in order to establish the existence of potentially mitigating factors." *Id.* at 90. It then generally discussed a defendant's rights to effective counsel, due process, and equal protection, *id.* at 90-94, and concluded with counsel's "represent[ation] to the [trial court] that he has probable cause to suspect that utilization of these particular [types of] experts will produce mitigating evidence." *Id.* at 94. There were no substantive facts shown to require the services of an expert psychiatrist or psychologist for Ward's sentencing proceeding.

At the hearing held on Ward's motion in his initial trial, moreover, his counsel made clear that the request for funds to hire a psychiatric expert was not intended to show Ward's criminal culpability was in issue, but rather was made for the purpose of developing mitigation evidence for

the sentencing phase. TR 201-02, 206-07 (stating the request for funds “[was] not for the guilt or innocence phase[]” or “to assist in proving that the defendant was not culpable[, but] is . . . for money to assist in adequately preparing a penalty phase[]”).

When Ward refiled the same motion in his final resentencing proceeding, the trial court, referring to the numerous motions Ward had refiled, specifically asked whether there was any reason to reconsider its previous rulings on any of the motions. Ward’s counsel did not seek a different ruling on the motion for funds and, in fact, made no mention of it. RR at 156-57. Like Ward’s evaluations, the motion and memorandum for funds, as well as the hearing on that motion, simply demonstrated nothing about Ward’s mental condition that would have suggested it was “seriously in issue,” and he effectively abandoned it.

While Ward points to his subsequent motion to stay the resentencing proceedings as evidence that his mental condition had been shown to be seriously in issue just before resentencing, Pet. at 19-20, Ward once again misunderstands *Ake* and misstates the record. As noted, when given the chance to do so in his final resentencing proceedings, Ward did not pursue

his *Ake* motion after refileing it. RR at 156-57. And, his later motion to stay the resentencing proceedings based on his dispute with counsel about whether he wished, and was competent, to waive the proceedings entailed neither an *Ake* request nor a demonstration that Ward's mental condition was seriously in issue in the resentencing proceedings for purposes of *Ake*. RR at 171-202. In fact, Ward's motion did not seek funds to hire an expert for sentencing, but expressly sought an evaluation *at the Arkansas State Hospital* specifically to ensure only that he was competent to waive his counsel's assistance and the resentencing proceeding. At the hearing on the motion, Ward cogently explained the basis for his disagreement with counsel and for the demands he had made, and he ultimately decided to proceed with the resentencing proceedings after the trial court addressed his concerns about the limits of the resentencing proceedings and the preservation of issues involving the conviction. *Id.*

Thus, Ward failed to make a showing sufficient to trigger *Ake's* requirement of expert services. Indeed, Ward did not rely on a defense of insanity at trial, and in the final resentencing proceeding at issue here, the prosecution presented no psychiatric or other evidence about Ward's

mental condition. In fact, the State did not dispute the independent psychiatric testimony that Ward's public defender, presumably with his state-funded budget, was able to acquire and present to demonstrate that Ward had a personality disorder, the signs of which had begun in childhood. Indeed, that testimony was consistent with the findings of the neutral evaluations of Ward's mental condition by the Arkansas State Hospital experts. There was no conflict, as Ward claims here.

The record thus demonstrates that Ward plainly was not thwarted by the trial court or the prosecution in presenting his theory in defense of capital punishment on resentencing. His real complaint here is that he was limited by the actual facts of his mental condition, which simply did not meet the threshold criteria of *Ake*. *Ake* did not require the State of Arkansas to provide Ward funds to hire a psychiatric expert who, regardless of what the facts showed, "[would] produce mitigating evidence[,]” as Ward contended. RR at 94. Nor did *Ake* require the State to provide Ward an ex parte hearing to demonstrate the threshold criteria of *Ake*, as he contends. Pet. at 24.

While *Ake* mentions in passing that an “ex parte threshold showing” would make the need for expert services apparent, 470 U.S. at 82-83, the Court’s actual holding in the case was expressed in terms that neither mandated ex parte proceedings nor precluded the use of open proceedings. *See Ake*, 470 U.S. at 74, 83. While an ex parte hearing is a service that, in some instances, “might be of benefit to an indigent defendant[,]” that “does not mean [it] is constitutionally required.” *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

In any event, Ward can hardly claim that he seriously pressed the trial court for an ex parte hearing to satisfy *Ake*’s threshold, as his one-line request for an ex parte hearing was supported by no facts to justify it and was presented in a motion that Ward effectively abandoned on resentencing. The motion indicated, moreover, that Ward did not yet have sufficient substantive facts to support any request for expert assistance – ex parte or otherwise – but instead was seeking funds to hire an expert to search for such facts in the first instance. TR at 39-42; RR at 89-94.

Ake simply required the State to assure Ward “an adequate opportunity to present [his] claims fairly within the adversary system” by

supplying the “basic tools of an adequate defense or appeal.” *Ake*, 470 U.S. at 77 (quoting *Britt v. N. Carolina*, 404 U.S. 226, 227 (1971)). Psychiatric assistance is considered a “basic tool[] of an adequate defense” under *Ake* when the requisite threshold showing is made. The State fulfilled its constitutional obligations when it afforded Ward an evaluation by neutral experts and an opportunity to make the requisite showing. Because neither Ward’s evaluation nor any other evidence in the record demonstrated Ward’s mental condition was seriously in issue, due process required the State to provide nothing more.

The petition does not present a meritorious constitutional claim. It should be denied.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Arkansas should be denied.

Respectfully submitted,

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BY:



ATTORNEYS FOR RESPONDENT