NO:

IN THE
SUPREME COURT OF THE UNITED STATES

LISA BERGMAN,

***Petitioner*,**

v.

JEREMY HOWARD,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Due Process Clause requires an impoverished criminal defendant to be appointed a scientific expert that is essential to confront scientific expert analysis used by the prosecution in its case-in-chief.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Lisa Bergman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion affirming the denial of Bergman's 28 U.S.C. § 2254 petition is included in the Appendix at A-1. The District Court's opinion denying Bergman's § 2254 petition is included at A-3, and its denial of her motion to reconsider

is included at A-2. The decision of the Michigan Court of Appeals affirming Bergman's conviction on direct appeal is included at A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of this Court's rules. The decision of the court of appeals denying Bergman's petition for en banc rehearing was entered on December 12, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Section 2254(d) of Title 28 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) states, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Lisa Bergman is serving a sentence of 25 to 50 years for second-degree murder because of a tragic car accident. The trial court left Bergman defenseless in the face of an onslaught of expert witnesses: six forensic scientists, two toxicologists, and three additional medical examiners. Bergman's attorney, by contrast, had nothing more than a high-school chemistry education, as he noted when begging the trial court for expert funding for Bergman's defense.

Even the district court "expressed its own strong belief that the state trial court's refusal to appoint a toxicology expert for Bergman had, indeed, resulted in a fundamentally unfair trial." Yet both the district court and the Sixth Circuit felt constrained by this Court's case law to deny relief. Bergman's trial was unfair, and her conviction represents a severe breakdown of the state-trial process. This Court should grant review and vacate her conviction.

STATEMENT OF THE CASE

1. In the early hours of July 20, 2013, a crash between vehicles driven by Lisa Bergman and Russell Ward tragically resulted in the death of both Ward and his passenger. Another driver from that night said had been "raining really, really bad" and was "really foggy out." Accident reconstructionists believed Bergman's truck crossed the center line and struck Ward's.

2. Witnesses to the crash's aftermath did not believe Bergman was intoxicated. Responding paramedics found her "shook up" and a bit "shaky," but this behavior was "consistent with someone that's been in a terrible accident." She answered questions coherently. She did not smell of alcohol, "appeared sober," and did not appear to be "under the influence of drugs." Bergman's boyfriend, who saw her just before she started driving agreed that nothing in her behavior made it seem like she should not drive. Her blood alcohol level was somewhere between .01 and .04, well within the legal limit.

3. Further testing revealed—according to prosecution experts—the presence of three drugs in Bergman's system: amphetamine, oxycodone, and the muscle relaxer Soma. The prosecution charged Bergman with second-degree murder. The prosecution's theory became clear at the preliminary examination: Bergman "created a high risk of death or great bodily harm, knowing that such death or harm would be the likely result of her actions" because there were "three prior occasions where this defendant was involved in an accident, a crash of some sort, and that she admitted being on Soma and in some cases Vicodin."

4. Recognizing how essential toxicology evidence was at the preliminary examination, Bergman's lawyer, Robert Ladd, moved for funding for a forensic toxicologist "to review the Prosecution's witnesses' conclusions and to have an opportunity to dig into their findings." He argued that an independent expert was

essential to a "meaningful defense." He emphasized that he could not interpret lab results given that he did not know chemistry, stating, "I just don't know this stuff. This is science."

5. The trial judge denied the motion, concluding that Ladd had not shown "a sufficient nexus" between the need for a toxicologist and the prosecution's case. The judge acknowledged that Ladd did not "fully understand the technical aspects of all of that toxicology," and that he did not think "most defense lawyers in your position would." The judge suggested, however, that "we have to do a lot of self-educating sometimes and take advantage of whatever resources we can that are out there, and there are a lot more resources out there today than there ever used to be with the Internet and things being what it is."

6. The proofs at trial were decidedly one-sided in terms of forensic science. During just five days of testimony, the prosecution presented a rapid-fire 47 witnesses, including six forensic scientists, two toxicologists, and at least three additional medical examiners. The exhibits included seventeen lab reports and two autopsy reports. The defense presented one witness—Bergman's mom—who testified briefly that Bergman could not use illegal substances while living at her home.

7. For the first two and half days, 29 witnesses testified about 7 prior incidents related to Bergman's driving dating from 2008 to June 2013. The prosecution presented six professional forensic experts from the Michigan State

Police Crime Lab testified about their analyses of Bergman's blood in relation to her prior incidents. Ladd's cross-examination of these experts was anemic. He asked each an average of less than 13 questions, and those questions primarily addressed chain of custody and confirmed the numbers in their reports.

8. Only one witness, Dr. Michelle Glinn, made the connection between the toxicology results and the prosecution's allegations that Bergman was impaired on the night of the accident. Dr. Glinn opined as an expert that the drugs in Bergman's system actually affected her "ability to operate a motor vehicle." She added, "[Bergman] can't operate a motor vehicle properly when she's taking them, and that is obvious to me from all of the lab reports and all of the police reports that I was provided." She also agreed the toxicology reports for the prior incidents showed "a fairly consistent type of drug classification" in her blood during the incidents.

9. During cross-examination, Ladd pointed out that Dr. Glinn was paid to testify, that Bergman appeared coherent after the crash, and that different people have different tolerances for medications. He had no detailed cross examination about Dr. Glinn's expert analysis.

10. The jury found Bergman guilty of second-degree murder. She received a prison sentence of 25 to 50 years.

11. On direct appeal, Bergman argued that the trial court erred by denying her motion for a toxicology expert. The Michigan Court of Appeals recognized that

Ake v. Oklahoma, 470 U.S. 68, 77 (1985), requires "that indigent defendants be afforded, at state expense, the 'basic tools of an adequate defense of appeal.'" (App.68) But the court held that *Ake* requires proof of a "nexus between the need for an expert and the facts of the case," and that Bergman "failed to establish the requisite nexus." (*Id.*) The court held that Bergman "did not establish why the objective results of blood analysis might be unreliable," and "made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving." (*Id.*) The Michigan Supreme Court denied leave to appeal.

12. Bergman then moved for federal habeas relief, asserting a due process violation from the denial of a defense expert. The district court criticized the analysis and conclusion of the Michigan Court of Appeals but denied relief because, in its view, "[t]he Supreme Court has not held that a criminal defendant in Bergman's position is entitled to the appointment of the type of expert she sought." (App.49, 54.)

13. Bergman moved to reconsider, noting that the district court had not addressed her argument that the Michigan Court of Appeals reached an unreasonable determination of the facts by finding that Bergman failed to explain why she could not safely proceed to trial without her own expert. In denying the motion, the district court restated "its own strong belief that state trial court's refusal to appoint a toxicology expert for Bergman had, indeed, resulted in a fundamentally

unfair trial." (App.20.) But the court concluded that the state court made a legal determination that Bergman did not offer a sufficient explanation for why she needed an expert, not a factual determination. (*Id.* at 23.) The court added, however, that it remained "firmly convinced that the Michigan Court of Appeals acted unreasonably when it determined that Bergman failed to show that she needed a toxicology expert." (*Id.* at 28.) The court added that "the state trial court's refusal to provide such an expert to Bergman at public expense left Bergman without any meaningful opportunity to develop an effective counter to the prosecution's key toxicology evidence and expert testimony." (*Id.*)

14. The Sixth Circuit affirmed the denial of habeas relief, emphasizing that Bergman failed to meet the stringent standards for relief under § 2254(d) "[g]iven the Supreme Court's lack of clarity over *Ake*'s scope." (App.2.) The court limited *Ake*'s "precise holding" to the principle "that a state must provide an expert psychiatrist to an indigent defendant who makes a substantial showing of an insanity defense." (*Id.* at 9.) The court observed that "subsequent decisions have not created a 'clear or consistent path for courts to follow' when answering this due-process question." (*Id.*, quoting *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).) Thus, the court concluded: "Until the [Supreme] Court provides more specific guidance on this topic, then, the law will remain 'unclear' and state courts will have 'broad discretion' to determine the

circumstances when defendants have a right to state-funded non-psychiatric experts." (*Id.* at 10, quoting *White v. Woodall*, 572 U.S. 415, 424 (2014).)

REASONS FOR GRANTING THE WRIT

I. This Court should recognize that the deprivation of critical expert assistance violates a criminal defendant's due process rights.

The Sixth Circuit is right that there is a "lack of clarity over *Ake*'s scope," and that this unclarity will persist until this Court "provides more specific guidance on this topic." (App.2, 10.) Until that time, criminal defendants will remain subject to unfair prosecutions where a highly paid prosecution expert—or even dozens of them as in this case—testifies about complex technical scientific knowledge, with the defense armed only with whatever a beleaguered appointed attorney can learn through Internet research. That is not due process; this Court should take this case and clarify this important area of criminal law.

Indeed, this Court "has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present her defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). Indeed, "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id.* Thus, it has long been clearly established that

"the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

This rule is not new. In *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), and then *Britt*, 404 U.S. at 227, this Court adopted this standard, which both involved requests for free transcripts of trial proceedings. The Court furthered this rule in *Little v. Streater*, 452 U.S. 1, 16 (1981), which held that the State cannot deny funding for blood testing to an indigent defendant in a *civil* paternity lawsuit. The Court reasoned that the refusal to fund an indigent defendant—who faces the State as an adversary when the child received public assistance—violates "the requirement of fundamental fairness expressed by the Due Process Clause." *Id.* (quotation omitted).

It is true that "the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." *Ake*, 470 U.S. at 77. But the Court "has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Id*. Thus, in 1986, in *Ake*, this Court applied these principles from its earlier due process cases to provide criminal defendants in death penalty cases with psychiatric experts—"the raw materials integral to the building of an effective defense." *Id.*

More recently, in *Medina v. California*, 505 U.S. 437 (1992), this Court concluded that "[t]he holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Id.* at 444–45 (quoting *Ake*, 470 at 76). Thus, clearly established law is that an indigent defendant must be given adequate resources for an expert if failure to provide those resources would deprive him of a fair opportunity to present a defense. And, *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), "clarified *Ak*e slightly by holding that a defendant must offer more than undeveloped assertions to be entitled to expert assistance under the Constitution." Theodore J. Greeley, *The Plight of Indigent Defendants in A Computer-Based Age: Maintaining the Adversarial System by Granting Indigent Defendants Access to Computer Experts*, 16 Va. J.L. Tech. 400, 416–17 (2011).

Respondent contended below that this Court has never held that due process requires the appointment of nonpsychiatric defense experts at state expense. But this argument misconstrues the right at issue by calling it a right to have the state "fund any expert a defendant might find useful." Bergman does not advocate that Supreme Court law requires the appointment of any "useful" expert. The rule is that "a criminal trial is fundamentally unfair if the State proceeds against an indigent

defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77.

Appellate courts have treated this right as "clearly established" even after enactment of AEDPA. In a post-AEDPA habeas case, the Sixth Circuit recognized that "*Ake* requires the provision of an independent pathologist to determine a victim's cause of death." *Clinkscale v. Warden, Lebanon Corr. Inst.*, 645 F. App'x 347, 348 (6th Cir. 2016). Similarly, citing *Medina*, 505 at 444–45, the Tenth Circuit held that *Ake* covers nonpsychiatric experts by establishing that "the Constitution requires that indigent defendants be provided with '[m]eaningful access to justice' such that they receive the 'basic tools of an adequate defense or appeal.'" *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1128 (10th Cir. 2006). The Ninth Circuit also holds that "[t]here is no doubt that in appropriate circumstances a court must provide investigative help to ensure that an accused has received the effective assistance of counsel." *Williams v. Stewart*, 441 F.3d 1030, 1053 (9th Cir. 2006).

II. This case is a good vehicle to resolve this question because of the prosecution's heavy reliance on experts, the lack of a defense expert, and the proper preservation of this question.

This Court should grant review to determine the scope of the right to expert assistance in criminal trials, and the evidentiary burden needed to show the necessity of an expert. Bergman faced a prosecution built fundamentally on forensic toxicology, and her defense attorney admittedly knew nothing about this science. If she had

money, she could have paid for an expert to assist her attorney in understanding the prosecution's case and to help her attorney craft cross-examination questions. Because she was poor, she could not. That disparity is fundamentally unfair and violates the Constitution, no matter whether conceptualized as a violation Bergman's right to present a meaningful defense or her right to the basic tools of an adequate defense.

The importance of defense experts to scrutinize the work of prosecution witnesses is underscored by *Hinton v. Alabama*, 571 U.S. 263, 276 (2014). *Hinton* makes clear that the necessity of defense experts is not just about proving innocence—rather, the real threat of false convictions "is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." *Id.*

In *Hinton*, prosecutors presented two ballistics experts, and Hinton's attorney procured a woefully deficient expert to rebut their conclusions. 571 U.S. at 268–69. The Court ultimately remanded for further analysis on whether counsel rendered ineffective assistance of counsel by not seeking funding for a more competent expert. *Id.* at 274–75. In doing so, the Court explained why the inculpatory testimony of the experienced prosecution experts did not change its calculus:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic

> evidence used in criminal trials.... One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Hinton, 571 U.S. at 276.

Here, the Michigan Court of Appeals failed to recognize this purpose of defense experts, and the extent to which Ladd was left unarmed by the trial judge's refusal to allow any expert assistance. In contrast to *Hinton*, where counsel hired one marginal expert witness, here, Berman was deprived of even one expert. That breakdown of the state criminal process fails to comport with the constitutional guarantee that criminal defendants receive the "basic tools" of their defense, *Britt*, 404 U.S. at 227, and a "meaningful opportunity" to participate in their case, *Little*, 452 U.S. at 12, 16.

The high number of prosecution experts made at least *one* defense expert necessary. Even at the preliminary hearing, the prosecution relied on a scientist to testify about forensic toxicology, who emphasized the complexity of the analysis by commenting that only a person with particularized expertise could fairly testify about the effects of the drugs in Bergman's system. Then the prosecution presented testimony from *eight* professional forensic experts from the Michigan State Police

Crime Lab. And the key expert regarding Bergman's intoxication during the alleged offense presented complex analysis about the level of different drugs in her system and the effects each would have had individually and together.

Trial counsel rightly recognized that refusal to appoint an expert would prevent Bergman "from proceeding safely to trial, because without expert witness assistance, Lisa Lynn Bergman w[ould] be denied the right to meaningful and informed cross-examination of the prosecution's expert witnesses." He explained to the court that he could not "determine the accuracy and indeed the relevance of [those toxicology] reports' purported findings." And he argued: "I've got some numbers in a report of various things and then numbers beside them. I don't know whether – what those mean." He further observed: "I am not competent as a chemist or toxicologist to know what do these numbers mean. They may not mean anything. Or maybe they mean that this person is highly impaired by these things because she's got such and such milligrams of this and this. I don't know."

This Court should grant this petition for review, clarify the scope of the defense right to expert assistance in the face of complex prosecution scientific evidence, and ultimately vacate Bergman's conviction.

CONCLUSION

Petitioner Lisa Bergman requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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