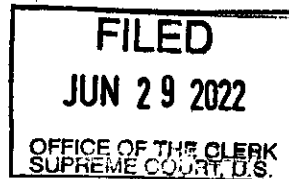


No. **22-5442**

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

POWELL JONES, JR. — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, Director, TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Western District of Texas

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Powell Jones, Jr. - #02126277

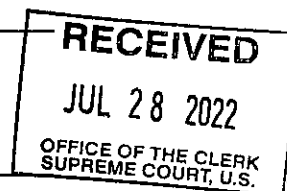
(Your Name)

O.B. Ellis Unit - 1697 FM 980

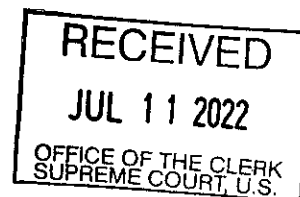
(Address)

Huntsville, Texas 77343

(City, State, Zip Code)



(Phone Number)



QUESTION(S) PRESENTED

- I. Did the panel of the Fifth Circuit err by deciding the merit of an appeal not properly before the Court to justify the denial of a certificate of appealability?
- II. Has the Supreme Court overruled *Strickland v. Washington*, which held that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary?
- III. Does the Supreme Court decision in *Ake v. Oklahoma*, that due process may require the appointment of an expert, not apply when trial counsel's error results in the denial of a motion for appointment of an expert witness, although the trial court did determine during proceedings that a technical medical issue was in fact a significant factor in the case?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the 66TH District Court of Hill County, Texas court appears at Appendix D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was April 1, 2022.

☒ No petition for rehearing was timely filed in my case. Motion for Extension of Time to file denied on April 20, 2022.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was July 22, 2020. A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTIONAL STATEMENT

Mr. Jones invokes this court's jurisdiction to grant the petition for writ of certiorari, the fifth Circuit of the United States Court of Appeals, on the basis of 28 U.S.C. §1254(1). The court of appeals denied Mr. Jones motion for the issuance of a certificate of appealability on April 1, 2022. Mr. Jones did not file for a rehearing in the court of appeals. This petition is timely filed in accordance with the Rules of the Supreme Court, Rule 13.1

STATEMENT OF THE CASE

On July 19 and 22, 2016, the petitioner, Powell Jones, Jr., was unable to attend scheduled meetings with his adult probation supervisors at the Tarrant County and Hill County Adult Community Supervision Offices due to illness complications he did experience related to his chronic medical disease and illnesses. On July 29, 2016, Mr. Jones did report to the Tarrant County probation office and advised his probation supervisor of his complications and hospitalization due to his pre-existing medical issues. On August 1, 2016, the Hill County District Attorney's Office filed State's Application To Proceed To Final Adjudication. On or about November 17, 2016, Mr. Jones was arrested while reporting to adult probation in Hill County. The Court did appoint defense counsel to represent the defendant in adjudication proceedings. On March 23, 2017, counsel presented a medical-excuse defense, without any medical evidence, in-part and the trial court did find that Mr. Jones's medical illness issue specifically his diabetes was a significant factor in this case. During proceedings the trial court denied Mr. Jones' request for the appointment of an expert witness and then found as true that Mr. Jones violated four (4) of the nine (9) State's Allegations and sentenced him to 60 years in the Texas Department of Criminal Justice Institutional Division (TDCJ-ID). Mr. Jones appealed his conviction.

Mr. Jones raised on direct appeal that he was denied his constitutional rights, under AKE, to the assistance of an medical expert among other things, thus, was denied a fair trial on the merits of the case. On January 3, 2018, the Tenth Court of Appeals of Texas affirmed the trial court's judgment as modified, holding that Mr. Jones failed to present a proper pretrial motion for the appointment of an expert witness for the defense, because there was no medical evidence presented to support his claim that his medical illness issue(s), specifically his diabetes, was a significant factor in the case. Which the court's opinion is made a part of the corresponding appendix. App. G-35

Mr. Jones submitted an state motion §11.07 Habeas corpus application, in which he raised Ineffective Assistance of Counsel (IAC) grounds for relief and due process violations which are particularized in his 11.07 petition, and made a part of the corresponding appendix. App. H-49

On May 15, 2020, the state habeas court issued a biased findings, without any hearing on the controverted facts and previously unresolved facts material to the legal justification of Mr. Jones's confinement, in which the court issued adverse findings due to trial counsel's sterling reputation with the Court and community and because of the defendant's conduct and failure to accept a reasonable plea offer with

the Court's adoption of Trial Counsel's conclusions, as presented in counsel's vitiated sworn affidavit, as its own, verbatim, as well as, the court's defining statement of deliberate indifference for the rights of the defendant. Which is also made a part of the corresponding appendix. App D-27.

On July 22, 2020, the Texas Court of Criminal Appeals (TCCA) denied Mr. Jones's §11.07 application for writ of habeas corpus based upon the findings of the trial court without written opinion, and made a part of the corresponding appendix. App C-26.

Mr. Jones submitted his instant motion seeking post-conviction relief pursuant to 28 U.S.C. §2254. His primary claims-although poorly particularized because of his ignorance of law - were based on four basic events: 1) his defense counsel failed to deprive him of reasonably adequate pretrial representation; 2) he was denied a right to expert witness assistance error; 3) the state habeas/trial court performed a biased review of the fact evidence before it; and 4) the state courts failed to answer the pertinent questions of was Mr. Jones denied adequate consultation and investigation of the technical medical issues of the case by his attorney; whether or not Mr. Jones was denied his right, under Ake, to the appointment of an expert witness was in error once the court did determine his medical issues was a significant factor in the case; and if so, was the denial a due process violation that resulted in a unfair trial.

On July 12, 2021, the U.S. District Court issued a memorandum opinion, which maintained that the state court's findings under a presumption of correctness in federal habeas corpus proceedings without answering the pertinent questions in relation to the indisputable evidence provided by Mr. Jones, the district court denied Mr. Jones's request for relief, under §2254. Which is made a part of the corresponding appendix. App B-3.

In addition to the district courts July 12, 2021, memorandum, it issued an order that denied Mr. Jones's Motion for Discovery and Production and further ordered the denial of Certificate of Appealability (C.O.A.) on the same day. Which is also made a part of the corresponding appendix. App B-25.

On July 22, 2021, Mr. Jones filed a notice of appeal from the district court's denial of a C.O.A., made a part of the corresponding appendix. App I-74.

On November 29, 2021, Mr. Jones filed Motion For Certificate of Appealability in the United States Court of Appeals for the Fifth District. Which is made a part of the corresponding appendix. App J-77.

On April 1, 2022, the U.S. Court of Appeals for the Fifth Circuit issued an order denying Mr. Jones's Motion for C.O.A., which the court's opinion is made a part of the corresponding appendix. App A-1.

On or about April 12, 2022, Mr. Jones filed his Motion for Extension of Time to file Petition for Rehearing and Rehearing En Banc in the U.S. Court of Appeals, and made a part of the corresponding appendix. App.K-99 .

On April 20, 20202, the U.S. Court of Appeals for the Fifth Circuit denied the motion for extension of time to file a motion for reconsideration/rehearing en banc. Which the court's memorandum is made a part of the corresponding appendix. App.L-102.

REASONS FOR GRANTING THE PETITION

- I. Did the panel of the Fifth Circuit err by deciding the merit of an appeal not properly before the Court to justify the denial of a certificate of appealability?
 - A. The panel improperly sidestepped the C.O.A. process by denying relief based on its views of the merits.

In reviewing the facts and circumstances of Mr. Jones's case, the Fifth Circuit panel "paid lip service to the principles guiding issuance of a C.O.A." Tennard v. Dretke, 542 U.S. 274, 283, 124 S.Ct. 2562, 2569 (2004), but in actuality, the panel held Mr. Jones to a far more strigent standard. Specifically, the Fifth Circuit panel "sidestepped the threshold C.O.A. process by first deciding the merits of [Mr. Jones'] appeal, and then justifying its denial of a C.O.A. based on its adjudication of the actual merits, thereby "in essence deciding an appeal without jurisdiction." Miller-El v. Cockrell, 537 U.S. 322, 336-37, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003).

As the Supreme Court held on Miller-El, the threshold nature of the C.O.A. inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he would prevail." Miller-El, 537 U.S. at 337. In Mr. Jones's case however, that is exactly what the panel did.

Mr. Jones filed a motion in the Fifth Circuit seeking a certificate of appealability, so that he may appeal the district court's denial of his §2254 motion. The panel however, determined that the district court's assessment of the constitutional claims that Mr. Jones's court-appointed lawyer had, indeed, provided effective assistance based on the state court(s) findings that trial counsel has a sterling reputation with the Court and the community, and matters complained of was the result of the Defendant while on the Defferred Adjudication term, and his failure to accept a reasonable plea offer, holding that trial counsel could only work with the facts presented. In fact, the state habeas court adopted trial counsel's conclusions as if set out in affidavit, verbatim. App. D-27; E-28. Thus, the panel awarded that the district court's opinion

on the merits of the state court(s) findings a presumption of correctness without any review of the facts of evidence in federal habeas corpus proceedings. Thus, the panel concluded that Mr. Jones should be denied a certificate of appealability because the appeal was obviously meritless.

The panel impermissibly sidestepped the C.O.A. inquiry in this manner by denying relief because the subsequent appeal would be meritless. The panels assessment of the merits is patently wrong. The panel could not possibly resolve the merits of the appeal based solely on a motion seeking a certificate of appealability. Moreover, without the issuance of a C.O.A. and the district court's record before the panel, the panel was without jurisdiction to determine the merits of the appeal.

II. Has the Supreme Court overruled *Strickland v. Washington*, which held that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary?

A. The Fifth Circuit of the court of appeals held that "Jones fails to demonstrate that reasonable jurists would find the district court's assesment of the constitutional claims in this case debatable or wrong." and denied him motion for C.O.A. because Jones does not make "substantial showing of the denial of a constitutional right."

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of *Strickland v. Washington*. The Supreme Court also held that a §2254 "collateral challenge may not so service for appeal." *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977); also see *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1594, 71 L.Ed. 816 (1982).

In the Fifth Circuit panel review the court found that Mr. Jones was denied his C.O.A. because he does not make a "substantial showing of the denial of a constitutional right" in his federal habeas corpus writ. The claims were raised in a supplemental brief filed in pro se. The federal court system requires that ineffective assistance of counsel claims should be brought in collateral proceedings and a factual record must be developed in, and addressed by, the state habeas court in the first instance for effective review. Even if evidence is not necessary, at the very least counsel accused of deficient performance can explain their reasonings and actions, and the state habeas court can render its opinion on the merits of the claim. An opinion by a state habeas court is a valuable aid to appellate review development; the claim

will still be presented first to the state court(s) in collateral proceedings, so the reviewing federal appellate court's can have the benefit of the state court's views.

The merit of Mr. Jones's §2254 writ is self-evident, although indigent defendants pursuing first-tier review in habeas proceedings are generally ill-equipped to represent themselves, for (a) first-tier review application, forced to act in Pro Se, would face unreviewed by appellate counsel; and (b) without guides keyed to court review. A Pro Se movant's entitlement to seek relief from ineffective assistance of trial counsel might be a formality than a right because navigating the state collateral process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals afforded only twelve months to learn the federal process he is now involved. Be that as it may, Mr. Jones sought to show that the state court's adjudication of his constitutional claims on the merits involved a decision that was contrary to, or involved an unreasonable application of, clearly established federal law. Mr. Jones made the district court aware that the state habeas court's findings, and given also the decision of the Texas Court of Criminal Appeals, primarily on the sworn statement and conclusions of the court-appointed defense counsel, verbatim. Mr. Jones did present to both the state court's and the U.S. district court fact evidence of the court records that counsel had sworn to have conducted consultation with him about his case at a time it was impossible to have done so, thus, counsels filed sworn affidavit is vitiated by his claim to have consulted with Mr. Jones on March 22, 2016, regarding the allegations in the State's Application to Proceed to Final Adjudication, factual and legal defenses to said allegations, offers made by the State, and his attestment that Mr. Jones understood said allegations, defenses, and offer, a date that was almost five (5) months prior to the State filing its first motion application to proceed to final adjudication on August 1, 2016, and about nine (9) months prior to the court appointing him to represent Mr. Jones in this case. Mr. Jones also introduced the sworn affidavit of Lillie Jones to each court, although the affidavit is now absent from state records, that attested to specific efforts by Mr. Jones to consult with counsel about his case, to which counsel refused to act. App.F-33. Attorney Patrick S. Dohoney's vitiated claim could have been verified where counsel did state that his consultation with Mr. Jones was by phone. AppE-29. Within the state record it is a fact that Mr. Jones did petition the state habeas court to issue subpoena of the Hill County Jail

inmate phone logs and visitation logs to develop facts in the record concerning attorney calls and visits, as being that he was incarcerated the entire time up to the adjudication proceeding. App.M-103. Mr. Jones sought to obtain his county jail medical records as well but the state habeas/trial court failed to rule or respond to his petition. It is evident that Mr. Jones referenced to "substantial" fact records and evidence to support his claim that defense counsel failed to adequately consult with him about his case in order to obtain information and facts known to him that was critical to preparing a viable medical-excuse defense, in-part, whereas the state court's and subsequently the district court's ruling relies on a vitiated sworn affidavit that can not refute the petitioner's claim. The denial of adequate pretrial consultation led to deprivation of critical medical record evidence, and the loss of potential corroborating witnesses testimony being obtained for the defense being discovered. This alone is sufficient to carry Jones's initial burden of demonstrating that he was denied a fair trial. Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982) (quoting Rummel v. Estelle, 590 F. 2d 103, 104 (5th Cir. 1979). App.M-103.

Furthermore, Mr. Jones made the district court aware that he introduced medical record evidence, that was reasonably available, that affirmed he suffered from Type 2 Diabetes Mellitus during time of States Allegatuins 1, 2, 7, and 9. This is "substantial" evidence that was critical to establishing his medical excuse defense. The medical record evidence specifically named his treating physicians. Defense counsel was well aware that Mr. Jones was under physicians care but, the attorney failed to interview or seek to interview any of the potential corroborating fact witnesses, whereas, Mr. Jones had informed counsel in the one brief consult that complications from his medical illnesses affected his ability to adhere to specific conditions of his probation. The vitiated sworn affidavit that the state habeas court relies does not discredits Mr. Jones's claim that his court-appointed lawyer failed to perform any investigation of the technical medical issues that he advised counsel of and failed to investigate or seek to interview any of the potential corroborating medical fact witnesses, his treating physicians. In fact, the attorney's statement in the affidavit regarding his investigation alludes Mr. Jones's claim as true. Trial counsel states that he only spoke to his client and his client's mother regarding the medical issues. App.E-29-30. Mr. Jones also made the district court aware that the defense counsel had informed the trial court in pre-trial motion that he did not possess the knowledge or expertise to perform an investigation of the technical medical issues that were significant factors of

in regards to the medical-excuse defense preparation in this case. The attorney's own statement of his incompetence to properly defend this case without assistance is sufficient to carry Jones's burden that he did not have a fair trial. During the adjudication proceeding the trial court did conclude that Mr. Jones's medical illnesses, specifically his diabetes was a "significant factor" in the case and was not disputed by the State, thus, it is reasonable to believe that had counsel investigated and discovered the medical record evidence and possibly obtained the testimony of potential corroborating medical witnesses regarding his diabetes at the time of the allegations there would have been a different outcome. The medical record evidence contained fact dialogue of symptoms and effects that a diabetic patient may experience that supported Mr. Jones's actual testimony of what he did experience himself. The sole affidavit, the vitiated statement of trial counsel does not dispute the truth of the medical record evidence and the fact that the court-appointed attorney failed to present any medical evidence or technical medical witness in a proceeding in which he was purportedly presenting a medical-excuse defense. Being that Mr. Jones has presented "substantial" evidence, from outside the record already, he then made the district court aware that he had petitioned the state habeas court to issue subpoena for his medical records and his treating physicians in order to develop the record with fact. AppN-107.

Mr. Jones believes that the question of whether or not the state court's sufficiently adjudicated petitioner's claim of ineffective assistance of counsel on merits to warrant giving the state court findings a presumption of correctness in federal habeas corpus proceedings when the state habeas court failed to conduct any hearing to fully develop the record on relevant sworn affidavit of Lillie Jones, Mr. Jones medical records that was reasonably available and verify's an issue of the illness existing during the time period the State alleges he violated specific conditions of his adult probation, and verify's that potential corroborating witnesses, Mr. Jones treating physicians existed. This evidence, from outside the record, provided support for Mr. Jones's constitutional claim that counsel failed to consult and/or investigate medical issue evidence, among other things, that was critical to counsel preparing a viable defense, and supports his plea for habeas corpus relief based on his meaningful allegations. The federal courts have long held that: "Investigation and preparation are the keys to effective representation,... court-appointed counsel have a duty to interview potential witnesses and "make an independent examination of facts, circumstances, pleadings and laws involved." See McQueen v. Swenson, 498 F. 2d 207, 217 (8th Cir. 1974); Pennington v. Beto, 437 F. 2d 1281 (5th Cir. 1971); As noted in King v. Beto, 429 F. 2d 221, 222, n. 1 (5th Cir 1965), Cert. denied,

401 U.S. 936, 91 S.Ct. 921, 28 L. Ed. 2d 216 (1971), "each case involving the constitutional issue of effectiveness of counsel depends on the facts and the specific conduct of the parties involved." Examination of the record clearly shows that, among others, the question of whether Mr. Jones's attorney conducted any pre-trial investigation of the technical medical issues of the case and whether or not counsel interviewed or sought to obtain testimony of potential corroborating fact medical witnesses, Jones's treating physicians, has never been answered.

Under these circumstances, the denial of his request for a evidentiary hearing was erroneous. Since Jones's is legally sufficient and raises issues of material fact that have not been resolved by a full hearing by the Texas court trier of fact, a federal evidentiary hearing is required. Townsend v. Sain, 372 U.S. 293, 312-313, 83 S.Ct. 745, 757, 9 L. Ed. 2d 770 (1963).

Jones made the district court aware that the trial counsel's vitiated affidavit does not address his failure to investigate and discover facts in the court records that disputes the validity of State's allegation #4. In the record, the same trial court had previously taken judicial notice of State's Application to Proceed to Final Adjudication filed on July 3, 2012, in which it alleged in allegation #6 that Mr. Jones failed to perform 121.5 hours CSR work by the due date of 06/14/2012. App. 0-113. The trial court subsequently reinstated Mr. Jones although it was adjudged that state's allegation #6 was true. Because there has been no other court action that would have increased the amount of CSR hours to 191.5 or amended the due date back to 02/14/2012, as the State alleged in these proceedings, the trial court's finding of true in State's recent allegation #4 is of contrary to facts of record and should have been disputed by defense counsel had he investigated. Moreso, Mr. Jones made the district court aware that counsel failed to investigate the facts of law in regards to the \$8.00 UA fee, that states, the State must prove defendant's inability to pay was intentional, even if the state satisfies burden of proving the defendant did not comply with payment requirements. Quisenberry v. State, 88 S.W. 3d 745 (Tex.App.-Waco 2002). The state court's findings in the habeas corpus petition was adjudicated on the merits of which involved an unreasonable application of, clearly established federal law. Although statutory provisions requires federal courts to be deferential to habeas corpus decisions on the merits by the state courts factual determinations are entitled to a presumption of correctness, which must be rebutted by a presentation of clear and convincing evidence. Goodrum v. Quarterman, 547 F. 3d 249, 256 (5th Cir, 2008). ~~That~~ Where Fifth Circuit cases have recognized that whether counsel has rendered reasonably effective assistance cannot be determined

solely by reference to his performance at trial, nor an attorney's standing with the court and community. The Fifth Circuit determined that "informed evaluation of potential defenses to charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." Gaines v. Hopper, 575 F. 2d 1147, 1149-50 (5th Cir. 1978).

Mr. Jones was entitled to federal evidentiary hearing in support of his plea for habeas corpus relief based on his constitutional claims, supported by evidence from outside the record, as well as, indisputable facts found in the record. When viewed in its totality, that the state habeas court declined in multiple occasions to develop the record on matters pertinent and relevant to the constitutional claims made by Mr. Jones in his state habeas corpus writ, yet the court chose to rely on a vitiated sworn affidavit of trial counsel and its obviously biased opinion to reach its findings and conclusions on the adjudication of the claims resulting in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The law and controlling precedent indicates that Mr. Jones is due his requested relief or, at the least an hearing to fully develop the facts raised by the evidence so that a fair determination can be made in this case.

III. Does the Supreme Court decision in Ake v. Oklahoma, that due process may require the appointment of an expert, not apply when trial counsel's error results in the denial of a motion for appointment of an expert witness, although the trial court did determine during proceedings that a technical medical issue was in fact a significant factor in the case?

A. Defense counsel's defective motion did not make a threshold showing with facts or evidence that an expert's testimony will likely be a significant factor in his client's defense.

Trial counsel did submit a pretrial motion for the appointment of an expert witness to assist with defense preparations and investigation of technical medical issues, but counsel failed to provide the requisite evidence or affidavit to the motion for the appointment of an expert witness. Indigent defendants may have access to expert witnesses provided by the State for the preparation of a defense where the defendant has made a preliminary threshold showing with

facts or evidence that the expert's testimony will likely be a significant factor in his defense or the State's prosecution. Ake v. Oklahoma, 470 U.S. 68, 82-86, 105 S. Ct. 1087, 1096-97, 84 L. Ed. 2d 53 (1985). However, satisfying the preliminary condition required more "than undeveloped assertions that the requested assistance would be beneficial." The defective motion trial counsel presented in pretrial contained no affidavits or other evidence that would support the need for an expert witness for the medical-excuse defensive theory, thus, counsel failed to meet the preliminary burden because he failed to obtain or seek to obtain reasonably available medical record evidence affirming that Mr. Jones does in fact suffer from technical medical illnesses that reasonably could have surely affected his ability to perform many of the conditions of probation, nor did counsel interview or seek to obtain affidavit or testimony from potential corroborating witnesses, his treating physician(s) who could have explained his clients symptoms to the court and potentially explained to the court why he violated certain conditions of probation. In the record, the Tenth Court of Appeals opinioned that the pretrial motion submitted by trial counsel was deficient to satisfy the preliminary burden required for the appointment of an expert witness to the defense in this case. App.G-41. It is also a fact that counsel's failure to present the motion in ex parte exposed to the State Mr. Jones's intended defense in-part, thus, provided the opposition a tactical advantage in this case. Trial counsel's error in presenting the defective, deficient motion amounted to ineffective assistance of counsel and led to a deprivation of due process because a Mr. Jones was denied "an expert who can buttress a viable defense." Defense counsel failed to provide concrete reasons for the appointment of an expert. He must offer "more than undeveloped assertions that the requested assistance would be beneficial." Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985). It is a fact of record that Mr. Jones had advised his attorney that he was under doctors care for his technical medical illnesses.

B. Under Ake, the court should have appointed the expert.

In written motion, defense counsel explained that Mr. Jones's diabetes presented "medical issues" that arose while he was "on probation." He requested expert assistance to "investigate[] and explore[]" these issues. Counsel also advised the trial court that he does not possess the knowledge or expertise to address all the issues involved in this medical investigation. Trial counsel attested that the appointment of an expert witness is necessary to insure that Powell

Jones, Jr. receives his rights to effective assistance of counsel, and other rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; also his right to due process and the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. At the hearing, the severity of Jones's diabetes was undisputed. Defense witness, Lillie Jones explained in layman's terms how his medical condition caused him to miss appointments and adversely affected his ability to work or seek employment. Mr. Jones himself testified that his diabetic-induced lethargy was a primary reason he failed to report and advised counsel that it was the reason he had not attended the graduation session for out-patient treatment. The court purported to give Jones "the benefit of the doubt on the diabetes issue, but the also purported to rely on its own understanding of diabetes in assessing Mr. Jones's condition. In the record it is shown miscommunications between the court's staff and trial counsel regarding the information the court required to consider appointing an expert did occur. Although the courts have discussed the balancing of three factors in *Ake*, the third factor is the most significant. The Supreme Court stated that an individual's interest in the accuracy of a proceeding where his life or liberty is at stake is "obvious and weighs heavily" in the analysis. *Ake*, 470 U.S. at 78, 105 S.Ct. at 1093.

Here, the impact of Jones's diabetes was a critical issue at the hearing. The trial court's acquiescence to its 'significance' still established that his diabetic condition was likely to be a significant factor, thus, Mr. Jones "was entitled to more than an expert to testify on his behalf-he was also entitled to 'technical assistance...to help evaluate the strength of [that] defense, ... and to identify the weaknesses in the State's case, if any. Because the trial court denied Mr. Jones's request for an expert who can buttress a viable defense due process rights violations are implicated and could not be overcome based on the state court's findings and conclusions. At the least, because the trial court violated Jones's right to due process by denying his request for the appointment of an expert, the judgment of conviction should be reversed and this case remanded for a new trial. See *Ake*, 470 U.S. at 87. The ...

In either consideration, Mr. Jones was deprived of his due process right, under *Ake*. The district court cannot say beyond a reasonable doubt that the error did not contribute to Mr. Jones's adjudication or punishment. The U.S. Court of Appeals errors in its ruling that Mr. Jones failed to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims

debatable or wrong." Based on the record in the district court and the evidence from out side the record, Mr. Jones has made "a substantial showing of the denial of a constitutional right." pursuant to 28 U.S.C. §2253(c)(2).

CONCLUSION

Mr. Jones respectfully pleads that this court grant his petition for a writ of certiorari and permit briefing and argument on the issues contained herein. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Rowell Jones Jr.

Date: June 29, 2022