No. 24-910

IN THE

Supreme Court of the United States

CHARLES RAY CRAWFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EARNEST LEE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY,

Respondents.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

PATRICK MULVANEY
SOUTHERN CENTER FOR HUMAN RIGHTS
60 Walton Street NW
Atlanta, GA 30303
(404) 688-1202
pmulvaney@schr.org

VANESSA J. CARROLL
104 Marietta Street NW
Suite 206
Atlanta, GA 30303
(404) 222-9202
vanessa.carroll@garesource.org

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Donald.Verrilli@mto.com
Ginger.Anders@mto.com

EVAN MANN
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4000
Evan.Mann@mto.com

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INTRODUCTION

The State goes to great lengths to paper over the blatant *Ake* error that rendered petitioner's conviction fundamentally unfair: the state trial court, over petitioner's contemporaneous objection, conditioned petitioner's right to expert assistance on his ability to demonstrate to the court that he was "in fact" insane based on an examination by the prosecution's experts. The trial court's imposition of that precondition was an open-and-shut violation of *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), as explicated in *McWilliams* v. *Dunn*, 582 U.S. 183 (2017). Yet the Fifth Circuit held that petitioner's contemporaneous objection failed to preserve that error for appeal, solely because the trial court held out the illusory possibility that it might later consider granting expert assistance if the prosecution's experts concluded that petitioner was indeed insane.

That reasoning deprives the *Ake* right of all meaning. It places defendants in an impossible Catch-22, unable to obtain the expert assistance that *Ake* recognized was indispensable to *evaluating* and *developing* an insanity defense, unless they can first convince the prosecution's experts and the trial court that they are in fact insane. And it allows the very imposition of that precondition—which denied petitioner's rights under *Ake*, while holding out a notional possibility of relief if petitioner satisfied the improper precondition—to effectively insulate the *Ake* error from appellate review. This Court's review is therefore warranted to ensure that *Ake* and *McWilliams* continue to have force in the Fifth Circuit.

The State's efforts to defend the decision below only reinforce the need for this Court's review. The State

first argues that the trial court did not require proof of petitioner's insanity as a precondition for expert assistance. But the record speaks for itself, and the State's mischaracterizations are easily refuted. The State also contends that an examination by the prosecution's experts was necessary to establish petitioner's entitlement to an expert. But that argument is irreconcilable with *Ake* and *McWilliams*.

The State's arguments with respect to petitioner's claims of ineffective assistance of counsel fare no better. Notably, the State defends appellate counsel's failure to raise the *Ake* issue *solely* on the ground that the error was unpreserved. But the error was preserved. And *no one*—not the en banc Fifth Circuit, not the State—has ever suggested that if the claim was preserved, appellate counsel nonetheless provided effective assistance despite failing to raise it. That is because no reasonable jurist could so conclude. And the State's arguments with respect to trial counsel all founder against the basic fact that trial counsel pursued an insanity defense without the expert assistance that *Ake* held is a "virtual necessity" if that defense is to have any chance of success. 470 U.S. at 81. This Court should grant certiorari.

ARGUMENT

I. The Fifth Circuit's Holding That Petitioner's Appellate Counsel Was Effective Warrants Review

A. *Ake* holds that a defendant is entitled to expert assistance in preparing and presenting a sanity-related defense whenever the defendant demonstrates that his sanity is "seriously in question." 470 U.S. at

82. That threshold burden is a low one: as this Court held in *McWilliams*, it is satisfied where the defendant's mental condition is relevant to guilt or punishment and there are *questions* as to that condition—even if the State's experts dispute the defendant's symptoms. 582 U.S. at 188-189, 195 (threshold burden satisfied where counsel moved for psychiatric examination, even though state experts believed defendant was exaggerating). Confirming that point, *Ake* entitles a defendant to expert assistance "*to help determine whether the insanity defense is viable*." 470 U.S. at 82 (emphasis added); *McWilliams*, 582 U.S. at 187, 198. That necessarily means that a defendant need not convince the court that his insanity defense will ultimately be meritorious in order to obtain expert funding.

The trial court unquestionably violated *Ake*. Petitioner placed his sanity in question by pursuing an insanity defense and submitting a psychologist's affidavit opining that petitioner "suffer[ed] from various serious mental health disorders" and that further psychiatric evaluation was necessary. ROA.1041-1043. The prosecution *agreed* that petitioner's sanity would be central at trial and that petitioner should be examined. ROA.2064-2065, 2092-2094. *Ake* required nothing more. But the trial court ruled that petitioner would be entitled to expert assistance only "[i]f the Court determines that he is, *in fact, has some mental deficiency or whatever,*" ROA.2096 (emphasis added), based on an examination by *state* experts. The court left no doubt about the basis for its ruling: the court denied funds because "I haven't heard any proof. I haven't heard anything that would indicate to me that the man has a problem." *Ibid*. The court thus required petitioner to *prove* his insanity via examination by the

state's experts before he could obtain funds for an expert. That requirement is flatly contrary to *Ake* and *McWilliams*, and no reasonable jurist could conclude otherwise.

The State's responses only reinforce that conclusion. The State first attempts to obscure the clear *Ake* violation by mischaracterizing the record. The State asserts that the trial court never stated that it would grant assistance only if petitioner proved that he was "in fact insane." Opp. 25. But the record speaks for itself. The court plainly sought "proof" that petitioner "in fact, has some mental deficiency," and he directed the state experts to determine whether petitioner "kn[e]w right from wrong o[n] the date of the alleged offense"—i.e., whether he was in fact insane. ROA.2096, ROA.2068-2069. The State also argues that trial counsel withdrew petitioner's *Ake* motion, Opp. 8-9, 22-23, but that assertion is so easily refuted that not even the en banc majority adopted it. Pet. App. 3a (concluding that issue was unpreserved for other reasons). Trial counsel Pannell withdrew previous counsel Fortier's motion to consolidate this case with a separate assault case, as well as "all * * * motions that are inconsistent with the position [he was] now taking." ROA.1408. That description encompassed evidentiary motions premised on the assumption that the two cases would be consolidated and tried together—not the *Ake* motion, which continued to be central to the insanity defense that Pannell presented in this case. ROA.1400-1405.

The State's only remaining argument squarely conflicts with *Ake* and *McWilliams*. The State contends that the trial court did not violate *Ake* by conditioning expert assistance as it did because, in the State's view,

petitioner could not meet *Ake*'s threshold requirement of placing his mental condition "seriously in question" without undergoing an examination by state experts. Opp. 25-26. That is a revealing argument: the State *agrees* that the trial court conditioned petitioner's entitlement to expert assistance on a judicial finding, based on an examination by the prosecution's experts, that petitioner lacked the "ability to know right from wrong." Opp. 26. But the State evidently believes that *Ake* and *McWilliams* allow the court to impose that threshold barrier. They do not. Petitioner unquestionably satisfied the only threshold burden that *Ake* imposes—and that burden is low for a reason. The purpose of the *Ake* right is to enable the defendant to evaluate and prepare potential defenses, even if they turn out not to be "viable." *Ake*, 470 U.S. at 82; *McWilliams*, 582 U.S. at 187, 198. If the State could place every defendant in a Catch-22 by obligating them to proffer expert evidence of their insanity in order to receive funding for an expert to evaluate their sanity, *Ake* would be a nullity.

The trial court's violation of *Ake* was complete when the court refused to provide funds for an expert, despite petitioner's satisfaction of *Ake*'s only prerequisites, based on its erroneous belief that petitioner needed to provide "proof" that he did not know right from wrong. Counsel preserved the issue by contemporaneously objecting. ROA.2093-2094. The State cites no authority whatsoever for the remarkable proposition that counsel's contemporaneous objection was insufficient merely because the trial court expressed openness to being convinced that petitioner was "in fact" insane if the State's experts so concluded. The point is that petitioner should not have had to make that showing in the first place. Counsel was not

required to re-argue that error *again* later, and certainly not after the prosecution's experts predictably opined that petitioner was sane. ROA.1135-1136. That event removed any doubt that further requests for expert assistance would have been futile under the plain terms of the court's rulings. Petitioner unquestionably preserved the *Ake* error.

B. The State effectively concedes that if the *Ake* error was preserved, petitioner's appellate counsel rendered ineffective assistance. The State defends appellate counsel's performance—and the Fifth Circuit's decision—only on the premise that the *Ake* claim was unpreserved and therefore unlikely to succeed on appeal. Opp. 26-27. But the error was in fact preserved. Appellate counsel failed to raise it only because he overlooked it, ROA.2497, and the Mississippi Supreme Court expressed concern about the *Ake* issue at argument, Pet. C.A. Br. 34, ROA.2497. The resulting prejudice is clear, given that the Mississippi court had vacated convictions based on preserved claims that the denial of a defense expert rendered the defendant unable to rebut the prosecution's case. Pet. 24. Under those circumstances, appellate counsel clearly rendered ineffective assistance. Indeed, neither the en banc Fifth Circuit nor the State has ever suggested that if the claim was preserved, appellate counsel provided effective assistance despite failing to raise it. That is compelling evidence that no reasonable jurist could so conclude.

The State also does not defend the legal grounds on which the Fifth Circuit rejected petitioner's ineffective-assistance claim. For good reason. Pet. App. 4a. First, *McWilliams* is not irrelevant merely because it was decided after the relevant state-court decisions.

McWilliams explained the propositions that *Ake* clearly established in 1985, years before petitioner's trial, and that explication of *Ake* is controlling here. *McWilliams*, 582 U.S. at 197. Second, the Fifth Circuit's assertion that neither *McWilliams* nor *Ake* involved ineffective appellate counsel is a non sequitur. Those decisions clearly establish petitioner's constitutional right to expert assistance, and it is bedrock law that counsel renders ineffective assistance by failing to assert a clearly meritorious claim of constitutional right. *Davila* v. *Davis*, 582 U.S. 521, 533 (2017).

II. The Fifth Circuit's Holding That Petitioner's Trial Counsel Was Effective Warrants Review

If the Fifth Circuit was correct that trial counsel failed to preserve the *Ake* issue, then trial counsel rendered ineffective assistance. The State's contrary arguments cannot refute the basic fact that petitioner's counsel pursued an insanity defense at trial without obtaining the expert assistance that *Ake* holds is necessary to the defense. That decision was deficient and prejudicial, and no reasonable jurist could conclude otherwise.

A. As *Ake* and *McWilliams* establish, expert assistance in evaluating and presenting an insanity defense is one of the "basic tools of an adequate defense." *Ake*, 470 U.S. at 77 (citation omitted). Yet if the Fifth Circuit's (erroneous) view of the preservation issue is accepted, then trial counsel forfeited any claim to expert assistance despite presenting an insanity defense. To defend petitioner on insanity grounds at trial without the critical expert help to which due process entitles him is the definition of ineffective assistance—as this

Court and the courts of appeals have repeatedly held. *See, e.g.*, *Hinton* v. *Alabama*, 571 U.S. 263, 273 (2014); *United States* v. *Laureys*, 866 F.3d 432, 440 (D.C. Cir. 2017); *Skaggs* v. *Parker*, 235 F.3d 261, 270 (6th Cir. 2000); *Saranchak* v. *Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 594 (3d Cir. 2015); Pet. 30.

B. The State offers various defenses of counsel's failure to seek expert assistance, but all founder against the simple fact that counsel chose to present an insanity defense—which means he had no excuse for not seeking expert assistance in aid of that defense.

The State argues at length that Pannell permissibly forwent expert assistance because he made a strategic decision to defend petitioner on innocence as well as insanity grounds. Opp. 28-30. But by the closing, Pannell had all but abandoned innocence, telling the jury that an insanity verdict would "[f]rankly * * * be the better road." ROA.1810. And in all events, the State has no answer to the basic point that even if the strategic decision to present a hybrid defense was reasonable, there was no justification for undermining the insanity portion of the defense by failing to obtain expert assistance. That counsel argued that petitioner was innocent does not alter the fact that counsel *also* argued insanity. And expert testimony is a "virtual necessity if an insanity plea is to have any chance of success." *Ake*, 470 U.S. at 81. Forgoing assistance that is a "necessity" to a defense is textbook ineffective assistance.

The State also relies heavily on Dr. Hutt's provision of assistance in petitioner's separate assault case, in which the insanity defense was unsuccessful. Opp. 29-30. But that failure did not deter Pannell from offering

an insanity defense in this case—and that decision made expert assistance all the more critical here, given that the defense had failed once and the prosecution intended to present two experts who testified that petitioner was sane. Pannell's decision to disable himself from rebutting that testimony vitiated the insanity defense. And it should go without saying that Hutt's assistance in a different case was no substitute for expert assistance in *this* case.

The State's contentions that Pannell reasonably decided that it was fruitless to pursue further investigation of petitioner's symptoms fail for the same reasons. Opp. 31. At the risk of repetition: the question is not whether counsel might reasonably have decided to forgo the insanity defense (and therefore expert assistance), but whether counsel's decision to present the defense *without* expert assistance was reasonable. The answer to that question is clearly no. Even beyond that, the information available to Pannell cried out for further expert examination. Around the time of petitioner's assault trial, he suffered numerous seizures requiring significant medical attention. Pet. 8. Hutt opined that those seizures could be caused by organic brain damage and that petitioner needed further testing. ROA.3009. But Pannell chose not to heed Hutt's advice, even when the seizures continued. ROA.3030.

The State responds that petitioner received a "normal" EEG result from state doctors around that time. Opp. 31. But that only reinforces the deficiency of Pannell's performance. Given that Pannell intended to present an insanity defense, it was critical to explain that EEG result. ROA.3039. To adequately prepare his defense, therefore, petitioner needed his own expert to perform an independent analysis. That

analysis would have revealed that notwithstanding the EEG, petitioner still needed neuropsychological testing—which was never performed. ROA.3157-3159; Pet. C.A. En Banc Reply 14.

C. The State's arguments on prejudice recycle the same incorrect points. The State relies primarily on the insanity defense's failure in petitioner's assault and murder trials. But Drs. Hutt and Webb, who testified at those trials, were engaged by petitioner's family at their own expense—and their assistance was limited by lack of funds. ROA. 3161-3162. Had Pannell pursued state funding, petitioner could have undergone the additional neurological testing that both experts emphasized was necessary but never performed. Pet. 32. In that event, petitioner could have presented testimony more like that submitted with his state post-conviction petition, which included test results showing that petitioner had serious brain damage and temporal lobe epilepsy that likely caused his seizures. ROA.2492, 2494. The State dismisses those test results because they "did not exist at the time," Opp. 34—but that is precisely the point. Counsel's failure to pursue expert assistance meant that he proceeded to trial with no test results at all—except for the supposedly normal EEG, which could have been explained and rebutted by defense-expert testing and testimony. ROA.3157-3159. The resulting prejudice is undeniable.

III. The Questions Presented Are Important, And This Case Is A Sound Vehicle.

This case presents the pressing question whether the *Ake* right retains any force in the Fifth Circuit. That court held that a state court may condition

receipt of expert funds on the trial court's conclusion, based on examination by *state* experts, that the defendant is *in fact insane*—and, further, that the court can insulate that error from appellate review simply by holding out the illusory possibility that the defendant may yet receive funds if the state experts agree that the defendant is insane. The decision thus nullifies the fundamental right to expert assistance that this Court recognized in *Ake* and reaffirmed just a few years ago in *McWilliams*. This Court must intervene, as it has in previous cases, to ensure that state and lower federal courts faithfully apply controlling precedent. See, *e.g.*, *Lynch* v. *Arizona*, 578 U.S. 613 (2016); *Miller-El* v. *Dretke*, 545 U.S. 231 (2005).

The need to do so is no less pressing because AEDPA governs. Contra Opp. 35. AEDPA's "[d]eference does not by definition preclude relief," *Miller-El*, 545 U.S. at 240 (citation omitted), and this case presents at least as stark a violation of *Ake* as did *McWilliams*—which also was governed by AEDPA. 582 U.S. at 199. And contrary to the State's suggestion, Opp. 35, that this case involves ineffective assistance of counsel is hardly any reason to conclude that review is unwarranted or that the *Ake* error should go uncorrected. See, *e.g.*, *Buck* v. *Davis*, 580 U.S. 100, 120 (2017).

Finally, the State's asserted factual "vehicle" issues rest on the same mischaracterizations of the record discussed above. Opp. 34-35. This Court need not pause over them. The record is in fact unusually clear: over petitioner's objection, the trial court expressly conditioned *Ake* assistance on petitioner's satisfying state experts and the court itself that he was insane, thereby violating *Ake*. Trial counsel nonetheless

pursued an insanity defense without an expert, severely prejudicing petitioner's ability to rebut the prosecution's experts. And appellate counsel overlooked that meritorious *Ake* claim, to the consternation of the Mississippi Supreme Court itself. The State's lengthy but immaterial factual disquisition should be seen for what it is: an effort to obscure the fundamental unfairness of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Donald.Verrilli@mto.com
Ginger.Anders@mto.com

PATRICK MULVANEY
SOUTHERN CENTER FOR HUMAN RIGHTS
60 Walton Street NW
Atlanta, GA 30303
(404) 688-1202
pmulvaney@schr.org

VANESSA J. CARROLL
104 Marietta Street NW
Suite 206
Atlanta, GA 30303
(404) 222-9202
vanessa.carroll@garesource.org

EVAN MANN
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4000
Evan.Mann@mto.com

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