No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN WAYNE KEEFE,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long held that the constitution guarantees the "basic tools of an adequate defense" for the rich and indigent alike. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The Court recently reaffirmed this protection includes expert assistance in "evaluation, preparation, and presentation" of the defense where the defendant's "'mental condition'. . . was 'relevant to . . . the punishment he might suffer' . . . [and] that 'mental condition,' *i.e.* his 'sanity at the time of the offense,' was 'seriously in question.'" *McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017) quoting *Ake v. Oklahoma*, 470 U.S. 68, 70, 83 (1985).

Petitioner here sought expert assistance for the preparation of his sentencing proceedings related to a juvenile offense, for which he faced potential death in prison. The trial court denied his request and appointed its own psychological expert to answer several questions concerning his mental health. The Montana Supreme Court affirmed the denial of a defense expert in psychology on the sole ground that petitioner's "sanity" was not at issue, App. 264a, and, when given the opportunity in this case, declined to reconsider its holding. App. 28a

This petition presents the following question: whether the "'basic tools of an adequate defense'" include expert assistance in "evaluation, preparation, and presentation" of a defense at sentencing premised on the age of the juvenile defendant and where the court and the State have put his mental state at issue. *Ake*, 470 U.S. at 77, 83 quoting *Britt*, 404 U.S. at 227.

PARTIES TO THE PROCEEDING

The petitioner is Steven Wayne Keefe.

The respondent is the State of Montana.

STATEMENT OF RELATED PROCEEDINGS

State v. Steven Wayne Keefe, No. ADC-86-059, District Court of the Eighth Judicial District for the State of Montana. Judgment entered December 17, 1986.

State v. Steven Wayne Keefe, No. 87-92, Supreme Court of Montana, 759 P.2d 128 (Mont. 1988). Judgment entered June 13, 1988.

State v. Steven Wayne Keefe, No. ADV-17-76, District Court of the Eighth Judicial District for the State of Montana. Judgment ordering resentencing entered December 18, 2017.

Keefe v. Kirkegard, No. 17-70223 (9th Cir.), No. 4:17-cv-15-BMM-JTJ (D. Mont.). Order dismissing in light of grant of re-sentencing relief entered on November 5, 2018.

State v. Steven Wayne Keefe, No. ADV-17-76, District Court of the Eighth Judicial District for the State of Montana. Judgment at resentencing entered on May 6, 2019.

State v. Steven Wayne Keefe, No. DA 19-0368, 478 P.3d 830 (Mont. 2021). Judgement reversing for re-sentencing entered January 8, 2021.

State v. Steven Wayne Keefe, Nos. ADC-86-059, ADV-17-076, District Court of the Eighth Judicial District for the State of Montana. Judgement entered at re-sentencing July 16, 2021.

State v. Steven Wayne Keefe, No. 21-0409, 512 P.3d 741 (Mont. 2022). Judgment entered June 28, 2022.

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Petitioner Steven Wayne Keefe respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Montana.

INTRODUCTION

In *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985) this Court made clear that defendants like Mr. Keefe were entitled to access to experts need to "assist in evaluation, preparation and presentation of the defense." This constitutional guarantee ensures "a proper functioning of the adversary process" by "making certain that [the defendant] has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77.

This petition presents a breakdown of that adversarial process. In preparation of his *Miller v. Alabama* 567 U.S. 450 (2012) resentencing, Mr. Keefe was on notice that his psychological profile and mental health would be central to the State's argument and the court's ruling. The State had previously made extensive arguments about his mental condition and the District Court at resentencing had appointed an expert and ordered him to address five areas concerning Mr. Keefe's mental condition. Yet, the District Court rejected Mr. Keefe's repeated requests for the assistance of a psychologist or any other mental health expert. At resentencing, the court's expert testified, offering apparently anachronistic views about psychology and juvenile development. Without the assistance of an expert, Mr. Keefe's attempt to counter the expert's testimony and

address the court's concerns fell flat. The Montana Supreme Court affirmed the denial of expert assistance, holding that *Ake* only requires state funding of experts when the defendant raises a substantial defense based on his lack of "sanity."

The Montana Supreme Court has repeatedly imposed its "sanity-only" version of *Ake* and is an outlier among the state and federal courts. The Montana Supreme Court's innovation left Mr. Keefe without the necessary tools for his defense, and undermines the due process guarantee in all Montana courtrooms. This Court should grant the petition.

OPINIONS BELOW

The June 28, 2022 decision of the Supreme Court of Montana is published. App. 16a–28a; *see State v. Keefe*, 512 P.3d 741 (Mont. 2022). The July 16, 2021 sentencing order of the District Court of the Eighth Judicial District for the State of Montana is unpublished. App. 5a–14a.

JURISDICTION

The Supreme Court of Montana entered judgment on June 28, 2022. App. 16a. On September 9, 2022, Justice Kagan extended the time to file until October 26, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Eighth Amendment to the Unites States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT

A. The Original Sentencing

In 1986, Mr. Keefe was found guilty of three counts of deliberate homicide and one count of burglary in connection with the deaths of respected Great Falls citizens Dr. David McKay, Constance McKay, and Dr. Marian Qamar. *See State v. Keefe*, 759 P.2d 128, 129 (Mont. 1988). Mr. Keefe was seventeen years old at the time of the offense. *Id.* at 131.

Mr. Keefe's psychological profile and mental health played a central role at the original trial and sentencing. During sentencing, the District Court considered a psychological evaluation from Dr. George Hossack, who concluded that Mr. Keefe suffered from antisocial personality disorder. App. 35a. The court also considered a prior diagnostic "impression" of antisocial personality disorder by Dr. Thomas J. Krajacich and a diagnosis of "conduct disorder" by Dr. John Rich both of whom had evaluated Mr. Keefe years before the offense. App. 35a. Citing this psychological

evidence, the District Court sentenced Mr. Keefe to three consecutive life sentences for the deliberate homicide, ten years for burglary, four ten-year terms for the use of a weapon in the offenses and found him ineligible for parole. *Keefe*, 759 P.2d at 129; App. 29a-35a.

B. Mr. Keefe's First Resentencing After *Miller v. Alabama*, 567 U.S. 460 (2012)

After serving more than thirty years in the Montana State Prison, on December 18, 2017, the District Court found the original sentencing hearing held in Mr. Keefe's case was insufficient "to justify imposition of life imprisonment without parole" under the constitutional standard set out in *Miller*. App.40a–41a. In granting relief, the court cautioned that Mr. Keefe "still faces the same penalty[.]" App. 41a.

In preparation for his resentencing hearing, defense counsel, representing Mr. Keefe on a *pro bono* basis, filed an ex parte motion requesting funds for experts. Sealed App. 299a–315a. Mr. Keefe explained to the court that, as a result of severe budget constraints, the Office of the State Public Defender would be unable to provide adequate funding absent a court order. Sealed App. 302a. Mr. Keefe argued for the need for psychological expert assistance in light of "[t]he State's use of previous psychological assessments in support of his former sentence indicat[ing] that experts to assess Mr. Keefe's mental, personal and social development 'may well be crucial to the defendant's ability to marshal his defense.'" Sealed App. 307a

(quoting *Ake*, 470 U.S. 68, 80 (1986). In particular, Mr. Keefe requested a reviewing forensic psychologist "to evaluate [the prior] psychological and psychiatrist testimony presented in Mr. Keefe's original sentencing." Sealed App. 310a.

In an April 2018 hearing, the District Court denied Mr. Keefe's requests for funds without prejudice, directing Mr. Keefe to seek appointment and funding from the Office of the State Public Defender. App. 55a. Counsel was appointed on May 15, 2018.[1]

Defense counsel then filed a motion to proceed ex parte and under seal to request expert funds, which was granted on December 11, 2018. In the same order, the District Court appointed Dr. Robert Page to report on Mr. Keefe's development and mental health at the time of the offense. App. 58a–59a. The order focused on Mr. Keefe's psychological state and sought Dr. Page's expert opinion across five inquiries:

> 1) The brain development of juveniles as a mitigating factor;
>
> 2) The effect of Keefe's developmental experiences on his commission of the crime;
>
> 3) An examination of Keefe's mental health prior to and contemporaneously with his commission of the crime;
>
> 4) An examination of Keefe's chemical dependency history prior to and contemporaneously with his commission of the crime; and

[1] Although counsel was appointed, none of Mr. Keefe's lawyers have, to date, sought or received compensation for their work on his case.

> 5) Any treatment recommendations related to Keefe's rehabilitation.

App. 59a.

Following Dr. Page's appointment, Mr. Keefe renewed his request to fund a psychological expert to support his defense. Mr. Keefe again requested experts who would "'conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" Sealed App. 426a (quoting *Smith* v. *McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (internal quotations omitted)). Mr. Keefe noted that "counsel is on notice that Mr. Keefe's mental health and development will be squarely (and extensively) at issue during his resentencing[.]" Sealed App. 433a. In his motion, Mr. Keefe renewed his request for a reviewing forensic psychiatrist, (Sealed App. 434a) and additionally requested a psychologist, "critical both for understanding and for responding to Dr. Page's report[.]" Sealed App. 437a. The court denied Mr. Keefe's renewed motion, noting that the court would not interfere with the administrative process of the Office of the Public Defender, and otherwise declined to exercise its discretion to allow for additional fees. App. 71a.

In his evaluation of Mr. Keefe, Dr. Page administered and interpreted various psychological test instruments "relevant to Mr. Keefe's current psychological condition as well as his psychological and chemical dependency conditions at the age of the commission of his crimes." App. 76a. These tests included the Beck Depression Inventory, the Beck Hopelessness Scale, the Stat-Trait Anxiety Inventory and the Million Clinical Multiaxial Inventory. App. 76a.

His report included conclusions regarding Mr. Keefe's psychological state, including that his "profile does not present significant signs of psychopathology." App. 88a. Dr. Page further concluded that Mr. Keefe was a different person than the seventeen-year-old who committed the offense, and that he could succeed outside of prison if given the proper support. App. 88a, 90a–91a.

At resentencing, Mr. Keefe presented a wealth of testimony reflecting his growth while in prison. Michael Mahoney, a warden at the Montana State Prison during Mr. Keefe's incarceration, testified to Mr. Keefe's maturation while in prison. App. 172a. Former correctional officer Robert Shaw testified that he first saw young Mr. Keefe as "naive, problematic," (App. 150a), but that he began to change and become "more dedicated to rehabilitative processes." App. 152a. Mr. Shaw, having known Mr. Keefe for almost two decades, testified that he would be happy to have Mr. Keefe as member of his own community. App. 150a, 161a. Additionally, Mr. Keefe presented letters from religious leaders, family members and other prison staff describing his development into a model inmate and strong potential for successful reentry into the community. Ptr's Exs. 1-20, No. ADV-17-0076 (April 18, 2019).

In the same hearing, Dr. Page testified about his evaluation, opining on key issues involving Mr. Keefe's mental health and psychological profile. He testified that the previous psychological testing on Mr. Keefe, including Mr. Keefe's scoring on a previously administered Minnesota Multiphasic Personality Inventory (MMPI),

was "pretty suggestive of antisocial personality trait disorder." App. 106a. Dr. Page also testified that prior diagnoses of Mr. Keefe with antisocial personality disorder by Dr. Hossack and Dr. Krajacich were not in error, even as Mr. Keefe was not yet an adult at the time of those diagnosis and even though Dr. Page recognized that such a diagnosis conflicted with the current standard of practice, as codified in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) 5. App. 107a, 124a–26a. To this point, Dr. Page opined that "with enough experience, clinical judgement is far superior to diagnostic criteria followed by the books." App. 107a. Dr. Page additionally testified that he did not use the the most recent version of the DSM in his practice. App. 100a. And despite his report concluding that Mr. Keefe's profile did not present significant signs of psychopathology, when asked by the State whether Mr. Keefe was a psychopath, Dr. Page declined to offer an opinion, explaining that he could not predict how Mr. Keefe would present if he were to leave prison. App. 112a-13a. Dr. Page additionally testified that he failed to speak with witnesses whose contact information was provided to him, including Mr. Keefe's mother, Vera Sickich, as well as Mike Mahoney, the warden for the Montana State Prison who knew Mr. Keefe well. App. 130a–32a.

During closing, the State used Dr. Page's testimony against Mr. Keefe, arguing that "Dr. Page has indicated that he's likely still psychopath. He likely still fits that antisocial personality disorder type." App. 187a. The District Court also

considered Mr. Keefe's mental health in sentencing, commenting, "It is undisputed that at the time he murdered three people, Mr. Keefe was a social deviant . . . a psychopath with no conscience," and noting "[a]t the time of the crime, psychologists described Mr. Keefe as antisocial, minimizing anything and everything that he has done." App. 248a. The District Court re-sentenced Keefe to three consecutive sentences of LWOP and five consecutive ten-year sentences related to the burglary and use of a firearm. App. 250–51a.

On appeal, Mr. Keefe argued that failure to provide Mr. Keefe with funds needed to appoint his own mental health expert was constitutional error. App. 262a–63a. The Montana Supreme Court held that *Ake* protections did not apply because although Mr. Keefe was indigent and Mr. Keefe's "youthful mental condition was relevant to determining he was 'irreparably corrupt' and 'permanently incorrigible,' Keefe's sanity has never been at issue." App. 264a. The Montana Supreme Court nevertheless held that "Keefe's resentencing hearing did not comply with the mandates of *Miller* and *Montgomery* by concluding Keefe was 'irreparably corrupt' and 'permanently incorrigible' without fully considering relevant evidence." App. 267a. The Montana Supreme Court vacated the sentence, and remanded to the District Court for resentencing in accordance with its opinion. App. 273a.

C. Mr. Keefe's Second *Miller* Resentencing

Prior to Mr. Keefe's second resentencing, Mr. Keefe sought, and was again denied, funds for expert assistance. App. 3a. After considering the evidence presented at the first resentencing,[2] Mr. Keefe was resentenced on July 16, 2021 to three consecutive life sentences. App. 7a.

On appeal, Mr. Keefe challenged his sentence as unconstitutionally disproportionate and again presented an *Ake* error claim. App. 28a. On June 28, 2022, the Montana Supreme Court declined to revisit its resolution of the *Ake* claim, holding again that there was no *Ake* violation, and affirmed Mr. Keefe's sentence. App. 28a.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court committed gross error when it held that the constitution only required expert assistance for those claiming a defense of "sanity," narrowly defined. App. 263-64a. Fundamental fairness and due process require courts to provide indigent defendants "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). This entitlement extends to the "basic tools of an adequate defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Regarding mental health,

[2] The District Court limited its consideration of new evidence to letters submitted on Mr. Keefe's behalf and only allowed Mr. Keefe to present an offer of proof of what witness testimony would entail. App. 5a.

this Court has repeatedly held the constitution provides expert assistance "when the State has made the defendant's mental condition relevant to his criminal culpability *and to the punishment he might suffer*." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (emphasis added); *see also McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017) ("His 'mental condition' was 'relevant to . . . the punishment he might suffer.'" quoting *Ake*, 470 U.S. at 80). Where these threshold conditions are met, a defendant is entitled to an expert who will "conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense." *McWilliams*, 137 S. Ct. at 1798 quoting *Ake*, 470 U.S. at 80. Despite these threshold conditions having been met, the court below held Mr. Keefe was not entitled to expert assistance because, although his "mental condition" was "at issue," he did not claim to be insane.

That holding was plainly wrong. The distinction the court drew is contrary to the purposes of *Ake*'s due process protections: fundamental fairness in our adversarial system. The distinction is also plainly contrary to the Court's precedents applying *Ake*. *McWilliams*, 137 S. Ct. at 1798; *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (per curiam). Mr. Keefe's denial of expert assistance, and the Montana Supreme Court's treatment of it, implicates an important question, and Mr. Keefe's case is an excellent vehicle for resolving it.

I. THE COURT BELOW ERRED

Mr. Keefe had a compelling case for a mitigated sentence. Beyond his age at the time of the offense—seventeen years old—and the attendant circumstances of youth, by the time he faced re-sentencing, Mr. Keefe had amassed decades of evidence of rehabilitation, demonstrating his suitability for a sentence that would provide him with a "chance for fulfillment outside prison walls." *Graham v. Florida*, 560 U.S. 48, 79 (2010). The former warden of the Montana State Prison knew Mr. Keefe well and offered his testimony in support of Mr. Keefe, the first time in the warden's decades-long career he had ever testified on behalf of an inmate. App. 164a. The warden testified that Mr. Keefe's initial poor adjustment to prison was something that, through a strong work ethic, Mr. Keefe was able to "mov[e] out of" as he matured. Compare App. 165a to App. 166a-70a. The warden explained how Mr. Keefe's work reading books aloud for the blind demonstrated his empathy and ability to "think beyond 'what's good for me' about things that go beyond the scope of how it impacts him" and appreciate things he "can do to contribute to society." App. 171a. From his personal experience with Mr. Keefe, the warden believed that Keefe "has matured and grown up and changed his [adolescent] behaviors." App. 172a.

Mr. Keefe was able to corroborate the warden's testimony with lay witnesses. He had the support of the leader of a prison ministry for the Roman Catholic Diocese of Helena as well as corrections officers, persons running re-entry

programs, and family and community leaders. Pt'r's Exs. 1-4,7-10, *Keefe v.* Kierkegard (No. ADV 17-0076) (April 18, 2019).

A. Mr. Keefe Lacked an Expert to Assist with the Mental Health Evidence in His Case

Despite the compelling case for rehabilitation, Mr. Keefe lacked the assistance of anyone with the education and training to interrogate and counter the evidence from the court's expert and the State's related arguments. At Mr. Keefe's re-sentencing, he requested to proceed ex parte in a request for expert assistance. In response, the court appointed its own expert psychologist and assigned the expert five areas of inquiry, each of which plainly related to Mr. Keefe's "mental condition" relevant to Mr. Keefe's sentence. *See McWilliams*, 137 S. Ct. at 1798. The court inquired about the "brain development of juveniles as a mitigating factor," the "effect of Mr. Keefe's "developmental experiences on his commission of the crime," an evaluation of Mr. Keefe's "mental health prior to and contemporaneously with his commission of the crime," an assessment of any "chemical dependency history," and, finally, any "treatment recommendations related to Keefe's rehabilitation." App. 59a.

After the appointment, Mr. Keefe again sought expert assistance. He explained that such an expert was "critical both for understanding and for responding to Dr. Page's report." Sealed App. 437a. That request was denied. App. 71a. The Montana Supreme Court affirmed that denial because, as discussed

further below, Mr. Keefe had not requested funding to pursue a sanity defense, the sole basis for which the Montana Courts will consider appointing an expert under *Ake.* App. 264a.

After a remand for re-sentencing on an unrelated issue, Mr. Keefe again sought expert assistance so he could understand and respond to the expert testimony from the court-appointed expert. Sealed App. 4242a–588a. He was denied that request in light of the Montana Supreme Court's resolution of the issue, with the court citing law of the case. App. 28a. At that proceeding, the court made it clear that it had taken notice of the entirety of the record in the case, which includes Dr. Page's report and testimony and the assessments of psychologists from when Mr. Keefe was a teenager. App. 5a; App. 102a–107a (Dr. Page's testimony regarding prior psychological assessments). Thus, Mr. Keefe again faced a potential death-in-prison sentence for a juvenile offense, where the state and the court had extensively placed his mental condition at issue, without the assistance of an expert.

B. Mr. Keefe Was Entitled to an Expert to Assist His Evaluation, Preparation, and Presentation of Mental Health Evidence

In our adversarial system, the constitution provides the rich and indigent alike the "tools" required to conduct their defense. *Britt*, 404 U.S. at 227; *see also Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). In appeals, that means the indigent get a transcript. *Britt*, 404 U.S. at 227. And in trials where the

defendant's mental condition is at issue, the defendant gets expert assistance. *Ake*, 470 U.S. at 82.

Although *Ake* and *McWilliams* reference "sanity," they are also clear that the protections they describe reach concerns over the defendant's "mental condition" as it relates to sentencing. *McWilliams*, 137 S. Ct. at 1798; *Ake*, 470 U.S. at 80. Indeed, in *McWilliams* the defendant received sentencing—not guilt-phase—relief. *McWilliams v. Comm'r*, 940 F.3d 1218, 1220 (11th Cir. 2019). If the Court meant "sanity" in the narrow sense used by the Montana Supreme Court, a full reversal would have been required in *McWilliams*.

Any doubt on this score is settled by *Tuggle v. Netherland*, 516 U.S. 10 (1995) (per curiam). There, this Court held it was an "*Ake* error" to deny a capital defendant a psychiatrist where the prosecution had put his future dangerousness at issue. *Id.* at 12, 14 (1995) (per curiam); *id.* at 14–15 (Scalia, J., concurring) (noting *Ake* error required reversal). Future dangerousness is a concept with mental health components, but hardly limited to questions of "sanity."

Here, the Montana courts' refusal to provide Mr. Keefe with expert assistance was plainly wrong. There is no doubt that Mr. Keefe's mental condition was squarely at issue. The District Court focused all parties' attention on it by appointing a psychologist and directing that psychologist to address several questions implicating Mr. Keefe's mental condition. App. 59a.

But Mr. Keefe was denied an expert to "assist in the evaluation, preparation, and presentation" of his defense. *McWilliams*, 137 S. Ct. at 1798. And the Montana Supreme Court affirmed that denial by narrowly defining "sanity" in a way that excluded anything beyond a guilt-phase defense. App. 264a. The opinion below simply states that Mr. Keefe's "sanity" was not at issue, without explaining what "sanity" means and without explaining why it was not at issue in light of the District Court's questions. App. 264a.

But the court below relied on *State v. Hill*, 14 P.3d 1237 (Mont. 2000), which provides more context. In *Hill*, the defendant sought expert assistance in light, inter alia, of his low intelligence. *Id.* at 1242. The Montana Supreme Court denied relief, holding that "sanity" was not "an issue" and noting that Hill had made no argument that his mental health "precluded him from forming the requisite mental state of purposely or knowingly." *Id.* at 1243. Thus, in *Hill*, as here, the Montana Supreme Court limited *Ake*'s application and the guarantees of the constitution to a complete guilt-phase defense of insanity. App. 264a.

That holding excludes expert assistance in instances, such as here, where a defendant's sound mental health—and presence or lack of any psychopathic personality disorder—was very much placed at issue by the State and the court.

The States and federal Circuit Courts of Appeal have recognized what *Ake* and the constitution require: that the type of assistance required is context-specific. For example, where the weight of drugs is relevant to which federal crime is

committed, the defense may be entitled to assistance assessing that weight. *See United States v. Chase*, 499 F.3d 1061, 1066 (9th Cir. 2007) (due process requires expert assistance where defendant faced narcotics charges and sought to contest quantity of drugs). And the courts have premised holdings on the right to the effective assistance of counsel on the understanding that counsel will sometimes need expert assistance in a variety of areas well beyond an assessment of "sanity." *See Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir. 1994) (holding counsel ineffective for failing to retain ballistics expert); *Ibar v. State*, 190 So.3d 1012, 1018–19 (Fla. 2016) (holding counsel ineffective for failing to retain facial recognition expert); *accord State v. Coker*, 412 N.W.2d 589 (Iowa 1987) (interpreting state statute in light of *Ake* and requiring expert assistance for "evaluation, preparation, and presentation of his intoxication defense").

The narrow construction of *Ake* is particularly problematic in cases such as Mr. Keefe's, where both the State and the court place the defendant's mental health at issue. Mr. Keefe, facing death in prison for a juvenile offense, was unable to evaluate, prepare for, or present his own mental health case.

Instead, he was left to accept Dr. Page's averments at face value. These include Dr. Page's view that Mr. Keefe's past actions were "pretty suggestive of an antisocial personality trait" (App. 106a) and not a reflection of how juveniles have under-developed executive functioning and are uniquely capable of change. *See Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an

underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.").

Mr. Keefe was also left without guidance on why Dr. Page would refuse to testify that Mr. Keefe could not be diagnosed with an anti-social personality disorder, including at a young age, despite Dr. Page himself not finding any signs of psychopathology. App. 88a, 107a. Likewise, Mr. Keefe lacked assistance in evaluating Dr. Page's rejection of the DSM. App. 100a. Dr. Page had also declined to interview several witnesses with important developmental information about Mr. Keefe—including Mr. Keefe's mother—further impairing Mr. Keefe's ability to evaluate and prepare his case. Mr. Keefe was unquestionably denied expert assistance in evaluating, preparing, and presenting his case. But because the Montana Supreme Court held that for purposes of *Ake*, only a claim of "insanity" constitutes a "'mental condition'. . . 'relevant to . . . the punishment he might suffer'" the court below affirmed. *McWilliams*, 137 S. Ct. at 1798 quoting *Ake*, 470 U.S. at 80. That holding was wrong, and this Court should grant review and reverse.

II. THE ERROR BELOW IMPLICATES A SPLIT OF AUTHORITY

The Montana Supreme Court's error implicates a split of authority. Montana stands alone in limiting expert assistance to cases involving a "sanity" defense at the guilt phase. Other courts have applied *Ake* to require expert assistance related to mental conditions other than "sanity." *See United States v. Barnette*, 211 F.3d

803, 825 (4th Cir. 2000) (finding *Ake* error for excluding defense's expert rebuttal testimony that the defendant was not a psychopath); *Dunn v. Roberts*, 963 F.2d 308, 313 (10th Cir. 1992) (battered-spouse syndrome expert); *Bright v. State*, 455 S.E.2d 37, 50–51 (Ga. 1995) (finding *Ake* error for failing to provide toxicologist and psychiatrist relevant to defendant's intoxication as mitigating evidence); *State v. Murray*, 644 A.2d 1040, 1042 (Me. 1994) (holding that a psychiatric expert should have been appointed to assess whether dental pain caused defendant to suspend judgment); *accord Doe v. Superior Court*, 39 Cal. App. 4th 538, 547 (1995) (requiring appointment of expert on battered spouse syndrome without reference to whether "sanity" was at issue).

Twenty-one states and six federal circuit courts of appeal have applied *Ake* to non-psychiatrists or outside the insanity context. *See Chase*, 499 F.3d at 1066 (expert assistance on quantity of drugs where defendant faced narcotics charges and sought to contest quantity of drugs); *Barnette*, 211 F.3d at 825; *People v. Propp*, 976 N.W.2d 1, 4–5 (Mich. 2021) (expert in autoerotic asphyxiation); *People v. Kennedy*, 917 N.W.2d 355, 357 (Mich. 2018) (DNA expert); *State v. Harris*, 859 A.2d 364, 444 (N.J. 2004) ("[I]t would be violative of due process to deprive a capital defendant of the opportunity to present evidence, including expert testimony, to support a *bona fide* claim of [intellectual disability]."); *Moore v. State*, 889 A.2d 325, 337-38 (Md. 2005) (collecting authorities from the Fifth, Sixth, Eighth, and Tenth Circuit Courts of Appeal and Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana,

Iowa, Louisiana, Mississippi, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, and Texas).[3] These courts recognize that just as there "is no principled way to distinguish between psychiatric and nonpsychiatric experts," limiting *Ake*'s protections to defense claims of insanity risks depriving defendants of the basic tools they need to avoid an unjust outcome. *Little*, 835 F.3d at 1243.

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[3] Federal Circuit Court Cases: *Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) (pathologist); *Dunn*, 963 F.2d at 313 (battered-spouse syndrome expert); *Scott v. Louisiana*, 934 F.2d 631, 633 (5th Cir. 1991) (ballistics expert); *Little v. Armontrout*, 835 F.2d 1240, 1243–44 (8th Cir. 1987) (hypnotism expert).

State Court Cases: *Ex parte Moody*, 684 So. 2d 114, 118–19 (Ala. 1996) (applicable to non-psychiatric experts generally); *Ex parte Dubose*, 662 So. 2d 1189, 1194 (Ala. 1995) (DNA expert); *Ex parte Sanders*, 612 So. 2d 1199, 1201–02 (Ala. 1993) (ballistics expert); *Prater v. State*, 820 S.W.2d 429, 439 (Ark. 1991) (DNA expert); *Doe*, 39 Cal. App. 4th at 546–47 (experts on battered spouse and post-traumatic stress syndromes); *Cade v. State*, 658 So.2d 550, 555 (Fla. Dist. Ct. App. 1995) (DNA expert); *Bright v. State*, 455 S.E.2d 37, 50 (Ga. 1995) (toxicologist); *Crawford v. State*, 362 S.E.2d 201, 206 (Ga. 1987) (serologist, psychologist, survey expert); *Thornton v. State*, 339 S.E.2d 240, 240–41 (Ga. 1986) (forensic dentist); *People v. Lawson*, 644 N.E.2d 1172, 1192 (Ill. 1994) (Fingerprint and shoe print experts); *James v. State*, 613 N.E.2d 15, 21 (Ind. 1993) (blood spatter expert); *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987) (expert to assist with intoxication defense); *State v. Carmouche*, 527 So. 2d 307, 307 (La. 1988) (fingerprint expert, serologist); *Polk v. State*, 612 So. 2d 381, 393–94 (Miss. 1992) (DNA expert) (overruled on other grounds); *People v. Tyson*, 209 A.D.2d 354, 354–55 (N.Y. App. Div. 1994) (spectrographic expert); *State v. Bridges*, 385 S.E.2d 337, 339 (N.C. 1989) (fingerprint expert); *State v. Moore*, 364 S.E.2d 648, 656–58 (N.C. 1988) (pathologist, non-psychiatrist physician, fingerprint expert); *State v. Mason*, 694 N.E.2d 932, 944–45 (Ohio 1998) (non-psychiatric experts generally); *Rogers v. State*, 890 P.2d 959, 966 (Okla. Crim. App. 1995) (any expert necessary for adequate defense); *State v. Rogers*, 836 P.2d 1308, 1315 (Or. 1992) (opinion polling expert); *State v. Edwards*, 868 S.W.2d 682, 697 (Tenn. Crim. App. 1993) (DNA expert); *Taylor v. State*, 939 S.W.2d 148, 153 (Tex. Crim. App. 1996) (DNA expert); *Rey v. State*, 897 S.W.2d 333, 338–39 (Tex. Crim. App. 1995) (forensic pathologist).

The decision in this case is not an isolated error, but the latest repetition of a construction the Montana Supreme Court first made in *State v. Mahoney*, 870 P.2d 65 (Mont. 1994). There, the defendant asserted that his trial counsel was deficient for falling to inform him that the State must provide access to a "competent psychiatrist." *Id.* at 73. The Montana Supreme Court explained that "[s]uch advice is mandated *only* where the defendant has demonstrated to the court that his sanity at the time of the offenses committed will be a 'significant factor at trial.'" *Id.* (quoting *Ake*, 470 U.S. at 83) (emphasis in original). They rejected the defendant's claim because counsel did consider mental impairment, but concluded there was no basis to present the defense. *Id.* Later, in *State v. Hill*, 14 P.3d 1237 (Mont. 2000), the court used their "sanity-only" construction of *Ake* to deny expert-assistance to a capital defendant. In *Hill*, the defendant sought expert assistance in light, inter alia, of his low intelligence. *Id.* at 1242. The Montana Supreme Court denied relief, holding that "sanity" was not "an issue" and noting that Hill had made no argument that his mental health "precluded him from forming the requisite mental state of purposely or knowingly." *Id.*

Montana stands alone on this issue, having parted ways with other state courts of last resort and the federal Circuit Courts. This Court should grant review and bring an end to Montana's cramped view of *Ake*'s scope.

III. THIS CASE SQUARELY PRESENTS THE QUESTION

Mr. Keefe has consistently pressed his claim that due process requires expert assistance. He requested the assistance before he was re-sentenced in 2019 and again before his most recent sentencing proceeding. The Montana Supreme Court ruled on the merits of the issue in 2021 and, after his most recent proceedings in the trial court, held that law of the case foreclosed his constitutional claim.

That resolution, based on law of the case, does not impede this Court's review. As this Court has put it, "We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and our right to examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *See Reece v. Georgia*, 350 U.S. 85, 87 (1955) (citation omitted); *Davis v. O'Hara*, 266 U.S. 314, 321 (1924) ("The ruling that the former decision of the state court became the law of the case does not affect the power of this Court to reexamine the question."). The law of the case must not prevent review because "[o]therwise the orderly process of review would be frustrated, and the litigant would lose all chance for Supreme Court scrutiny of the claim of federal rights." Stephen M. Shapiro, et al., *Supreme Court Practice* § 31.7 (2019).

Mr. Keefe comes to this Court to vindicate his federal right to fundamental fairness. He has sought at every opportunity to obtain the assistance the constitution guarantees. Instead, the Montana courts have departed from the

practice of other sister state courts and the federal Circuit Courts in confining *Ake*'s protections to those raising a defense of insanity. Mr. Keefe's case presents this Court with an opportunity to correct course.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2022