No.

IN THE

SUPREME COURT OF THE UNITED STATES

SHAUN N. TAYLOR, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

JAMES E. CHADD
State Appellate Defender

SANTIAGO A. DURANGO
Counsel of Record
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rdDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

Of Counsel:
Dimitri G. Golfis
Assistant Appellate Defender

QUESTIONS PRESENTED FOR REVIEW

I. Do this Court's decisions in *Ake v. Oklahoma* and *McWilliams v. Dunn* require the appointment of a second insanity expert for an indigent defendant where the defendant's first insanity expert provided a "borderline" opinion that the defendant was sane and advised that a second opinion be sought?

II. Does Illinois's statutory scheme creating grossly imbalanced rights to the appointment of insanity experts for prosecutors and indigent defendants violate the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases: **Page**

Federal Cases:

State Cases:

Federal Constitutional Provisions:

Federal Statutory Provisions:

State Statutory Provisions:

No.

IN THE

SUPREME COURT OF THE UNITED STATES

SHAUN N. TAYLOR, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

Petitioner, Shaun N. Taylor, respectfully petitions this Court for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The published opinion of the Supreme Court of Illinois affirming the Appellate Court of Illinois, and affirming the Circuit Court of Illinois, is reported at 2023 IL 128316, and is attached as Appendix A. The published opinion of the Appellate Court of Illinois, affirming Shaun Taylor's conviction, including a dissenting opinion, is reported at 2022 IL App (3d) 190281, and is attached as Appendix B.

JURISDICTION

On May 18, 2023, the Supreme Court of Illinois issued its opinion affirming the Appellate Court of Illinois and the Circuit Court of Illinois. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. Amend XIV, § 1.

Section 113-3(d) of the Illinois Code of Criminal Procedure, 725 ILCS 5/113-3(d) (2016), provides as follows, in relevant part: "[I]f the court determines that the defendant is indigent the court may, upon the filing with the court of a verified statement of services rendered, order the county Treasurer of the county of trial to pay necessary expert witnesses for defendant reasonable compensation stated in the order . . . ."

Section 115-6 of the Illinois Code of Criminal Procedure, 725 ILCS 5/115-6 (2016), provides, in relevant part:

> If the defendant has given notice that he may rely upon the defense of insanity . . . or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall, on motion of the State, order the defendant to submit to examination by at least one clinical psychologist or psychiatrist, to be named by the prosecuting attorney. The Court shall also order the defendant to submit to an examination by one neurologist, one clinical psychologist and one electroencephalographer to be named by the prosecuting attorney if the State asks for one or more of such additional examinations. The Court may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions.

STATEMENT OF THE CASE

Shaun N. Taylor is a United States military veteran with a history of psychosis and debilitating mental illness (SC19–20, 29). When Taylor was young, a fall resulted in a loss of consciousness and a concussion (SC6). In December 2007, at the age of 26, Taylor was involuntarily hospitalized due to bizarre behavior and a psychotic episode. Notably, Taylor was questioning the identity of his biological father, asking him for identification to prove he was Taylor's "real dad" (SC15, 20). About three months after Taylor was discharged, he enlisted in the United States Army. He served two combat tours in Afghanistan and was honorably discharged in 2014 (SC14–15, 29).

After serving his country, Taylor experienced depression, anxiety, mood swings, distressing flashbacks, fear of crowds, paranoia, intrusive thoughts, and delusional thinking. He became distrusting of others and exhibited hyperarousal and hypervigilance. He believed he was being stalked, including by the government, and became preoccupied with fear (SC6–7, 15–17, 30). Managing his anxiety and mistrust, on the one hand, and his delusional thinking, on the other, dominated his everyday activities (SC17). Taylor continued making bizarre statements, such as falsely stating that he had siblings and that his mind had been "erased" (SC16). Taylor has been diagnosed with bipolar disorder, psychotic symptoms, and severe post-traumatic stress disorder (PTSD) (SC10, 19, 30).

On the night of October 15, 2017, Illinois State Police Trooper Andrew Scott stopped Taylor on Interstate 80 because he had a GPS device mounted on his windshield, directly above the steering wheel of his SUV (R281–83). When Trooper Scott approached Taylor's door, Taylor rolled his window down one inch and complied with the trooper's request to provide his driver's license and proof of insurance (R284). Trooper Scott told Taylor the reason for the traffic stop. In response, Taylor removed

the GPS device from his windshield (R285). Trooper Scott said he was only going to issue a warning and asked Taylor to join him in his squad car while he completed the paperwork (R286). Taylor refused (R287–88). The trooper returned to his squad car, requested K-9 assistance, and began working on the warning (R288).

Sergeant Sean Veryzer, a K-9 handler, arrived at the scene and went to speak to Taylor as Trooper Scott continued working on the warning (R288–89). Sergeant Veryzer then conducted a free-air sniff with his K-9, which signaled a positive alert to Taylor's vehicle (R289–90, 387).

Due to the positive alert, the troopers returned to Taylor and asked him to exit his vehicle. Taylor refused multiple times and asked the troopers to listen to what he had to say because they did not understand (R290–91, 388). Taylor's hands were trembling (R291). Taylor told the troopers that he wanted to talk to them. He said he was an Army veteran with PTSD and did not trust the police or men. Taylor added that he had been raped and sodomized his entire life (R292, 309–10, 388, 412). Taylor appeared to be in emotional distress (R413). Taylor lifted his hands to the ceiling of his vehicle. The troopers responded by drawing their weapons at Taylor and ordering him to lower his hands (R291, 388–89). Taylor did so, and the troopers holstered their weapons (R292). Taylor continued to refuse to exit his vehicle, so Sergeant Veryzer warned Taylor that they would remove him with force if he did not comply. Trooper Scott grabbed his baton and prepared to break the windshield. Taylor then put his vehicle into drive, told the troopers "sorry," and sped away (R292–93, 390).

The troopers returned to their squad cars, notified dispatch of the events, and began to search for Taylor (R293–94, 394–95). Trooper Scott took the first exit off the highway and searched the vicinity (R297–98). Within 10 minutes of when Taylor fled the traffic stop, Trooper Scott found Taylor's unoccupied vehicle parked off the side of

a road (R297–300). Trees lined one side of the road. A tall corn field lined the other (R299–300). The area was dark (R339). Trooper Scott parked away from Taylor's vehicle and illuminated it with his spotlight and overhead lights (R298–301). The trooper exited his vehicle, drew his firearm, and scanned the area with his flashlight (R301). He then began to hear gunfire. Trooper Scott took cover as he felt bullets hiss around him (R301–04). His squad car started steaming and its lights (spotlight and headlights) began to go out (R303, 313). Dozens of law enforcement officers arrived at the scene as gunfire continued (R302–06). They could not locate where the gunfire was coming from (R314, 332, 345). Law enforcement established a perimeter and a command post about two miles from the scene (R305, 364–65, 369).

Four or five hours later, Taylor peacefully approached Illinois State Police Trooper Michael Kasprak at the command post while the trooper was at his squad car (R363–66, 381). Trooper Kasprak recognized Taylor as "the possible armed suspect" and asked him who he was and what he was doing there (R366–67). Taylor had his hands in his pockets, shrugged his shoulders, and did not answer (R367). Trooper Kasprak took Taylor into custody and again asked for his name. Taylor responded with his name and said, "I'm the guy you are looking for" (R367–68). Taylor was unarmed (R367–70). Trooper Kasprak asked Taylor where his weapon was. Taylor answered that it was 200 meters away, pointing to the location (R368). Taylor asked the trooper if anyone had been hurt and expressed hope that no one had been. Taylor reacted with relief when he learned that no one had been and said he never intended to hurt anyone (R371–72, 380–83). Law enforcement found Taylor's rifle and handgun in a field (R398–402). Forensic testing established that Taylor's rifle had fired numerous .223 caliber cartridge cases recovered from the scene (R465–66). Law enforcement did not find narcotics in or around Taylor's vehicle (R407).

During an interview after his arrest, Taylor admitted fleeing the traffic stop (R425–28). He explained that he wanted to get away and panicked because he was confused and thought there were people who were going to kill him (R431, 433–35). Addressing his conduct off of Interstate 80, Taylor said he was "confused," "wasn't really thinking," and "just reacted" (R429). He went into "survival mode" and did "what he needed to do to defend himself" (R429–30). He remembered having his rifle in his hands and seeing the emergency lights and spotlights (R428–29, 431–32). But he could not recall pulling the trigger (R431, 433). As the night went on, Taylor developed "a different understanding of what the situation actually was" and "understood the situation better" (R430). He "understood the situation was to the point where he needed to drop the weapons and . . . turn himself in" (R430). He thought "something bad happened" (R427). Taylor became very worried that he may have shot a trooper and that "it was a situation that should not have happened" (R431, 433).

The State of Illinois charged Taylor with attempted murder, 720 ILCS 5/8-4(a), (c)(1)(A) (2016) (C15). The Henry County Circuit Court appointed counsel for Taylor due to his indigence (C17, 19). The court appointed Dr. Kirk Witherspoon to evaluate Taylor concerning his fitness for trial and sanity at the time of the offense (C28).

Dr. Witherspoon authored two separate evaluations: one recommending that Taylor was fit for trial and a second recommending that he did not meet the criteria for the insanity defense (SC4–10, 13–19). Dr. Witherspoon's diagnostic impressions of Taylor were that he suffered from bipolar disorder, with psychotic symptoms, and severe PTSD (SC8–10, 16–19). The doctor noted that Taylor experienced anxiety, considerable paranoia, other-thought disorder, intrusive experiences, delusional thinking, hyperarousal, and hypervigilance. Dr. Witherspoon also noted that Taylor believed he was being stalked, was preoccupied with fear, and had a history of making

peculiar statements (SC6–8, 15–17). Nevertheless, the doctor opined that Taylor's mental-health problems were not enough to excuse his conduct because Taylor's behavior at the time of the offense "did not apparently reflect psychosis or a degree of irrationality that would have prevented his understanding the criminality of his exhibited conduct" (SC18–19). The doctor concluded that a guilty but mentally ill presumption seemed applicable (SC19).[1] At no point in the written evaluations did Dr. Witherspoon state that his opinions were to a reasonable degree of scientific certainty (SC4–10, 13–19).

After the completion of the initial sanity evaluation, Dr. Witherspoon obtained and reviewed records from Taylor's involuntary psychiatric hospitalization in December 2007. After his review, the doctor issued an addendum to his sanity evaluation. Dr. Witherspoon opined that Taylor's hospitalization was due to a brief psychotic episode. Taylor had displayed aberrant thinking and behavior, such as challenging his father's identity and making bizarre statements. Dr. Witherspoon found that Taylor's functioning at the time of his 2007 hospitalization was akin to his functioning in this case. Nevertheless, Dr. Witherspoon opined that the new information was not significant enough to alter his prior recommendations (SC20–21).

Dr. Witherspoon provided Taylor's public defender a handwritten note. In the note, the doctor wrote, "Mr. Taylor is a borderline case. I do not think he meets the threshold of NGRI. However, if his parents can afford it, you may wish to seek a second

---

[1] In Illinois, "A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill." 720 ILCS 5/6-2(c) (2016). "A defendant who has been found guilty but mentally ill is subject to any sentence that could have been imposed upon a defendant who had been convicted of the same offense without a finding of mental illness . . . ." *People v. Urdiales*, 225 Ill. 2d 354, 428 (2007).

opinion. If so, I can give you the names of a couple of other good psychologists who can do this work" (SC22).

Taylor's counsel moved the court to appoint another insanity expert to provide a second opinion. Counsel emphasized Dr. Witherspoon's note. And he informed the court of a conversation he had with Dr. Witherspoon, where the doctor said Taylor's case was "a very, very close call" and that it was important that a second opinion be obtained (SC11; R60–65). The court denied the request because the doctor's written evaluations did not recommend that the court appoint a second expert (R64–70).

Without an expert to assist in an insanity defense, Taylor's defense at trial was that he did not intend to murder Trooper Scott. Taylor argued that he was a trained military marksman and could have killed the trooper if he wanted. His failure to kill the trooper illustrated that he did not intend to commit murder (R593–97). The jury rejected the defense and found Taylor guilty of attempted murder (C128; R651–52). The court sentenced him to 50 years' imprisonment (C140; R700–01).

In his direct appeal to the Appellate Court of Illinois, Taylor argued that the appointment of a second insanity expert was required by Illinois statute, 725 ILCS 5/113-3(d) (2016), and this Court's decisions in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *McWilliams v. Dunn*, 582 U.S. 183 (2017). Taylor explained that, because Dr. Witherspoon opined that the issue of sanity at the time of the offense was "borderline" and advised him to get a second opinion, Taylor's sanity remained seriously in question. Further, because the doctor could not assist Taylor in the preparation and presentation of an insanity defense at trial, and given the nature of his opinion, an additional expert was warranted (Taylor's App. Ct. Br. at 9–14). The Appellate Court affirmed Taylor's conviction, holding that he was not entitled to the appointment of a second expert. *People v. Taylor*, 2022 IL App (3d) 190281, ¶¶ 16–21, 42–43. The court

reasoned that the appointment of Dr. Witherspoon satisfied the requirements of *Ake* and *McWilliams* because he evaluated Taylor and found that he was sane. *Id.* ¶ 19. The court opined that a second expert would not have been of substantial value to Taylor. *Id.* ¶ 21.

Taylor petitioned the Supreme Court of Illinois for discretionary review, asking that it address whether the appointment of a second expert was warranted under Illinois law and this Court's precedent. In doing so, Taylor contended that the statutory scheme in Illinois providing for the appointment of insanity experts for the State and indigent defendants, 725 ILCS 5/115-6 (2016) and 725 ILCS 5/113-3(d) (2016), respectively, as interpreted by the Appellate Court, violates due process (Petition for Leave to Appeal at 3–7). The Supreme Court of Illinois granted review. *People v. Taylor*, 2023 IL 128316, ¶ 1.

In the Supreme Court of Illinois, Taylor claimed that he was entitled to the appointment of a second insanity expert pursuant to section 113-3(d) and this Court's decisions in *Ake* and *McWilliams*. As he did in the Appellate Court, Taylor argued that *Ake* and *McWilliams* required the appointment of a second expert because (1) his sanity at the time of the offense remained seriously in question where he had a history of psychosis and Dr. Witherspoon, despite finding him to be sane, opined that the question of sanity was "borderline" and advised that he seek a second opinion and (2) Dr. Witherspoon could not assist in the preparation and presentation of an insanity defense given the nature of his opinion (Taylor's Sup. Ct. Br. at 27–34; Taylor's Sup. Ct. Reply Br. at 13–18).

Relying on this Court's decision in *Wardius v. Oregon*, 412 U.S. 470 (1973) (striking down alibi rules that did not provide reciprocal discovery rights), Taylor also claimed that the statutory scheme in Illinois providing for the appointment of insanity

experts for the State and indigent defendants, as interpreted by the Appellate Court, violates the Due Process Clause of the Fourteenth Amendment. Taylor explained that whenever the State moves a trial court for the appointment of a first or an additional insanity expert pursuant to section 115-6, the court must grant the request and appoint an expert of the State's choosing. In contrast, when an indigent defendant moves for a first or an additional insanity expert pursuant to section 113-3, the defendant must show that the expert is "necessary" and satisfy the *Ake* standard. Even if the defendant does so, the court then has discretion to not appoint an expert. Taylor argued that this scheme provides an unconstitutional imbalance between the accuser and the accused by permitting the State to expert shop, thereby undermining the search for truth at trial. To avoid this constitutional problem, Taylor urged the court to look at federal law interpreting an indigent defendant's right to a "necessary" expert under 18 U.S.C. § 3006A(e). Relying on federal caselaw, Taylor asked the court to hold that an indigent defendant has a statutory right to an insanity expert pursuant to section 113-3 if an insanity defense is plausible and a reasonable attorney would engage the services of such an expert for a client having the independent financial means to pay for them (Taylor's Sup. Ct. Br. at 34–38; Taylor's Sup. Ct. Reply Br. at 11–13).

The Supreme Court of Illinois affirmed the Appellate Court's judgment. *Taylor*, 2023 IL 128316, ¶¶ 72–73. The court declined Taylor's request to hold that indigent defendants have a statutory right to an insanity expert when an insanity defense is plausible and a reasonable attorney would engage the services of such an expert for a client having the independent financial means to pay for them. The court found no constitutional problem with the disparity in the statutory rights of the State and indigent defendants to insanity experts. The court analyzed Taylor's statutory and

constitutional claims under the *Ake* standard, holding that "Dr. Witherspoon's examinations and evaluations of [Taylor] fulfilled the standards set forth in *Ake*." *Id.* ¶¶ 30, 41–42. The court emphasized that Dr. Witherspoon did not indicate any uncertainty in his opinion that Taylor was sane. *Id.* ¶ 38. According to the court, Dr. Witherspoon helped evaluate, prepare, and present a defense of guilty but mentally ill, just not Taylor's preferred defense of insanity. *Id.* ¶ 40.

REASONS FOR GRANTING CERTIORARI

I. REVIEW IS WARRANTED TO DECIDE WHETHER *AKE V. OKLAHOMA* AND *MCWILLIAMS V. DUNN* REQUIRE THE APPOINTMENT OF A SECOND INSANITY EXPERT FOR AN INDIGENT DEFENDANT WHERE THE DEFENDANT'S FIRST EXPERT CHARACTERIZED HIS FINDING OF SANITY AS BORDERLINE AND ADVISED THAT A SECOND OPINION BE SOUGHT.

In *Ake v. Oklahoma*, this Court held that the Constitution guarantees indigent defendants the assistance of an insanity expert to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of an insanity defense when sanity is likely to be a significant factor at trial. *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985). In other words, the expert must "help determine whether the insanity defense is viable, . . . present testimony, and . . . assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. Explaining its ruling, the *Ake* Court emphasized that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Id.* at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)). To achieve that end, they are constitutionally entitled to the basic tools of an adequate defense, which may include the assistance of an expert. *Id.* Where the question of sanity is likely to be a significant factor at trial, "a defense may be devastated by the absence of a psychiatric examination and testimony." *Id.* at 83. This Court noted that the constitutional right to an insanity expert is "limited to provision of one competent psychiatrist" and is not a right of defendants to choose a psychiatrist of their personal liking. *Id.* at 79, 83.

More than 30 years later, this Court revisited *Ake* in *McWilliams v. Dunn*, 582 U.S. 183 (2017). Before trial in that case, appointed counsel moved the court for a psychiatric evaluation of McWilliams's sanity. *McWilliams*, 582 U.S. at 188. The court ordered the state to convene a "Lunacy Commission," comprised of three psychiatrists,

to examine McWilliams and file a report with the court. *Id.* After examining McWilliams, each psychiatrist found that he was not suffering from mental illness at the time of the offense. *Id.* One of the psychiatrists opined that McWilliams was grossly exaggerating symptoms of mental illness. *Id.* A jury later convicted McWilliams of capital murder, and the prosecutor sought the death penalty. *Id.* At sentencing, McWilliams and his mother testified that he suffered from mental illness. *Id.* at 188–89. In a prearrest report, a psychologist opined that McWilliams had a "blatantly psychotic thought disorder," needing inpatient treatment. *Id.* Members of the Lunacy Commission testified for the State, opining that McWilliams did not suffer from mental illness. *Id.* at 189. While a defense subpoena for McWilliams's mental-health records from the facility where he was incarcerated was pending, the jury recommended the death penalty. *Id.* Five weeks before the judicial sentencing hearing, the trial court ordered the Alabama Department of Corrections to respond to the subpoena, and it granted a motion of McWilliams for neurological and neuropsychological exams. *Id.* at 190. A state neuropsychologist, Dr. Goff, examined McWilliams and filed a report two days before the judicial sentencing hearing. Dr. Goff found that McWilliams was obviously exaggerating neuropsychological symptoms to appear emotionally disturbed; however, it was apparent that McWilliams had genuine neuropsychological problems suggestive of organic personality syndrome. *Id.* The day before the judicial sentencing hearing, defense counsel received McWilliams's hospital records, which provided that he had been taking psychotropic medications. *Id.* at 190–91. At the judicial sentencing hearing, defense counsel requested a continuance and an additional expert "to review these findings" and offer "a second opinion as to the severity of the organic problems discovered." *Id.* at 191. The court denied the request and sentenced McWilliams to death. *Id.* at 191–93.

In a *habeas* appeal, this Court held that Alabama "did not meet even *Ake*'s most basic requirements." *Id.* at 197. Citing to its discussion of the conflicting evidence presented at sentencing concerning whether McWilliams suffered from mental illness at the time of the offense, this Court opined that his mental condition at the time of the offense was seriously in question. *Id.* at 195. Thus, "the Constitution, as interpreted by *Ake*, required the State to provide McWilliams with 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" *Id.* (quoting *Ake*, 470 U.S. at 83). The Court stated that it was willing to assume Dr. Goff's examination of McWilliams satisfied *Ake*'s examination requirement. *Id.* at 198–99. However, neither Dr. Goff nor any other expert satisfied *Ake*'s requirements of assisting McWilliams in the evaluation, preparation, and presentation of a mental-illness defense at sentencing. *Id.* Specifically, no expert helped the defense evaluate Dr. Goff's report and McWilliams's medical records to translate the data into a legal strategy; helped prepare and present arguments that might have explained that McWilliams's conduct was consistent with mental illness; helped the defense prepare to cross-examine the state's experts; or testified at the judicial sentencing hearing for the defense. *Id.*

A. The Decision Below Conflicts With *Ake* And *McWilliams*.

The Illinois Supreme Court concluded that "Dr. Witherspoon's examinations and evaluations of [Taylor] fulfilled the standards set forth in *Ake*" and, therefore, the appointment of a second expert was not required. *Taylor*, 2023 IL 128316, ¶ 42. According to the court, Dr. Witherspoon's opinion that Taylor was sane was "unequivocal." *Id.* at ¶ 38. Further, Dr. Witherspoon opined that Taylor could be found guilty but mentally ill. *Id.* at ¶ 40. The court reasoned, "This may not have been

[Taylor's] preferred defense, but [Taylor] cannot say that Dr. Witherspoon did not help him evaluate, prepare, and present a defense." *Id.*

The Illinois Supreme Court misconstrued this Court's precedent. The court inappropriately focused on whether Dr. Witherspoon was certain of his opinion that Taylor was sane. And it inappropriately focused on whether Dr. Witherspoon fulfilled *Ake*'s requirements as to the defense of guilty but mentally ill, instead of insanity. Under *Ake*, the proper inquiry is whether, following Dr. Witherspoon's examination and evaluation of Taylor, (1) Taylor's sanity remained seriously in question and, if so, (2) whether Dr. Witherspoon effectively assisted Taylor in the preparation and presentation of an insanity defense. If Dr. Witherspoon's evaluation illustrated that Taylor's sanity was not seriously in question, then Taylor received what *Ake* requires. If Dr. Witherspoon's evaluation illustrated that sanity was seriously in question, and the doctor was able to assist the defense in preparing and presenting an insanity defense, then Taylor received what *Ake* requires. But, the Illinois Supreme Court was not presented with either scenario. Instead, the court was presented with a scenario where Taylor's sanity at the time of the offense remained seriously in question after Dr. Witherspoon's examination and evaluation. And the doctor, due to the nature of his opinion, could not assist Taylor in preparing and presenting an insanity defense.

More specifically, Taylor had a history of mental illness and psychosis (SC19–20, 29). His behavior in this case illustrated an irrational reaction to law enforcement's decision to issue him a traffic warning (R286–323, 385–413). His confusion about what was happening and his inability to recall firing his weapon suggested he may have been under a state of psychosis during the offense (R429–31, 433). This was corroborated by Dr. Witherspoon's observation that Taylor's functioning in this case was akin to his functioning during a prior psychotic episode (SC20–21). Despite

concluding that Taylor was sane at the time of the offense, Dr. Witherspoon opined that the question of sanity was "borderline," and he failed to attest that his opinion was to a reasonable degree of scientific certainty (SC13–21). Moreover, the doctor advised Taylor's attorney to seek a second opinion because the issue was a "very, very close call" (SC22; R60–65).

In light of this, Taylor's sanity remained seriously in question. This conclusion is supported by the fact that psychiatry is a field where experts frequently disagree, including on the legal question of insanity. *Ake*, 470 U.S. at 81. It is also supported by *McWilliams*, which demonstrates that a defendant's sanity is seriously in question when there is contradictory evidence on the issue, even if multiple experts have each opined that the defendant did not have a mental illness at the time of the offense. See *McWilliams*, 582 U.S. at 188–89, 195 (finding McWilliams's sanity to be seriously in question after three experts opined that he had no mental illness, McWilliams and his mother testified to his history of mental illness, and a psychologist opined in a prearrest report that McWilliams had a mental illness). The Illinois Supreme Court failed to appreciate this.

After Dr. Witherspoon examined and evaluated Taylor, the doctor was unable to effectively assist the defense in the preparation and presentation of an insanity defense when Taylor's sanity remained seriously in question. More specifically, because the doctor opined that the question of sanity was a close call deserving of a second opinion, but fell on the side that Taylor was sane, the doctor could not assist Taylor in preparing and presenting an insanity defense. Therefore, Dr. Witherspoon did not satisfy the requirements of *Ake*. Although the constitutional right to expert assistance is limited to one competent expert, *Ake*, 470 U.S. at 78, this assumes the expert appointed to the indigent defendant performs all the functions required by *Ake*

(examination, evaluation, preparation, and presentation) when the defendant's sanity is seriously in question. Dr. Witherspoon did not perform each of these functions in relation to an insanity defense. It makes no difference that Dr. Witherspoon could have done so for a defense of guilty but mentally ill, as Taylor's sanity remained seriously in question. Consequently, Taylor was entitled to the appointment of a second insanity expert pursuant to *Ake* and *McWilliams*. The Illinois Supreme Court erred by concluding otherwise.

B. This Issue Is Exceptionally Important.

This Court recognized in *Ake* that psychiatry plays a pivotal role in criminal proceedings. *Ake*, 470 U.S. at 79. Both the State and private individuals rely on psychiatrists as examiners, consultants, and witnesses when sanity is at issue. *Id.* at 81–82 & n.8. Psychiatrists, and insanity experts in general, assist both counsel and the jury with issues that are "complex and foreign." *Id.* at 81. Their assistance can be "a virtual necessity" if an insanity defense is to have any likelihood of success. *Id.* at 81–82 & n.8. Moreover, their assistance increases the likelihood that sanity issues will be resolved accurately. *Id.* at 81–82. Thus, the *Ake* Court concluded that when an indigent defendant's sanity is seriously in question, the assistance of an insanity expert is a basic tool that is constitutionally required for an adequate defense. *Id.* at 77–83.

But, this Court in *Ake* also recognized that psychiatry is not an exact science. *Id.* at 81. Psychiatrists frequently and widely disagree on diagnosis and treatment. *Id.* And "there often is no single, accurate psychiatric conclusion on legal insanity in a given case." *Id.* Thus, psychiatry is reflective of the practice of medicine as a whole. See, *e.g.*, *Rice v. Tissaw*, 112 P.2d 866, 236 (Ariz. 1941) (recognizing that medicine is not an exact science); *People v. Burpo*, 164 Ill. 2d 261, 266 (1995) (same); *Stunz v. United States*, 27 F.2d 575, 578 (8th Cir. 1928) (same). For these reasons, the

importance of obtaining a second opinion for significant medical decisions is widely recognized. See, *e.g.*, *Rey v. State*, 897 S.W.2d 333, 338 (Tex. Crim. App. 1995) (stating that because the practice of medicine eludes mathematical precision, there is often a need for a second opinion for important medical questions); see also *Lonicki v. Sutter Health Central*, 180 P.2d 321, 325–26 (Cal. 2008) (explaining how California law authorizes employers to seek second and third medical opinions when doubting the validity of an employee's certification from a health-care provider concerning the reason for medical leave); *Florida Detroit Diesel v. Nathai*, 28 So.3d 182, 184 (Fla. Dist. Ct. App. 2010) (discussing a physician's testimony that a second opinion for a patient was medically necessary); *People v. McCullum*, 386 Ill. App. 3d 495 (1st. Dist. 2008) (prosecutor received second opinion after State's first expert opined that the defendant was insane); *In re Chase*, 987 A.2d 924 (Vt. 2009) (affirming medical board's finding that physician engaged in unprofessional conduct by actively discouraging patients from obtaining second opinions); W. Va. Code Ann. § 16-30-24 (2023) (requiring a second opinion that a person is incapacitated due to mental illness before an attending physician is authorized to select a surrogate); 29 U.S.C. § 2613(c)(1), (d)(1) (2023) (Family and Medical Leave Act authorizes employers to seek second and third medical opinions when doubting the validity of an employee's certification from a health care provider concerning the reason for medical leave).

Whether the *Ake* standard requires the provision of a second insanity expert to an indigent defendant when, as a practical matter, the circumstances would objectively warrant it, is an exceptionally important question. Where experts in the field frequently disagree and second opinions in medicine are the norm for significant medical questions, the answer to this question will determine whether the right to expert assistance guaranteed by our Constitution, as interpreted in *Ake*, is a practical

one reflecting what occurs in society today. In circumstances where we would expect a reasonable prosecutor or private defense attorney to seek a second opinion as a matter of due diligence, does the Constitution envision indigent defendants and their public defenders doing the same? Or, does it merely provide indigent defendants an entry ticket into a lottery, with only one chance to have an expert recognize a viable insanity defense when it is expected that experts will likely disagree on the issue?

The ability of indigent defendants to obtain a second opinion when warranted will ensure that in cases where the question of insanity is apparent or a close call, the viability of an insanity defense will be fully investigated so that viable cases of insanity do not fall through the cracks just because of one expert's opinion. As a result, attorneys and juries will be empowered with more information. Cases where insanity is at issue will be resolved more accurately because the evidence presented will be more representative of the actual merits of a defendant's case for insanity. And fairness will be ensured in a justice system where prosecutors are free to shop for insanity experts.

Accordingly, this Court should grant certiorari because the question presented is important and the decision below is contrary to this Court's precedent.

II. THE CONSTITUTIONALITY OF ILLINOIS'S STATUTORY SCHEME CREATING GROSSLY IMBALANCED RIGHTS TO THE APPOINTMENT OF INSANITY EXPERTS FOR PROSECUTORS AND INDIGENT DEFENDANTS MERITS REVIEW.

Section 113-3 of the Illinois Code of Criminal Procedure provides that "if the court determines that the defendant is indigent the court may . . . order the county Treasurer of the county of trial to pay necessary expert witnesses for defendant reasonable compensation . . . ." 725 ILCS 5/113-3(d) (2016).

In contrast, section 115-6 provides that where the State has reason to believe the defendant may rely upon the insanity defense, "the Court shall, on motion of the State, order the defendant to submit to examination by at least one clinical psychologist or psychiatrist, to be named by the prosecuting attorney." 725 ILCS 5/115-6 (2016). The statute further provides, "The Court *shall* also order the defendant to submit to an examination by one neurologist, one clinical psychologist and one electroencephalographer to be named by the prosecuting attorney if the State asks for one or *more* of such *additional* examinations." *Id.* (emphasis added).

Accordingly, section 113-3 provides that a court has the discretion to appoint an indigent defendant an insanity expert if the expert is "necessary." 725 ILCS 5/113-3(d) (2016); see also *People v. Watson*, 36 Ill. 2d 228, 234 (1966) (holding that for noncapital felonies, section 113-3(d) provides a mechanism for indigent defendants to obtain state-funded experts). Whether an indigent defendant requests an insanity expert pursuant to Illinois statute or the United States Constitution, the Illinois Supreme Court has held that the defendant must establish that the expert is necessary, by showing insanity is a crucial issue or significant factor in the case, and he or she would be prejudiced if funds are denied. See, *e.g.*, *People v. Lawson*, 163 Ill. 2d 187, 221–22 (1994); *People v. Taylor*, 2023 IL 128316, ¶¶ 30, 39–42.

In contrast, a court must provide the State an insanity expert of the prosecutor's choosing to examine the defendant when the State requests it. See 725 ILCS 5/115-6 (2016) (stating that the court "shall" order the defendant to submit to an examination at the State's request). And, if the State wants additional insanity experts to examine the defendant, the court must provide them. See *id.* (stating that the court "shall" order the defendant to submit to additional examinations when requested by the State). This inequity should not be allowed to stand.

A. This Court's Precedent Dictates That Illinois's Statutory Scheme Violates The Due Process Clause Of The Fourteenth Amendment.

This Court's precedent establishes that when a state provides pretrial and trial rights to the prosecution and the defendant, the Constitution requires that those rights be balanced so as to not interfere with the defendant's ability to secure a fair trial. See, *e.g.*, *Wardius v. Oregon*, 412 U.S. 470, 471–79 (1973) (holding that the Due Process Clause requires reciprocal discovery rights); *Washington v. Texas*, 388 U.S. 14, 17–23 (1967) (striking down a Texas rule allowing only the prosecution to call accomplices as witnesses); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent defendants have a right to counsel to stand equally with prosecutors at trial).

For example, in *Wardius*, 412 U.S. at 471–79, this Court held that Oregon's notice-of-alibi rule violated the Due Process Clause of the Fourteenth Amendment because it did not provide reciprocal discovery rights to criminal defendants. Specifically, an Oregon statute prohibited a criminal defendant from introducing at trial any evidence to support an alibi defense if the defendant did not first serve a compliant notice of alibi on the prosecution. *Wardius*, 412 U.S. at 471–72 & n.3. The State of Oregon did not require the prosecution to disclose its witnesses to the defendant. *Id.* at 475 & n. 8. This Court opined that the Due Process Clause speaks to a "balance of forces between the accused and his accuser" and noted that it had been "particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Id.* at 474 & n.6. This Court emphasized that "discovery must be a two-way street" because "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

Id. at 475–76. The Court opined that due process embraces a rule that is "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id.* at 474.

The statutory scheme in Illinois creating rights to the appointment of insanity experts for the prosecution and indigent defendants falls well short of conferring reciprocal benefits. The State of Illinois possesses a grossly disproportionate right to the services of insanity experts. Essentially, the State is free to expert shop. See, *e.g.*, *People v. McCullum*, 386 Ill. App. 3d 495, 498–99, 503 (1st Dist. 2008) (State obtains three insanity experts to examine the defendant, each opining that the defendant was insane). To obtain an expert to evaluate the indigent defendant, the State need only ask the court. The trial court's authority to appoint experts for the State is not discretionary. It is mandatory. And the State can name an expert of its choice. 725 ILCS 5/115-6 (2016). In contrast, an indigent defendant can only obtain an insanity expert by convincing the trial court that (1) the question of sanity at the time of the offense is a crucial issue for trial; (2) an insanity expert is necessary; and (3) the defendant would be prejudiced without the expert. Unlike the trial court's mandatory obligation when the State requests an expert, the court has discretion when deciding whether to appoint an insanity expert for an indigent defendant. Moreover, if an indigent defendant wants an additional expert to provide a second opinion, the defendant, unlike the State, must show that his sanity remains a crucial issue and a second opinion is necessary because the initial expert did not effectively examine and evaluate him. 725 ILCS 5/113-3(d) (2016); *Lawson*, 163 Ill. 2d at 221–22; *Taylor*, 2023 IL 128316, ¶ 42. Thus, if an insanity expert gives the indigent defendant an unfavorable opinion, the defendant would not be entitled to a second opinion, even

when the initial expert advised the defense to get a second opinion because the issue was a close call. *Taylor*, 2023 IL 128316, ¶¶ 7–8, 40–42.

This disparity in rights upsets the balance of forces between the State and indigent defendants, interfering with the ability of indigent defendants in Illinois to receive a fair trial. As this Court has recognized, "the testimony of psychiatrists can be crucial and a virtual necessity if an insanity plea is to have any chance of success." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (internal quotation omitted). But, it also recognized that "there often is no single, accurate psychiatric conclusion on legal insanity in a given case." *Id.* Consequently, the ability of the State to shop for an insanity expert essentially guarantees that it will have such an expert testify on its behalf at trial. Whether an indigent defendant with a viable insanity defense will have an insanity expert assist him for trial will depend on whether he wins the expert lottery with his first expert (*i.e.*, the first expert provides a favorable opinion). If the expert provides an unfavorable opinion, an insanity defense is virtually guaranteed to fail. The search for truth in a criminal trial of an indigent defendant is supposed to be a two-way street, not a game of luck rigged in the State's favor, as it is in Illinois. Cf. *Wardius*, 412 U.S. at 474 (stating that the adversary system must be a "two-way street" where the search for truth is enhanced by the State and the defendant having reciprocal rights to investigate crucial facts).

Therefore, this Court should grant certiorari to review Illinois's statutory scheme creating rights to insanity experts for the State and indigent defendants because it violates the Due Process Clause of the Fourteenth Amendment.

B. There Is A Split Of Authority Among The Circuits Of The United States Court Of Appeals And Among The States Concerning How To Achieve A Balance Of Forces Between Indigent Defendants Who Seek Government-Funded Insanity Experts And Prosecutors Who May Expert Shop.

Jurisdictions throughout the United States have attempted to define an indigent defendant's statutory right to insanity experts in a way that achieves a balance of forces between the prosecution and the defense, satisfying due process. Conflicting legal standards have emerged.

To start, indigent defendants in federal courts are entitled to the services of an insanity expert when they are "necessary for adequate representation." 18 U.S.C. § 3006A(e) (2023). As for the government, it is entitled to have an expert examine a defendant who is intending to assert an insanity defense. Fed. R. Crim. P. 12.2(c)(1)(B). And the government may obtain more than one expert. See, *e.g.*, *United States v. Waldman*, 310 F.3d 1074, 1077 (8th Cir. 2002) (three government experts testify to the defendant's sanity); *United States v. Henderson*, 770 F.2d 724, 727 (8th Cir. 1985) (two government experts testify concerning the defendant's mental condition); *United States v. Collins*, 690 F.2d 431, 435 (5th Cir. 1982) (two government experts testify regarding the defendant's sanity). While the government's right to multiple experts is clear, a split of authority exists among the circuits of the United States Court of Appeals concerning when an expert's services are "necessary" for an indigent defendant to be entitled to an expert under section 3006A(e).

One view is that an insanity expert's services are necessary if (1) the defendant has a plausible insanity defense and (2) a reasonable attorney would engage such services for a client having the independent financial means to pay for them. This "private-attorney standard" has been embraced by the Second, Third, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits. See, *e.g.*, *United States v. Durant*, 545 F.2d 823,

826–27 (2d Cir. 1976); *United States v. Roman*, 121 F.3d 136, 143 (3d Cir. 1997); *United States v. Paczan*, 229 Fed. Appx. 100, 104 (3d Cir. 2007); *United States v. Pitts*, 346 Fed. Appx. 839, 841 (3d Cir. 2009); *Jacobs v. United States*, 350 F.2d 571, 573 (4th Cir. 1965); *United States v. Alden*, 767 F.2d 314, 318–19 (7th Cir. 1984); *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir 1974); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1975); *United States v. Burroughs*, 613 F.3d 233, 239 (D.C. Cir. 2010) (citing *United States v. Anderson*, 39 F.3d 331, 343 (D.C. Cir. 1994), rev'd on other grounds, 59 F.3d 1323 (D.C. Cir. 1995) (en banc)). The standard arose in Judge Wisdom's special concurring opinion in *United States v. Theriault*, 440 F.2d 713, 716–17 (5th Cir. 1971). Recommending this standard, Judge Wisdom opined that the criminal process cannot be expected to work unless indigent defendants receive reasonably adequate defense aids to offset the government's far superior resources. *Theriault*, 440 F.2d at 717 (Wisdom, J., concurring specially). Further, Judge Wisdom believed trial judges "should have a healthy respect for the judgment of the defense attorney in making his findings of necessity." *Id.* According to Judge Wisdom, this standard "comes close to putting the indigent defendant in the same position as a non-indigent defendant, where the defense attorney would determine whether to engage the services." *Id.* Federal circuits that have adopted the "private-attorney standard" have opined that it strikes an appropriate balance between the concerns that defendants should not be prejudiced by their indigence and that the government should not be forced to fund a "fishing expedition." See *Durant*, 545 F.2d at 827; *Alden*, 767 F.2d at 318–19.

A second view is that an insanity expert's services are "necessary" to an indigent defendant when the defendant's request is objectively reasonable, reasonably necessary, or reasonably probable to be of assistance to the defense. Such

reasonableness tests have been embraced by the Fifth and Eleventh Circuits. See, *e.g.*, *United States v. Patterson*, 724 F.2d 1128, 1130 (5th Cir. 1984); *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987); see also *United States v. Pribyl*, 856 Fed. Appx. 818, 821 (11th Cir. 2021).

The Sixth Circuit has adopted a third view, which is that an indigent defendant must demonstrate that "(1) such services are necessary to mount a plausible defense, and (2) without such authorization, the defendant's case would be prejudiced." *United States v. Gilmore*, 282 F.3d 398, 406 (6th Cir. 2002); but see *United States v. Tate*, 419 F.2d 131, 132–33 (6th Cir. 1969) ("It seems obvious that the Congressional purpose in adopting [section 3006A(e)] was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases. Certainly counsel for a nonindigent defendant who was intending such a defense would seek expert testimony to support it as part of an 'adequate defense.'").

The Tenth Circuit's view is that an indigent defendant is entitled to an expert under section 3006A(e) by clearly establishing that his mental condition will be a significant factor at trial. *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985); see also *United States v. Crews*, 781 F.2d 826, 833–34 & n.5 (10th Cir. 1986). In other words, a defendant must meet the *Ake* constitutional standard. See *Ake*, 470 U.S. at 82 (holding that indigent defendants are entitled to the appointment of an insanity expert under the Constitution where sanity is to be a significant factor at trial).

The First Circuit applies yet another standard, opining that expert services are necessary under section 3006A(e) when it is "critical" or "pivotal" to the defense. *United States v. Manning*, 79 F.2d 212, 218 (1st Cir. 1996).

As this Court recognized in *Ake*, many state statutes provide indigent defendants the right to insanity experts using language similar to section 3006A(e).

Ake, 470 U.S. at 80 & n.6 (compiling state authorities). To guarantee this statutory right strikes a balance of forces that ensures indigent defendants receive a fair trial when prosecutors are free to engage multiple experts, some states apply the "private-attorney standard" when defining an indigent defendant's statutory right to expert assistance. See, *e.g.*, *State v. Sahlie*, 245 N.W.2d 746, 480 (S.D. 1976); *State v. McGhee*, 220 N.W.2d 908, 912–13 (Iowa 1974); *State ex rel. Foster v. Luff*, 264 S.E.2d 477, 479–81 (W. Va. 1980); see also *State v. Hamilton*, 448 So.2d 1007, 1007–09 (Fla. 1984) (Florida statute provides that indigent defendants are entitled to the appointment of an insanity expert where counsel conveys to the court that he or she has reason to believe the defendant was insane at the time of the offense); *People v. Faxel*, 91 Cal. App. 3d 327, 328–31 (1979) ("The test is not whether the indigent defendant is entitled to waste money in unnecessary expenditures as might an affluent and profligate defendant, but whether the indigent defendant is placed on a general level of equality with nonindigent defendants."); *City of Mount Vernon v. Cochran*, 855 P.2d 1180, 522–27 (Wash. Ct. App. 1993) (applying a variation of private-attorney standard).

Other states have adopted a reasonableness standard, such as by asking whether a reasonable attorney would engage the services of an expert, whether the request for an expert is reasonable, or whether it is reasonably probable the expert would be of assistance. See, *e.g.*, *Ex parte Moody*, 684 So.2d 114, 116–21 (Ala. 1996); *State v. Apelt*, 861 P.2d 634, 650–51 (Ariz. 1993); *Brown v. Dist. Court In & For Seventeenth Judicial Dist.,* 541 P.2d 1248, 1249 (Colo. 1975); *State v. Wang*, 92 A.3d 220, 245 (Conn. 2014); *Gaither v. United States*, 391 A.2d 1364, 1367–68 (D.C. 1978); *Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984); *State v. Touchet*, 642 So.2d 1213, 1216 (La. 1994); *State v. Johnson*, 344 S.E.2d 775, 778 (N.C. 1986); *State v. Broom*, 533 N.E.2d 682, 691 (Ohio 1998); *State v. Mercer*, 672 S.E.2d 556, 564 (S.C.

2009); *State v. Dellinger*, 79 S.W.3d 458, 469 (Tenn. 2002); *Jackson v. State*, 624 P.2d 751, 755–56 (Wyo. 1981); see also *State v. West*, 279 P.3d 354, 360 (Or. Ct. App. 2012) (providing that an indigent defendant is entitled to services of an expert where he demonstrates that it is probable the expert will be of assistance).

And, yet, other jurisdictions provide that an indigent defendant must satisfy the *Ake* standard, or something similar, to demonstrate the need for an insanity expert under state statute. See, *e.g.*, *State v. Olin*, 648 P.2d 203, 206 (Idaho 1982) (explaining that an indigent defendant's request for an expert under Idaho statute must be measured against the standard of fundamental fairness); *State v. Anaya*, 456 A.2d 1255, 1262–63 (Me. 1983) (rejecting private-attorney standard and holding that an indigent defendant must demonstrate that the expert is "essential" for an adequate defense); *State v. Richards*, 495 N.W.2d 187, 197–98 (Minn. 1992) (requiring a specific showing that an expert is necessary to the defense); Okla. Stat. Ann. tit. 22, § 1176 (2023) (providing that an indigent defendant must show that sanity is to be a significant factor at trial); Va. Code Ann. § 19.2-169.5 (2023) (using significant-factor test from *Ake*). As previously explained, Illinois falls within this group. See *Lawson*, 163 Ill. 2d at 221–22; *Taylor*, 2023 IL 128316, ¶¶ 30, 39–42.

In sum, most jurisdictions in the United States define an indigent defendant's statutory right to insanity experts with the "private-attorney standard" or an objective standard of reasonableness. These standards ensure that the rights of the government and indigent defendants to insanity experts, while not equal, strike a balance of forces that satisfies due process under *Wardius*. Although indigent defendants do not have the ability to expert shop or go on "fishing expeditions," they are entitled to what is objectively reasonable under the circumstances. In other words, they should obtain what we would expect a reasonable prosecutor or a reasonable defense attorney to

obtain when exercising due diligence. However, the minority of jurisdictions, like Illinois, that severely limit the statutory right of indigent defendants to insanity experts, while disproportionately allowing the government to expert shop, do not comport with what due process requires under *Wardius*.

To be sure, where the Illinois Supreme Court concluded that Taylor was not entitled to an additional insanity expert for a second opinion, Taylor would have been entitled to such an expert in a majority of jurisdictions in the United States. As previously explained, Taylor had a history of mental illness and psychosis (SC19–20, 29). His behavior in this case was irrational (R286–323, 385–413). His confusion and inability to recall firing his weapon suggested psychosis at the time of the offense, which was corroborated by Dr. Witherspoon's observation that Taylor's functioning in this case was akin to his functioning during a prior psychotic episode (R429–31, 433; SC20–21). Further, Dr. Witherspoon, despite concluding that Taylor was sane, opined that the question of sanity was "borderline," failed to attest that his opinion was to a reasonable degree of scientific certainty, and advised Taylor's attorney to seek a second opinion (SC13–22; R60–65).

In these circumstances, an insanity defense remained plausible for Taylor. It was objectively reasonable for his appointed counsel to seek a second opinion from an additional insanity expert. Certainly, a reasonable attorney representing a client with financial means would have secured a second opinion in those circumstances. And if the shoe were on the other foot—that is, if a government insanity expert were to advise the prosecutor to get a second opinion after concluding that Taylor was insane—we would expect a reasonable prosecutor to do so.

This Court should grant certiorari to resolve this split of authority and ensure that indigent defendants in the United States are not deprived of due process due to

an imbalance in the statutory rights of the government and indigent defendants to insanity experts.

C. The Issue Is Important.

The question presented is important. As this Court recognized in *Ake*, psychiatry plays a critical role in criminal proceedings. *Ake*, 470 U.S. at 79. For indigent defendants who wish to raise a viable insanity defense, access to insanity experts is a virtual necessity to have any chance of success at trial because juries rely on these experts to make an accurate determination on the issue. *Id.* at 81–82. Without the assistance of an insanity expert for the defense, "the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82. Importantly, this Court determined that "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* at 79. Therefore, states "must take steps to assure that the defendant has a fair opportunity to present his defense" because, under the Constitution, indigent defendants are entitled to the assistance of an insanity expert where sanity is seriously in question. *Id.* at 76, 82–83.

Despite establishing this constitutional floor, jurisdictions like Illinois deny indigent defendants a fair opportunity to present an insanity defense. They do so by sanctioning an imbalance of forces between the accused and the accuser when it comes to the ability to obtain insanity experts under statutory law. Specifically, an indigent defendant must clear a high hurdle to obtain an insanity expert, doing so by demonstrating that the expert is "necessary," "critical," or "essential." In the event the indigent defendant does so, he must pray the expert delivers a favorable opinion because it is unlikely he will be able to get a second opinion, even when recommended by the initial expert. The indigent defendant would have to convince the court that his

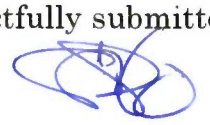
sanity not only remains a crucial issue but that a second opinion is necessary because the initial expert did not effectively examine and evaluate him. See, *e.g.*, *Taylor*, 2023 IL 128316, ¶¶ 7–8, 40–42. Even in a strong case for insanity, there is no guarantee the initial defense expert will provide a favorable opinion because psychiatry is not an exact science, psychiatrists disagree widely and frequently, and "there often is no single, accurate psychiatric conclusion on legal insanity in a given case." *Id.* at 81. In contrast, prosecutors are free to engage experts of their choice. If their initial expert opines that the defendant was insane, they simply go to another expert. This all but guarantees the government will have an expert testify at trial that the defendant was sane. Yet, the ability of an indigent defendant to present a viable insanity defense with the assistance of an expert turns on the luck of a lottery. Under such a system, the search for truth concerning an indigent defendant's sanity is rigged in the prosecutor's favor, leading to inaccurate trial results. This undermines the fairness and integrity of the justice system and what this Court sought to achieve in *Ake*.

Accordingly, this Court should grant certiorari because the question presented is important.

CONCLUSION

For the foregoing reasons, petitioner, Shaun N. Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,



SANTIAGO A. DURANGO
Counsel of Record
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rdDistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER

Of Counsel:
Dimitri G. Golfis
Assistant Appellate Defender