No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, et al.,
Petitioners-Appellants,

v.

JAMES E. MCWILLIAMS,
Respondent-Appellee.

APPLICATION FOR STAY OF MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to 28 U.S.C. 2101(f) and Supreme Court Rule 23, the Attorney General of Alabama, the Commissioner of the Alabama Department of Corrections, and the Warden of the Holman Correctional Facility apply to stay proceedings in the district court pending a decision on applicants' forthcoming petition for a writ of certiorari.

In 2015, the Eleventh Circuit considered James McWilliams's claim that he was deprived of due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985), because the psychiatric expert who assisted him was not a member of the defense team and, even if that expert's assistance could have been adequate, McWilliams did not receive the assistance early enough in his trial proceedings. The court held that no *Ake* violation had occurred. Important here, the court also recognized that *Ake* errors are trial errors subject to harmless-error review and further held that, even if an *Ake* error had occurred, relief was not warranted because "the error did not have a substantial and injurious effect on McWilliams's sentence." *McWilliams v. Comm'r, Ala. Dep't of Corr.* (*McWilliams I*), 634 F. App'x 698, 707 (11th Cir. 2015) (App.59a), *rev'd on other grounds sub nom.*, *McWilliams v. Dunn* (*McWilliams II*), 137 S. Ct. 1790 (2017).

This Court later concluded in *McWilliams II* that an *Ake* violation had occurred and ordered the Eleventh Circuit to determine whether the violation "would have mattered." 137 S. Ct. at 1801. Thus, in *McWilliams III*, the parties briefed one question: whether the state court's *Ake* error had a substantial and injurious effect on McWilliams's sentence.

The *McWilliams III* panel never answered that question. Instead, by a 2-1 vote, the panel held that McWilliams's *Ake* error was not a *trial* error, but instead was a *structural* error for which prejudice must be presumed. App.17a-18a. The majority failed to explain why all three judges on the panel conducted a harmless-error analysis in *McWilliams I*, but did not—and indeed claimed they could not—perform the same analysis on the same record in *McWilliams III*. Worse still, the majority took this doctrinal leap without briefing on whether *Ake* error is trial or structural error.

The result is an ill-considered opinion that creates a lopsided circuit split. The five other circuits to address whether *Ake* errors are trial or structural errors have concluded that they are trial errors. *See, e.g.*, *Tuggle v. Netherland*, 79 F.3d 1386, 1388 (4th Cir. 1996); *White v. Johnson*, 153 F.3d 197, 203 (5th Cir. 1998); *Powell v. Collins*, 332 F.3d 376, 393-96 (6th Cir. 2003); *Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995). Neither those decisions nor their progeny can be reconciled with the Eleventh Circuit's approach.

The Eleventh Circuit's departure from the prior consensus is also deeply flawed, for a harmless-error analysis is clearly possible. A reviewing court need only "quantitatively assess[]" the evidence that should have been admitted "in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). That's what all three judges on the *McWilliams III* panel did when they decided *McWilliams I*. And all nine Justices of this Court suggested that the *Ake* error *in this case* could (and should) be analyzed under a harmless-error standard on remand. The Eleventh Circuit's new approach

thus makes no sense. And it promises significant, unwarranted intrusions on state sovereignty, for it practically guarantees that presumptively valid state court judgments will be undone by federal courts even where an error had no effect on the defendant's conviction or sentence.

There is thus a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse the Eleventh Circuit's decision. The decision creates a clear circuit split on an issue that was the sole basis for the Eleventh Circuit's ruling. The decision conflicts with this Court's directive to the Eleventh Circuit to reassess prejudice. The decision is clearly wrong, as the panel's decision in *McWilliams I* undercuts every premise undergirding *McWilliams III*. And the decision will have serious consequences for States who will be forced to retry and resentence defendants decades after they have committed their crimes, even though a state court's error had *no effect* on a defendant's case.

Without a stay, the State will likely suffer irreparable harm. The Eleventh Circuit's mandate has issued, meaning the state court will soon be forced to resentence McWilliams, likely before this Court can consider the State's forthcoming petition. That impending resentencing presents serious mootness and federalism concerns. On mootness, the caselaw is arguably unsettled as to whether a resentencing would moot the State's requested relief. Though the State maintains that resentencing would not moot the case, this Court should grant a stay to foreclose any doubt, protect its jurisdiction, and guarantee the State its right to seek this Court's review. And mootness concerns aside, the State should not be forced by federal court order to

marshal judicial and executive resources to resentence McWilliams for a crime he committed more than 35 years ago if the constitutional violation that occurred at his 1986 sentencing had no effect on its outcome. Such an intrusion on state sovereignty irreparably harms the State and should not occur before a court has properly determined that the intrusion is necessary.

A stay is also warranted because it will not prejudice McWilliams in any way. The most lenient sentence that McWilliams could receive at resentencing would be life in prison without parole. Granting a stay, therefore, would not preclude McWilliams from obtaining relief. The application thus should be granted.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's order denying the State's motion to recall and stay the mandate is reproduced at App.1a-2a. The Eleventh Circuit's issuance of the mandate is reproduced at App.3a-4a. The Eleventh Circuit's order denying rehearing en banc is reproduced at App.5a-6a. The Eleventh Circuit's opinion in *McWilliams III* is reproduced at App.7a-39a. The Eleventh Circuit's opinion in *McWilliams I* is reproduced at App.40a-86a. The District Court's opinions are reproduced at App.87a-129a and App.130a-154a. The Magistrate Judge's Report and Recommendation is reproduced at 155a-336a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) and 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

In December 1984, James McWilliams robbed, raped, and murdered a woman working a convenience-store night shift. Before his trial and upon his request, three

psychiatrists evaluated McWilliams in a secure mental hospital for over a month. T.1543-47.[1] "All three doctors concluded McWilliams was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms." App.45a (*McWilliams I*). McWilliams was convicted of capital murder, and the jury recommended the death sentence.

The court allowed more testing—neuropsychological—before judicial sentencing but denied McWilliams's request for a continuance to review the evidence with an expert. App.46a-48a. After weighing the aggravating and mitigating circumstances, the judge followed the jury's recommendation and imposed the death sentence. App.48a-49a. McWilliams appealed his conviction arguing that the trial court had violated *Ake*. The Alabama Court of Criminal Appeals rejected the claim, *McWilliams v. State*, 640 So. 2d 982, 991-93 (Ala. Crim. App. 1991), and the Alabama Supreme Court affirmed, *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

McWilliams then sought state postconviction relief arguing his counsel were ineffective for failing to present mitigating evidence. App.49a. The circuit court conducted a four-day evidentiary hearing on that claim. *Id.* At that hearing, a psychiatrist testified for McWilliams, explaining what McWilliams would have presented if he had been provided the psychiatric assistance he requested, including testimony about the relationship between malingering—lying on tests to try to appear mentally ill—and mental illness. *See, e.g.*, P.C.T.936, 986. A psychiatrist also testified for the

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[1] "T." refers to the certified trial record, and "P.C.T." refers to the certified state postconviction transcript.

State, showing how the State would have rebutted that testimony. *See, e.g.*, P.C.T.1084. The state postconviction court denied McWilliams's petition. P.C.T.1775-1828. The state appellate court affirmed. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

McWilliams then filed a federal habeas petition, raising an *Ake* claim. The district court denied federal habeas relief. In *McWilliams I*, the Eleventh Circuit affirmed, holding that the state court's application of *Ake* was not objectively unreasonable. App.58a. The Eleventh Circuit further held that, "even assuming an *Ake* error occurred," any such error did not have a "'substantial and injurious effect or influence' on the outcome of McWilliams's case." App.58a-59a. The court looked at facts from both the trial and state postconviction proceedings including the pre-trial evaluation which had "determined McWilliams was a malingerer and a faker," Dr. Goff's (the neutral post-conviction, pre-sentencing evaluator) report which "indicated that McWilliams was malingering on some level," and the state postconviction hearing testimony of "Dr. Woods, McWilliams's post-conviction expert[, who] admitted McWilliams has a history of malingering and can be deceitful and manipulative." App.59a. The court thus found that any error would have been harmless, noting that there was a "mountain of evidence undercutting [McWilliams'] claims that he suffered from mental illness during the time of the crime." *Id.*. Judge Wilson dissented. He concluded that there was an *Ake* error and that it was prejudicial. App.82a-86a.

This Court granted certiorari and reversed. *McWilliams II*, 137 S. Ct. 1790. The Court held that the state courts were "objectively unreasonable" in holding that

McWilliams had received the assistance that *Ake* required. *Id.* at 1801. The Court then remanded for the Eleventh Circuit to consider whether access to that assistance "might have been able to alter the judge's perception of the case." *Id.* Thus, on remand, the parties briefed only the issue of whether the *Ake* error had a substantial and injurious effect on McWilliams's sentencing.

The Eleventh Circuit never answered that question. Instead, the 2-1 majority declared it "impossible to know" how expert assistance might have affected the case and, on that ground, deemed the *Ake* error to be structural. App.17a. Ignoring the postconviction record that the same judges had relied on in *McWilliams I*, the majority asserted that in McWilliams's case, "[a]ll we have is the record before the trial judge at the sentencing hearing." App.22a. The majority then reasoned that "[t]he assistance a psychiatrist *would have* provided McWilliams's counsel … is unknown and, as such, cannot be quantitatively assessed in the context of the evidence presented to the sentencing judge." App.17a. Rather than consider remanding to the district court to develop this purportedly necessary evidence, the majority concluded that "prejudice to McWilliams must be presumed." App.18a.

Judge Jordan concurred in the judgment but rejected the majority's structural-error holding. App.24a. He noted that "[e]very other circuit to decide the issue has … held that an *Ake* error is subject to harmless-error review." App.24a n.1. He emphasized that this Court remanded for the Eleventh Circuit to assess whether the *Ake*-error "resulted in a 'substantial and injurious effect or influence,'" App.28a (citing *Brecht*, 507 U.S. at 623); *see also* App.32a, and explained that *Brecht* "supplied the

appropriate harmless-error standard for *Ake* violations in federal habeas cases," App.25a, App.28a. He highlighted how each judge had performed a harmless-error analysis in *McWilliams I*, App.29a-30a, and how Judge Wilson's *McWilliams I* dissent had explicitly relied on "testimony from the Rule 32 post-conviction hearing," App.30a.[2] Judge Jordan also clarified that "the record contains both the record of Mr. McWilliams's trial *and* the record of the state post-conviction proceedings." App.26a n.2. Finally, Judge Jordan noted that "[b]oth the majority opinion and the dissent in the Supreme Court provided divergent accounts of what, in their respective views, the record showed regarding prejudice," and that this "prejudice discussion … seems to confirm that the Supreme Court did not view the *Ake* violation as structural." App.31a, 32a n.4.

The State petitioned for rehearing en banc, which was denied on December 12, 2020. App.6a. On December 20, 2019, the Eleventh Circuit issued its mandate to the district court, instructing it to issue a writ of habeas corpus and to direct Alabama to resentence McWilliams. App.4a. That same day the State filed a motion to recall the mandate and stay the mandate pending a petition for certiorari. On January 7, 2020, the Eleventh Circuit denied that motion. App.2a.

The State intends to file a petition for certiorari this Term.

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[2] Rule 32 of the Alabama Rules of Criminal Procedure governs post-conviction proceedings in the State.

REASONS FOR GRANTING THE APPLICATION

This Court may stay proceedings in the district court "to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases," the Court will also "balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

This case meets those criteria. When the Eleventh Circuit first considered McWilliams's case in 2015, the panel held that no *Ake* error occurred and that, if it had, it was a trial error that had not prejudiced McWilliams. After this Court held that the Eleventh Circuit had misapplied *Ake* and that an error had occurred, the Court remanded so that the Eleventh Circuit could reconsider whether McWilliams had been prejudiced. But the Eleventh Circuit deemed that task a fool's errand. The same Eleventh Circuit panel from *McWilliams I* concluded that the *Ake* error in this case (and presumably many others) is *not* a trial error and is *not* subject to harmless-error analysis, but rather is a structural error for which prejudice must be presumed. That unexplained and inexplicable decision—reached without briefing on whether *Ake* errors are structural—is not only wrong, it squarely conflicts with every other circuit that has spoken to the issue, creating a 5-to-1 circuit split. Every other court of appeals to have considered whether *Ake* error is trial or structural error has

concluded that *Ake* error is trial error. The contrary decision below promises to impose significant new burdens on States, frustrate their interests in finality, and infringe on their sovereign power to enforce criminal law.

The State's forthcoming cert petition is thus reasonably likely to be granted, and there is at least a fair prospect this Court will correct the Eleventh Circuit's error by again ordering that court to conduct a harmless-error analysis.

The equities strongly favor granting a stay. The State would be irreparably harmed without a stay, for if the mandate is not stayed, the case may become moot when McWilliams is resentenced, and the State has a right to have this Court consider its forthcoming petition for certiorari. Moreover, even if a resentencing would not moot the State's effort to obtain this Court's review, the State should not have to spend the considerable resources needed to resentence McWilliams if there was no constitutional error that affected his first sentencing. Finally, a stay would not prejudice McWilliams in any way, as the most favorable outcome he can obtain at resentencing is a sentence of life without parole. The stay therefore should be granted.

I. There Is A Reasonable Probability That This Court Will Grant Certiorari And Will Reverse The Eleventh Circuit's Decision.

A. The Decision Below Conflicts With the Decisions Every Other Court of Appeals That Has Addressed the Issue.

In *Ake v. Oklahoma*, this Court held that when a defendant makes a threshold showing "to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a

competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985).

And this Court has long recognized "that a constitutional error does not automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). The Court has divided constitutional violations into two categories, trial errors and structural errors.

"Trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (cleaned up). This "Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306.

In contrast, the Court has deemed only a handful of errors to be structural, including "the total deprivation of the right to counsel at trial," denial of an impartial judge, unlawful exclusion of members of a defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. *Id.* at 309-10. "Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

1. In the 35 years since *Ake*, six federal courts of appeals have considered whether *Ake* error is trial or structural. Every one of them, save the Eleventh Circuit,

has held that *Ake* errors are trial errors subject to harmless-error review.[3] For example, in 1996, the Fourth Circuit held that "courts confronting *Ake* errors involving the denial of expert psychiatric assistance are in a position to assess the impact of the error on the jury's ultimate sentencing determination," and thus "the error concerning [the defendant's] lack of expert assistance at sentencing … [is] subject to harmless-error analysis." *Tuggle v. Netherland*, 79 F.3d 1386, 1392 (4th Cir. 1996).

Likewise, when the Fifth Circuit first addressed the issue, it recognized that "[t]hree other circuits have expressly concluded that *Ake* error is subject to harmless-error analysis, and" the court then "join[ed] them." *White v. Johnson*, 153 F.3d 197, 2001 (5th Cir. 1998). Because the case involved a federal habeas petition challenging a state conviction, the Fifth Circuit explained that "[i]nterests of comity and federalism, as well as 'the State's interest in the finality of convictions' … mandate that the alleged *Ake* error does not entitle [the defendant] to habeas relief unless it 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 204 (quoting *Brecht*, 507 U.S. at 635). And the court ultimately held that "any *Ake* error that occurred in this case was harmless." *Id.* at 207.

The Sixth Circuit agreed in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), finding "the denial of expert psychiatric assistance as guaranteed by *Ake* to be more akin to trial error, such as that where counsel has performed deficiently, and is thus

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[3] *See, e.g.*, *Tuggle v. Netherland*, 79 F.3d 1386, 1388 (4th Cir. 1996); *White v. Johnson*, 153 F.3d 197, 203 (5th Cir. 1998); *Powell v. Collins*, 332 F.3d 376, 393-96 (6th Cir. 2003); *Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994); and *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995).

subject to harmless error review." 332 F.3d at 393. The Sixth Circuit went on to explain that "[u]nlike the case where a defendant has been denied the right to counsel completely, thereby constituting a structural defect, the denial of an *Ake* expert … may not always result in prejudice to the defendant." *Id.*

The Eighth Circuit has also held that *Ake* error is subject to harmless-error review in a case involving a defendant's request for a psychiatric expert to present affirmative evidence of his mental health at both the guilt and penalty phases of trial. *Starr v. Lockhart*, 23 F.3d 1280, 1287 (8th Cir. 1994). In that case, the defendant's "mental condition was his only viable defense and his strongest argument in mitigation for sentencing purposes." *Id.* at 1288. Even so, the Eighth Circuit held that "the denial of an *Ake* expert is the sort of constitutional omission that is subject to harmless error analysis" because it is "mere trial error" and not "a defect abrogating the constitutional structure of a trial." *Id.* at 1291. The Eighth Circuit reasoned that *Ake* "requires a defendant to make a threshold showing of the relevance and the helpfulness of the expert's services," and "a right to which a defendant is not entitled absent some threshold showing can[not] fairly be defined as basic to the structure of a constitutional trial." *Id.* Finding the denial of an expert more analogous to a counsel's ineffective performance than to the deprivation of the right to counsel, the Eighth Circuit explained that "[l]ike deficient performance of counsel, the denial of an *Ake* expert deprives the defendant of a tool basic to the preparation of his defense, but circumstances may render the lack of that tool a mere inconvenience, rather than a total disability, and prejudice may not result." *Id.*

The Tenth Circuit has agreed with the Eighth Circuit's reasoning in *Starr* and held that for *Ake* violations, "harmless error review is appropriate" because "a right to which a defendant is not entitled absent some threshold showing cannot fairly be defined as basic to the structure of a constitutional trial." *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995) (cleaned up).

2. And then came the decision below. Departing from decades-long consensus, the Eleventh Circuit held that McWilliams's *Ake* error was structural. App.17a-18a. The court declared that denying McWilliams additional assistance from a psychiatric expert was tantamount to "the denial of counsel" because it "prevented" McWilliams "from offering any meaningful evidence of mitigation based on his mental health, or from impeaching the State's evidence of his mental health." App.17a. Because "[t]he assistance a psychiatrist *would have* provided McWilliams's counsel … is unknown," it was "all but impossible" to conduct the harmless-error analysis called for by this Court. App.17a-18a. Instead, the Eleventh Circuit declared that "prejudice to McWilliams must be presumed." App.18a.

This holding is irreconcilable with those of the five circuits referenced above. Worse still, the State never had the chance to point out this conflict to the panel, which charted its new course without warning and without any briefing on the matter. Even so, Judge Jordan's concurrence noted at least some of the conflicting decisions on the other side of this new circuit split. *See* App.24a n.1. The majority brushed these aside in a conclusory footnote, asserting that "[t]he cases from our sister circuits holding that an *Ake* error is subject to harmless error review are inapposite." App.18a

n.8. According to the majority, when a "defendant seeks to affirmatively offer evidence of his mental state, as McWilliams did here," rather than "in anticipation that the State would introduce psychiatric testimony," the analysis is "much different." *Id.* But no other court of appeals has thought so. Instead, all five circuits that have declared *Ake* errors to be trial errors have maintained that position even when the "defendant seeks to affirmatively offer evidence of his mental state."

For example, the Fourth Circuit has held *Ake* error to be harmless when the denied psychiatric expert would have presented affirmative psychiatric evidence for the defendant. *See Page v. Lee*, 337 F.3d 411, 420 n.6 (4th Cir. 2003) (asserting that the harmless-error standard was appropriate where the defendant wanted to affirmatively present evidence of his insanity at trial but finding no *Ake* error so not performing the harmless-error analysis); *cf. Swann v. Taylor*, 173 F.3d 425, at *8 (4th Cir. 1999) (noting that it "ha[d] expressly determined that *Ake* errors are amenable to [harmless-error] analysis" and applying that analysis to the mitigation phase in a case where the prosecution did not present any psychiatric testimony). The same goes for the Fifth Circuit. *See Long v. Johnson*, 189 F.3d 469, at *5 & n.7 (5th Cir. 1999) (assuming *Ake* error but holding that "any *Ake* error was harmless" in a case where the defendant wanted to affirmatively present evidence of his insanity). The Sixth Circuit's *Powell* decision likewise performed a harmless-error review when the defendant sought to introduce affirmative evidence. 332 F.3d at 393-96. The Eighth Circuit's decision in *Starr* is no different, as the prosecution there did not rely on a psychiatric expert. *See Starr*, 23 F.3d at 1290 n.8 ("We see no rational reason that a

defendant be allowed an *Ake* expert only if the prosecution is relying on an opposing expert."). Multiple Tenth Circuit cases have also made clear that harmless-error analysis applies not only in cases where expert testimony would have rebutted the prosecution's evidence, but also in cases where the defendant would have used the expert to present general mental health evidence as affirmative evidence of mitigating factors during the penalty phase, *Castro v. Ward*, 138 F.3d 810, 829 (10th Cir. 1998) ("We are confident that the omission of the additional mitigating evidence [the defendant] argues should have been presented to the jury did not have a 'substantial and injurious effect or influence in determining the jury's verdict.' Thus, if there was error, it was harmless." (internal citations omitted)), or to assist him in proving an affirmative defense at the guilt phase, *Toles v. Gibson*, 269 F.3d 1167, 1172-77 (10th Cir. 2001).

The Eleventh Circuit thus created a five-to-one split, even in the artificially restricted category of cases where "the defendant seeks to affirmatively offer evidence of his mental state." And the court did so without any meaningful discussion of its sister circuits' reasoning, without even mentioning most of its sister circuits' relevant opinions, and without any briefing on the issue.

Finally, the Eleventh Circuit's reasoning brings the split into even sharper relief. The majority likened *Ake* errors to "the denial of counsel." App.18a. But both the Sixth and Eighth Circuits have expressly held that "the denial of an appropriate expert is *not* parallel to the deprivation of the right to counsel … [but] is more analogous to the situation where counsel has performed deficiently." *Starr*, 23 F.3d at 1291

(emphasis added); *see Powell*, 332 F.3d at 393. And two other circuits have cited deprivation of the right to counsel as an example of structural error in holding that *Ake* errors are *not* structural. *See Tuggle*, 79 F.3d at 1392; *Brewer*, 51 F.3d at 1529. Though Judge Jordan explained why the *Ake* error here was not akin to the complete denial of the right to counsel, App.27a n.3, the majority reached the opposite conclusion without mentioning the contrary authority or even addressing Judge Jordan's argument.

That is because there is no way to reconcile the Eleventh Circuit's decision with those of the five other circuits who have (repeatedly) held that *Ake* errors are not among those rare errors that require a court to presume prejudice. This case thus presents a clear split, and there is a reasonable probability this Court will resolve it.

B. The Eleventh Circuit's Decision Is Wrong.

Ake errors, like "most constitutional errors[,] can be harmless." *Fulminante*, 499 U.S. at 306. They thus belong with the numerous other errors this Court has deemed to be trial errors. When a court erroneously fails to provide a defendant with expert assistance that could help him make his case, the lack of assistance does not necessarily "infect the entire trial process." *Brecht*, 507 U.S. at 630. The evidentiary balance may be altered, but a defendant can later attempt to show what he would have proven, and a court can assess that evidence "in the context of other evidence presented in order to determine the effect it [would have] had on the trial." *Id.* at 629.

This Court recognized as much in this case when the Court remanded with the instruction that the Eleventh Circuit panel re-conduct its harmless-error analysis.

The Court did not presume prejudice or assume the *Ake* error's effect could not be assessed. Rather, all nine Justices appeared to think that this question could be answered. For instance, the five Justices in the majority believed that there was "reason to think that" the assistance *Ake* requires "could have" mattered and mentioned specific pieces of evidence in the record that the Eleventh Circuit should consider. *McWilliams II*, 137 S. Ct. at 1801. The four Justices in dissent explained that because the Eleventh Circuit had already deemed this error harmless, the court had "specifically addressed the very question that the majority instructs it to consider on remand," and "nothing in the majority opinion prevents the Court of Appeals from reaching the same result on remand." *Id.* at 1809 (Alito, J., dissenting). As Judge Jordan put it, "[b]oth the majority opinion and the dissent in the Supreme Court provided divergent accounts of what, in their respective views, the record showed regarding prejudice," and this "prejudice discussion in the majority and dissenting opinions in *McWilliams* seems to confirm that the Supreme Court did not view the *Ake* violation as structural." App.31a, 32a n.4.

The Eleventh Circuit majority, however, concluded that this Court had assigned an "impossible" task. In the majority's view, "[t]he assistance a psychiatrist *would have* provided McWilliams's counsel in 'evaluating, preparing, and presenting the defense that Ake requires' is unknown"—and apparently unknowable—"and, as such, cannot be quantitatively assessed in the context of the evidence presented to the sentencing judge." App.17a. Thus, "prejudice to McWilliams must be presumed." App.18a.

But courts assess prejudice in cases like this one all the time. As Judge Jordan explained, all the court had to do "to answer the specific question remanded to us by the Supreme Court," was identify what evidence could have been presented but was not because of the error (by examining the evidence produced at trial and in the state-habeas proceedings) and then reweigh all of that evidence against the evidence presented by the prosecution. App.33a. That is the exact method routinely used by courts to assess prejudice for ineffective-assistance-of-counsel claims.

More importantly, that is the exact method the Eleventh Circuit already employed—*to this very claim*. All three judges on the *McWilliams I* panel performed a harmless-error analysis in assessing McWilliams's *Ake* claim. The *McWilliams I* majority held that, "even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence." App.59a. And Judge Wilson's dissent, while disagreeing about whether there was prejudice, agreed with the majority that *Ake* errors are subject to harmless-error review. App.82a-86a. Nothing changed between *McWilliams I* and *McWilliams III* that would make conducting this analysis "impossible." The Eleventh Circuit had it right the first time—*Ake* errors are trial errors subject to harmless-error analysis.

Even if the Eleventh Circuit needed more evidence to determine whether compliance with *Ake* "would have made a difference," *McWilliams II*, 137 S. Ct. at 1801, a constitutional violation's status as trial or structural "depends on the nature of the violation, and not when[, where,] or how the error was raised or litigated." App.26a (*McWilliams III*) (Jordan, J., concurring in the judgment). In short, "a constitutional

error is either structural or it is not." *United States v. Neder*, 527 U.S. 1, 14 (1999). Thus, even if the appellate court needed more evidence, that fact would not convert the trial error into a structural one. The appropriate remedy would be to (1) remand to the district court for an evidentiary hearing if the petitioner had not had an opportunity to develop the necessary facts or (2) deny the petition if the petitioner had previously had the opportunity to develop facts but failed to do so. In neither event, however, is a dearth of evidence about prejudice a reason to presume it.

Thus, given this Court's structural error jurisprudence, the Court's approach to prejudice in *McWilliams II*, and the obvious and unexplained faults in the lower court's reasoning, there is a fair prospect this Court will reverse the decision below.

C. The Question Presented Is Important and Warrants Review.

This question is important because deeming *Ake* error to be structural error would require the State to retry or resentence defendants even when an *Ake* error had no effect on state court proceedings. *Ake* required that a defendant make only "an *ex parte* threshold showing that his sanity is likely to be a significant factor in his defense," before he is entitled to expert assistance. 470 U.S. at 82-83. It is not difficult to imagine a defendant who can clear this threshold, but for whom a wrongful denial of assistance would have no "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. For instance, a capital defendant might seek to present mental-health evidence as mitigation and show the trial court that he suffered a head injury as a child. If a reviewing court (on appellate or collateral review) later determined that the trial court misapplied *Ake* in denying

assistance, the court would have to order resentencing, even if the State could prove that the head injury had left no lasting effect on the defendant. Deeming such trial errors to be structural would substantially burden States in at least three ways.

First, habeas grants require States to either release defendants—in contravention of States' duty to protect their citizens from violent offenders—or retry or resentence defendants for crimes committed years or even decades earlier. "Retrying defendants whose convictions are set aside … imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'" *Brecht*, 507 U.S. at 637 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). These are costs States and society must bear when an error may have affected the outcome of a proceeding. But federal courts should not impose these costs when an error had no substantial effect on a defendant's case. To force States to reinvest substantially more of society's resources for technical violations that made no difference in the outcome of a case would damage our federal system by needlessly "intrud[ing] on state sovereignty." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017).

Second, unnecessary retrials and resentencings erode the principle of finality, which in turn frustrates deterrence and rehabilitation. *See Engle v. Isaac*, 456 U.S. 107, 127 & n.32 (1982); *see also McCleskey*, 499 U.S. at 491 ("One of the law's very objects is the finality of its judgments. … 'Without finality, the criminal law is

deprived of much of its deterrent effect,'" and "[f]inality has special importance in the context of a federal attack on a state conviction."). As this Court has made clear, "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey*, 499 U.S. at 492. Such significant costs should only be imposed when a defendant was prejudiced by an error.

Third, not only would retrials and resentencings be onerous and prejudicial in the first instance, they would also trigger a new right of direct appeal, state-habeas relief, and federal-habeas relief. Such proceedings could take twenty or thirty more years. One round of "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused," *Engle*, 468 U.S. at 126–27, "places a heavy burden on scarce … resources, and threatens the capacity of the system to resolve primary disputes," *McCleskey*, 499 U.S. at 491. This "ordeal worsens during subsequent collateral proceedings." *Id.* at 492.

The importance of correcting the Eleventh Circuit's decision is underscored by the fact that many courts have extended *Ake*'s guarantee to experts beyond the field of psychiatry. The Eighth Circuit, for example, has concluded that there "is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given." *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987); *see also Castro v. Ward*, 138 F.3d 810, 826 (10th Cir. 1998) (holding that if an "investigator was a 'basic tool' necessary to an adequate defense, the court erred

[under *Ake*] in failing to provide funds for one"); *Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) (holding that denial of a pathologist was an *Ake*-error). The Eleventh Circuit too has stated that this Court's decisions "impl[y] that the government's refusal to provide nonpsychiatric expert assistance could, in a given case, deny a defendant a fair trial." *Moore v. Kemp*, 809 F.2d 702, 711 (11th Cir. 1987). If the reasoning below stands, a denial of any type of expert could be considered structural error, which would increase the burden on States all the more.

II. Applicants Will Suffer Irreparable Harm Absent A Stay.

The State will suffer irreparable harm if it is forced to resentence McWilliams before this Court can determine whether he is even entitled to resentencing. First, without a stay, there is a risk this Court will not be able to entertain the State's petition for certiorari or consider the merits of this case. "[T]he most compelling justification for a Circuit Justice to upset a[] … decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari." *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, at *6 (1976) (in chambers). Although the State maintains that if the state court obeys an unstayed mandate and resentences McWilliams this case would not become moot,[4] potentially conflicting authority

[4] *See, e.g.*, *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017) ("[N]either the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing nor the trial court's action in light of that mandate makes the case moot. Reversal would simply 'und[o] what the *habeas corpus* court did.'" (internal citations omitted)); *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972) (holding that a case does not become moot when a state court resentences a defendant in "obedience to the mandate of the Court of Appeals"); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 315-16

creates a risk that warrants a stay to avoid precluding review. For instance, Justice Burger found that retrial of the defendant prior to this Court's review of a petition for certiorari "would effectively deprive this Court of jurisdiction to consider the petition." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (in chambers). He then reasoned that when "the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted [because] foreclosure of certiorari review by this Court would impose irreparable harm upon applicants." *Id.* (quotations omitted); *see also California v. Harris*, 468 U.S. 1303, 1304 (1984) (Rehnquist, J., in chambers) (stating that if the case did not have a procedural flaw which would likely keep the Court from granting certiorari, he "would grant a stay, because … with California's rule requiring retrial in 60 days, the case would become moot without a stay"). This Court need not determine now whether the case would be moot upon resentencing because even the possibility that a case might be mooted is sufficient to justify a stay. *Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers) (explaining that even the hypothetical chance that respondents might take a course of action that might possibly moot the case warranted a stay).

And mootness concerns aside, forcing the State to resentence a defendant for a constitutional violation that may have had no effect on his original sentence would constitute irreparable harm to the State on multiple fronts. First, even merited grants of habeas relief represent a significant "intru[sion] on state sovereignty to a

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(1946) (holding that habeas relief obtained "through the assertion of judicial power" does not moot the case or deprive the Supreme Court of jurisdiction).

degree matched by few exercises of federal judicial authority." *LeBlanc*, 137 S. Ct. at 1729. Such intrusions should occur only when warranted, not simply when a federal court has declined to determine whether the intrusion is warranted.

Second, resentencing McWilliams for a rape and murder he committed more than 35 years ago would require a significant expenditure of state executive and judicial resources. The State cannot recoup these public resources even if this Court ultimately rejects the Eleventh Circuit's outlier approach.[5]

The Court therefore should stay the mandate until it can resolve the circuit split created by the decision below.

III. The Equities Favor A Stay.

Finally, the equities clearly favor a stay because a stay would in no way prejudice McWilliams. Currently, McWilliams has been sentenced to death, but the execution has not been scheduled nor will the State request an execution date from the Alabama Supreme Court or carry out the sentence before this Court rules on the State's forthcoming petition for certiorari. Because McWilliams's conviction of a capital crime is not disputed, the only other sentence he could possibly receive would be

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[5] *See Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (explaining that it is the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation" that precludes injuries of "money, time and energy necessarily expended in the absence of a stay" from constituting irreparable harm); *John Doe I v. Miller*, 418 F.3d 950, 952 (8th Cir. 2005) (holding that "costs," which would include money, time, and energy, "may constitute a form of 'irreparable harm'" if "they would not be recoverable"). *But see Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (holding, in the context of requiring exhaustion of administrative remedies, that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

life without parole. As such, even if McWilliams is resentenced to the least severe sentence available, a stay by this Court would not prolong his incarceration or prejudice him in any way. McWilliams may have to wait a little longer to be resentenced, but the entire point of this litigation is to determine whether he should be resentenced at all.

Moreover, the public interest also weighs in favor of a stay. Absent a stay, the State would be forced to expend substantial resources to conduct a new sentencing hearing for a robbery, rape, and murder that occurred 35 years ago. If this Court reverses the Eleventh Circuit, that resentencing would represent a significant waste of the public's resources.[6]

CONCLUSION

The Court should grant this petition for a stay of the mandate of the United States Court of Appeals for the Eleventh Circuit pending disposition of a petition for writ of certiorari.

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[6] *See Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989) (explaining that "[t]he public interest is ill-served" by the "waste [of] resources that could be put to any number of more productive uses); *Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 101 (5th Cir. 1977) (holding that it could "best support the public interest by … preclud[ing] relitigation" because "relitigation would continue to waste judicial resources and time").

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