THIS IS A CAPITAL CASE

No. 17-9159

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

PETITIONER'S REPLY BRIEF

JENNIFER MERRIGAN*
JOSEPH PERKOVICH
Phillips Black Project
1901 S. 9th Street, 510
Philadelphia, PA 19148
(Tel.) (888) 532-0897
j.perkovich@phillipsblack.org
j.merrigan@phillipsblack.org

JENNIFFER HORAN
Federal Defender
SCOTT W. BRADEN
APRIL GOLDEN
april_golden@fd.org
Federal Public Defender Office
1401 West Capitol Avenue
Suite 490
Little Rock, Arkansas 72201
(501) 324-6114

*Counsel of Record

TABLE OF CONTENTS

Table of Authorities ii

A. This Court has jurisdiction 1

B. Mr. Ward's *Ake* Claim is meritorious and presents an appropriate Vehicle 4

TABLE OF AUTHORITIES

Page(s)

Cases

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

Heike v. United States,
217 U.S. 423 (1910) 5

Market Street R. Co. v. Railroad Comm'n of Cal.,
324 U.S. 548 (1945) 6

McWilliams v. Dunn,
___ U.S. ____, 137 S. Ct. 1790 (2017) 5, 6, 8, 13

Ward v. State,
2017 Ark. 136 (2017) 5, 8

Statutes

28 U.S.C. § 1257 .... 4, 5

Other Authorities

Black's Law Dictionary 970 (10th ed. 2014) 5

Conduct of Attorney in Connection with Making Objections Or Taking Exceptions as Contempt of Court, 68 A.L.R. 3d 314 10

Federal Rules of Civil Procedure, Rule 60(b) 8

For the first time since his arrest in 1989, the State of Arkansas, in its Brief in Opposition, asserts that Mr. Ward's defense retained an expert at trial. Though Mr. Ward has repeatedly litigated his right to assistance of an expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the State has never before made such an allegation. Nor could it. The record is clear: the only expert to which Mr. Ward had access at the time of his trials was the doctor from the state hospital who testified for the state and *against* Mr. Ward in his initial trial. Though trial counsel repeatedly requested an independent expert who could assist counsel in understanding and developing evidence of their client's deterioration and long history of mental illness, the trial court denied each and every request. This Court should grant certiorari and correct the constitutional error in this case.

A. This Court has jurisdiction.

Under 28 U.S.C. § 1257, the Court may review "final judgments or decrees rendered by the highest court of a State in which a decision could be had, . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." Respondent falsely suggests that the Arkansas Supreme Court's decision denying Mr. Ward's motion to recall the mandate was not a final judgment or decree subject to review under 28 U.S.C. § 1257 and did not involve a federal question.

The fallacy of Respondent's claim—that the Arkansas court did not enter a final judgment or decree in the matter—is revealed by the court's own actions. While *McWilliams v. Dunn*, ___ U.S. ____, 137 S. Ct. 1790 (2017), was pending, Mr. Ward

filed a motion to recall the mandate with the Arkansas Supreme Court asserting he was denied due process under *Ake*. The state court stayed Mr. Ward's execution to take his motion to recall "as a case." *Ward v. State*, 2017 Ark. 136 (2017).[1] The parties fully briefed and orally argued the *Ake* issue, and the case was submitted to the court for decision. On March 1, 2018, a divided Arkansas Supreme Court issued a three-justice majority opinion in the matter, accompanied by a two-justice concurring opinion, and a two-justice dissenting opinion denying Mr. Ward relief and lifting one of his stays of execution. The opinions were published in the court's official reporter (online) as well as the regional reporter.

The Arkansas Supreme Court's March 1 decision is a "judgment or decree" as those terms are commonly understood. See *Heike v. United States*, 217 U.S. 423 (1910) (defining a final judgment or decree as one that terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined) (quoting *St. Louis, IM & S. R. Co. v. Southern Exp. Co.*, 108 U.S. 24 (1883)); see also Black's Law Dictionary 970 (10th ed. 2014) (defining "judgment" as "[a] court's final determination of the rights and obligations of the parties in a case").

Likewise, the finality language in § 1257 requires that a state-court judgment be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the

[1] The court had previously entered a separate stay for Mr. Ward based on a challenge to Arkansas's procedure for determining competence to be executed pursuant to *Ford v. Wainwright*.

litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). The lower court's decision was final within this meaning—there would be no further review by a state tribunal and the decision was not interlocutory or intermediate.

Additionally, the Arkansas Supreme Court's denial of Mr. Ward's *Ake* claim rests squarely on a federal question: whether Mr. Ward had the right to assistance of an expert at trial to conduct "'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. As the dissent observed, the majority failed to apply those factors to Mr. Ward's case. The dissent, on the other hand, did apply the factors and found that "[a]s in McWilliams, the three *Ake* assistance factors were not satisfied in Ward's case." App. 27a. Based on the application of *Ake*, 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.

Put simply, the lower court's finding that Mr. Ward failed to meet the standard for recalling the mandate was based on its erroneous interpretation of federal law and resultant conclusion 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." BIO 30. This Court's jurisdiction is clear.

B. Mr. Ward's *Ake* claim is meritorious and presents an appropriate vehicle.

The State's opposition rests on two faulty premises. First, the State asserts, for the first time, that Mr. Ward's trial counsel retained a mental health expert. *See* BIO 31, 38 (citing to "the independent psychiatric testimony that Ward's public defender, presumably with his state-funded budget, was able to acquire and present.") This assertion is flatly incorrect. Mr. Ward's counsel did not have funds for a psychiatric expert, and the court denied their repeated requests for such funds. The State appears to be referring to Dr. Cillufo, a psychiatrist who had examined Mr. Ward in 1977, 20 years before the sentencing in question, and testified as a fact witness at his penalty phase. Critically, Dr. Cillufo was not available to evaluate Mr. Ward or assist his defense counsel because Mr. Ward had no funds to retain an expert. Even so Dr. Cillufo was providing the jury only historical information about Mr. Ward and not expert testimony as the State implies. His testimony was taken via telephonic deposition at the time of Mr. Ward's second trial in 1992. It was then read into the record in Mr. Ward's final resentencing in 1997. The witness did not meet Mr. Ward, or his counsel, at any point at the time of his arrest in 1989 or subsequent trials. Far from being an expert who was paid from trial counsel's "state funded budget" the witness was not even brought into the state of Arkansas to testify in person. To the extent that Respondent argues that a 1992 telephonic deposition about a 15-year-old

evaluation satisfies *Ake's* mandate, this argument must fail.[2] Dr. Cillufo clearly did not "conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense.'"[3] *McWilliams v. Dunn*, 137 S.Ct. at 1793, *citing Ake v. Oklahoma*, 470 U.S. at 83.

Respondent's second argument, that Mr. Ward "never made a particularized showing that his mental condition was seriously in issue," rests on similar mischaracterizations of the record.[4] BIO 31. Respondent acknowledges that counsel pled not guilty by mental disease or defect (BIO 5) and filed a motion for a psychiatric expert along with a brief in support arguing that the expert was necessary "for the

---

[2] The testimony of Dr. Cillufo further highlights the need for the assistance of an independent expert. Trial counsel's examination of Dr. Cillufo about Mr. Ward's prior mental health history makes clear that counsel did not understand his mental illness, the prior testing, or the prior diagnoses. An independent expert would have been key to helping them develop this evidence and prepare an effective examination of the prior doctor.

[3] Critically, Respondent does not aver that the State Hospital Doctors were available to provide the kind of "assistance" to defense counsel mandated by *Ake* and *McWilliams*.

[4] Respondent's recitation of the record on habeas is similarly incomplete. Mr. Ward's initial petition did not contain an *Ake* claim (BIO 22-23) because he did not have habeas counsel until "on or about the day that his limitations period for seeking habeas relief was to expire." *Ward v. State*, 8th Cir, 05-4381, *Ex Parte* Motion for Leave to Withdraw, January 13, 2005. Counsel spent approximately 8 hours hastily drafting a placeholder that he never amended. *Id*. Brief, December 19, 2007. Counsel attempted to engage his client but found, as trial counsel had found it "obvious, even to a lay person, that Mr. Ward was delusional. His paranoia is severe. Counsel has difficulty engaging in meaningful dialogue with him about his case." *Ward v. Norris,* E.D. Ark., 5:03cv00201, *Ex Parte* Motion for Funds for Investigative and Mitigation Assistance, September 14, 2004. Subsequent counsel were appointed and attempted to develop evidence of Mr. Ward's incompetence, which was raised in a Motion pursuant to Federal Rules of Civil Procedure, Rule 60(b). *Id.*, Order Granting Motion to Appoint Counsel, Doc. 48, August 10, 2006; Motion for Relief from Judgment, Doc. 54, August 15, 2006.

purpose of developing mitigation evidence for the sentencing phase." BIO 9-10, 34-36, s*ee also* App. 46a-51a. That motion expressly requested "an ex parte hearing on this motion under the authority of *Ake v. Oklahoma*, 470 U.S. 68 (1985). This request is made because defense counsel does to wish to unnecessarily disclose the defense mitigation case." App. 46a. Respondent also acknowledges that after the motion was denied, counsel sought to stay the proceedings and obtain another evaluation because Mr. Ward's "mental condition has deteriorated to the point that he cannot or will not cooperate with counsel and is unable or unwilling to proceed to trial with present counsel." BIO 15, *see also* App. 53a. Counsel again requested an opportunity to make an ex parte showing, explaining that "Further evidence relate to the above is available for review by the court in camera but would have to penetrate the attorney client privilege." App. 54a. At a hearing on the motion, counsel reiterated that they had additional evidence of Mr. Ward's mental health that was privileged. 3-R. 190. As the dissent articulated:

> The record is replete with questions that defense counsel raised concerning Ward's mental health. 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."

App. 27a. Plainly, counsel met their burden.

Despite the record, Respondent faults counsel for failing to yet again request an independent expert (BIO 36) or an ex parte hearing[5] (BIO 39). Respondent misses the point. Counsel made their record, they were not required to incur contempt charges in order to protect their client's constitutional rights.[6] Conduct of Attorney in Connection with Making Objections Or Taking Exceptions as Contempt of Court, 68 A.L.R. 3d 314. In fact, counsel repeatedly requested permission to reveal privileged information to the court in support of their request for an expert. *See* App. 54a, 3-R-189. Notably, Respondent is silent as to the numerous affidavits of prior counsel outlining the evidence they would have revealed had they been granted the opportunity. *See* App. 34a-44a.

The *Ake* Court's reference to an ex parte hearing was hardly made "in passing." BIO 39. In fact, as the dissent observed, the ex parte feature was "an important tenet" of *Ake's* threshold showing:

> *When the defendant 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, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success.*

App. 31a (emphasis in original), citing *Ake*, 470 U.S. at 82–83. In any event, while

[5] Respondent's averment that counsel "effectively abandoned" their requests for an ex parte hearing and for the assistance of an expert is contradicted by the record. BIO 39. Counsel did not abandon either request.

[6] The court's hostility toward counsel is clear from the cold record. At one point, when counsel is attempting to introduce evidence of Mr. Ward's delusions, the court suggested that maybe counsel "made this all up." 3-R-163.

Ake may not require an ex parte hearing in every case,[7] it certainly entitles a defendant to one where his counsel have repeatedly notified the court that they are unable to publically reveal protected material. The lower court's refusal to hold an ex parte hearing hamstrung counsel, depriving them of the opportunity to make a further showing of their client's deteriorating mental health. Permitting Respondent to capitalize on that deprivation violates basic fairness. *See* App. 31a (Chief Justice, dissenting, "the 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.")

Respondent also offers a misleading representation of Mr. Ward's own on-record "ramblings."[8] Picking out brief excerpts and fabricating context, the State characterizes Mr. Ward's rants as "cogent" dealings with counsel and the court. BIO 15. Yet a full reading of the exchanges underscores the need for involvement of a mental health expert who could have assisted trial counsel. What Respondent characterizes as Mr. Ward "cogently explaining" his legal position, is actually the

[7] *But see* App. 31a (The Chief Justice, dissenting: "A majority of state courts hold that an ex parte hearing is required. 3 Criminal Procedure § 11.2(e) (4th ed.)").

[8] Throughout its brief, Respondent attempts to recast the confused ramblings of a mentally ill man into the rational styling of a sane person. For example, Respondent represents that Mr. Ward "said he had written out all he could remember about the case and wanted his recollection put in the record because he understood the record had been lost." BIO 16. Yet the exchange on the record is much different: Mr. Ward told the court that "the Prosecuting Attorney's Office has lost the entire record," a delusion that he holds to this day. 3-R.176. Based on this delusion, Mr. Ward said that he had "written down everything [he] could remember about the case" and asked to enter it into the record. *Id.* The court responded that he would not accept into evidence Mr. Ward's "rambling and notes and remembrances. 3-R. 186.

chaotic ramblings of a deeply paranoid man. For example, after the trial prosecutor accused Mr. Ward of "malingering," (3-R. 172) Mr. Ward seized on the word, repeatedly telling the judge that yes he was in fact malingering, though it is clear from the context of his sentences that he does not understand the meaning of the word. *See,* 3-R. 174 ("Okay. She was talking about malingering. Yes, I am malingering, because- -And I would appreciate it if you would get this on the record… Because all issues in this case have been allowed to die, and those issues will be permanently dead if a jury trial is allowed to continue, and I will never be able to appeal anything."); 3R. 175 ("The whole reason I'm malingering is because I want the issues raised back up--"). Further, his proffered reasons for "malingering" actually evidence his paranoid delusions. As do his list of demands, which Respondent characterizes as matters that "concerned a law suit he intended to file." BIO 18. In addition to his request for a new motorcycle, which Respondent argues was rational because his was impounded upon his arrest, Mr. Ward also requested a "full blanket presidential pardon," "a new Social Security number that can in no way be traced to his present Social Security number," and a cash award of $1,000,000 for each year of his incarceration. App. 54a.

Far from being "cogent", these demands are indicative of the persecutory and grandiose delusions commonly displayed by persons suffering from schizophrenia. That counsel were not able to understand and articulate the symptomology of their client's mental illness underscores their need for the assistance of a qualified expert.

Conclusion The court below denied Mr. Ward's claim, upholding Arkansas's long time rule that the state hospital automatically fulfills the requirements of *Ake*. A mere two states in this country have held such a rule: Arkansas and Alabama. In June 2017, this Court addressed the rule in Alabama. The Court should now take this opportunity to address Arkansas. [9]

Respectfully submitted,

/s/ Jennifer Merrigan

JENNIFER MERRIGAN
JOSEPH PERKOVICH
Phillips Black Project
1901 S. 9th Street, 510
Philadelphia, PA 19148
(Tel.) (888) 532-0897
j.perkovich@phillipsblack.org
j.merrigan@phillipsblack.org

JENNIFFER HORAN
Federal Defender
SCOTT W. BRADEN
APRIL GOLDEN
april_golden@fd.org
Federal Public Defender Office
1401 West Capitol Avenue, Suite 490
Little Rock, Arkansas 72201
(501) 324-6114

September 14, 2018

[9] Though Arkansas changed its rule in 1998, two men remain on death row, Bruce Ward and Don Davis, having been refused the assistance of an expert pursuant to *McWilliams* and *Ake*.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, the foregoing was electronically served on counsel for the Respondents, via electronic mail and first class mail to:

Kelly Fields, Counsel of Record
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
501-682-3650 (phone)

/s/ Jennifer Merrigan
Jennifer Merrigan
Counsel for Petitioner