No. 19A871

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.

OPPOSITION TO 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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INTRODUCTION

This case is a poor candidate for certiorari and thus there is no reason to stay the mandate that the Eleventh Circuit issued to the district court. Accordingly, the State's motion for a stay should be denied.

This Court remanded this case to the Court of Appeals for the Eleventh Circuit for a determination of whether the denial of assistance by a mental health expert in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), "would have mattered" at McWilliams's capital sentencing hearing. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017). On remand, all three Eleventh Circuit judges concluded that expert assistance would have mattered. Two concluded that the error "infected the entire sentencing hearing from beginning to end, as McWilliams was prevented from offering any meaningful evidence of mitigation based on his mental health, or from impeaching the State's evidence of his mental health." *McWilliams v. Commissioner*, 940 F.3d 1218, 1224 (11th Cir. 2019). The third member of the panel concluded that as a result of the error, McWilliams was prevented from presenting evidence regarding his mental impairments that would have contradicted the prosecution's evidence and established a mitigating circumstance, and that this had a "'substantial and injurious effect or influence in determining' the trial court's sentence." *Id.* at 1231 (Jordan, J., concurring) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

The State argues that this Court might grant certiorari to address the analysis employed by two members of the Eleventh Circuit. However, the State

presented its arguments when seeking rehearing *en banc* in the Eleventh Circuit, and no member of the court requested a poll. The State did not move in a timely manner for a stay of the mandate in the Eleventh Circuit; instead, it waited until after the mandate issued and sought to have it recalled. Now the State asks this Court to stay the mandate issued to the district court by the Eleventh Circuit. It suggests that the concurring member of the court, Judge Jordan, applied the correct analysis in determining whether the error was harmless, but Judge Jordan concluded that the error was not harmless. And another member of the panel, Judge Wilson, applied that same analysis when the case was first before the Eleventh Circuit in 2015, and he also concluded that the *Ake* error had a "substantial and injurious effect" on McWilliams's death sentence. *McWilliams v. Commissioner*, 634 F. App'x 698, 716-17 (11th Cir. 2015) (Wilson, J., dissenting), *rev'd*, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

Thus, there is no question that the denial of a mental health expert to assist McWilliams in the preparation and presentation of his defense was not harmless under even the standard that the State argues for. This case presents no question for this Court. Accordingly, the State's motion should be denied.

STATEMENT OF THE CASE

Two days before James McWilliams's 1986 capital sentencing hearing in Alabama, defense counsel received a neuropsychologist's assessment reporting that McWilliams had "organic brain dysfunction." *McWilliams*, 137 S. Ct. at 1796; *see*

also T. 1634.[1] The assessment found that McWilliams had "'genuine neuropsychological problems'" and an "'obvious neuropsychological deficit.'" *McWilliams*, 137 S. Ct. at 1796 (quoting the neuropsychologist's assessment). Counsel also received, on the day before the sentencing hearing, records from the state mental hospital and, on the day of the sentencing hearing, records indicating that McWilliams was being treated with psychotropic medication in prison. *Id.*; *see also* T. 1406-09. The records had been subpoenaed approximately two months earlier.

Upon receipt of all of this new information, defense counsel sought time and assistance to respond. As this Court explained:

> Defense counsel told the trial court that the eleventh-hour arrival of the [neuropsychologist's] report and the mental health records left him "unable to present any evidence today." He said he needed more time to go over the new information. Furthermore, since he was "not a psychologist or a psychiatrist," he needed "to have someone else review these findings" and offer "a second opinion as to the severity of the organic problems discovered."

McWilliams, 137 S. Ct. at 1796 (quoting the trial court record). After a recess, defense counsel continued:

> "It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court . . . . [W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance."

[1] Citations to "T. __" refer to the record as prepared for McWilliams's direct appeal.

Id. at 1796-97 (quoting the trial court record).

The trial court denied the motion and proceeded to sentencing. *Id.* at 1797. The prosecutor then offered his closing statement, arguing that there were "'no mitigating circumstances.'" Defense counsel replied that he "'would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce . . . any mitigating circumstances.'" *Id.* (quoting the trial court record). But, he said, since neither he nor his co-counsel were "doctors," neither was "'really capable of going through those records on our own.'" *Id.* (quoting the trial court record).

The trial judge said that he had reviewed the records himself and found evidence that McWilliams was faking and manipulative. *Id.* The court found "no mitigating circumstances" and sentenced McWilliams to death. *Id.*

On direct appeal, the Alabama Court of Criminal Appeals held that there had been no violation of *Ake* and affirmed McWilliams's death sentence. *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991).

In federal habeas corpus proceedings, a panel of the Eleventh Circuit ruled against McWilliams on the *Ake* issue by a vote of 2-1. *McWilliams v. Commissioner*, 634 F. App'x 698 (11th Cir. 2015) (per curiam), *rev'd*, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). Judge Wilson dissented. He found that the denial of expert assistance was an unreasonable application of *Ake*, applying 28 U.S.C. § 2254(d)(1), and was prejudicial at sentencing under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Judge Wilson stated: "We are required to grant habeas relief for an '*Ake*

error' if the error had a 'substantial and injurious effect' on the trial or sentencing. Alabama's *Ake* error had this effect on McWilliams's death sentence. . . ." 634 F. App'x at 716 (Wilson, J., dissenting) (internal citations omitted).

This Court granted certiorari and reversed. It held, "Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams's conviction and sentence was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *McWilliams*, 137 S. Ct. at 1801 (quoting 28 U.S.C. § 2254(d)(1)). The Court then remanded the case to the Court of Appeals, saying: "[The Eleventh Circuit] did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered. There is reason to think that it could have." *McWilliams*, 137 S. Ct. at 1801 (citing *Davis v. Ayala*, 135 S. Ct. 2187 (2015)).

On remand, all three judges on the Eleventh Circuit panel agreed that McWilliams was prejudiced by the denial of expert assistance. *McWilliams v. Commissioner*, 940 F.3d 1218 (11th Cir. 2019). Judge Tjoflat concluded in an opinion for two members of the Court, "the *Ake* error infected the entire sentencing hearing from beginning to end, as McWilliams was prevented from offering any meaningful evidence of mitigation based on his mental health, or from impeaching the State's evidence of his mental health." *Id.* at 1224. Because the "assistance a psychiatrist *would have* provided McWilliams's counsel in 'evaluating, preparing,

and presenting the defense that *Ake* requires' is unknown," *id.* (emphasis in original), and there was no "record from which we could assess prejudice," *id.* at 1226, Judge Tjoflat concluded that "*this Ake* error defies analysis by harmless-error review, [and] prejudice to McWilliams must be presumed," *id.* at 1224 (emphasis in original). In a concurring opinion, Judge Jordan conducted a prejudice analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and concluded that "the *Ake* error identified by the Supreme Court had a 'substantial and injurious effect or influence in determining' the trial court's sentence." 940 F.3d at 1231 (Jordan, J., concurring).

The State petitioned for rehearing *en banc*. However, no member of the court requested a poll, and the court denied the petition on December 12, 2019. *See* Appendix C to State's Application for Stay. The State did not ask the Eleventh Circuit to stay its mandate. Accordingly, the court issued the mandate on December 20, 2019. *See* Appendix B to State's Application for Stay. That same day, the State filed a Motion to Recall the Mandate and Stay the Mandate Pending a Petition for Certiorari. The State acknowledged that it "failed to seek a Rule 41(d) stay" prior to issuance of the mandate and that "its motion for stay should have been filed before the mandate issued." Motion to Recall the Mandate and Stay the Mandate at 1, 6. The Eleventh Circuit denied the motion on January 7, 2020. The State now asks this Court to stay the proceedings in the district court. McWilliams opposes the State's Application.

ARGUMENT IN OPPOSITION TO APPLICATION FOR STAY

The State argues that there is a reasonable probability that this Court will grant certiorari. State's Application for Stay at 3. However, this case presents no question worthy of this Court's review. The three judges on the court below all reached the conclusion that McWilliams was prejudiced by the trial court's failure to meet "even *Ake*'s most basic requirements." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017). Although they took slightly different routes to reach that destination, it is clear that McWilliams was prejudiced and is entitled to a new sentencing.

Judge Tjoflat, joined by Judge Wilson, concluded that "the *Ake* error infected the entire sentencing hearing from beginning to end, as McWilliams was prevented from offering any meaningful evidence of mitigation based on his mental health, or from impeaching the State's evidence of his mental health." 940 F.3d at 1224. Instead of speculating about "*how* a psychiatrist would have assisted the defense, *what* mitigating evidence the defense would have presented based on the psychiatrist's analysis, or what evidence the defense would have offered to impeach the State's evidence, and *how* the State would have responded in rebuttal," Judge Tjoflat determined that under the circumstances of this case, a presumption of prejudice was warranted. *Id.* (emphasis in original).

The State argues that harmless error should be assessed under the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), but it is clear from the opinions below that the same result is reached under that analysis.

Judge Jordan concluded in a concurring opinion that "the *Ake* error identified by the Supreme Court had a 'substantial and injurious effect or influence in determining' the trial court's sentence." 940 F.3d at 1231 (Jordan, J., concurring) (citing *Brecht*, 507 U.S. at 623).[2] He based his conclusion on several facts, including the neuropsychological assessment stating that McWilliams had organic brain dysfunction. He cited to the assessment, which described "'evidence of cortical dysfunction attributable to right cerebral hemisphere dysfunction,' shown by 'left hand weakness, poor motor coordination on the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills.'" 940 F.3d at 1231-31 (quoting the neuropsychologist's assessment). Judge Jordan noted that these "deficiencies were 'suggestive of a right hemisphere lesion' and 'compatible with the injuries' Mr. McWilliams said he sustained as a child." *Id.* at 1232 (quoting the neuropsychologist's assessment). Further quoting the mental health assessment, Judge Jordan recognized that McWilliams's "'obvious neuropsychological deficit' could be related to his 'low frustration tolerance and impulsivity.'" *Id.*

Judge Jordan also noted that the prison records, received by defense counsel on the day of the sentencing, showed that McWilliams was being administered "an assortment of psychotropic medications," including the "antipsychotic Mellaril." *Id.* Judge Jordan also relied upon the testimony of a neuropsychiatrist presented in

[2] As Judge Jordan observed, the Eleventh Circuit's initial opinion "considered the alleged *Ake* error to be the failure to appoint a defense expert," but after its opinion was reversed by this Court, it was required to address the failure of the trial court to ensure that McWilliams had "meaningful assistance in evaluating, preparing, and presenting the defense." 940 F.3d at 1231 (quoting *McWilliams*, 137 S. Ct. at 1800-01).

McWilliams's post-conviction proceedings, who explained that the results of pretrial testing of McWilliams had been misinterpreted and actually reflected "significant psychiatric and psychological problems." *Id.* at 1232 (internal quotations omitted).

This evidence, Judge Jordan concluded, "could have been translated into a legal strategy," *id.*, which would have enabled McWilliams "to present evidence and arguments to explain that his purported malingering was not necessarily inconsistent with mental illness," and "could have persuaded the trial court that his organic brain dysfunction caused sufficient impairment to rise to the level of a mitigating circumstance." *Id.* at 1233. However, without the assistance that should have been provided under *Ake*, McWilliams's counsel were unable to understand the reports and records and present this evidence. In the absence of this evidence, the trial judge found that McWilliams was malingering and that there were no mitigating circumstances.

Judge Wilson also found that the *Ake* error had a "substantial and injurious effect" at sentencing when he dissented from the Eleventh Circuit's first decision in this case in 2015. 634 F. App'x at 716-18 (Wilson, J., dissenting). In his dissent, Judge Wilson found that McWilliams was denied "meaningful access to a mental health expert contemplated by *Ake*." *Id.* at 713. He cited testimony by the neuropsychiatrist who testified in post-conviction proceedings that McWilliams would have presented "different," significantly "more viable" mental health evidence had he been "afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense." *Id.* at 717. Judge Wilson

concluded that the *Ake* error "precluded McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the State," *id.* at 716-17, and that "but-for the trial court's *Ake* error, the court would have been faced with a starkly different record," *id.* at 718. In short, even under the analysis for which the State argues, the denial of expert assistance was prejudicial to McWilliams, and a new sentencing hearing is required.[3] Thus, even if the case does present the question that the State claims it does, its resolution would not alter the ultimate outcome in this case—and therefore provides no basis to prevent McWilliams's resentencing proceeding from going forward.

In all events, the Eleventh Circuit's opinion is extremely unlikely to have the broad effects suggested by the State. The court explicitly limited its analysis to the unique factual and procedural circumstances of McWilliams's case, 940 F.3d at 1224, and it considered and distinguished opinions from other circuits which, faced with different facts and procedural postures, found otherwise, *id.* at 1224 n.8. Therefore, the Eleventh Circuit's decision below would not affect the disposition of this case or have a broad effect on other cases. It is doubtless for that reason that not a single member of the Eleventh Circuit voted to rehear the issue *en banc*. If the panel majority had adopted a position so directly at odds with the law of other circuits, surely at least one member of the Court of Appeals would have voted in favor of review by the full court.

For these reasons, this is not a strong case for certiorari review. A grant of

[3] These conclusions are consistent with this Court's observation that "[t]here is reason to think that" the *Ake* violation "could have" mattered. *McWilliams*, 137 S. Ct. at 1801.

certiorari would have no effect on the ultimate disposition of this case, and a stay of the Eleventh Circuit's mandate is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the State's Application for a stay.

Dated February 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark Loudon-Brown, counsel for James McWilliams and a member of the Supreme Court Bar, hereby certify that a copy of the attached Opposition to Application for Stay of the Mandate was filed electronically and by first-class mail with the United States Supreme Court and was served electronically and by first-class mail on the following party, this 10th day of February, 2020.

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